

**VOLUME V**

**CRIMINAL LAW DIGEST**

**SEPTEMBER 5, 1990 - JANUARY 12, 1994**



**PREPARED AND PUBLISHED BY:**

**THE CRIMINAL LAW RESEARCH CENTER  
JOHN A ROGERS, DIRECTOR**

**A DIVISION OF**

**WEST VIRGINIA PUBLIC DEFENDER SERVICES  
JOHN A. ROGERS, EXECUTIVE DIRECTOR**

**COPY RIGHT 1991 STATE OF WEST VIRGINIA**

## INTRODUCTION

**Criminal Law Digest Volume V contains selected cases issued by the West Virginia Supreme Court of Appeals from September 5, 1990 thru January 12, 1994. Indexed in this volume are cases affecting areas in which Public Defender Services is authorized to provide services. I.e., criminal, juvenile, abuse and neglect, paternity, contempt and mental hygiene matters. DUI administrative appeals are applicable to criminal matters. The Digest is divided into different topics and is cross-indexed throughout according to the issues discussed by the Court.**

**We attempt to index all relevant cases handed down by the West Virginia Supreme Court within the heretofore mentioned time period. We suggest, however, that if you are relying on a case as authority, you should inquire of the Clerk of the Supreme Court of Appeals whether a petition for rehearing has been filed. These slip opinions are also subject to formal revision before publication.**

**In briefing the cases, we have attempted to be faithful to the language of the Court. Again we suggest that the summary of the case not be used as a substitute for a thorough reading of the case.**

**We welcome any comments or suggestions on this material and any ideas you may have regarding future projects for the research center which will assist practitioners.**

# TABLE OF CONTENTS

	PAGE(S)
<b>ABUSE AND NEGLECT</b> .....	<b>1</b>
<b>Burden of proof</b> .....	<b>1</b>
<b>Duty of DHS</b> .....	<b>1</b>
<b>Guidelines</b> .....	<b>2</b>
<b>Evidence of</b> .....	<b>2</b>
<b>Use in criminal proceeding</b> .....	<b>2</b>
<b>Guardians <i>ad litem</i></b> .....	<b>2</b>
<b>Duty of counsel</b> .....	<b>2</b>
<b>Improvement period</b> .....	<b>2</b>
<b>Improvement period</b> .....	<b>3</b>
<b>Least restrictive alternative</b> .....	<b>3</b>
<b>Neglect defined</b> .....	<b>3</b>
<b>Proof of</b> .....	<b>4</b>
<b>Supervised visitation</b> .....	<b>4</b>
<b>Finding by master or judge</b> .....	<b>4</b>
<b>Termination of parental rights</b> .....	<b>6</b>
<b>Association with siblings</b> .....	<b>6</b>
<b>Guardian's duty</b> .....	<b>6</b>
<b>Improvement period</b> .....	<b>7</b>
<b>Procedural delays</b> .....	<b>10</b>
<b>Standard of proof</b> .....	<b>11</b>
<b>ABUSE OF DISCRETION</b> .....	<b>12</b>
<b>Admissibility of evidence</b> .....	<b>12</b>
<b>Generally</b> .....	<b>12</b>
<b>Introduction after case closed</b> .....	<b>12</b>
<b>Appointed counsel fees</b> .....	<b>12</b>
<b>Bail</b> .....	<b>12</b>
<b>Denial of change of venue</b> .....	<b>13</b>
<b>Immunity</b> .....	<b>13</b>
<b>Grant of</b> .....	<b>13</b>
<b>Joinder</b> .....	<b>13</b>
<b>Plea bargain</b> .....	<b>14</b>
<b>Acceptance of</b> .....	<b>14</b>
<b>Probation</b> .....	<b>14</b>
<b>Prohibition</b> .....	<b>14</b>
<b>Newly discovered evidence</b> .....	<b>14</b>
<b>Psychiatric evaluation</b> .....	<b>14</b>
<b>Denial of</b> .....	<b>14</b>
<b>Venue</b> .....	<b>14</b>
<b>Denial of change</b> .....	<b>14</b>
<b><i>Voir dire</i></b> .....	<b>15</b>
<b>ABUSE OF PROCESS</b> .....	<b>16</b>
<b>Generally</b> .....	<b>16</b>

<b>AIDING AND ABETTING</b> .....	17
<b>Concerted acts</b> .....	17
<b>APPEAL</b> .....	18
<b>Appointed counsel fees</b> .....	18
<b>Confessions</b> .....	18
<b>Voluntariness</b> .....	18
<b>Cumulative error</b> .....	18
<b>Defined for appointed counsel compensation</b> .....	18
<b>Directed verdict</b> .....	19
<b>Standard for review</b> .....	19
<b>Dismissal of magistrate court complaint</b> .....	19
<b>Enlargement of time</b> .....	19
<b>Evidence</b> .....	19
<b>Insufficient</b> .....	19
<b>Failure to file</b> .....	19
<b>Failure to preserve</b> .....	20
<b>Failure to develop record</b> .....	20
<b>Failure to object</b> .....	20
<b>Fugitives</b> .....	21
<b><i>Habeas corpus</i></b> .....	21
<b>Distinguished from writ of error</b> .....	21
<b>Ineffective assistance</b> .....	22
<b>Standard for</b> .....	22
<b>Standard for review</b> .....	22
<b>Jury instructions</b> .....	22
<b>Failure to give</b> .....	22
<b>Magistrate court complaint</b> .....	22
<b>Mootness</b> .....	22
<b>Newly-discovered evidence</b> .....	23
<b>Sufficient for new trial</b> .....	23
<b>Plain error</b> .....	23
<b>Generally</b> .....	23
<b>Plea bargain</b> .....	23
<b>Standard for acceptance</b> .....	23
<b>Prisoner at large</b> .....	23
<b>Resentencing</b> .....	24
<b>Fugitive</b> .....	24
<b><i>Res judicata</i></b> .....	24
<b>Paternity determination</b> .....	24
<b>Right to</b> .....	24
<b>Sentencing</b> .....	24
<b>Sentencing order following reversal</b> .....	24
<b>Setting aside verdict</b> .....	25
<b>Polling jury</b> .....	25
<b>Standard for review</b> .....	25
<b>Admissibility of evidence</b> .....	25
<b>Confessions</b> .....	26
<b>Directed verdict</b> .....	26
<b>Ineffective assistance</b> .....	26
<b>Plea bargain</b> .....	26

Probation .....	26
Prosecutorial misconduct .....	26
Sentencing .....	27
Setting aside verdict .....	27
Sufficiency of evidence .....	29
Sufficiency of evidence .....	30
Generally .....	30
Transcript .....	31
Right to .....	31
Waiver of right to .....	32
Warrants .....	32
Standard for review .....	32
Writ of error .....	32
Dismissal of .....	32
<b>APPOINTED COUNSEL .....</b>	<b>33</b>
Conflict of interest .....	33
Mandamus .....	33
<b>ARREST .....</b>	<b>34</b>
Citizen's complaint as basis for .....	34
Judge's ordering at trial .....	34
Warrantless .....	34
Confession incident to .....	34
Felony .....	34
Warrantless search incident to .....	35
<b>ASSAULT .....</b>	<b>36</b>
Transferred intent .....	36
<b>ATTEMPT .....</b>	<b>37</b>
Generally .....	37
<b>ATTEMPTED MURDER .....</b>	<b>38</b>
Generally .....	38
<b>ATTORNEYS .....</b>	<b>39</b>
Admonishment to judge .....	39
Annulment .....	39
Burden of proof .....	40
Community service .....	40
Appointed .....	41
Fee reductions .....	41
Client funds .....	42
Attorney's duty toward .....	42
Compensation .....	42
Appointed criminal cases .....	42
Conflict of interest .....	43
Business relations with client .....	43
Court-appointed counsel .....	44
Divorce action .....	44

Estate settlement .....	44
Prosecuting attorney .....	45
Prosecuting attorneys' private practice .....	45
Tort liability .....	45
Contempt .....	45
Misrepresentation to court .....	45
Conviction of crimes .....	46
Discipline .....	46
Abandoning clients .....	46
Admission of guilt .....	47
Aggravating factor .....	47
Annulment .....	47
Attorney-client relationship .....	48
Burden of proof .....	52
Conflict of interest .....	56
Conviction of crimes .....	57
Desuetude .....	67
Disciplinary action in foreign jurisdiction .....	68
Drug or alcohol tests .....	69
Duty to law partners .....	69
Embezzlement .....	70
Estate administration .....	71
Estates .....	72
<i>Ex parte</i> communications .....	72
Failure to communicate with clients .....	73
Failure to file appeal .....	74
Failure to respond to Bar counsel .....	74
Fiduciary responsibility .....	74
Free speech .....	75
Generally .....	77
Lawyer as witness .....	79
Misconduct in another jurisdiction .....	80
Misrepresentation to court .....	80
Moral turpitude .....	81
Perjury before grand jury .....	82
Practicing without a license .....	83
Prior discipline .....	84
Prosecuting attorney .....	84
Public reprimand .....	85
Repayment of funds .....	86
Suspensions .....	87
Uttering .....	88
Duty to report disciplinary action .....	89
Embezzlement .....	89
Estate settlement .....	89
Fiduciary responsibility .....	89
Fines .....	89
Impairment .....	90
Inadequate record .....	90
Incapacitation .....	90
Drug or alcohol test .....	90

Mental disorder .....	91
Suspension .....	91
Ineffective assistance .....	92
Failure to present evidence on capacity to waive rights .....	93
Standard for .....	93
Malpractice .....	94
Release from .....	94
Mental illness .....	94
Moral turpitude .....	94
Defined .....	94
Professional responsibility .....	95
Attorney-client relationship .....	95
Burden of proof .....	95
Professional responsibility .....	96
Campaign law violations .....	96
Conflict of interest .....	97
Conviction of crimes .....	97
Desuetude .....	98
Disciplinary action in foreign jurisdiction .....	99
Duty to law partners .....	99
Embezzlement .....	99
Estates .....	99
Estate administration .....	99
Estate settlement .....	99
<i>Ex parte</i> communications .....	100
Failure to file appeal .....	100
Failure to respond to Bar counsel .....	100
Failure to respond to clients .....	100
Free speech .....	100
Generally .....	100
Impairment .....	101
Incapacitation .....	101
Lawyer as witness .....	101
Misrepresentation to court .....	102
Mitigation hearing .....	102
Moral turpitude .....	103
Perjury .....	103
Practicing law without a license .....	103
Public reprimand .....	103
Rehabilitation .....	103
Suspension .....	104
Prosecuting .....	104
Comments at trial .....	104
Conflict of interest .....	104
Conflict with private practice .....	105
Disqualification .....	105
Duty generally .....	105
Effect of disqualification on indictment .....	105
Exculpatory evidence .....	106
Grand jury influenced by .....	106
Misstating evidence .....	106

Withholding evidence .....	106
Public official .....	106
Ethical violations by .....	106
Public reprimand .....	106
Suspensions .....	107
Worthless checks .....	110
Aggravating factor .....	110
When constitutes moral turpitude .....	110
<b>BAIL .....</b>	<b>111</b>
Discretion of court .....	111
Revocation of .....	111
First-degree sexual assault .....	111
Hearing required .....	111
Right to .....	112
After conviction of codefendant .....	112
First-degree sexual assault of children .....	113
<b>BURGLARY .....</b>	<b>114</b>
Dwelling house .....	114
When ceases to be .....	114
Sentencing .....	114
Sufficiency of evidence .....	114
<b>CERTIFIED QUESTION .....</b>	<b>116</b>
Conflict of interest .....	116
Prosecuting attorney .....	116
Prosecuting attorney .....	116
Conflict of interest .....	116
Use in criminal cases .....	116
Video poker declared unlawful .....	116
<b>CHILD CUSTODY .....</b>	<b>117</b>
Guidelines for changing .....	117
Termination of parental rights .....	117
Recision of voluntary relinquishment .....	117
Standard of proof .....	117
Subsequent recision of .....	117
<b>CITIZEN COMPLAINTS .....</b>	<b>118</b>
Basis for warrant .....	118
<b>CIVIL PENALTY .....</b>	<b>119</b>
Distinguished from criminal .....	119
<b>CLOTHING .....</b>	<b>120</b>
Prison attire .....	120
Defendant's right to appear without .....	120
<b>COLLATERAL CRIMES .....</b>	<b>121</b>
Admissibility .....	121

Generally .....	121
Use of in abuse and neglect or termination proceeding .....	121
<b>COMPETENCY .....</b>	<b>122</b>
Failure to challenge .....	122
Ineffective assistance of counsel .....	122
Right to psychiatric evaluation .....	122
Standard for .....	122
Suicide attempt .....	122
Effect of .....	122
<b>CONCERTED ACTS .....</b>	<b>125</b>
Liability for .....	125
<b>CONDITIONS OF CONFINEMENT .....</b>	<b>126</b>
Rules regarding .....	126
Promulgation of .....	126
<b>CONFESSION OF ERROR .....</b>	<b>127</b>
Effect of .....	127
<b>CONFESSIONS .....</b>	<b>128</b>
Admissibility .....	128
Generally .....	128
Warrantless arrest .....	128
Admissibility for impeachment .....	129
Generally .....	129
Coerced .....	129
Involuntary .....	129
Admissibility .....	129
Voluntariness .....	130
Coercion .....	131
Delay in producing written statement .....	131
Delay in taking before magistrate .....	132
<b>CONFLICT OF INTEREST .....</b>	<b>133</b>
Attorney-client relationship .....	133
Business relations with client .....	133
Prosecuting attorney .....	133
<b>CONSPIRACY .....</b>	<b>134</b>
Sufficiency of evidence .....	134
<b>CONTEMPT .....</b>	<b>136</b>
Civil .....	136
For invoking right against self-incrimination .....	136
Misrepresentation by attorney .....	136
<b>CONTINUANCE .....</b>	<b>137</b>
Discretion in granting .....	137

<b>CONTROLLED SUBSTANCES</b> .....	<b>138</b>
<b>Joinder of repeated offenses</b> .....	<b>138</b>
<b>Proof of acquiring</b> .....	<b>138</b>
<b>Questioning regarding prescription</b> .....	<b>138</b>
 <b>CORPORATIONS</b> .....	 <b>139</b>
<b>Indictment of officers</b> .....	<b>139</b>
 <b>COUNTY/REGIONAL JAILS</b> .....	 <b>140</b>
<b>Double celling</b> .....	<b>140</b>
<b>Exercise room in regional jail</b> .....	<b>140</b>
<b>Overcrowding</b> .....	<b>140</b>
<b>State's duty to incarcerate</b> .....	<b>140</b>
 <b>COURT COSTS</b> .....	 <b>141</b>
<b>Special prosecutor fees</b> .....	<b>141</b>
 <b>COURT REPORTER</b> .....	 <b>142</b>
<b>Administrative director's authority over</b> .....	<b>142</b>
<b>Civil liability for failure to produce transcript</b> .....	<b>142</b>
<b>Transcript</b> .....	<b>142</b>
<b>Failure to provide</b> .....	<b>142</b>
 <b>CRIMINAL PENALTY</b> .....	 <b>145</b>
<b>Distinguished from civil</b> .....	<b>145</b>
 <b>CRITICAL STAGES</b> .....	 <b>146</b>
<b>Right to be present</b> .....	<b>146</b>
 <b>CROSS-EXAMINATION</b> .....	 <b>147</b>
<b>Credibility of witnesses</b> .....	<b>147</b>
<b>Prejudice or bias</b> .....	<b>147</b>
<b>Scope of</b> .....	<b>147</b>
 <b>CUMULATIVE ERROR</b> .....	 <b>149</b>
<b>Setting aside verdict</b> .....	<b>149</b>
 <b>DANGEROUS OR DEADLY WEAPON</b> .....	 <b>150</b>
<b>Inferences</b> .....	<b>150</b>
<b>Instruction on</b> .....	<b>150</b>
<b>Malice</b> .....	<b>150</b>
 <b>DEADLY FORCE</b> .....	 <b>151</b>
<b>When permissible</b> .....	<b>151</b>
 <b>DEPOSITION</b> .....	 <b>152</b>
<b>Basis for compelling</b> .....	<b>152</b>
 <b>DETENTION</b> .....	 <b>153</b>
<b>Juveniles</b> .....	<b>153</b>
<b>Standards for</b> .....	<b>153</b>

<b>DETENTION CENTERS</b> .....	<b>154</b>
Standards for .....	154
<b>DIRECTED VERDICT</b> .....	<b>155</b>
Entrapment .....	155
Standard for granting .....	155
<b>DISCIPLINE</b> .....	<b>156</b>
Bias .....	156
Campaign funds .....	156
Dismissal of .....	157
Charges improper .....	157
Sexual impropriety .....	158
Signing .....	158
Forms in blank .....	158
<b>DISCOVERY</b> .....	<b>160</b>
Failure to disclose .....	160
Consequences of .....	160
Demonstrative evidence .....	160
Exculpatory evidence .....	160
Informants .....	160
Late-discovered evidence .....	161
Standard for prejudice .....	162
Witnesses .....	162
Judge's discretion .....	163
Physical examinations .....	164
Judge's discretion .....	164
Psychological tests .....	164
Judge's discretion .....	164
Witnesses .....	165
Failure to disclose .....	165
Prior statements .....	165
<b>DISCRIMINATION</b> .....	<b>166</b>
Racial .....	166
Jury selection .....	166
Racial bias in jury selection .....	168
Equal protection .....	168
<b>DOUBLE JEOPARDY</b> .....	<b>169</b>
Attempted murder and malicious assault .....	169
Felony-murder .....	169
Indictments .....	171
New indictment after dismissal .....	171
Legislative intent .....	171
Malicious assault and attempted murder .....	171
Mistrial .....	171
Manifest necessity .....	171
Multiple indictments .....	172

Multiple offenses .....	172
Attempted murder and malicious assault .....	172
Separate punishments .....	173
Multiple punishments .....	174
Murder .....	175
Prohibition writ not to offend .....	175
Recidivism .....	176
Retrial .....	176
Same transaction test .....	177
Sexual assault .....	177
Abuse (by a parent or guardian) .....	177
Sexual assault (concurring opinion only) .....	181
<b>DRIVING UNDER THE INFLUENCE .....</b>	<b>182</b>
Evidence .....	182
Breath test .....	182
Prior offenses in another state .....	183
Prompt presentment .....	183
Sentencing .....	184
Alternative sentencing .....	184
Third offense .....	184
Work release .....	184
Third offense DUI .....	185
Sentencing .....	185
<b>DUE PROCESS .....</b>	<b>186</b>
Appeal .....	186
Attorneys .....	186
Annulment of license .....	186
Confessions .....	186
Tape recording of .....	186
Defendant's right to testify .....	186
Waiver of .....	186
Failure to disclose exculpatory evidence .....	187
Indictment delayed .....	187
Indictment delayed for strategic advantage .....	187
Neglect defined .....	188
Police interrogation .....	188
Recording of .....	188
Prison uniforms .....	188
Trial while wearing .....	188
Right to appeal .....	189
Right to confront accuser .....	189
Right to speedy trial .....	189
Right to testify .....	190
Sufficiency of statute .....	190
Vagueness .....	190
Worthless checks .....	190
<b>EMBEZZLEMENT .....</b>	<b>191</b>
Intent .....	191

Public official .....	191
<b>ENTRAPMENT .....</b>	<b>192</b>
Grounds for .....	192
<b>EQUAL PROTECTION .....</b>	<b>194</b>
Right to appeal .....	194
Right to jury free of racial discrimination .....	194
<b>ESCAPE .....</b>	<b>195</b>
From work release center .....	195
<b>ETHICS .....</b>	<b>196</b>
Attorney-client relationship .....	196
Burden of proof .....	196
Conviction of crimes .....	196
Disciplinary action in another jurisdiction .....	196
Duty to law partners .....	196
Fiduciary responsibility .....	197
Generally .....	197
Judges .....	199
Judicial discipline .....	199
Magistrates .....	199
Mental incapacity .....	200
Prosecuting attorney .....	200
Duty generally .....	200
<b>EVIDENCE .....</b>	<b>201</b>
Abuse and neglect .....	201
Use in criminal proceeding .....	201
Admissibility .....	201
Abuse in termination proceeding .....	201
Blood tests .....	201
Breath test for DUI .....	201
Character of accused .....	201
Character of victim .....	202
Confessions .....	203
Confession of juveniles .....	205
Collateral crimes .....	205
Defendant's flight .....	209
Discretion of judge .....	209
Exclusionary rule .....	210
Expert opinion .....	210
Flight by defendant .....	210
Generally .....	210
Hearsay .....	211
Hearsay (witness unavailable) .....	212
Identification in court .....	212
Identification out of court .....	212
Intercepted communications .....	212
Invited error .....	213

Items outside curtilage .....	213
Late-discovered evidence .....	213
Motive or intent .....	213
Other crimes .....	214
Photographs .....	215
Physical evidence .....	215
Police reports .....	216
Polygraphs .....	216
Prejudice versus probative value .....	216
Prior inconsistent statements .....	217
Prompt complaint .....	220
Relevance .....	221
Testimony based on personal knowledge .....	222
Threats by defendant .....	223
Threats by victim .....	223
Victim's acts of violence .....	223
Waiver of objection .....	223
Wiretaps .....	224
Writing by witness .....	225
Bias or prejudice .....	226
Breath test .....	226
Foundations for .....	226
Character of accused .....	226
Confessions .....	226
Hearsay .....	226
Motive or intent .....	227
Other crimes .....	227
Witness unavailable .....	227
Character of victim .....	227
Circumstantial .....	229
Sufficiency of .....	229
Collateral crimes .....	229
Abuse .....	230
Character of accused .....	230
Confessions .....	231
Admissibility .....	231
Defendant's flight .....	231
Destruction of in testing .....	231
State's duty to document .....	231
Disclosure of .....	232
Accessible to prosecution .....	232
Documents .....	232
Written by witness .....	232
Exculpatory .....	232
Duty to disclose .....	232
Failure to disclose .....	234
Expert witnesses .....	235
Admissibility of opinions .....	235
Extrajudicial statement .....	236
Flight of defendant .....	236
Hearsay .....	236

Admissibility .....	236
Admissibility of extrajudicial statements .....	236
Juvenile transfer based on .....	237
Prior inconsistent statements .....	237
Right to confront accuser .....	237
Spontaneous declaration/excited utterance .....	237
Identification of defendant .....	237
Admissibility .....	237
Impeachment .....	238
Mental health records .....	238
Prior inconsistent statement .....	238
Insanity .....	239
Sufficient to rebut presumption .....	239
Introduction after case closed .....	239
Introduction of incompetent evidence .....	239
Waiver of objection .....	239
Invited error .....	239
Judicial notice .....	239
Blood tests .....	239
Jury's use of evidence .....	239
Mental health records .....	240
<i>Miranda</i> rights .....	240
As showing of prior offenses .....	240
Newly-discovered evidence .....	240
Sufficient for new trial .....	240
Photographs .....	240
Physical objects .....	240
Police reports .....	241
Polygraphs .....	242
Prejudicial to defendant .....	242
Prior inconsistent statements .....	242
Prior offenses .....	243
Abuse of children in termination proceeding .....	243
Reading of rights .....	243
Proffer for appeal .....	243
Psychiatric or psychological disability .....	243
Records relating to .....	243
Rebuttal evidence .....	245
Reputation of victim .....	245
Sanity .....	245
Sufficient to establish .....	245
Sexual relations .....	245
Between victim and attacker (non-rape) .....	245
Spontaneous declaration/excited utterance .....	245
Sufficiency .....	246
For conviction of larceny .....	246
Surviving spouse .....	247
Termination of parental rights .....	247
Evidence of prior abuse .....	247
Testimony .....	247
Witness' personal knowledge .....	247

Threats by defendant .....	248
Victim's acts of violence .....	248
Victim's character or reputation .....	249
Vouching the record .....	249
Wiretaps .....	249
Witnesses .....	249
Cross-examination .....	249
Hostile .....	250
Unavailable at transfer hearing .....	250
Witnesses unavailable .....	251
Extrajudicial statements .....	251
Juvenile transfer hearing .....	251
Writings .....	251
 <i>EX POST FACTO</i> .....	 252
Sentencing .....	252
 <b>EXPERT WITNESSES</b> .....	 253
Qualifying as such .....	253
 <b>EXTRADITION</b> .....	 254
Basis for .....	254
Validity of warrant .....	254
Custody while awaiting .....	254
Fugitives .....	255
 <b>FELONY</b> .....	 256
Murder .....	256
Suicide .....	256
Right to be present at all stages .....	256
 <b>FELONY-MURDER</b> .....	 257
Double jeopardy .....	257
Election to proceed on .....	257
Elements of .....	257
Instructions on .....	257
 <b>FIFTH AMENDMENT</b> .....	 258
Clothing seized during arrest .....	258
Incarceration for invoking .....	258
Prescription for controlled substances .....	258
Waiver of .....	258
 <b>FOURTH AMENDMENT</b> .....	 259
Civil liability .....	259
Hot pursuit without warrant .....	259
Plain view exception .....	259
Search warrant .....	259
Probable cause for .....	259
Warrantless search .....	259
Incident to lawful investigative stop .....	259

Lawfully parked car .....	260
<b>FUGITIVES .....</b>	<b>261</b>
Defined for extradition .....	261
<b>GAMING DEVICES .....</b>	<b>262</b>
Video poker .....	262
<b>GRAND JURY .....</b>	<b>263</b>
Citizen's access to .....	263
Evidence considered by .....	263
Prosecuting attorney influencing .....	263
Prosecuting attorney presenting evidence to .....	263
Record required .....	263
Return of multiple indictments .....	263
<b>GRAND LARCENY .....</b>	<b>264</b>
Sufficiency of evidence .....	264
<b>GUARDIAN AD LITEM .....</b>	<b>265</b>
Abuse and neglect cases .....	265
Duty of counsel .....	265
Duty to abused children .....	265
Paternity .....	265
<b>GUILTY PLEA .....</b>	<b>267</b>
Sentencing .....	267
When judge is bound .....	267
Waiver of rights .....	267
Withdrawal of plea .....	267
<b>HABEAS CORPUS .....</b>	<b>268</b>
Bail bond .....	268
Child custody .....	268
Recision of voluntary relinquishment .....	268
Confessions .....	268
Voluntariness .....	268
Contempt for invoking right against self-incrimination .....	268
Custody awaiting extradition .....	268
Distinguished from appeal .....	268
Distinguished from writ of error .....	269
Double jeopardy .....	269
Recidivism .....	269
Extradition .....	270
Generally .....	270
Habeas corpus relief .....	270
Ineffective assistance .....	270
Effect of direct appeal .....	270
Parole .....	270
Parole from regional or county jails .....	272
Prison/jail conditions .....	272

Probation .....	272
Recidivism .....	273
Double jeopardy .....	273
Release from regional/county jail .....	273
Parole .....	273
Right to .....	273
Right to appeal .....	274
Waiver of .....	274
Right to counsel .....	274
Scope of .....	274
Right to ruling on .....	274
<b>HARMLESS ERROR .....</b>	<b>275</b>
Constitutional .....	275
Ineffective assistance .....	275
Right to be present .....	275
Right to be present at all stages .....	275
Right to testify or remain silent .....	275
Critical stages .....	275
Defendant not present .....	275
Non-constitutional .....	276
Test for .....	276
<b>HEARING .....</b>	<b>277</b>
Spontaneous declaration/excited utterance .....	277
Witness unavailable .....	278
Prosecution's burden .....	278
<b>HEARSAY .....</b>	<b>279</b>
Admissibility of extrajudicial statements .....	279
Defined .....	279
Prompt complaint/excited utterance .....	279
<b>HOMICIDE .....</b>	<b>280</b>
Attempted murder .....	280
Attempted murder and malicious assault .....	281
Not double jeopardy .....	281
Conspiracy to commit .....	281
Evidence .....	281
Surviving spouse's testimony .....	281
Felony-murder .....	281
Double jeopardy .....	282
Election to proceed on .....	282
Elements of .....	282
First-degree murder .....	282
Instructions to distinguish type .....	282
Instructions .....	282
Premeditation .....	283
Malice .....	283
Inferred from deadly weapon .....	283
Recommendation of mercy .....	284

Second-degree murder .....	284
Malice inferred from deadly weapon .....	284
Self-defense .....	284
Duty to retreat .....	284
Sentencing .....	285
Recommendation of mercy .....	285
Sufficiency of evidence .....	285
<b>IDENTIFICATION .....</b>	<b>287</b>
<b>In court .....</b>	<b>287</b>
Admissibility .....	287
<b>Out-of-court .....</b>	<b>287</b>
Admissibility .....	287
Suggestive identification .....	289
<b>IMMUNITY .....</b>	<b>290</b>
Grant by police officer .....	290
Grant by prosecuting attorney .....	290
Police officer .....	291
Hot pursuit without warrant .....	291
Search and seizure violation .....	291
Subsequent prosecution .....	291
<b>IMPEACHMENT .....</b>	<b>292</b>
Prior inconsistent statement .....	292
Statements made for probation consideration .....	292
Use at trial .....	292
<b>INDICTMENT .....</b>	<b>293</b>
Dismissal of .....	293
Effect of on new indictment .....	293
Generally .....	293
Magistrate court .....	294
Prosecuting attorney disqualified .....	294
Undue delay .....	295
Enhancement of sentence .....	297
Use of firearm .....	297
Joinder of .....	297
Larceny .....	297
Sufficiency of .....	297
Sufficiency of .....	297
Corporate officer .....	298
Generally .....	299
Larceny .....	299
Sexual abuse .....	299
Specific acts alleged .....	300
<b>INDIGENTS .....</b>	<b>302</b>
Right to appeal compromised by .....	302
<b>INEFFECTIVE ASSISTANCE .....</b>	<b>303</b>

Confessions .....	303
Involuntary .....	303
Consent to search .....	303
Involuntary .....	303
Defendant represents himself .....	303
Inadequate record .....	303
Presumption of .....	304
Appointment one day prior to trial .....	304
Standard of proof .....	305
Standby or hybrid counsel .....	312
INFORMATION .....	313
Sufficiency of .....	313
INSANITY .....	314
Burden of proof .....	314
Presumptions .....	314
Test for .....	314
INSTRUCTIONS .....	315
Accidental death .....	315
Confessions .....	315
Voluntariness .....	315
Confusing .....	315
Elements of offense .....	315
Failure to give .....	316
Failure to object at trial .....	316
First-degree murder .....	316
To include felony-murder and premeditated .....	316
Homicide .....	317
First-degree murder .....	318
Incomplete .....	318
Incorrect .....	318
Inferences from use of deadly weapon .....	318
Intoxication .....	318
Lesser included offenses .....	318
Malice .....	319
Murder .....	319
Premeditation .....	319
Refusal to give .....	319
Right to .....	319
Self-defense .....	321
Voluntariness of confessions .....	321
INTENT .....	322
Embezzlement .....	322
Public official .....	322
Evidence of .....	322
Transferred intent .....	322
INTERROGATION .....	323

<b>Prior inconsistent statements to police</b> .....	323
<b>Recording of</b> .....	323
<b>Waiver of right to counsel</b> .....	323
<b>Juveniles</b> .....	323
<b>INTOXICATION</b> .....	324
<b>Instruction on for self-defense</b> .....	324
<b>INVESTIGATORS</b> .....	325
<b>Non-residents employed as</b> .....	325
<b>JAILS AND PRISONS</b> .....	326
<b>Conditions of</b> .....	326
<b>JOINDER</b> .....	327
<b>Discretion of judge</b> .....	327
<b>JUDGES</b> .....	329
<b>Abuse of discretion</b> .....	329
<b>Accepting plea bargain</b> .....	329
<b>Grant of immunity</b> .....	329
<b>Newly discovered evidence</b> .....	329
<b>Admonishment</b> .....	329
<b>Certified question</b> .....	329
<b>Use in criminal cases</b> .....	329
<b>Contempt</b> .....	330
<b>Discharging jury</b> .....	330
<b>Discipline</b> .....	330
<b>Conviction of crimes</b> .....	331
<b>Election endorsements</b> .....	331
<b>Election improprieties</b> .....	332
<b>Generally</b> .....	332
<b>Standard of proof</b> .....	333
<b>Statements regarding a case</b> .....	334
<b>Suspension pending hearing</b> .....	335
<b>Discretion</b> .....	336
<b>Admissibility of evidence</b> .....	336
<b>Contempt</b> .....	337
<b>Continuance</b> .....	337
<b>Expert witnesses</b> .....	337
<b>Immunity</b> .....	337
<b>Jury instructions</b> .....	338
<b>Jury selection</b> .....	338
<b>Mercy in first-degree murder sentence</b> .....	338
<b>Mistrial</b> .....	338
<b>New trial based on new evidence</b> .....	338
<b>Notes by jury</b> .....	339
<b>Plea bargain</b> .....	339
<b>Pre-trial discovery</b> .....	339
<b>Probation</b> .....	339
<b>Scope of cross-examination</b> .....	339

Sentencing .....	340
Voluntariness of confession .....	340
Disqualification .....	340
Duties .....	340
Before accepting guilty plea .....	340
Explanation of appointed counsel fee reductions .....	340
Jury bias .....	340
Psychiatric evaluation for competency .....	341
To ascertain competency .....	341
To declare mistrial .....	341
To inform of sentence enhancement .....	341
To inquire into racial discrimination .....	342
To instruct on elements of crime .....	342
To render decisions .....	343
To rule in timely manner .....	343
When informant not disclosed .....	344
Elections .....	344
Endorsements by incumbents .....	344
Election improprieties .....	344
Ethical misconduct .....	344
Ethics .....	346
<i>Ex parte</i> communications .....	347
Examining witnesses .....	348
Former prosecuting attorney .....	348
Immunity .....	349
Sole judge of .....	349
Judicial notice .....	349
Blood tests .....	349
Juvenile matters .....	349
Magistrates .....	349
Concurrent jurisdiction with circuit court .....	349
Public censure .....	349
Suspensions .....	350
JUDICIAL NOTICE .....	351
Blood tests .....	351
JURISDICTION .....	352
Appeal by prosecution .....	352
Magistrate court .....	352
Concurrent jurisdiction with circuit court .....	352
JUROR .....	353
Bias .....	353
Generally .....	353
JURY .....	354
Bias .....	354
Generally .....	354
Judge's duty to examine for .....	354
Juror talking with witnesses .....	355

Victim weeping in court .....	355
Challenges .....	356
Generally .....	356
Pending lawsuit against spouse .....	356
Discharge without verdict .....	356
Disqualification .....	356
Delay between impaneling and trial .....	356
Generally .....	357
Pending lawsuit against spouse .....	357
Peremptory strike requires explanation .....	357
Relationship to law enforcement officer .....	357
Exhibits .....	358
Use during deliberation .....	358
Instructions on elements of offense .....	358
Misconduct .....	358
Note-taking .....	359
Use of notes .....	359
Poll .....	359
Prejudicing .....	360
Juror talking with witness .....	360
Prosecutor's inflammatory statements .....	360
Victim weeping in court .....	360
Qualifications .....	360
Generally .....	360
Jury impaneled for related trial .....	362
Right to be present at jury selection .....	362
Selection .....	362
Racial discrimination in .....	362
Unanimity required for verdict .....	362
<i>Voir dire</i> .....	363
JUVENILES .....	365
Detention .....	365
Alternative placement .....	365
Condition of centers .....	365
Judge's responsibility .....	365
Detention centers .....	366
Dispositional hearing .....	366
Maximum length of stay .....	366
Standards for .....	366
Guardians <i>ad litem</i> .....	367
Duty of counsel .....	367
Right to counsel .....	368
Abuse and neglect .....	368
Self-incrimination .....	368
Waiver of right to counsel .....	368
Warrantless search at school .....	369
Transfer to adult jurisdiction .....	369
Admissibility of statements to police .....	369
Factors to consider .....	369
Generally .....	370

Probable cause .....	370
Right to confront .....	372
Warrantless search at school .....	374
<b>LARCENY .....</b>	<b>375</b>
Sufficiency of evidence .....	375
<b>LESSER INCLUDED OFFENSES .....</b>	<b>376</b>
Generally .....	376
Worthless checks .....	376
<b>MAGISTRATE COURT .....</b>	<b>378</b>
Admonishment .....	378
Advice by magistrate or clerk .....	378
Appeal from .....	378
Bail bondsman .....	379
Preference for .....	379
Concurrent jurisdiction with circuit court .....	379
Discipline .....	380
Election finance .....	380
Election improprieties .....	381
Generally .....	382
Public censure .....	383
Ruling on son-in-law's case .....	383
Standard of proof .....	383
Ethics .....	385
Bias .....	386
Incapacity .....	387
Retirement .....	387
Judicial ethics .....	387
Bias .....	388
Probable cause .....	388
Standard for .....	388
Retirement for physical incapacity .....	389
Right to speedy trial in .....	389
Right to trial in .....	389
Warrants .....	389
Standard for appellate review .....	389
<b>MALICE .....</b>	<b>390</b>
Deadly weapon .....	390
Inference from .....	390
Instruction on .....	390
<b>MALICIOUS ASSAULT .....</b>	<b>391</b>
Transferred intent .....	391
<b>MANDAMUS .....</b>	<b>392</b>
Abuse and neglect .....	392
Guidelines .....	392
Appointed counsel relieved .....	392

Conflict of interest .....	392
Bail bond .....	392
Conflict of interest .....	392
Relieving appointed counsel .....	392
<i>Habeas corpus</i> .....	392
Compel ruling .....	392
Police brutality .....	393
Revised sentence .....	393
Ruling by court .....	393
To compel .....	393
Sexual abuse .....	393
Transcripts .....	394
Court reporter to produce .....	394
 <b>MIRANDA WARNINGS</b> .....	 396
As showing prior crimes .....	396
 <b>MISTRIAL</b> .....	 397
Judge's promise to declare .....	397
Effect of .....	397
Jury misconduct .....	397
Manifest necessity .....	397
Not double jeopardy .....	397
 <b>MOTIVE</b> .....	 398
Evidence of other crimes .....	398
 <b>MULTIPLE OFFENSES</b> .....	 399
Multiple acts .....	399
Sexual intercourse .....	399
Separate punishments .....	399
 <b>MURDER</b> .....	 400
Felony-murder .....	400
Instructions on .....	400
Felony-murder and premeditated .....	400
Election to proceed on .....	400
First-degree .....	400
Instructions on .....	400
Instructions .....	400
To distinguish felony-murder and premeditated .....	400
Malice .....	401
Inferred from deadly weapon .....	401
Sentencing .....	401
Recommendation of mercy .....	401
Sufficiency of evidence .....	401
 <b>NEW TRIAL</b> .....	 402
Newly discovered evidence .....	402
Sufficient for new trial .....	405
Sufficiency of evidence .....	407

<b>OBSCENITY</b> .....	<b>408</b>
<b>County commissions</b> .....	<b>408</b>
<b>Authority to enact ordinances</b> .....	<b>408</b>
<b>ORDINANCES</b> .....	<b>410</b>
<b>Obscenity</b> .....	<b>410</b>
<b>PAROLE</b> .....	<b>411</b>
<b>County/regional jails</b> .....	<b>411</b>
<b>Inmates sentenced to penitentiary</b> .....	<b>411</b>
<b>Duty of parole board</b> .....	<b>411</b>
<b>Generally</b> .....	<b>411</b>
<b>Inmates held in county or regional jails</b> .....	<b>411</b>
<b>PATERNITY</b> .....	<b>412</b>
<b>Best interests of the child</b> .....	<b>412</b>
<b>Determination of</b> .....	<b>412</b>
<b>When prior determination is <i>res judicata</i></b> .....	<b>412</b>
<b>PENALTIES</b> .....	<b>414</b>
<b>Civil distinguished from criminal</b> .....	<b>414</b>
<b>PERJURY</b> .....	<b>415</b>
<b>Prior inconsistent statements to police</b> .....	<b>415</b>
<b>PLAIN ERROR</b> .....	<b>416</b>
<b>Generally</b> .....	<b>416</b>
<b>Prosecuting attorney's comments</b> .....	<b>416</b>
<b>PLEA</b> .....	<b>417</b>
<b>Waiver of rights</b> .....	<b>417</b>
<b>Withdrawal of</b> .....	<b>417</b>
<b>PLEA BARGAINS</b> .....	<b>418</b>
<b>Acceptance of</b> .....	<b>418</b>
<b>Right to appeal</b> .....	<b>418</b>
<b>Waiver of</b> .....	<b>418</b>
<b>Sentencing</b> .....	<b>418</b>
<b>Setting aside</b> .....	<b>419</b>
<b>Necessity for record</b> .....	<b>419</b>
<b>Right to transcript unaffected</b> .....	<b>420</b>
<b>Standard for acceptance</b> .....	<b>422</b>
<b>Statements made during</b> .....	<b>422</b>
<b>Use at trial</b> .....	<b>422</b>
<b>Withdrawal of</b> .....	<b>422</b>
<b>POLICE OFFICER</b> .....	<b>423</b>
<b>Agreement not to prosecute</b> .....	<b>423</b>
<b>Authority to bargain for information</b> .....	<b>423</b>
<b>Civil liability</b> .....	<b>423</b>

Hot pursuit without warrant .....	423
Complaint procedure .....	424
Entrapment .....	424
Interrogation by .....	424
Recording of .....	424
Non-resident investigator employed by .....	424
Police brutality .....	424
Procedure for complaining .....	424
Reports .....	426
Disclosure of .....	426
Writing confession for accused .....	426
<b>PRELIMINARY HEARING .....</b>	<b>427</b>
Purpose of .....	427
<b>PREMEDITATION .....</b>	<b>428</b>
Instruction on .....	428
<b>PRESENTENCE REPORT .....</b>	<b>429</b>
Defendant's right to inspect .....	429
<b>PRIOR OFFENSES .....</b>	<b>430</b>
Introduction at trial .....	430
Previous reading of rights .....	430
Use of in DUI prosecution .....	430
<b>PRISON/JAIL CONDITIONS .....</b>	<b>431</b>
Detention centers .....	431
Standards for .....	431
Double ceiling .....	431
Exercise room in regional jail .....	431
Generally .....	432
Juveniles detention centers .....	434
Overcrowding .....	434
Rules for .....	434
Overcrowding and rules for exercise .....	435
Promulgation of rules regarding .....	435
Processing of prisoners at county jail .....	437
State's duty to incarcerate .....	437
<b>PRIVATE PROSECUTING ATTORNEYS .....</b>	<b>439</b>
Appointment of when conflict arises .....	439
Dismissal of indictment .....	439
<b>PRIVILEGES AND IMMUNITIES CLAUSE .....</b>	<b>440</b>
Non-resident investigators .....	440
<b>PROBABLE CAUSE .....</b>	<b>441</b>
Felony arrest .....	441
Gesture when stopped .....	441
Juveniles .....	442

Required for warrant .....	442
Standard for .....	442
Transfer to adult jurisdiction .....	442
Warrantless arrest .....	442
Worthless checks .....	442
<b>PROBATION .....</b>	<b>443</b>
Conditions of .....	443
Confinement .....	443
Failure to report to probation officer .....	443
Special prosecutor fees .....	443
Confinement as condition of .....	444
Constructive probation .....	444
Denial of .....	444
DUI .....	444
Eligibility with revoked operator's license .....	444
Eligibility .....	445
Unlawful wounding .....	445
Firearm .....	445
Use of prohibits .....	445
Home confinement .....	445
Incarceration as condition of .....	445
Modification hearing .....	445
Notice of to prosecuting attorney .....	445
Notice of modification hearing .....	446
Prosecuting attorney entitled to .....	446
Revocation .....	446
Hearing procedure .....	446
Right to .....	447
Right to probation officer's presentence report .....	447
Statements made during discussions .....	448
Impeachment .....	448
Use at trial .....	448
Work release .....	448
In misdemeanor .....	448
<b>PROFESSIONAL RESPONSIBILITY .....</b>	<b>449</b>
Attorney-client relationship .....	449
<b>PROHIBITION .....</b>	<b>450</b>
Bail .....	450
Right to in sexual assault of children .....	450
Criminal cases generally .....	450
Delay of indictment .....	450
Denial of change of venue .....	450
Deposition .....	450
Compelling of .....	450
Disqualification of prosecuting attorney .....	451
DUI .....	451
Dismissal of .....	451
DUI convictions .....	451

Immunity promised by prosecuting attorney .....	451
Indictment .....	451
Delay in bringing .....	451
Probation .....	452
Notice of modification hearing required .....	452
Prosecuting attorney .....	452
Presenting evidence to grand jury .....	452
Prosecuting attorney may use .....	452
<b>PROMPT PRESENTMENT .....</b>	<b>453</b>
Delay in taking before magistrate .....	453
DUI .....	453
Generally .....	453
Statements made to police .....	453
Use of for impeachment .....	453
<b>PROPORTIONALITY .....</b>	<b>455</b>
Appropriateness of sentence .....	455
Recidivism .....	455
Generally .....	459
Recidivism .....	459
<b>PROSECUTING ATTORNEY .....</b>	<b>461</b>
Appeal by .....	461
Prohibition .....	461
Right to bail in sexual assault of children .....	462
Conduct at trial .....	463
Comments during closing argument .....	463
Questioning witnesses .....	466
Confessing error .....	467
Effect of .....	467
Conflict of interest .....	467
Disqualification .....	471
Conflict of interest .....	472
Effect on indictment .....	472
Reasons to appear on record .....	472
Duty .....	473
Generally .....	473
To be fair .....	474
To document test wherein evidence destroyed .....	474
Exculpatory evidence .....	475
Failure to disclose .....	475
Failure to disclose .....	475
Demonstrative evidence .....	475
Evidence available to prosecutor .....	475
Exculpatory evidence .....	476
Inducements to witness .....	477
Informant .....	477
Tape recording .....	477
When prejudicial .....	477
Fairness to accused .....	477

Grand jury .....	478
Evidence presented to .....	478
Influencing .....	478
Immunity .....	478
Promised by prosecuting attorney .....	478
Judges .....	479
Record required when attorney becomes judge .....	479
Misstating evidence .....	479
Personal opinion .....	479
Forbidden during argument .....	479
Prohibition .....	479
DUI .....	479
Not appropriate in grand jury proceedings .....	479
When prosecutor may seek .....	480
Quasi-judicial role .....	480
Special prosecutor .....	481
Fees for .....	481
Witness for defense .....	481
<b>PSYCHOLOGICAL/PSYCHIATRIC EVALUATION .....</b>	<b>482</b>
Right to .....	482
Self-Incrimination .....	482
Waiver during examination .....	482
<b>PUBLIC EMPLOYMENT .....</b>	<b>484</b>
Defined .....	484
<b>PUBLIC OFFICER .....</b>	<b>485</b>
Defined .....	485
<b>PUBLIC RECORDS .....</b>	<b>486</b>
Officer in charge of defined .....	486
<b>RECIDIVISM .....</b>	<b>487</b>
Sentencing .....	487
<b>RECORDS .....</b>	<b>488</b>
Officer in charge .....	488
Define .....	488
<b>REGIONAL JAIL AUTHORITY .....</b>	<b>489</b>
Rules governing jails .....	489
<b>RES JUDICATA .....</b>	<b>490</b>
Paternity determination .....	490
<b>RESTRAINTS .....</b>	<b>491</b>
Right to be free of at trial .....	491
<b>RIGHT TO APPEAL .....</b>	<b>492</b>
Constitutional right .....	492

Generally .....	492
Right to counsel .....	493
Waiver in plea bargain .....	494
Waiver of .....	495
<b>RIGHT TO BE PRESENT .....</b>	<b>496</b>
All stages of proceedings .....	496
Critical stage defined .....	497
Waiver of .....	497
<b>RIGHT TO CONFRONT .....</b>	<b>499</b>
Admissibility of extrajudicial statements .....	499
Critical stages .....	500
Juvenile transfer hearing .....	501
Right to be present at all stages .....	501
<b>RIGHT TO COUNSEL .....</b>	<b>502</b>
Abuse and neglect .....	502
Children's right to counsel .....	502
Children's right .....	502
Abuse and neglect cases .....	502
Denial of .....	502
Ineffective assistance of counsel .....	502
Generally .....	502
Recanting request for counsel .....	502
Waiver of .....	504
Seizure of evidence pursuant to lawful arrest .....	504
Self-representation .....	504
Waiver of .....	506
Withdrawal of counsel .....	506
<b>RIGHT TO FAIR TRIAL .....</b>	<b>507</b>
Right to instructions on elements of crime .....	507
<b>RIGHT TO REMAIN SILENT .....</b>	<b>508</b>
Incarceration for invoking .....	508
Waiver of .....	508
<b>RIGHT TO SPEEDY TRIAL .....</b>	<b>509</b>
Generally .....	509
Indictment delayed .....	510
Prohibition writ not to offend .....	510
Standard for determining .....	510
Three-term rule .....	512
<b>RIGHT TO TESTIFY .....</b>	<b>513</b>
Defendant's right to testify .....	513
Waiver of .....	513
Mistrial if not exercised .....	513
<b>RIGHT TO TRANSCRIPT .....</b>	<b>514</b>

Court reporter to produce .....	514
Generally .....	515
<b>RIGHT TO TRIAL .....</b>	<b>516</b>
Charges in magistrate court .....	516
Speedy trial .....	516
Generally .....	516
Speedy trial in magistrate court .....	516
<b>ROBBERY .....</b>	<b>517</b>
Aggravated .....	517
Double jeopardy .....	517
Sentence for .....	517
<b>SCIENTIFIC TESTS .....</b>	<b>518</b>
Evidence destroyed .....	518
Duty to make record .....	518
Judicial notice .....	519
<b>SEARCH AND SEIZURE .....</b>	<b>520</b>
Civil liability .....	520
Hot pursuit without warrant .....	520
Curtilage .....	521
Exclusionary rule .....	521
Items outside curtilage .....	521
Expectation of privacy .....	522
Plain view exception .....	522
Warrant .....	524
Area of curtilage .....	524
Probable cause for .....	524
Warrantless search .....	528
Gesture by vehicle occupants .....	528
Incident to lawful arrest .....	528
Incident to lawful investigative stop .....	528
Juvenile at school .....	529
Lawfully parked car .....	530
Plain view exception .....	530
Probable cause for .....	530
Right to counsel .....	531
<b>SELF-DEFENSE .....</b>	<b>532</b>
Duty to retreat .....	532
Force permissible .....	532
Instructions on .....	533
Victims's acts admissible .....	533
<b>SELF-INCRIMINATION .....</b>	<b>534</b>
Clothing seized during arrest .....	534
During arrest .....	534
Consent to search .....	534
Involuntary .....	534

Controlled substance prescription .....	534
<b>SELF-INCRIMINATION/STATEMENTS BY DEFENDANT .....</b>	<b>535</b>
Confessions .....	535
Admissibility .....	535
Confessions to police .....	542
Delay in taking before magistrate .....	543
Prompt presentment .....	543
Psychiatric examination .....	543
Waiver during .....	543
Right to invoke .....	543
Testimony by defendant .....	544
Threats against victim .....	544
Voluntariness .....	545
Coercion .....	545
Delay in taking before magistrate .....	545
Generally .....	547
Statement written by police officer .....	547
<b>SENTENCING .....</b>	<b>548</b>
Appropriateness .....	548
Generally .....	548
Recidivism .....	548
Burglary .....	548
Consecutive sentences .....	549
Multiple convictions .....	549
Court costs .....	549
Special prosecutor fees .....	549
Delay in imposing .....	549
Disproportionate sentence .....	550
Recidivism .....	550
DUI .....	550
Alternative sentencing .....	550
Probation .....	550
Third offense .....	550
Work release .....	551
Enhancement .....	551
Duty to inform jury .....	551
<i>Ex post facto</i> application .....	551
Multiple convictions .....	551
Notice of .....	551
Prior use of 5 year enhancement .....	553
Remoteness in time of prior offense .....	553
Use of firearm .....	553
<i>Ex post facto</i> application .....	554
Failure to sentence .....	554
Effect of .....	554
Generally .....	554
Good time credit .....	555
Home confinement .....	556
Incarceration preceding .....	556

Multiple offenses .....	556
Same transaction .....	557
Notice .....	557
For enhancement .....	557
Plea bargaining .....	557
When judge bound by plea .....	557
Presentence report .....	557
Defendant's right to inspect .....	557
Probation .....	558
Incarceration as condition of .....	558
Use of firearm prohibits .....	559
Proportionality .....	559
Recidivism .....	560
Recidivism .....	560
Appropriateness of sentence .....	560
Double jeopardy .....	561
Recommendation of mercy .....	561
Resentencing .....	561
When accused is fugitive .....	561
Reviewing sentence .....	562
Standard for .....	562
Revised order following reversal .....	563
Work release .....	563
<b>SEXUAL ATTACKS .....</b>	<b>564</b>
Bail .....	564
Right to in sexual assault .....	564
Child assault or abuse .....	564
Abuse .....	565
Collateral crimes .....	565
Double jeopardy .....	565
State confesses error .....	565
Collateral crimes .....	565
Child assault or abuse .....	565
Concerted acts .....	566
Double jeopardy .....	566
Assault .....	566
Evidence .....	566
Collateral crimes .....	566
Prompt complaint/excited utterance .....	567
Use of civil abuse in criminal matters .....	567
Indictment .....	567
Sufficiency of .....	567
Instructions .....	567
Assault and abuse .....	567
Lesser included offenses .....	567
Assault and abuse .....	568
Multiple acts of intercourse .....	568
Sufficiency of evidence .....	569
<b>SIXTH AMENDMENT .....</b>	<b>570</b>

<b>Right to confront</b> .....	<b>570</b>
<b>Admissibility of extrajudicial statements</b> .....	<b>570</b>
<b>Seizure of evidence pursuant to lawful arrest</b> .....	<b>570</b>
<b>SPECIAL PROSECUTOR</b> .....	<b>571</b>
<b>Fees for</b> .....	<b>571</b>
<b>SPECTATORS IN COURT</b> .....	<b>572</b>
<b>Victim</b> .....	<b>572</b>
<b>Weeping in court</b> .....	<b>572</b>
<b>SPEEDY TRIAL</b> .....	<b>573</b>
<b>Indictment delayed</b> .....	<b>573</b>
<b>Right to</b> .....	<b>573</b>
<b>Right to in magistrate court</b> .....	<b>573</b>
<b>STATUTES</b> .....	<b>574</b>
<b>Legislative intent</b> .....	<b>574</b>
<b>Plain language</b> .....	<b>574</b>
<b>Presumption of constitutionality</b> .....	<b>574</b>
<b>Specificity and notice</b> .....	<b>574</b>
<b>Statutory construction</b> .....	<b>576</b>
<b>Generally</b> .....	<b>576</b>
<b>Void for vagueness</b> .....	<b>577</b>
<b>Worthless checks</b> .....	<b>577</b>
<b>SUBPOENAS</b> .....	<b>579</b>
<b>Mental health records</b> .....	<b>579</b>
<b>SUFFICIENCY OF EVIDENCE</b> .....	<b>580</b>
<b>Burglary</b> .....	<b>580</b>
<b>Circumstantial evidence</b> .....	<b>580</b>
<b>Concerted action</b> .....	<b>581</b>
<b>Conflicting oral testimony</b> .....	<b>581</b>
<b>Conspiracy</b> .....	<b>582</b>
<b>Embezzlement</b> .....	<b>582</b>
<b>Generally</b> .....	<b>582</b>
<b>Grand larceny</b> .....	<b>583</b>
<b>Homicide</b> .....	<b>584</b>
<b>Larceny</b> .....	<b>584</b>
<b>Murder</b> .....	<b>584</b>
<b>Sentencing</b> .....	<b>584</b>
<b>Sexual abuse</b> .....	<b>585</b>
<b>Sexual abuse by a guardian or parent</b> .....	<b>585</b>
<b>Sexual assault</b> .....	<b>585</b>
<b>SUICIDE</b> .....	<b>586</b>
<b>Felony-murder</b> .....	<b>586</b>
<b>TAPE RECORDING</b> .....	<b>587</b>
<b>Failure to disclose</b> .....	<b>587</b>

<b>TERMINATION OF PARENTAL RIGHTS</b> .....	<b>588</b>
<b>Abandonment</b> .....	<b>588</b>
<b>Failure to pay support</b> .....	<b>588</b>
<b>Abuse and neglect</b> .....	<b>588</b>
<b>Evidence of prior abuse</b> .....	<b>588</b>
<b>Least restrictive alternative</b> .....	<b>589</b>
<b>Procedural delays</b> .....	<b>589</b>
<b>Sufficient to terminate</b> .....	<b>589</b>
<b>Association with siblings</b> .....	<b>590</b>
<b>Duty of guardian to initiate</b> .....	<b>590</b>
<b>Failure to pay child support</b> .....	<b>590</b>
<b>Generally</b> .....	<b>590</b>
<b>Guardian <i>ad litem</i></b> .....	<b>591</b>
<b>Duty of counsel</b> .....	<b>591</b>
<b>Guardian <i>ad litem</i> for children</b> .....	<b>591</b>
<b>Improvement period</b> .....	<b>591</b>
<b>Length of</b> .....	<b>591</b>
<b>Least restrictive alternative</b> .....	<b>592</b>
<b>Presumption for parent</b> .....	<b>593</b>
<b>Standard of proof</b> .....	<b>593</b>
<b>Voluntary relinquishment</b> .....	<b>596</b>
<b>Subsequent recession of</b> .....	<b>596</b>
<b>Voluntary termination</b> .....	<b>598</b>
<b>Guardian for children</b> .....	<b>598</b>
<b>TRANSCRIPTS</b> .....	<b>599</b>
<b>Right to</b> .....	<b>599</b>
<b>Distinguished from appeal</b> .....	<b>599</b>
<b>Failure to provide</b> .....	<b>599</b>
<b>TRANSFER TO ADULT JURISDICTION</b> .....	<b>604</b>
<b>Generally</b> .....	<b>604</b>
<b>Mandatory factors to consider</b> .....	<b>604</b>
<b>Probable cause</b> .....	<b>604</b>
<b>TRIAL</b> .....	<b>605</b>
<b>Arrest of witness</b> .....	<b>605</b>
<b>Clothing</b> .....	<b>605</b>
<b>Right to appear without prison attire</b> .....	<b>605</b>
<b>New trial</b> .....	<b>605</b>
<b>Jury misconduct</b> .....	<b>605</b>
<b>Newly discovered evidence</b> .....	<b>605</b>
<b>Prison attire</b> .....	<b>605</b>
<b>Right to appear without</b> .....	<b>605</b>
<b>Restraints</b> .....	<b>606</b>
<b>Right to be free of</b> .....	<b>606</b>
<b>Right to speedy trial</b> .....	<b>606</b>
<b>Magistrate courts</b> .....	<b>606</b>
<b>Spectators</b> .....	<b>606</b>
<b>Victim weeping in court</b> .....	<b>606</b>

Speedy trial .....	606
Right to .....	606
Venue .....	606
Proof required to change .....	606
<b>UNLAWFUL WOUNDING .....</b>	<b>607</b>
Probation for .....	607
<b>UTTERING .....</b>	<b>608</b>
Probable cause for .....	608
<b>VENUE .....</b>	<b>609</b>
Change of venue .....	609
Abuse of discretion in not granting .....	609
Sufficiency of proof for .....	609
Change of venue .....	610
Denial of change .....	610
<b>VERDICT .....</b>	<b>611</b>
Polling jury .....	611
Setting aside .....	611
Cumulative error .....	611
Sufficiency of evidence .....	611
<b>VIDEO POKER .....</b>	<b>613</b>
Declared unlawful .....	613
<b>VOIR DIRE .....</b>	<b>615</b>
Abuse of discretion .....	615
<b>WAIVER .....</b>	<b>616</b>
Right to appeal .....	616
<b>WARRANTS .....</b>	<b>617</b>
Citizen's complaint as basis for .....	617
Cross-warrants .....	618
Prosecutor to pursue .....	618
Plain view exception .....	618
Search warrant .....	619
Probable cause for .....	619
<b>WIRETAPS .....</b>	<b>620</b>
Admissibility .....	620
<b>WITNESSES .....</b>	<b>621</b>
Arrest in presence of jury .....	621
Credibility .....	621
Cross-examination .....	621
Generally .....	621
Prejudice or bias .....	622
Scope of .....	622

Experts .....	623
Admissibility of expert opinion .....	623
Qualifying as such .....	623
Failure to disclose .....	623
Hostile .....	623
Interrogation of .....	623
Impeachment .....	624
Mental health records .....	624
Judges' examining .....	624
Personal knowledge .....	624
Prior statements .....	624
Admissibility .....	624
Discovery of .....	624
Prosecution called for defense .....	625
Sequestration .....	625
Sexual assault .....	625
Prompt complaint .....	625
Surviving spouse .....	625
Testimony .....	625
Admissibility based on personal knowledge .....	625
Unavailability .....	626
Juvenile transfer hearing .....	626
Prosecution's burden .....	626
Writings by .....	626
<b>WORK RELEASE .....</b>	<b>627</b>
Escape from .....	627
In lieu of magistrate court sentence .....	627
Psychiatric or psychological records .....	627
<b>WORTHLESS CHECKS .....</b>	<b>628</b>
Attorney reprimand for .....	628
Lesser included offenses .....	628
Probable cause .....	628
Statutory procedures for .....	628

## ABUSE AND NEGLECT

### Burden of proof

*Department of Human Services v. Peggy F.*, 399 S.E.2d 460 (1990) (Per Curiam)

Appellant's parental rights were terminated for abuse and neglect. Six of appellant's eleven children were the subject of this action. The Department of Human Services workers found the home to be without heat, dirty and unsafe for small children. Several of the children regularly engaged in criminal acts. Two of the younger children were found out of doors in cold weather in nightclothes, without shoes.

In April, 1988, appellant voluntarily placed the children in the Department of Human Services' custody while seeking psychiatric treatment. All of the children exhibited emotional problems but have shown improvement while in foster care. On May 18, 1988, the Department of Human Services sought temporary custody. On July 7, 1988 a six month improvement period was granted and the Department of Human Services ordered to submit a family case plan. *W.Va. Code*, 49-6D-3. Following this period, appellant's rights were terminated except for one child, age fourteen, who objected; she remained in temporary custody until age eighteen. *W.Va. Code*, 49-6-5(a)(6).

Syl. pt. 1 - "*W.Va. Code*, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove 'conditions existing at the time of the filing of the petition ... by clear and convincing proof.' The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden." Syllabus Point 1, *In Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).

Syl. pt. 2 - "Under *W.Va. Code*, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to *W.Va. Code*, 49-6D-3 (1984)." Syllabus Point 3, *State ex rel. W.Va. Dep't of Human Servs. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

The Court found ample evidence to support the termination. The Department of Human Services had no obligation to show that appellant did not comply with the family case plan. No error.

### Duty of DHS

*Department of Human Services v. Peggy F.*, 399 S.E.2d 460 (1990) (Per Curiam)

See ABUSE AND NEGLECT Burden of proof, (p. 1) for discussion of topic.

## **ABUSE AND NEGLECT**

### **Duty of DHS (continued)**

#### **Guidelines**

*Jennifer A. v. Burgess*, No. 21009 (7/16/93) (Per Curiam)

This action in mandamus resulted from *Jennifer A. v. Burgess*, No. 21009 (May 15, 1992), which required guidelines to be promulgated regarding DHHR handling of cases of alleged sexual abuse of children. The case was brought back for monitoring of DHHR's progress.

The Court concluded that satisfactory progress was lacking and ordered a statewide advisory committee to develop the guidelines. Judge Craig Broadwater was appointed to chair the committee and included the Court Administrator, the Court Clerk and DHHR personnel, expenses to be paid by the Administrator's Office.

### **Evidence of**

#### **Use in criminal proceeding**

*State v. James R.*, 422 S.E.2d 521 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 470) for discussion of topic.

### **Guardians *ad litem***

#### **Duty of counsel**

*In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 593) for discussion of topic.

### **Improvement period**

*Department of Human Services v. Peggy F.*, 1399 S.E.2d 460 (1990) (Per Curiam)

See ABUSE AND NEGLECT Burden of proof, (p. 1) for discussion of topic.

## ABUSE AND NEGLECT

### Improvement period

*James M. v. Maynard*, 408 S.E.2d 400 (1991) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Improvement period, (p. 9) for discussion of topic.

### Least restrictive alternative

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Abuse and neglect, Least restrictive alternative, (p. 589) for discussion of topic.

### Neglect defined

*State v. De Berry*, 408 S.E.2d 91 (1991) (McHugh, J.)

Appellant was indicted for felony neglect pursuant to *W.Va. Code*, 61-8D-4(b). At trial, defense counsel successfully argued that the definition of neglect therein is unconstitutionally vague. The indictment was dismissed, from which dismissal the prosecution appealed.

The prosecution alleged that defendant took her twelve-year-old daughter to a party, knowing that alcohol would be available. The daughter, upon encouragement by her mother, played “drinking games” and consumed sufficient alcohol to lose consciousness. Apparently, defendant allowed someone else to take her daughter home, while she engaged in sexual intercourse with another guest at the party. The daughter was found dead the next morning; the cause of death was “acute ethanol intoxication.”

Syl. pt. 1 - In order to obtain a conviction under *W.Va. Code*, 61-8D-4(b) [1988], the State must prove that the defendant neglected a minor child within the meaning of the term “neglect,” as that term is defined by *W.Va. Code*, 61-8D-1(6) [1988], which definition is “the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child’s physical safety or health.” Furthermore, the State must prove that such neglect caused serious bodily injury. However, there is no requirement to prove criminal intent in a prosecution under *W.Va. Code*, 61-8D-4(b) [1988].

## ABUSE AND NEGLECT

### Neglect defined (continued)

#### *State v. De Berry*, (continued)

Syl. pt. 2 - “A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.” Syl. pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

Syl. pt. 3 - The term “neglect,” as defined by *W.Va. Code*, 61-8D-1(6) [1988], is not unconstitutionally vague in violation of due process principles contained in *U.S. Const.* amend. XIV, § 1, and *W.Va. Const.* art. III, § 10. Therefore, *W.Va. Code*, 61-8D-4(b) [1988] is not unconstitutionally vague in violation of due process principles contained in *U.S. Const.* amend. XIV, § 1, and *W.Va. Const.* art. III, § 10, because such statute’s use of the term “neglect” gives a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited and it also provides adequate standards for adjudication.

Reversed.

### Proof of

*Department of Human Services v. Peggy F.*, 399 S.E.2d 460 (1990) (Per Curiam)

See ABUSE AND NEGLECT Burden of proof, (p. 1) for discussion of topic.

*State v. De Berry*, 408 S.E.2d 91 (1991) (McHugh, J.)

See ABUSE AND NEGLECT Neglect defined, (p. 3) for discussion of topic.

### Supervised visitation

#### Finding by master or judge

*Sherry L.H. v. Hey*, 419 S.E.2d 17 (1992) (Per Curiam)

Petitioner sought a writ of prohibition to prevent enforcement of an order granting supervised visitation to her ex-husband, alleging that her ex-husband had sexually abused her two daughters. The family law master had concluded that the daughters were sexually abused by their father and recommended that visitation be suspended pending the father’s treatment.

## ABUSE AND NEGLECT

### Supervised visitation (continued)

#### Finding by master or judge (continued)

##### *Sherry L.H. v. Hey*, (continued)

Syl. pt. 1 - “Prior to ordering supervised visitation pursuant to *W.Va. Code*, 48-2-15(b)(1) [1991], if there is an allegation involving whether one of the parents sexually abused the child involved, a family law master or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law master or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law master or circuit court should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the sexual abuse against risk of harm of such visitation to the child. Furthermore, the family law master or circuit court should ascertain that the allegation of sexual abuse under these circumstances is meritorious and if made in the context of the family law proceeding, that such allegation is reported to the appropriate law enforcement agency or prosecutor for the county in which the alleged sexual abuse took place. Finally, if the sexual abuse allegations were previously tried in a criminal case, then the transcript of the criminal case may be utilized to determine whether credible evidence exists to support the allegations. If the transcript is utilized to determine that credible evidence does or does not exist, the transcript must be made a part of the record in the civil proceeding so that this Court, where appropriate, may adequately review the civil record to conclude whether the lower court abused its discretion.” Syllabus Point 2, *Mary D. v. Watt*, 190 W.Va. 341, 438 S.E.2d 521 (1992).

Syl. pt. 2 - “Where supervised visitation is ordered pursuant to *W.Va. Code*, 48-2-15(b)(1) [1991], the best interests of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.” Syllabus Point 3, *Mary D. v. Watt*, 190 W.Va. 341, 438 S.E.2d 521 (1992).

The Court remanded for determination as required in Syl. Pt. 2. Writ granted.

## ABUSE AND NEGLECT

### Termination of parental rights

#### Association with siblings

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Association with siblings, (p. 590) for discussion of topic.

#### Guardian's duty

*In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 593) for discussion of topic.

*In the Matter of Scottie D.*, 406 S.E.2d 214 (1991) (McHugh, J.)

Appellant was appointed guardian *ad litem* for infant children pursuant to an action initiated against Ronald and Joyce D to terminate their parental rights. One of the children was treated in a hospital emergency room for severe burns on her feet, giving rise to an investigation. The circuit court found the father not guilty of abuse. Appellant contended on appeal that the father took no action with respect to the abuse and that the children should not have been returned to the home.

Syl. pt. 1 - *W.Va. Code*, 49-1-3(a) [ , as amended], in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. pt. 3, *In the Interest of Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988).

Syl. pt. 2 - Termination of parental rights of a parent of an abused child is authorized under *W.Va. Code*, 49-6-1 to 49-6-10, as amended, where such parent contends non-participation in the acts giving rise to the termination petition but there is clear and convincing evidence that such non-participating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va. Code*, 49-1-6 to 49-1-10, as amended, where such non-participating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.

## ABUSE AND NEGLECT

### Termination of parental rights (continued)

#### Guardian's duty (continued)

##### *In the Matter of Scottie D.*, (continued)

Syl. pt. 3 - In a proceeding to terminate parental rights pursuant to *W.Va. Code*, 49-6-1 to 49-6-10, as amended, a guardian *ad litem*, appointed pursuant to *W.Va. Code*, 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian *ad litem*, an appeal is necessary.

The children here were clearly abused and the father's version of how injuries occurred did not comport with the medical evidence. Reversed and remanded.

#### Improvement period

##### *In re Lacey P.*, 433 S.E.2d 518 (1993) (Brotherton, J.)

See TERMINATION OF PARENTAL RIGHTS Improvement period, Length of, (p. 591) for discussion of topic.

##### *In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

Appellant claimed the circuit court erred in terminating her parental rights because: (1) the Department of Human Services did not make a reasonable effort to reunify the family as required by *W.Va. Code*, 49-6-5; (2) the caseworker did not develop a realistic case plan as required by *W.Va. Code*, 49-6D-3; (3) the court found appellant's outbursts of anger and erratic behavior impaired her ability to parent; and (4) the court allowed improper evidence of abuse to other children.

Syl. pt. 2 - “ “A parent has the natural right to the custody of his or her infant child, and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts.” Syllabus, *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 168 S.E.2d 798 (1969).’ Syl. pt. 2, *Hammack v. Wise*, 158 W.Va. 343, 211 S.E.2d 118 (1975).” Syl. Pt. 1, *Nancy Viola R. v. Randolph W.*, 177 W.Va. 710, 356 S.E.2d 464 (1987).

**Termination of parental rights** (continued)

**Improvement period** (continued)

*In the Interest of Carlita B.*, (continued)

Syl. pt. 3 - “Under *W.Va. Code*, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to *W.Va. Code*, 49-6D-3 (1984).” Syl. Pt. 3, *State ex rel. West Virginia Dept. Human Servs. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

Syl. pt. 4 - In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.

Syl. pt. 6 - At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court’s discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

Appellant was granted two six-month improvement periods. Although the Department of Human Services did not complete the first case plan expeditiously, no harm resulted to appellant; however, the Court expressed concern that the child was harmed. The Court noted that the status of the conditions required during the improvement period should be monitored by the circuit court on a monthly basis. The parent’s desire to be with the child should be a significant factor.

Here, the case plans appeared realistic and appropriate. The Court rejected appellant’s argument that the case should have been assigned to a different case worker. Given the Department of Human Services’ staffing shortage, the Court found its efforts reasonable. No error.

## ABUSE AND NEGLECT

### Termination of parental rights (continued)

#### Improvement period (continued)

*James M. v. Maynard*, 408 S.E.2d 400 (1991) (Workman, J.)

Petitioners requested a writ of prohibition to prevent respondent from granting an improvement period and restoration of the father's custody of four minor children. During the proceedings, evidence was introduced of the father's alcohol abuse and physical abuse toward the mother. At one point, the father quit his job and deserted the family. The family then moved from place to place, living with three men at the time of the Department of Human Services' intervention. The children went without necessary medical care. After the Department of Human Services rented an apartment for her, the mother abandoned the premises. Following a long series of sporadic contacts, the Department of Human Services filed a petition for removal of custody based on neglect.

The mother and father were given a six-month improvement period but the father was not present at the hearing although he later admitted knowing of the children's removal. The children were placed in foster care but two were returned temporarily to the mother until emergency custody was taken by the Department of Human Services and an amended petition filed alleging continuing neglect and abuse by the mother and abandonment by the father.

The father attended the resulting hearing but did not request an improvement period nor ask to see the children; the court ordered an evaluation of his home for possible placement. After several continuances necessitated by lack of service on the father, the father moved for an improvement period, which motion was granted.

Syl. pt. 1 - “[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.” Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).” Syl. Pt. 1, in part, *In re Darla B.*, 175 W.Va. 137, 331 S.E.2d 868 (1985).

Syl. pt. 2 - Abandonment of a child by a parent(s) constitutes compelling circumstances sufficient to justify the denial of an improvement period.

## ABUSE AND NEGLECT

### Termination of parental rights (continued)

#### Improvement period (continued)

##### *James M. v. Maynard*, (continued)

Syl. pt. 3 - It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

Syl. pt. 4 - In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.

Syl. pt. 5 - The guardian *ad litem*'s role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home.

In addition to the usual considerations relating to medical and physical abuse and neglect, the Court found the father's abandonment and the "tender ages" of the children to be especially compelling. Ruling on improvement period reversed; writ granted.

#### Procedural delays

##### *In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

Appellant claimed the circuit court erred in terminating her parental rights because: (1 the Department of Human Services did not make a reasonable effort to reunify the family as required by *W.Va. Code*, 49-6-5; (2 the caseworker did not develop a realistic case plan as required by *W.Va. Code*, 49-6D-3; (3 the court found appellant's outbursts of anger and erratic behavior impaired her ability to parent; and (4 the court allowed improper evidence of abuse to other children.

## ABUSE AND NEGLECT

### Termination of parental rights (continued)

#### Procedural delays (continued)

##### *In the Interest of Carlita B.*, (continued)

Pursuant to various investigations, a petition to terminate parental rights was filed 27 March 1987. A hearing was held 23 April 1987, resulting in an improvement period. A second hearing was held 10 November 1987, extending the improvement period and ordering further testing. Additional hearings were held 26 July 1988 and 1 August 1988, with termination ordered 30 January 1989. Because of difficulty in obtaining a transcript a final order was reentered 24 January 1990, resulting in this appeal.

(The Court noted that a sibling's termination case was delayed even more, resulting in foster care for seven years without a permanent placement.)

Syl. pt. 1 - Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security. Consequently, in order to assure that all entities are actively pursuing the goals of the child abuse and neglect statutes, the Administrative Director of this Court is hereby directed to work with the clerks of the circuit court to develop systems to monitor the status and progress of child neglect and abuse cases in the courts.

Syl. pt. 5 - The clear import of the statute [West Virginia Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.

The Court noted that delay by the Department of Human Services was not as serious as the delay in the court system. Affirmed.

#### Standard of proof

##### *In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 593) for discussion of topic.

##### *State v. Krystal T.*, 407 S.E.2d 395 (1991) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 596) for discussion of topic.

## ABUSE OF DISCRETION

### Admissibility of evidence

*State v. Bass*, 432 S.E.2d 86 (1993) (Per Curiam)

See EVIDENCE Admissibility, Prejudice versus probative value, (p. 216) for discussion of topic.

*State v. Slaman*, 431 S.E.2d 91 (1993) (Per Curiam)

See SEARCH AND SEIZURE Plain view exception, (p. 523) for discussion of topic.

### Generally

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

See EVIDENCE Admissibility, Relevance, (p. 221) for discussion of topic.

### Introduction after case closed

*State v. Harding*, 422 S.E.2d 619 (1992) (Per Curiam)

See BAIL Revocation of, Hearing required, (p. 111) for discussion of topic.

### Appointed counsel fees

*Judy v. White*, 425 S.E.2d 588 (1992) (McHugh, C.J.)

See ATTORNEYS Compensation, Appointed criminal cases, (p. 42) for discussion of topic.

### Bail

*State ex rel. Woods v. Wolverton*, No. 20165 (7/11/91) (Per Curiam)

Relators brought this original proceeding in mandamus, requesting that the Court require the circuit court to set bail bond. Relators were charged with first-degree murder. *W.Va. Code*, 62-1C-1 allows the trial court to set bail in pending charges punishable by life imprisonment but prohibits bail on appeal from a conviction punishable by life imprisonment.

## ABUSE OF DISCRETION

### Bail (continued)

#### *State ex rel. Woods v. Wolverton*, (continued)

Another individual charged with the crime was convicted of second-degree murder. The Court rejected Relators' argument that the conviction entitled them to bail. No abuse of discretion. No error.

### Denial of change of venue

#### *Lewis v. Henry*, No. 20194 (7/11/91) (Per Curiam)

Relator sought a writ of prohibition to prevent respondent judge from denying a change of venue. Relator is a Martinsburg city councilman charged with aiding and assisting in the murder of his wife. Relator's co-defendant was convicted of first-degree murder and sentenced to life without mercy; the trial received widespread publicity. Surveys showed that 76% of the residents of Berkeley County had heard "a lot" about the case, with 55% saying they thought relator was guilty.

The Court found extensive hostile community sentiment against relator, sufficient to grant a change of venue. *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978); *State v. Sette*, 161 W.Va. 384, 242 S.E.2d 464 (1978); *State v. Dandy*, 151 W.Va. 547, 153 S.E.2d 507 (1967). Writ granted; transfer ordered.

### Immunity

#### Grant of

#### *State ex rel. Friend v. Hamilton*, No. 21449 (12/16/92) (Per Curiam)

See IMMUNITY Grant by prosecuting attorney, (p. 290) for discussion of topic.

### Joinder

#### *State v. Drennen*, 408 S.E.2d 24 (1991) (Per Curiam)

See JOINDER Discretion of judge, (p. 327) for discussion of topic.

## **ABUSE OF DISCRETION**

### **Plea bargain**

#### **Acceptance of**

*State ex rel. Friend v. Hamilton*, No. 21449 (12/16/92) (Per Curiam)

See IMMUNITY Grant by prosecuting attorney, (p. 290) for discussion of topic.

### **Probation**

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See PROBATION Denial of, (p. 444) for discussion of topic.

### **Prohibition**

#### **Newly discovered evidence**

*State ex rel. Spaulding v. Watt*, 422 S.E.2d 818 (1992) (Per Curiam)

See NEW TRIAL Newly discovered evidence, (p. 403) for discussion of topic.

### **Psychiatric evaluation**

#### **Denial of**

*State v. Hatfield*, 413 S.E.2d 162 (1991) (McHugh, J.)

See COMPETENCY Suicide attempt, Effect of, (p. 122) for discussion of topic.

### **Venue**

#### **Denial of change**

*State ex rel. Walker v. Schlaegel*, No. 20033 (4/11/91) (Per Curiam)

See VENUE Change of venue, Abuse of discretion in not granting, (p. 609) for discussion of topic.

## ABUSE OF DISCRETION

### *Voir dire*

*State v. Ward*, 424 S.E.2d 725 (1991) (Workman, J.)

See JURY *Voir dire*, (p. 363) for discussion of topic.

## ABUSE OF PROCESS

### Generally

*State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

See INDICTMENT Dismissal, Undue delay, (p. 296) for discussion of topic.

## AIDING AND ABETTING

### Concerted acts

*State v. Lola Mae C.*, 408 S.E.2d 31 (1991) (Workman, J.)

See SEXUAL ATTACKS Multiple acts of intercourse, (p. 568) for discussion of topic.

## APPEAL

### Appointed counsel fees

*Judy v. White*, 425 S.E.2d 588 (1992) (McHugh, C.J.)

See ATTORNEYS Compensation, Appointed criminal cases, (p. 42) for discussion of topic.

### Confessions

#### Voluntariness

*State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Statement written by police officer, (p. 547) for discussion of topic.

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 539) for discussion of topic.

*State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 540) for discussion of topic.

### Cumulative error

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 569) for discussion of topic.

### Defined for appointed counsel compensation

*Judy v. White*, 425 S.E.2d 588 (1992) (McHugh, C.J.)

See ATTORNEYS Compensation, Appointed criminal cases, (p. 42) for discussion of topic.

## **APPEAL**

### **Directed verdict**

#### **Standard for review**

*State v. Stevens*, 436 S.E.2d 312 (1993) (Per Curiam)

See CONSPIRACY Sufficiency of evidence, (p. 134) for discussion of topic.

### **Dismissal of magistrate court complaint**

*State v. Walters*, 411 S.E.2d 688 (1991) (McHugh, J.)

See MAGISTRATE COURT Appeal from, (p. 378) for discussion of topic.

### **Enlargement of time**

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

### **Evidence**

#### **Insufficient**

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See HOMICIDE Malice, Inferred from deadly weapon, (p. 283) for discussion of topic.

### **Failure to file**

*Committee on Legal Ethics v. Cowgill*, No. 21518 (2/24/93) (Per Curiam)

See ATTORNEYS Discipline, Failure to file appeal, (p. 74) for discussion of topic.

## APPEAL

### Failure to preserve

#### Failure to develop record

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

Appellant was convicted of first-degree sexual assault. The trial court refused to allow cross-examination of a prosecution witness to show that she had failed to cooperate with investigating officers.

Syl. pt. 3 - “If a party offers evidence to which an objection is sustained, that party, in order to preserve the rejection of the evidence as error on appeal, must place the rejected evidence on the record or disclose what the evidence would have shown, and the failure to do so prevents an appellate court from reviewing the matter on appeal.” Syllabus point 1, of *Horton v. Horton*, 164 W.Va. 358, 264 S.E.2d 160 (1980).

Although defense counsel objected, he did not vouch the record sufficiently to allow the Court to review the allegations here.

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

See INEFFECTIVE ASSISTANCE Inadequate record, (p. 304) for discussion of topic.

#### Failure to object

*State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

See CROSS-EXAMINATION Scope of, (p. 147) for discussion of topic.

*State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

Appellant was convicted of first-degree murder. He claimed that the trial court erred in giving State’s Instruction No. 5, instructing the jury that intoxication cannot be used for a diminished capacity defense unless the “bodily machinery completely fails...;” and, where a weapon is involved, that the defendant must be shown to have no predisposition toward violence except such as the voluntary intoxication brought out.

Appellant claimed that no evidence or issue raised justified the giving of the instruction. Trial counsel generally objected to the instruction but did not cite any specific grounds.

## APPEAL

### Failure to preserve (continued)

#### Failure to object (continued)

*State v. McCarty*, (continued)

Syl. pt. 4 - “The general rule is that a party may not assign as error the giving of an instruction unless he objects, stating distinctly the matters to which he objects and the grounds of his objection.” Syllabus point 3, *State v. Gangwer*, 169 W.Va. 177, 286 S.E.2d 389 (1982).

Pursuant to Rule 30 of the West Virginia Rules of Criminal Procedure “no party may assign as error the giving or the refusal to give an instruction ... unless he objects thereto ... stating distinctly the matter to which he objects and the grounds of his objection.” Counsel failed to state his objection. No error.

*State v. Stewart*, 419 S.E.2d 683 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Duty, Generally, (p. 473) for discussion of topic.

### Fugitives

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

### Habeas corpus

#### Distinguished from writ of error

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See also, *Frank Billotti v. A.V. Dodrill*, 183 W.Va. 48, 394 S.E.2d 32 (1990), Volume IV of the Criminal Law Digest, (p. 34) for discussion of topic.

*State ex rel. Phillips v. Legursky*, 420 S.E.2d 743 (1992) (Per Curiam)

See HABEAS CORPUS Distinguished from appeal, (p. 269) for discussion of topic.

## **APPEAL**

### **Ineffective assistance**

#### **Standard for**

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 306) for discussion of topic.

#### **Standard for review**

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 306) for discussion of topic.

### **Jury instructions**

#### **Failure to give**

*State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

See INSTRUCTIONS Failure to give, (p. 316) for discussion of topic.

### **Magistrate court complaint**

*State v. Walters*, 411 S.E.2d 688 (1991) (McHugh, J.)

See MAGISTRATE COURT Appeal from, (p. 378) for discussion of topic.

### **Mootness**

*State ex rel. Smith v. Skaff*, 428 S.E.2d 54 (1993) (Per Curiam)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 438) for discussion of topic.

## **APPEAL**

### **Newly-discovered evidence**

#### **Sufficient for new trial**

*State v. O'Donnell*, 433 S.E.2d 566 (1993) (Workman, C.J.)

See NEW TRIAL Newly-discovered evidence, Sufficient for new trial, (p. 405) for discussion of topic.

### **Plain error**

#### **Generally**

*State v. Harris*, 432 S.E.2d 93 (1993) (Neely, J.)

See DISCRIMINATION Racial, Jury selection, (p. 167) for discussion of topic.

*State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 540) for discussion of topic.

### **Plea bargain**

#### **Standard for acceptance**

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

See PLEA BARGAINS Acceptance of, (p. 418) for discussion of topic.

### **Prisoner at large**

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

## APPEAL

### Resentencing

#### Fugitive

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

#### *Res judicata*

#### Paternity determination

*State ex rel. Stump v. Cline*, 406 S.E.2d 749 (1991) (Per Curiam)

See PATERNITY When prior determination is *res judicata*, (p. 412) for discussion of topic.

#### Right to

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See RIGHT TO APPEAL Constitutional right, Right to counsel, (p. 493) for discussion of topic.

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

#### Sentencing

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

See SENTENCING Reviewing sentence, Standard for, (p. 562) for discussion of topic.

#### Sentencing order following reversal

*Brumfield v. Legursky*, No. 19932 (3/14/91) (Per Curiam)

See MANDAMUS Revised sentence, (p. 393) for discussion of topic.

## APPEAL

### Setting aside verdict

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 569) for discussion of topic.

*State v. Gill*, 416 S.E.2d 253 (1992) (Miller, J.)

See DOUBLE JEOPARDY Sexual assault, Abuse (by a parent or guardian), (p. 178) for discussion of topic.

*State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

See CONSPIRACY Sufficiency of evidence, (p. 134) for discussion of topic.

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See BURGLARY Sufficiency of evidence, (p. 114) for discussion of topic.

### Polling jury

*State v. Vandevender*, 438 S.E.2d 24 (1993) (Per Curiam)

See JURY Unanimity required for verdict, (p. 362) for discussion of topic.

### Standard for review

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See CONCERTED ACTS Liability for, (p. 125) for discussion of topic.

### Admissibility of evidence

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

See EVIDENCE Admissibility, Relevance, (p. 221) for discussion of topic.

## APPEAL

### Standard for review (continued)

#### Confessions

*State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 540) for discussion of topic.

#### Directed verdict

*State v. Stevens*, 436 S.E.2d 312 (1993) (Per Curiam)

See CONSPIRACY Sufficiency of evidence, (p. 134) for discussion of topic.

#### Ineffective assistance

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 306) for discussion of topic.

#### Plea bargain

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

See PLEA BARGAINS Acceptance of, (p. 418) for discussion of topic.

#### Probation

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See PROBATION Denial of, (p. 444) for discussion of topic.

#### Prosecutorial misconduct

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 463) for discussion of topic.

## APPEAL

### Standard for review (continued)

#### Prosecutorial misconduct (continued)

*State v. Leadingham*, 438 S.E.2d 825 (1993) (McHugh, J.)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 464) for discussion of topic.

#### Sentencing

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

See SENTENCING Reviewing sentence, Standard for, (p. 562) for discussion of topic.

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See SENTENCING Generally, (p. 554) for discussion of topic.

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

See SENTENCING Reviewing sentence, Standard for, (p. 562) for discussion of topic.

#### Setting aside verdict

*State v. Drennen*, 408 S.E.2d 24 (1991) (Per Curiam)

Appellant was convicted of three counts of delivery of marijuana to juveniles and gave multiple sentences. On appeal he claimed that the evidence was insufficient to support proof of delivery and that there was no evidence to show that the type of marijuana delivered was the type prohibited by the Uniform Controlled Substances Act.

Syl. pt. 3 - “In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.” Syllabus point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

## APPEAL

### Standard for review (continued)

#### Setting aside verdict (continued)

##### *State v. Drennen*, (continued)

The evidence here was sufficient. No error.

##### *State v. Farmer*, 406 S.E.2d 458 (1991) (Per Curiam)

Appellant was convicted of malicious assault. On appeal she claimed that the evidence was insufficient to convict. The record showed that appellant telephoned the victim and requested that he pick her up at the bus station. After returning to the victim's house, appellant took the victim's revolver and fired three shots, one of which struck the victim in the forehead. Two witnesses maintained that the victim made contemporaneous statements that he was shot because he refused to give appellant money.

Syl. pt. 5 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Evidence sufficient. No error.

##### *State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

Appellant was convicted of first-degree murder. On appeal he claimed that because the trial court refused to charge the jury on self-defense and provocation, an alternative verdict was removed from consideration. Further, he claimed that no proof of malice, premeditation or deliberation was produced.

Syl. pt. 7 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. Pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Evidence sufficient. No error.

## APPEAL

### Standard for review (continued)

#### Setting aside verdict (continued)

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See APPEAL Standard for review, Setting aside verdict, (p. 28) for discussion of topic.

*State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

Appellant was convicted of first-degree murder. He claimed on appeal that the evidence was insufficient to convict. Evidence at trial showed that the victim and appellant had quarreled one month before the killing and appellant said “There’ll be another day and another time and I will stick you.” Both men were in a bar the night of the killing and were seen arguing.

Later in the evening appellant carried a drunk friend from the bar and when the victim followed a struggle began. The evidence was in conflict as to how the fight started but the victim was stabbed during the melee; he died sometime later. Appellant’s knife and clothing were introduced at trial. Appellant claimed self-defense and that the victim’s death was caused by poor medical care. He also claimed that he blacked out during the fight and therefore could not have formed the requisite intent.

Syl. pt. 1 - “In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.” Syllabus point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Evidence sufficient. No error.

#### Sufficiency of evidence

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 569) for discussion of topic.

## APPEAL

### Standard for review (continued)

#### Sufficiency of evidence (continued)

*State v. Gill*, 416 S.E.2d 253 (1992) (Miller, J.)

See DOUBLE JEOPARDY Sexual assault, Abuse (by a parent or guardian), (p. 178) for discussion of topic.

*State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

See CONSPIRACY Sufficiency of evidence, (p. 134) for discussion of topic.

*State v. Tharp*, 400 S.E.2d 300 (1990) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Generally, (p. 582) for discussion of topic.

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See BURGLARY Sufficiency of evidence, (p. 114) for discussion of topic.

#### Sufficiency of evidence

##### Generally

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

See EVIDENCE Admissibility, Relevance, (p. 221) for discussion of topic.

*State v. Nelson*, 436 S.E.2d 308 (1993) (Neely, J.)

See SUFFICIENCY OF EVIDENCE Circumstantial evidence, (p. 580) for discussion of topic.

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

Appellant was convicted of possession of marijuana with intent to deliver. On appeal he claimed the verdict was against the weight of the evidence.

## APPEAL

### Sufficiency of evidence (continued)

#### Generally (continued)

##### *State v. Smith*, (continued)

Syl. pt. 5 - “In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.” Syllabus point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The Court noted the evidence showed probable cause to arrest, that marijuana was found in appellant’s possession, along with cash and that police officer observed appellant dropping a paper bag into his girlfriend’s purse, which paper bag contained marijuana. No error.

##### *State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See HOMICIDE Malice, Inferred from deadly weapon, (p. 283) for discussion of topic.

### Transcript

#### Right to

##### *State ex rel. Phillips v. Boggess*, 416 S.E.2d 270 (1992) (McHugh, C.J.)

See PLEA BARGAINS Setting aside, Right to transcript unaffected, (p. 420) for discussion of topic.

##### *State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

## APPEAL

### Waiver of right to

*State ex rel. Adkins v. Trent*, No. 21441 (12/10/92) (Per Curiam)

Relator sought to be released from the penitentiary because his counsel “forced” and “tricked” him into signing a waiver of his right to appeal. Following his conviction on arson and conspiracy to commit grand larceny, relator filed a *habeas* corpus petition asking for a transcript of his arson trial; the circuit court denied the petition, noting that the transcript was already in the case file and that “...petitioner has no concern for the truth in his verified petition,” but allowing the “trickery” proceeding.

In response to the allegation of trickery, relator’s attorney, Thomas Butcher, submitted a document styled “Waiver” which stated that petitioner was advised of his right to appeal, of Butcher’s willingness to appeal and that petitioner released Butcher from any further representation. Petitioner and Butcher’s signatures appeared on the document. Petitioner claimed his third grade education did not enable him to understand the document and that he relied on Butcher’s oral representations that his appeal would not be dismissed.

Unable to determine whether petitioner knowingly and intelligently waived his right to appeal, the Court remanded for further hearings. Writ granted.

### Warrants

#### Standard for review

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 526) for discussion of topic.

### Writ of error

#### Dismissal of

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

## **APPOINTED COUNSEL**

### **Conflict of interest**

#### **Mandamus**

*Cooper v. Murensky*, No. 21438 (12/18/92) (Per Curiam)

See ATTORNEYS Conflict of interest, Court-appointed counsel, (p. 44) for discussion of topic.

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

## ARREST

### Citizen's complaint as basis for

*Harman v. Frye*, 425 S.E.2d 566 (1992) (McHugh, C.J.)

See WARRANTS Citizen's complaint as basis for, (p. 617) for discussion of topic.

### Judge's ordering at trial

*State v. Ferrell*, 412 S.E.2d 501 (1991) (Per Curiam)

See JUDGES Examining witnesses, (p. 348) for discussion of topic.

### Warrantless

#### Confession incident to

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See CONFESSIONS Admissibility, Warrantless arrest, (p. 128) for discussion of topic.

### Felony

*State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

Appellant was convicted of first-degree murder. On appeal he claimed that certain evidence should have been excluded because it was seized pursuant to an unlawful arrest. When appellant was stopped by police he was put in the police car and taken to the jail where he was given *Miranda* warnings. His trousers and a pocket knife were introduced into evidence.

Syl. pt. 2 - "The right to arrest in public without a warrant, based on probable cause that the person has or is about to commit a felony, is the general if not universal rule in this country." Syllabus point 4, *State v. Howerton*, 174 W.Va. 801, 329 S.E.2d 874 (1985).

The Court distinguished between the right to arrest and the need for *Miranda* warnings to avoid coercion during a custodial interrogation. Search and seizure protections under the Fourth Amendment are not implicated by lack of *Miranda* warnings.

Probable cause to arrest was present here; the police officer knew of the fight and observed appellant covered with blood. Evidence admissible. No error.

## ARREST

### Warrantless search incident to

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See SEARCH AND SEIZURE Plain view exception, (p. 522) for discussion of topic.

## ASSAULT

### Transferred intent

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See INTENT Transferred intent, (p. 322) for discussion of topic.

## ATTEMPT

### Generally

*State v. Burd*, 419 S.E.2d 676 (1991) (Workman, J.)

See HOMICIDE Attempted murder, (p. 280) for discussion of topic.

## ATTEMPTED MURDER

### Generally

*State v. Burd*, 419 S.E.2d 676 (1991) (Workman, J.)

See HOMICIDE Attempted murder, (p. 280) for discussion of topic.

## ATTORNEYS

### Admonishment to judge

*In the Matter of Kaufman*, 416 S.E.2d 480 (1992) (Brotherton, J.)

See JUDGES *Ex parte* communications, (p. 347) for discussion of topic.

### Annulment

*Committee on Legal Ethics v. Boettner*, 422 S.E.2d 478 (1992) (Miller, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 57) for discussion of topic.

*Committee on Legal Ethics v. Carman*, No. 20161 (7/16/91) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 58) for discussion of topic.

*Committee on Legal Ethics v. Folio*, 401 S.E.2d 248 (1990) (Workman, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 59) for discussion of topic.

*Committee on Legal Ethics v. Gorrell*, 407 S.E.2d 923 (1991) (Brotherton, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 60) for discussion of topic.

*Committee on Legal Ethics v. Grubb*, 420 S.E.2d 744 (1992) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 61) for discussion of topic.

*Committee on Legal Ethics v. Hart*, 410 S.E.2d 714 (1991) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 62) for discussion of topic.

## ATTORNEYS

### **Annulment** (continued)

*Committee on Legal Ethics v. Lambert*, 428 S.E.2d 65 (1993) (Per Curiam)

See ATTORNEYS Discipline, Fiduciary responsibility, (p. 74) for discussion of topic.

*Committee on Legal Ethics v. Moore*, 411 S.E.2d 452 (1991) (Brotherton, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 63) for discussion of topic.

*Committee on Legal Ethics v. Wilson*, 408 S.E.2d 350 (1991) (McHugh, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

### **Burden of proof**

*Committee on Legal Ethics v. Gorrell*, 407 S.E.2d 923 (1991) (Brotherton, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 60) for discussion of topic.

### **Community service**

*Committee on Legal Ethics v. Mitchell*, 418 S.E.2d 733 (1992) (Neely, J.)

Respondent admitted neglecting two legal actions entrusted to him. The actions involved negligence and breach of warranty and were filed in 1969 in Kanawha Circuit Court. In one matter, between 1970 and 1974 respondent's partner engaged in discovery; respondent then consented to a 1978 trial date. From 1982 through 1984 other discovery was made. In the second action, virtually no action was taken between 1974 and 1987. On motion of the defendants, the actions were dismissed in 1987 and 1988. Respondent failed to communicate with his clients.

## ATTORNEYS

### Annulment (continued)

#### Community service (continued)

##### *Committee on Legal Ethics v. Mitchell*, (continued)

The Committee found that respondent failed to pursue these cases because of factual weaknesses rather than an unwillingness to prosecute. Despite his sincere contrition, the Committee found that 17 years of delay was intolerable and recommended 60 days suspension. Restitution was not recommended because of malpractice actions brought by both clients. Respondent requested 120 hours of public service over 90 days' time, noting that his other clients would suffer if suspension were imposed.

Syl. pt. 1 - "In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar ... the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the complaint filed on behalf of the Committee." Syllabus Point 1, in part, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

Syl. pt. 2 - "Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Ethics Committee ... are to be given substantial consideration." Syllabus Point 3, in part, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980).

Syl. pt. 3 - In an appropriate case involving legal ethics, this Court would consider requiring community service as a legitimate sanction provided that the details of the proposed service are sufficiently specific that the Legal Ethics Committee can evaluate them and that the community service meets our requirements for neutrality.

The Committee met its burden here. Although approving of the concept of community service the Court refused to consider it here because no plan was presented to the Committee on Legal Ethics. Suspension for sixty days and costs.

### Appointed

#### Fee reductions

*Judy v. White*, 425 S.E.2d 588 (1992) (McHugh, C.J.)

See ATTORNEYS Compensation, Appointed criminal cases, (p. 42) for discussion of topic.

## ATTORNEYS

### Client funds

#### Attorney's duty toward

*Committee on Legal Ethics v. Lambert*, 428 S.E.2d 65 (1993) (Per Curiam)

See ATTORNEYS Discipline, Fiduciary responsibility, (p. 74) for discussion of topic.

### Compensation

#### Appointed criminal cases

*Judy v. White*, 425 S.E.2d 588 (1992) (McHugh, C.J.)

Respondent Judge White cut petitioner's court-appointed counsel fee by half in a criminal appeal. Petitioner contended that Judge White violated *W.Va. Code*, 29-21-13a and *Jewell v. Maynard*, 181 W.Va. 571, 383 S.E.2d 536 (1989); and that the fee limit in this case should have been a multiple of the number of charges at issue times the statutory maximum for one "case."

Respondent claimed that petitioner's fee was neither reasonable, necessary nor valid and that *W.Va. Code*, 29-21-13a permits a reduction in fees. Amicus curiae, Public Defender Services, claimed that a single appeal from a single final order constitutes one proceeding for purposes of attorney's fees, hence petitioner was only entitled to the statutory maximum of \$3,000.00.

Syl. pt. 1 - Single appeals to the West Virginia Supreme Court of Appeals, regardless of the number of convictions appealed from, for the purposes of *W.Va. Code*, 29-21-13a [1990], constitute a single proceeding.

Syl. pt. 2 - *W.Va. Code*, 29-21-13a [1990] mandates that a trial court review vouchers submitted by court-appointed attorneys for indigent criminal defendants to determine if the time and expense claims made therein are reasonable, necessary and valid; and said trial court shall then forward the voucher to the agency with an order approving payment of the claimed amount or such lesser sum as the trial court considers appropriate. The decision of the trial court in that regard will not be altered by the West Virginia Supreme Court of Appeals absent an abuse of discretion.

## ATTORNEYS

### Compensation (continued)

#### Appointed criminal cases (continued)

##### *Judy v. White*, (continued)

Syl. pt. 3 - Trial courts must give a brief explanation for any order reducing the amount of fees claimed by a court-appointed attorney by virtue of *W.Va. Code*, 29-21-13a [1990]. Said explanation must provide enough guidance for the court-appointed attorney to respond meaningful by petitioning the trial court for reconsideration of the reduction order and allowing the attorney to submit additional supporting written documentation and explanation without appearance. The trial court shall then set the final amount of compensation without further explanation. Absent an abuse of discretion, the trial court's decision is final.

Syl. pt. 4 - "To entitle one to a writ of mandamus, the party seeking the writ must show a clear legal right thereto and a corresponding duty on the respondent to perform the act demanded.' Syl. Pt. 1, *State ex rel. Prince v. West Virginia Department of Highways*, 156 W.Va. 178, 195 S.E.2d 160 (1972)." Syllabus, *Krivonyak v. Hey*, 178 W.Va. 692, 364 S.E.2d 18 (1987).

The Court found the statute clear: the trial court, may, in its discretion, reduce an attorney's fee. The Court's review is limited to whether the trial court abused its discretion.

Counsel must be given some basis for the reductions, even though a reduction does not, per se, amount to an unconstitutional taking of property without due process. Petitioner did not establish a clear legal right to the fee he demanded. Writ denied.

#### Conflict of interest

##### Business relations with client

*Committee on Legal Ethics v. Cometti*, 430 S.E.2d 320 (1993) (Miller, J.)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 48) for discussion of topic.

## ATTORNEYS

### Conflict of interest (continued)

#### Court-appointed counsel

*Cooper v. Murensky*, No. 21438 (12/18/92) (Per Curiam)

Petitioner is an attorney who was appointed to an indigent's criminal case by respondent Judge Murensky. She claimed that she should not undertake the representation because a conflict now existed between the codefendants for whom she was appointed. The charges were child abuse and neglect; subsequent to the appointment the parents separated and intended to divorce.

Respondent judge entered an order noting that the guardian *ad litem* for the children indicated that neither parent intended to testify against the other, nor have parental rights terminated. Respondent found no actual conflict then existed but set a hearing; petitioner represented to the Supreme Court that she was unable to articulate specific facts without violating attorney-client privilege. She did indicate that the parties intended to testify against one another.

Citing Rule 1.7 of the Rules of Professional Conduct, the Court found the mere possibility of adverse testimony sufficient to relieve petitioner. See *State ex rel. Stanley v. MacQueen*, 187 W.Va. 97, 416 S.E.2d 55 (1992); generally, *State ex rel. Bailey v. Facemire*, 186 W.Va. 528, 413 S.E.2d 183 (1991). Writ granted.

#### Divorce action

*Committee on Legal Ethics v. Frame & Benninger*, 433 S.E.2d 579 (1993) (Per Curiam)

See ATTORNEYS Discipline, Public reprimand, (p. 85) for discussion of topic.

#### Estate settlement

*Committee on Legal Ethics v. Veneri*, 411 S.E.2d 865 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 55) for discussion of topic.

## ATTORNEYS

### Conflict of interest (continued)

#### Prosecuting attorney

*Bayles v. Hedrick*, 422 S.E.2d 524 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Conflict of interest, (p. 467) for discussion of topic.

*State v. James R.*, 422 S.E.2d 521 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 470) for discussion of topic.

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See PROSECUTING ATTORNEY Disqualification, Reasons to appear on record, (p. 472) for discussion of topic.

#### Prosecuting attorneys' private practice

*Committee on Legal Ethics v. Goode*, No. 21857 (11/23/93) (Per Curiam)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 84) for discussion of topic.

#### Tort liability

*Committee on Legal Ethics v. Frame & Benninger*, 433 S.E.2d 579 (1993) (Per Curiam)

See ATTORNEYS Discipline, Public reprimand, (p. 85) for discussion of topic.

## Contempt

#### Misrepresentation to court

*State v. Smarr*, 418 S.E.2d 592 (1992) (Per Curiam)

See CONTEMPT Misrepresentation by attorney, (p. 136) for discussion of topic.

## ATTORNEYS

### Conviction of crimes

*Committee on Legal Ethics v. Boettner*, 422 S.E.2d 478 (1992) (Miller, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 57) for discussion of topic.

*Committee on Legal Ethics v. Grubb*, 420 S.E.2d 744 (1992) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 61) for discussion of topic.

*Committee on Legal Ethics v. Moore*, 411 S.E.2d 452 (1991) (Brotherton, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 63) for discussion of topic.

### Discipline

*Committee on Legal Ethics v. Simmons*, 399 S.E.2d 894 (1990) (Per Curiam)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 51) for discussion of topic.

*Committee on Legal Ethics v. Smith*, 399 S.E.2d 36 (1990) (Per Curiam)

See ATTORNEYS Discipline, Estate administration, (p. 71) for discussion of topic.

### Abandoning clients

*Committee on Legal Ethics v. Ikner*, 438 S.E.2d 613 (1993) (McHugh, J.)

See ATTORNEYS Discipline, Suspensions, (p. 87) for discussion of topic.

## ATTORNEYS

### Discipline (continued)

#### Admission of guilt

*Committee on Legal Ethics v. Martin*, 419 S.E.2d 4 (1992) (Workman, J.)

Respondent was alleged to fail to complete a final order in a divorce action. Respondent failed to respond to numerous letters from Bar counsel requesting an answer to complainant's allegations. Respondent, who had moved from the jurisdiction, assured Bar counsel's assistant three times by telephone that he would respond.

At the disciplinary hearing, respondent testified that he moved due to extreme financial problems, was working nights at a motel and taking care of his two children during the day. He admitted to not responding to Bar inquiries but attributed the failure to his circumstances. Further, he said he had sought counseling.

Syl. pt. 1 - An attorney violates West Virginia Rule of Professional Conduct 8.1(b) by failing to respond to requests of the West Virginia State Bar concerning allegations in a disciplinary complaint. Such a violation is not contingent upon the issuance of a subpoena for the attorney, but can result from the mere failure to respond to a request for information by the Bar in connection with an investigation of an ethics complaint.

Syl. pt. 2 - In order to expedite the investigation of an ethics complaint by the Bar, an attorney's failure to respond to a request for information concerning allegations of ethical violations within a reasonable time will constitute an admission to those allegations for the purposes of the disciplinary proceeding.

Court ordered respondent to cooperate with Bar counsel. Public reprimand.

#### Aggravating factor

*Committee on Legal Ethics v. Taylor*, 437 S.E.2d 443 (1993) (Per Curiam)

See ATTORNEYS Discipline, Practicing without a license, (p. 83) for discussion of topic.

#### Annulment

*Committee on Legal Ethics v. Folio*, 401 S.E.2d 248 (1990) (Workman, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 59) for discussion of topic.

## ATTORNEYS

### Discipline (continued)

#### Annulment (continued)

*Committee on Legal Ethics v. Lambert*, 428 S.E.2d 65 (1993) (Per Curiam)

See ATTORNEYS Discipline, Fiduciary responsibility, (p. 74) for discussion of topic.

#### Attorney-client relationship

*Committee on Legal Ethics v. Cometti*, 430 S.E.2d 320 (1993) (Miller, J.)

In 1986 respondent was engaged by Catherine Shrewsbury to represent her in a civil action involving a defective solar heating system. Ms. Shrewsbury confided to respondent that she was unable to pay a mortgage, among other financial difficulties. Respondent and Ms. Shrewsbury discussed a possible sale of the property to respondent.

A lease-purchase agreement was reached and respondent began making payments directly to the mortgagor. The Committee characterized the agreement as complex and likely to lead to an adverse relationship between respondent and his client.

Because Ms. Shrewsbury's arrearage was not paid the mortgagor threatened foreclosure. At the same time disagreements arose between respondent and Ms. Shrewsbury concerning the original solar heating problem. Ms. Shrewsbury paid the arrearage and locked respondent out of the property without notice. Respondent filed suit to regain his belongings.

In a separate matter Theresa Cochran engaged respondent in an action involving student loans. Ms. Cochran gave respondent certain documents which respondent did not return when Ms. Cochran sought another attorney.

Finally, respondent was engaged by Beverly Middleton to represent her in an employment compensation claim. Respondent failed to file an appeal and did not return Ms. Middleton's phone calls. By written agreement respondent offered to pay Ms. Middleton's benefits if she agreed not to sue for malpractice. Despite Ms. Middleton's acceptance of the agreement respondent made no payments until after institution of an ethics complaint.

Syl. pt. 1 - "In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar for the purpose of having suspended the license of an attorney to practice law for a designated period of time, the burden is on the Committee to prove by full, preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee." Syllabus Point 1, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

**Discipline** (continued)

**Attorney-client relationship** (continued)

*Committee on Legal Ethics v. Cometti*, (continued)

Syl. pt. 2 - DR5-104(A) of the Code of Professional Responsibility states: “A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.” Its present counterpart is found in Rule 1.8(a) of the Rules of Professional Conduct.

Syl. pt. 3 - “‘The relationship of attorney-at-law and client is of the highest fiduciary nature, calling for the utmost good faith and diligence on the part of such attorney.’ Syllabus Point 4, *Bank of Mill Creek v. Elk Horn Coal Corp.*, 133 W.Va. 639, 57 S.E.2d 736 (1950).” Syllabus Point 2, *Rodgers v. Rodgers*, 184 W.Va. 82, 399 S.E.2d 664 (1990).

Syl. pt. 4 - In order to avoid violating the ethical prohibition of having an adverse interest with a client, it is incumbent upon the attorney to fully disclose the nature of his interest to the client, including its possible adverse effect on the client. The client should also be given an opportunity to seek independent advice. Finally, the client must then consent to the attorney’s participation in such adverse interest.

Syl. pt. 5 - “An attorney violates West Virginia Rule of Professional Conduct 8.1(b) by failing to respond to requests of the West Virginia State Bar concerning allegations in a disciplinary complaint. Such a violation is not contingent upon the issuance of a subpoena for the attorney, but can result from the mere failure to respond to a request for information by the Bar in connection with an investigation of an ethics complaint.” Syllabus Point 1, *Committee on Legal Ethics v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 (1992).

Syl. pt. 6 - Rule 1.16(a)(3) of the Rules of Professional Conduct allows a client to discharge an attorney, and, with regard to a civil case, an attorney may be discharged at any time with or without cause, subject to liability for payment for the lawyer’s services.

Syl. pt. 7 - Rule 1.8(h) of the Rules of Professional Conduct is designed to cover two situations. The first is where a lawyer accepts representation of a client, but conditions such representation upon the client’s prospectively releasing the attorney from any potential claim for malpractice in the handling of the case. The second situation is where the attorney, in his representation of the client, commits malpractice and then seeks to settle the matter and obtain a release from the client who is unrepresented.

## ATTORNEYS

### Discipline (continued)

#### Attorney-client relationship (continued)

##### *Committee on Legal Ethics v. Cometti*, (continued)

Syl. pt. 8 - Where an attorney has committed malpractice and then wishes to have the client release him from liability, Rule 1.8(h) of the Rules of Professional Conduct requires that the attorney advise the client in writing that consultation with an independent attorney should be undertaken.

Syl. pt. 9 - “The [Rules of Professional Conduct] states the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.” Syllabus Point 3, *Committee on Legal Ethics v. Tatterson*, 173 W.Va. 613, 319 S.E.2d 381 (1984).

Syl. pt. 10 - “‘This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorney’s licenses to practice law.’ Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).” Syllabus Point 1, *Committee on Legal Ethics v. Charonis*, 184 W.Va. 268, 400 S.E.2d 276 (1990).

Syl. pt. 11 - Under Rule 8.1(b) of the Rules of Professional Conduct, as explained in *Committee on Legal Ethics v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 (1992), a disciplinary violation can be imposed if a lawyer fails to cooperate with the Committee on Legal Ethics of the West Virginia State Bar. To the extent that *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976), differs with *Martin*, is overruled.

Although the Committee accepted respondent’s claim that he intended no harm by entering into the lease/purchase agreement, it was clear the parties had different interests and respondent made no effort to advise his client to seek independent counsel, nor did he fully disclose his own interest. Respondent clearly violated DR104(A).

Because respondent had withdrawn from representing his client when he sought return of his belongings, the Court found he did not violate Rule 1.7(b). However, respondent did violate Rule 8.1(b) when he repeatedly failed to give the Committee information despite written requests from disciplinary counsel on 14 August 1989, 6 September 1989 and 27 September 1989.

Respondent similarly refused to respond to counsel in the Cochran matter, although he did finally return Ms. Cochran’s documents in April, 1990, some six months after she sought their return. The Court found respondent violated Rule 1.16(d) for failure to give Ms. Cochran her file.

**Discipline** (continued)

**Attorney-client relationship** (continued)

*Committee on Legal Ethics v. Cometti*, (continued)

With respect to Ms. Middleton, the Court found respondent violated Rule 1.8(h) for failure to advise her to seek independent counsel with regard to their agreement not to sue for malpractice.

Suspension for fifteen months, supervised practice of law for six months thereafter.

*Committee on Legal Ethics v. Simmons*, 399 S.E.2d 894 (1990) (Per Curiam)

Respondent advised the first complainant here as to the sale of a farm; when negotiations ceased, respondent offered to buy the farm. He did not prepare a deed of trust or a vendor's lien and did not inform his client as to the conflict of interest inherent in his preparation of the documents, nor advise her to get another attorney.

Respondent encumbered the farm and two other parcels of real estate with a first lien deed of trust which exceeded the value of the amount owing to the complainant. Respondent subsequently defaulted on his payments to complainant.

In a separate complaint, respondent was loaned funds by another of his clients by the early surrender of two separate certificates of deposit. Although respondent made some payments on the loan, the payments were not timely and the complainant, who was by then a widow, was forced to plead for her money. The complainant hired an attorney to obtain the full amount. Respondent contacted the complainant directly, with full knowledge that she was represented by counsel, and offered partial settlement.

Syl. pt. 1 - "The Disciplinary Rules of the Code of Professional Responsibility state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Syl. pt. 3, *Committee on Legal Ethics v. Tatterson*, 173 W.Va. 613, 319 S.E.2d 381 (1984).

Syl. pt. 2 - "In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar for the purpose of having suspended the license of an attorney to practice law for a designated period of time, the burden is on the Committee to prove by full, preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee." Syl. pt. 1, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

## ATTORNEYS

### Discipline (continued)

#### Attorney-client relationship (continued)

##### *Committee on Legal Ethics v. Simmons*, (continued)

Syl. pt. 3 - “As soon as a client has expressed a desire to employ an attorney and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and client has been established; and all dealings thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation.” Syl. pt. 1, *Keenan v. Scott*, 64 W.Va. 137, 61 S.E. 806 (1908).

Here, respondent violated DR5-101(A) and DR5-104(A) by entering into business transactions with clients without making adequate disclosure or providing adequate security to protect their interests; further, respondent violated DR7-104(A)(1) by communicating with an adverse party represented by counsel. The Court rejected respondent’s arguments that an attorney- client relationship did not exist. Respondent’s license was suspended for six months and costs assessed.

#### Burden of proof

##### *Committee on Legal Ethics v. Charonis*, 400 S.E.2d 276 (1990) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 52) for discussion of topic.

##### *Committee on Legal Ethics v. Charonis*, 400 S.E.2d 276 (1990) (Per Curiam)

Respondent was hired to obtain custody of a child and child support. The client agreed to a modification of custody order which did not include payment of child support in reliance upon respondent’s representations that the Child Advocate’s Office would assist him in getting payment. That office was unable to do so because there was no support order.

The Committee on Legal Ethics recommended discipline on the grounds that misrepresentation had occurred, in violation of DR1-102(A)(4). The Court disagreed, noting that an Advocate worker testified that the office could have filed a reciprocal support action. No violation here.

**Discipline** (continued)

**Burden of proof** (continued)

*Committee on Legal Ethics v. Charonis*, (continued)

The Committee also charged respondent with abandonment of the case, in violation of DR6-101(A)(3) and DR7-101(A)(1). The Court disagreed, holding that after the order was signed the continuation of the attorney-client relationship was in doubt. No violation here.

In a separate matter, combined for this proceeding, the Committee charged respondent with failing to communicate with his client, in violation of DR6-101(A)(3) and DR7-101(A) (1); misrepresented the case status in violation of DR1-102(A)(4); and failed to protect his client upon withdrawal from the case in violation of DR2-110(A) (2). The client here hired respondent to represent him in an employment compensation matter and to file a wrongful discharge action against his former employer.

Respondent represented the client at an administrative hearing and won; the matter was appealed to the Employment Security Board of Review. Respondent chose to submit the matter on the record and not appear personally in order to prevent introduction of potentially damaging testimony. The Board reversed. Respondent agreed to appeal to circuit court and claimed that the appeal was mailed but no appeal was filed.

Respondent agreed to refile the appeal but did not. Respondent did not return the file and refund his fee until five months after the client demanded return.

The Court found no misrepresentation in relation to the appeal (DR1-102(A)(4), choosing to accept that the appeal was lost in the mail. Because respondent failed to return his client's phone calls and missed scheduled appointments, however, the Court found neglect and failure to represent the client zealously (DR6-101(A) (3) and DR7-101(A)(1). In addition, the Court found respondent was obligated to return the client's file prior to withdrawing from the case (DR2-110(A)(2).

Syl. pt. 1 - "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).

## ATTORNEYS

### Discipline (continued)

#### Burden of proof (continued)

##### *Committee on Legal Ethics v. Charonis*, (continued)

Syl. pt. 2 - “In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar for the purpose of having suspended the license of an attorney to practice law for a designated period of time, the burden is on the Committee to prove by full, preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee.” Syllabus Point 1, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

The Court suspended respondent’s license for two months and ordered respondent to submit to the Committee on Legal Ethics a plan for one year of supervised practice. Costs were also assessed.

##### *Committee on Legal Ethics v. Keenan*, 427 S.E.2d 471 (1993) (Per Curiam)

See ATTORNEYS Discipline, Failure to communicate with clients, (p. 73) for discussion of topic.

##### *Committee on Legal Ethics v. Lambert*, 428 S.E.2d 65 (1993) (Per Curiam)

See ATTORNEYS Discipline, Fiduciary responsibility, (p. 74) for discussion of topic.

##### *Committee on Legal Ethics v. Matthews*, 411 S.E.2d 265 (1991) (Per Curiam)

Respondent was named the executor of the estate of Ruby Winters, who died 14 September 1981. Because respondent failed to settle the estate, the Court found respondent negligent and entered an unpublished order, dated 26 June 1985 which found him negligent in two other estate matters. Respondent was placed on probation, ordered to participate in an alcohol rehabilitation program and a supervising attorney was appointed regarding the estates.

Syl. pt. - “ “In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee’s complaint.” Syl. Pt. 1, *Committee on Legal Ethics v. Pence*, 216 S.E.2d 236 (W.Va. 1975).’ Syllabus Point 1, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).” Syllabus Point 1, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

**Discipline** (continued)

**Burden of proof** (continued)

*Committee on Legal Ethics v. Matthews*, (continued)

Because respondent still did not settle the Winters estate the Court once again found him negligent and in violation of DR6-101(A)(3). He was publicly reprimanded, ordered to submit a plan for supervision within sixty days and ordered to pay costs.

*Committee on Legal Ethics v. Morton*, 410 S.E.2d 279 (1991) (Per Curiam)

The Committee found respondent guilty of a pattern and practice of client neglect in failing to communicate properly with clients in two separate matters, in violation of Rule 1.4 of the *Rules of Professional Conduct*. In addition, the Committee noted that respondent's problems arose from a lack of training rather than neglect or malfeasance. Respondent agreed to the Committee's recommendation that she take part in a mentor program designed to improve her office management.

Syl. pt. 1 - "In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar ... the burden is on the Committee to prove, by full, preponderating ... and clear evidence, the charges contained in the Committee's complaint." Syllabus Point 1, in part, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

Syl. pt. 2 - "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 783 (1985).

The court accepted the Committee's recommendations. Public reprimand and mentor program.

*Committee on Legal Ethics v. Veneri*, 411 S.E.2d 865 (1991) (Per Curiam)

Respondent represented his mother's estate, and was also executor and beneficiary under her will. Even after several irreconcilable conflicts arose over title to certain property, respondent continued in multiple capacities. The Committee on Legal Ethics found respondent violated DR5-105(A) and D1-102(A)(1).

## ATTORNEYS

### Discipline (continued)

#### Burden of proof (continued)

##### *Committee on Legal Ethics v. Veneri*, (continued)

Syl. pt. 1 - “In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar ... the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the complaint filed on behalf of the Committee.” Syllabus Point 1, in part, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

Syl. pt. 2 - “Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Ethics Committee ... are to be given substantial consideration.” Syllabus Point 3, in part, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980).

Here, respondent may have actually drafted his mother’s will, giving his sister an option to purchase whatever interest his mother had in an apartment building at Claytor Lake, Virginia. When his sister tried to exercise the option, respondent denied their mother had any legal interest and treated the money as purchase money for furnishings of one apartment their mother used.

Similarly, a bank account which respondent’s mother and sister had joint title to became a point of contention when respondent wanted to withdraw the money for the benefit of the estate and his sister refused. The Court found no actual impropriety in respondent’s actions but disapproved of respondent’s refusal to remove the conflict, even after a clear dispute arose. License suspended for three months; costs of proceeding assessed.

#### Conflict of interest

##### *Committee on Legal Ethics v. Goode*, No. 21857 (11/23/93) (Per Curiam)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 84) for discussion of topic.

Discipline (continued)

Conviction of crimes

*Committee on Legal Ethics v. Boettner*, 422 S.E.2d 478 (1992) (Miller, J.)

Respondent was convicted of evading federal income taxes pursuant to 26 U.S.C. 7201 as a result of failing to report as income interest payments made on his behalf. Following an earlier State Bar hearing, a mitigation hearing was granted, *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990), partly because the new disciplinary rules abandoned the concept of “moral turpitude” and under the old rules conviction of a crime involving moral turpitude was ground for disbarment. Tax evasion was considered a crime involving moral turpitude. *In re West*, 155 W.Va. 648, 186 S.E.2d 776 (1972); *In the Matter of Mann*, 151 W.Va. 644, 154 S.E.2d 860 (1967).

Syl. pt. 1 - “Where annulment of an attorney’s license is sought based on a felony conviction under Article VI, Section 23 of the Constitution By-Laws, and Rules and Regulations of the West Virginia State Bar, due process requires the attorney be given the right to request an evidentiary hearing[.]” Syllabus Point 2, in part, *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990).

Syl. pt. 2 - Under Article VI, Section 35 of the Constitution, By-Laws, and Rules and Regulations of the West Virginia State Bar, disbarment of an attorney and annulment of his license are two ways of expressing the same form of punishment. The annulment of a license to practice law constitutes a disbarment. Annulment relates to the license and disbarment refers to the individual.

Syl. pt. 3 - “The right to an evidentiary mitigation hearing is not automatic. In order to obtain such a hearing, the attorney must make a request therefor after the Committee on Legal Ethics files its petition with this Court under Article VI, Section 25 of the Constitution, By-Laws and Rules and Regulations of the West Virginia State Bar.” Syllabus Point 3, *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990).

Syl. pt. 4 - “The cases in which a mitigation hearing will be appropriate are the exception rather than the rule. Whether a mitigation hearing is appropriate in a particular instance will depend upon a variety of factors, including but not limited to, the nature of the attorney’s misconduct, surrounding facts and circumstances, previous ethical violations, the wilfulness of the conduct, and the adequacy of the attorney’s previous opportunity to present evidence sufficient for a determination of appropriate sanctions.” Syllabus Point 3, *Committee on Legal Ethics v. Folio*, 184 W.Va. 503, 401 S.E.2d 248 (1990).

**Discipline** (continued)

**Conviction of crimes** (continued)

*Committee on Legal Ethics v. Boettner*, (continued)

Syl. pt. 5 - “ “In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances [in each case], including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate, and when the committee on legal ethics initiates proceedings before this Court, it has a duty to advise this Court of all pertinent facts with reference to the charges and the recommended disciplinary action.” Syl. pt. 2, *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976).’ Syllabus Point 2, *Committee on Legal Ethics v. Higinbotham*, 176 W.Va. 186, 342 S.E.2d 152 (1986).” Syllabus Point 4, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

Syl. pt. 6 - “Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office.” Syllabus Point 3, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

The Court noted that respondent was a majority leader of the State Senate and had been Chairman of the Senate Judiciary Committee at the time of the offense. Respondent had been a legal services attorney, had done public interest work in his private practice and expressed remorse over his actions, despite insisting that he was unaware of the tax consequences of interest payments made on his behalf. Three year suspension and costs.

*Committee on Legal Ethics v. Carman*, No. 20161 (7/16/91) (Per Curiam)

Respondent pled guilty to two counts of bank fraud on 20 December 1990. His request for a mitigation hearing was denied 13 June 1991.

Conviction of a crime involving moral turpitude is grounds for annulment. Art. VI, § 23, By-Laws of the West Virginia State Bar. Fraud is a crime involving moral turpitude. *In the Matter of Mann*, 151 W.Va. 644, 154 S.E.2d 860 (1967), *overruled on other grounds*; *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990); *In re Smith*, 158 W.Va. 13, 206 S.E.2d 920 (1974). Further, annulment is mandatory upon conviction of such a crime. *In the Matter of Mann, supra*; *In the Matter of Trent*, 154 W.Va. 333, 175 S.E.2d 461 (1970); *In re Barron*, 155 W.Va. 98, 181 S.E.2d 273 (1971); *In re Robertson*, 156 W.Va. 463, 194 S.E.2d 650 (1973).

License annulled.

**Discipline** (continued)

**Conviction of crimes** (continued)

*Committee on Legal Ethics v. Dues*, No. 21424 (12/11/92) (Per Curiam)

Respondent was convicted of willful failure to file an income tax return in 1985, in violation of 26 U.S.C. 7203. He was put on probation for five years and required to perform community service work. The Committee on Legal Ethics recommended that he be suspended for three months for violating DR1-102(A)(6).

Respondent was seriously ill with sickle-cell anemia in 1979 and continues to suffer from the illness, requiring much work at home. From 1984 through 1986 respondent's wife underwent two life-threatening surgeries. Not all of the required medical treatment was covered by insurance.

Respondent attempted to set up a payment schedule with the IRS in 1984 but was refused. The IRS seized his bank accounts. Respondent was unable to pay his personal and business debts and decided to pay his creditors with funds which might have gone to taxes. At the time of the hearing in this matter, respondent had not been paid \$1,000 per month for performing as a hearing examiner for the Human Rights Commission for two years. Further, respondent gave a substantial part of his time to pro bono work for the Charleston Legal Aid Society, the Appalachian Research and Defense Fund, the NAACP, the West Virginia State Bar Association and the Mountain State Bar Association.

Finding a direct causal relationship between respondent's and his wife's medical disabilities and his failure to file income tax returns, the Court publicly reprimanded respondent. See *Committee on Legal Ethics v. Higinbotham*, 176 W.Va. 186, 342 S.E.2d 152 (1986).

*Committee on Legal Ethics v. Folio*, 401 S.E.2d 248 (1990) (Workman, J.)

Respondent was acquitted of obstruction of justice in Federal court but found guilty of conspiracy to obstruct justice by a jury. The guilty charge was dismissed by the judge but reinstated on appeal. An award of a new trial was also overturned on appeal. Respondent was sentenced to two years' probation, fined \$1,000, ordered to perform community service and suspended from practice for ten days.

Syl. pt. 1 - "Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction." Syllabus Point 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989)." Syl. Pt. 1, *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990).

## ATTORNEYS

### Discipline (continued)

#### Conviction of crimes (continued)

##### *Committee on Legal Ethics v. Folio*, (continued)

Syl. pt. 2 - “A license to practice law is a valuable right, such that its withdrawal must be accompanied by appropriate due process procedures. Where annulment of an attorney’s license is sought based on a felony conviction under Article VI, Section 23 of the Constitution, By-laws, and Rules and Regulations of the West Virginia State Bar, due process requires the attorney be given the right to request an evidentiary hearing. The purpose of such a hearing is not to attack the conviction collaterally, but to introduce mitigating factors which may bear on the disciplinary punishment to be imposed.” Syl. Pt. 2, *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990).

The Court found that an additional hearing on mitigating circumstances was not warranted. Respondent flagrantly violated Rule 8.4(b)-(d) of the Rule of Professional Conduct. License annulled.

##### *Committee on Legal Ethics v. Gorrell*, 407 S.E.2d 923 (1991) (Brotherton, J.)

Respondent was convicted of eleven counts of mail fraud, a felony. He requested that the Court allow petition for reinstatement in the event that his appeal on the mail fraud convictions was successful.

Syl. pt. 1 - “ “In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee’s complaint.” Syl. Pt. 1, *Committee on Legal Ethics v. Pence*, 216 S.E.2d 236 (W.Va. 1975).’ Syllabus Point 1, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).” Syllabus Point 1, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

Syl. pt. 2 - “Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics’ burden of proving an ethical violation arising from such conviction.” Syllabus Point 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

**Discipline** (continued)

**Conviction of crimes** (continued)

*Committee on Legal Ethics v. Gorrell*, (continued)

Syl. pt. 3 - “ “Section 23, Part E, Article IV of the By-Laws of the West Virginia State Bar imposes upon any Court before which an attorney has been qualified a mandatory duty to annul the license of such attorney to practice law upon proof that he has been convicted of any crime involving moral turpitude.” Point 2, syllabus, *In the Matter of Mann*, 151 W.Va. 644 154 S.E.2d 860 (1967).’ Syllabus, *In re Smith*, 158 W.Va. 13, 206 S.E.2d 920 (1974).” Syllabus Point 3, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

Reversal on appeal does not negate currently pending disciplinary proceedings. In addition, the Court noted that voluntary cessation of practice does not count toward the necessary elapsed time prior to petition for reinstatement. License annulled.

*Committee on Legal Ethics v. Grubb*, 420 S.E.2d 744 (1992) (Per Curiam)

Respondent was found guilty of the federal charges of bribery of a public official, mail fraud, conspiracy, witness tampering, obstruction of justice, racketeering and aiding and abetting. Respondent was an elected circuit court judge at the time of the violations. The Committee recommended that respondent’s license be annulled, with reinstatement possible if the convictions are reversed on appeal.

Syl. pt. 1 - “ “In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee’s complaint.” Syl. Pt. 1, *Committee on Legal Ethics v. Pence*, 216 S.E.2d 236 (W.Va. 1975).’ *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987). Syl. pt. 1, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).” Syllabus Point 1, *Committee on Legal Ethics v. Moore*, 186 W.Va. 127, 411 S.E.2d 452 (1991).

Syl. pt. 2 - “ ‘Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics’ burden of proving an ethical violation arising from such conviction.’ Syl. pt. 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).” Syllabus Point 2, *Committee on Legal Ethics v. Moore*, 186 W.Va. 127, 411 S.E.2d 452 (1991).

The Court found the Committee met its burden. License annulled, pending reversal of charges on appeal.

## ATTORNEYS

### Discipline (continued)

#### Conviction of crimes (continued)

*Committee on Legal Ethics v. Hart*, 410 S.E.2d 714 (1991) (Per Curiam)

Respondent pled guilty to preparation and presentation of a false income tax return in violation of 26 U.S.C. 7206(2). He claimed that he had a bona fide defense and requested a mitigation hearing. The Committee claimed his license should be annulled because of conviction of a crime involving moral turpitude pursuant to § 23, Article V of the By-Laws of the West Virginia State Bar. Rule 8.4(b), Rules of Professional Conduct.

Syl. pt. 1 - “ “Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics’ burden of proving an ethical violation arising from such conviction.” Syllabus Point 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).’ Syl. Pt. 1, *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990).” Syl. pt. 1, *Committee on Legal Ethics v. Folio*, 184 W.Va. 503, 401 S.E.2d 248 (1990).

Syl. pt. 2 - “The cases in which a mitigation hearing will be appropriate are the exception rather than the rule. Whether a mitigation hearing is appropriate in a particular instance will depend upon a variety of factors, including but not limited to, the nature of the attorney’s misconduct, surrounding facts and circumstances, previous ethical violations, the willfulness of the conduct, and the adequacy of the attorney’s previous opportunity to present evidence sufficient for determination of appropriate sanctions.” Syl. pt. 3, *Committee on Legal Ethics v. Folio*, 184 W.Va. 503, 401 S.E.2d 248 (1990).

Noting that Rule 8.4 changed the emphasis from a crime involving “moral turpitude” to a “criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness in other respects,” the Court found that respondent committed such an act and denied respondent’s request for a mitigation hearing because respondent failed to cite sufficient reasons therefor. License annulled.

## ATTORNEYS

### Discipline (continued)

#### Conviction of crimes (continued)

*Committee on Legal Ethics v. Moore*, 411 S.E.2d 452 (1991) (Brotherton, J.)

Respondent, former Governor of West Virginia, pled guilty to mail fraud, obstruction of justice, filing a false income tax return and violating the Hobbs Act. Respondent's subsequent attempt to withdraw his plea was refused by both the federal district and circuit courts, including a petition for rehearing of the appellate decision. The United States Supreme Court refused certiorari. Respondent was granted a stay in disciplinary proceedings pending resolution of these other proceedings. The Court refused to delay further on account of respondent's pending *habeas corpus* petition. Respondent also requested a mitigation hearing.

Syl. pt. 1 - “ “In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint.” Syl. Pt. 1, *Committee on Legal Ethics v. Pence*, 216 S.E.2d 236 (W.Va. 1975).’ Syllabus Point 1, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).” Syl. pt. 1, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

Syl. pt. 2 - “Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction.” Syl. pt. 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

Syl. pt. 3 - “A license to practice law is a valuable right, such that its withdrawal must be accompanied by appropriate due process procedures. Where annulment of an attorney's license is sought based on a felony conviction under Article VI, Section 23 of the Constitution, By-Laws, and Rules and Regulations of the West Virginia State Bar, due process requires the attorney be given the right to request an evidentiary hearing. The purpose of such hearing is not to attack the conviction collaterally, but to introduce mitigating factors which may bear on the disciplinary punishment to be imposed.” Syllabus point 2, *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990).

## ATTORNEYS

### Discipline (continued)

#### Conviction of crimes (continued)

##### *Committee on Legal Ethics v. Moore*, (continued)

Syl. pt. 4 - The cases in which a mitigation hearing will be appropriate are the exception rather than the rule. Whether a mitigation hearing is appropriate in a particular instance will depend upon a variety of factors, including but not limited to, the nature of the attorney's misconduct, surrounding facts and circumstances, previous ethical violations, the willfulness of the conduct, and the adequacy of the attorney's previous opportunity to present evidence sufficient for a determination of appropriate sanctions." Syl. pt. 3, *Committee on Legal Ethics v. Folio*, 184 W.Va. 503, 401 S.E.2d 248 (1990).

Syl. pt. 5 - Mitigation hearings are inappropriate when the circumstances involve a lawyer who willfully violates the public trust by extortion or the obstruction of justice.

The Court noted that respondent willfully violated the public trust by extortion and obstruction of justice. Mitigation hearing denied. License annulled.

##### *Committee on Legal Ethics v. White*, 428 S.E.2d 556 (1993) (Per Curiam)

Respondent, former prosecuting attorney of Marshall County, pled guilty to three misdemeanor charges involving possession of cocaine, marijuana and percocet. The drug use occurred while he was prosecuting attorney. The Court found him in violation of DR1-102(A)(4), (5) and (6), engaging in conduct involving dishonesty, etc.

Respondent explained his conduct resulted from involvement with a woman and the use of percocet for pain relief for an abscessed tooth, resulting in addiction. Respondent voluntarily gave information to the Committee prior to criminal charges being filed. He also asked to be put on inactive status prior to entering his plea and entered an inpatient rehabilitation facility at the urging of the Impaired Lawyer Committee, even though he had not used drugs for more than a year and one half.

Syl. pt. 1 - "Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction." Syllabus Point 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

**Discipline** (continued)

**Conviction of crimes** (continued)

*Committee on Legal Ethics v. White*, (continued)

Syl. pt. 2 - “ ‘In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.’ Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).” Syllabus Point 5, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

Syl. pt. 3 - “Ethical violations by a lawyer holding public office are viewed as more egregious because of the betrayal of the public trust attached to the office.” Syllabus Point 3, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

Syl. pt. 4 - “ ‘ “In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances [in each case], including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate, and when the committee on legal ethics initiates proceedings before this Court, it has a duty to advise this Court of all pertinent facts with reference to the charges and the recommended disciplinary action.” Syl. pt. 2, *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976).’ Syllabus Point 2, *Committee on Legal Ethics v. Higinbotham*, 176 W.Va. 186, 342 S.E.2d 152 (1986).” Syllabus Point 4, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

Although the Court noted respondent’s attempts at mitigation, it also emphasized the public trust respondent was in when the violations occurred. Suspension for two years, retroactive to 2 January 1992 and costs.

*Committee on Legal Ethics v. Wilson*, 408 S.E.2d 350 (1991) (McHugh, J.)

On April 16, 1991 respondent pled guilty to three counts of obtaining money by false pretenses (a felony in the amount at issue). In February, 1991 he had petitioned for voluntary resignation from the Bar pursuant to § 33, Art. VI of the By-Laws of the West Virginia State Bar. In March, 1991 the Committee on Legal Ethics requested a stay of the consideration of respondent’s motion because of the pending criminal charges.

**Discipline** (continued)

**Conviction of crimes** (continued)

*Committee on Legal Ethics v. Wilson*, (continued)

In May, 1991 the Committee petitioned for annulment. The Court suspended respondent's license pending resolution of the annulment petition. Respondent then sought to change the issue to one of incapacity pursuant to § 26, Art. VI of the By-Laws. The Court denied respondent's motion for continuance to supplement the record with depositions of two psychiatrists.

Syl. pt. 1 - "Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction." Syl. pt. 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219(1989).

Syl. pt. 2 - An attorney who is the subject of a pending disciplinary proceeding under sections 23 and 25 article VI of the *By-Laws of the West Virginia State Bar* may obtain an order from this Court holding the disciplinary proceeding in abeyance if, and only if, the attorney, pursuant to subsection (c) of section 26 of article VI of the *By-Laws of the West Virginia State Bar*, contends explicitly that he or she is suffering currently from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which makes it impossible for the respondent attorney to practice law currently and to defend himself or herself adequately in the disciplinary proceeding. If, after any such contention, it is determined subsequently that the attorney is not incapacitated to that extent, this Court, under subsection (c) of section 26 of article VI of the *By-Laws of the West Virginia State Bar*, will direct the resumption of the disciplinary proceeding against the respondent. The disciplinary proceeding ultimately would be dismissed only if the attorney's mental illness, at the time of the offense, rendered him or her unable to form the intent which is an element of the offense charged.

Syl. pt. 3 - "The right to an evidentiary mitigation hearing is not automatic. In order to obtain such a hearing, the attorney must make a request therefor after the Committee on Legal Ethics files its petition with this Court under Article VI, Section 25 of the Constitution, By-Laws, and Rules and Regulations of the West Virginia State Bar." Syl. pt. 3, *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990).

The Court found respondent capable of answering the disciplinary charges. At the criminal proceedings respondent did not raise incompetency as a defense. Noting that respondent did not request a mitigation hearing, the Court annulled respondent's license.

# ATTORNEYS

## Discipline (continued)

### Desuetude

*Committee on Legal Ethics v. Printz*, 416 S.E.2d 720 (1992) (Neely, J.)

See ATTORNEYS Discipline, Desuetude, (p. 67) for discussion of topic.

*Committee on Legal Ethics v. Printz*, 416 S.E.2d 720 (1992) (Neely, J.)

Respondent's father discovered that \$200,000 was missing from his company. The company manager confessed to embezzling the money. To avoid public embarrassment, respondent, his father and the embezzler agreed to a repayment schedule. Respondent prepared a written confession and an agreement for the embezzler to sell his home, motorcycle and other personal property, proceeds to go to the company.

A second audit revealed \$395,515 missing. The embezzler agreed to continue working at the company and to direct his therapist to turn over notes to respondent to help locate the missing funds. Following refusal by the embezzler's father to repay the money, respondent sent a "final demand" letter in which he demanded a repayment schedule or criminal charges would result. Negotiations fell apart and respondent's father notified police.

Syl. pt. 1 - "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).

Syl. pt. 2 - Disciplinary Rule 7-105(a) of the *Code of Professional Responsibility* (1978) does not apply to otherwise legitimate negotiations undertaken on behalf of a client.

Syl. pt. 3 - Penal statutes may become void under the doctrine of desuetude if:

- (1) The statute proscribes only acts that are *malum prohibitum* and not *malum in se*;
- (2) There has been open, notorious and pervasive violation of the statute for a long period; and
- (3) There has been a conspicuous policy of non-enforcement of the statute.

**Discipline** (continued)

**Desuetude** (continued)

*Committee on Legal Ethics v. Printz*, (continued)

Syl. pt. 4 - *W.Va. Code*, 61-5-19 [1923] is void under the doctrine of desuetude to the extent that it prohibits a victim or his agent from seeking restitution in lieu of a criminal prosecution.

The Court noted that the prohibition against using threat of criminal charges to obtain advantage in a civil matter was deliberately omitted from the new Rules of Professional Conduct. Respondent's actions here were violative of *W.Va. Code*, 61-5-19 but the statute itself was declared dead from lack of use. Charges dismissed.

**Disciplinary action in foreign jurisdiction**

*Committee on Legal Ethics v. Battistelli*, 405 S.E.2d 242 (1991) (Miller, C.J.)

Respondent misrepresented facts in an appeal before the Fourth Circuit and was fined twice the costs of the appeal. The Committee on Legal Ethics asked that the Court impose the same fine, issue a public reprimand and charge respondent with the costs of the proceeding.

Syl. pt. 1 - Article VI, Section 28-A of the By-Laws of the West Virginia State Bar permits the Committee on Legal Ethics to discipline members of the State Bar against whom disciplinary action has been taken by other jurisdictions.

Syl. pt. 2 - Article VI, Section 28-A(a) of the By-Laws of the West Virginia State Bar provides that a final adjudication of professional misconduct in another jurisdiction conclusively establishes the fact of such misconduct for purposes of reciprocal disciplinary proceedings here.

Syl. pt. 3 - Article VI, Section 28-A(b) of the By-Laws of the West Virginia State Bar places an affirmative duty on a lawyer to report the fact that he has been publicly disciplined or required to surrender his license to practice in a foreign jurisdiction.

Syl. pt. 4 - Under Article VI, Section 28-A(e) of the By-Laws of the West Virginia State Bar, the attorney's right to challenge the disciplinary action of a foreign jurisdiction is limited to the following four grounds: (1) the procedure followed in the other jurisdiction violated due process; (2) there was a total infirmity of proof of misconduct; (3) imposition of the same discipline would result in a grave injustice; or (4) the misconduct warrants a substantially different type of discipline.

## ATTORNEYS

### Discipline (continued)

#### Disciplinary action in foreign jurisdiction (continued)

##### *Committee on Legal Ethics v. Battistelli*, (continued)

Syl. pt. 5 - Article VI, Section 28-A(e) of the By-Laws of the West Virginia State Bar requires imposition of the identical sanction imposed by a foreign jurisdiction in the absence of one of the enumerated exceptions contained in subsections (1) through (4). If the Committee believes one of these exceptions is applicable, it must make appropriate findings.

The Court found that issuance of a public reprimand was not permissible because it was in addition to the reciprocal fine imposed. The Court rejected the Committee's argument that it must impose some sanction in order to impose a fine. Fine and costs imposed.

#### Drug or alcohol tests

##### *Committee on Legal Ethics v. Lambert*, No. 20970 (7/10/92) (Per Curiam)

See ATTORNEYS Incapacitation, Drug or alcohol test, (p. 91) for discussion of topic.

#### Duty to law partners

##### *Committee on Legal Ethics v. Hess*, 413 S.E.2d 169 (1991) (Miller, C.J.)

Respondent opened a settlement account for real estate transactions without informing his law partners. This account was separate from the firm's client trust account. Respondent converted the settlement account to an interest-bearing account, again without informing his partners and earned \$10,304.75 in interest, withdrawing \$6,189.25 for his personal account. Further, respondent wrote checks to himself from the account in the amount of \$16,759.97.

The Committee found respondent violated DR1-102(A)(4) and (6) (now Rule 8.4 of the Rules of Professional Conduct) and recommended suspension for two years despite respondent's repayment of the funds.

## ATTORNEYS

### Discipline (continued)

#### Duty to law partners (continued)

##### *Committee on Legal Ethics v. Hess*, (continued)

Syl. pt. 1 - “In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar for the purpose of having suspended the license of an attorney to practice law for a designated period of time, the burden is on the Committee to prove by full, preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee.’ Syllabus Point 1, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).” Syllabus Point 1, *Committee on Legal Ethics v. Smith*, 184 W.Va. 6, 399 S.E.2d 36 (1990).

Syl. pt. 2 - “The utmost good faith and fair dealing must be exercised toward each other by ... partners, not only after the partnership has been formed, but also during negotiations leading thereto. Syllabus Point 1, in part, *Zogg v. Hedges*, 126 W.Va. 523, 29 S.E.2d 871 (1944).

Syl. pt. 3 - Standards of professional conduct are applicable to an attorney’s relationship with his or her firm. If a lawyer converts firm monies to his or her own use without authorization, the attorney is subject to a disciplinary charge. Such conduct obviously reflects a dishonest and deceitful nature which violates the general precept that an attorney should avoid dishonesty or deceitful conduct.

Syl. pt. 4 - The repayment of funds wrongfully held by an attorney does not negate a violation of a disciplinary rule. Any rule regarding mitigation of the disciplinary punishment because of restitution must be governed by the facts of the particular case.

The Court accepted the Committee’s recommendation, rejecting respondent’s claim that no disciplinary violation occurred since a client was not injured. License suspended.

#### Embezzlement

*Committee on Legal Ethics v. Ikner*, 438 S.E.2d 613 (1993) (McHugh, J.)

See ATTORNEYS Discipline, Suspensions, (p. 87) for discussion of topic.

Discipline (continued)

Estate administration

*Committee on Legal Ethics v. Smith*, 399 S.E.2d 36 (1990) (Per Curiam)

Respondent was charged with failure to complete the administration of an estate in violation of DR1-102(A) and threatening the heirs who filed the ethics complaint DR6-101(A) and DR1-102(A). (The heirs tried to withdraw the complaint but the Committee proceeded on its own.)

The decedent executed a will drafted by respondent naming respondent as the executor and providing for conversion of the estate into cash at the executor's sole discretion, with proceeds to be divided among five heirs. As of September 11, 1990, the distribution had not been made.

The estate had an "*in terrorem*" clause to disinherit unsuccessful litigants who challenged the will. Respondent wrote to the complainants characterizing the ethics proceeding as litigation within the meaning of the clause. Respondent advanced money to one of the heirs and then wrote to her suggesting that the money was taken under false pretenses. He asked another heir to sign a letter misrepresenting the facts and said he "would like to own a house in Georgia," apparently referring to the house the heir lived in. He prepared a letter for an heir to sign directing her attorney not to testify at the disciplinary hearing. He filed suit against the decedent's brother seeking damages for statements made in a newspaper article.

Syl. pt. 1 - "In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar for the purpose of having suspended the license of an attorney to practice law for a designated period of time, the burden is on the Committee to prove by full, preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee." Syllabus Point 1, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

Syl. pt. 2 - "Prior discipline is an aggravating factor in a pending disciplinary proceeding because it calls into question the fitness of the attorney to continue to practice a profession imbued with a public trust." Syllabus Point 5, *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986).

Syl. pt. 3 - "Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Legal Ethics Committee ... are to be given substantial consideration." Syllabus Point 3, in part, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980).

## ATTORNEYS

### Discipline (continued)

#### Estate administration (continued)

##### *Committee on Legal Ethics v. Smith*, (continued)

The Committee on Legal Ethics recommended a one-year suspension. The Court dismissed respondent's argument that he did not have notice of charges relating to his attempts to thwart the complaint process and took judicial notice of respondent's prior charges (which resulted in a public reprimand in 1973 and annulment of his license in 1974). License was suspended for one year.

#### Estates

##### *Committee on Legal Ethics v. McCreight*, No. 21507 (3/26/93) (Per Curiam)

Respondent was engaged to settle an estate. He failed to file the estate appraisal form or do any other work to settle the estate. Two years after the initial engagement, the client asked for return of the various documents related to the estate. Respondent admitted he had lost them.

Respondent also failed to respond to Bar counsel following filing of this complaint until subpoenas were issued. Respondent claimed at the ethics hearing that he had moved his office and his wife had died during the period covered.

The Court found respondent violated DR6-101(A)(3), neglecting a legal matter; DR9-102(B)(3) and (4), failing to preserve a client's property; DR1-102, misrepresenting facts to Bar counsel; DR1-102(A)(4), engaging in dishonest conduct; and Rule 8.1(b), failing to respond to Bar counsel. Two-month suspension and costs of the proceeding.

#### *Ex parte communications*

##### *In the Matter of Kaufman*, 416 S.E.2d 480 (1992) (Brotherton, J.)

See JUDGES *Ex parte communications*, (p. 347) for discussion of topic.

**Discipline** (continued)

**Failure to communicate with clients**

*Committee on Legal Ethics v. Keenan*, 427 S.E.2d 471 (1993) (Per Curiam)

Respondent was charged with failure to communicate with three different clients, failure to act with diligence in representation of clients, failure to keep clients informed, and failure to return an unearned fee. Although respondent claimed his psychological and psychiatric problems account for these omissions, he submitted no evidence showing these problems were stabilized.

In one instance the statute of limitations was allowed to run and respondent was found guilty of malpractice, installment payments on which have been sporadic. In another instance a partition suit was not filed despite repeated pleas; respondent eventually gave the client's file to her so she could seek new counsel. Lastly, respondent failed to file a divorce action, again failing to respond to repeated requests for information.

Syl. pt. 1 - "In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar . . . the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the complaint filed on behalf of the Committee." Syllabus Point 1, in part, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

Syl. pt. 2 - "Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Ethics Committee . . . are to be given substantial consideration." Syllabus Point 3, in part, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980).

Respondent claimed to suffer from "a bipolar mental or emotional disorder of a manic/depressive type." He further claimed that he is diabetic and that this mental disorder is a common byproduct of diabetes. Respondent claimed to be undergoing treatment but offered no testimony or medical reports except his own testimony, despite promises made to the Committee that reports would be submitted after the hearing.

The Court agreed with the Committee that respondent presented a continuing danger to the public. Indefinite suspension until respondent demonstrates his condition has stabilized and costs of this proceeding have been paid.

## ATTORNEYS

### Discipline (continued)

#### Failure to file appeal

*Committee on Legal Ethics v. Cowgill*, No. 21518 (2/24/93) (Per Curiam)

Respondent was appointed to a felony proceeding; the client was convicted and respondent became responsible for appealing the case. Despite assuring the circuit court on three separate occasions that an appeal had been filed, respondent did not appeal. The circuit court fined respondent \$500.00.

Respondent admitted the charges. The Court found him in violation of Rule 3.3(a)(1), making a false statement of fact or law to a court. Although normally grounds for annulment, respondent's contrition convinced the Court to suspend his license for six months and assess the costs of the proceedings.

#### Failure to respond to Bar counsel

*Committee on Legal Ethics v. Cometti*, 430 S.E.2d 320 (1993) (Miller, J.)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 48) for discussion of topic.

*Committee on Legal Ethics v. Martin*, 419 S.E.2d 4 (1992) (Workman, J.)

See ATTORNEYS Discipline, Admission of guilt, (p. 47) for discussion of topic.

*Committee on Legal Ethics v. McCreight*, No. 21507 (3/26/93) (Per Curiam)

See ATTORNEYS Discipline, Estates, (p. 72) for discussion of topic.

#### Fiduciary responsibility

*Committee on Legal Ethics v. Lambert*, 428 S.E.2d 65 (1993) (Per Curiam)

Respondent was found in violation of *W.Va. Code*, 30-2-13, 61-3-20, 61-4-5 and DR1-102(A)(3) and (4) and DR9-102(B)(4) and Rule 8.1(b) for converting clients' property to his own use, causing a forged instrument to be uttered, failing to pay over money received on behalf of clients and failing to inform the Committee that he owed clients money. His clients collected the maximum amount possible from the State Bar's Client Security Fund.

## ATTORNEYS

### Discipline (continued)

#### Fiduciary responsibility (continued)

##### *Committee on Legal Ethics v. Lambert*, (continued)

Syl. pt. 1 - “In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar for the purpose of having suspended the license of an attorney to practice law for a designated period of time, the burden is on the Committee to prove by full preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee.” Syl. pt. 1, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

Syl. pt. 2 - “Detaining money collected in a professional or fiduciary capacity without bona fide claim coupled with acts of dishonesty, fraud, deceit or misrepresentation justify annulment of an attorney’s license to practice law.” Syl. pt. 5, *Committee on Legal Ethics v. Pence*, 161 W.Va. 240, 240 S.E.2d 668 (1977).

Syl. pt. 3 - “An attorney must promptly pay or deliver, upon request by a client, the funds or other property in the possession of the attorney to which the client is entitled.” Syl. pt. 3, *Committee on Legal Ethics v. Pence*, \_\_\_ W.Va. \_\_\_, 216 S.E.2d 236 (1975).

The Court noted respondent’s previous suspension and admitted alcoholism and his refusal at that time to submit to a psychiatric evaluation in West Virginia. Respondent was reinstated despite the pendency of the claims herein; respondent did not acknowledge the debt owed the complainant herein when applying for reinstatement.

Respondent did not show remorse or submit persuasive evidence, instead blaming others for his transgressions and claiming faded memory. He has made no effort to reimburse the Client Security Fund. Further, his claim of alcoholism as mitigation was unpersuasive since he did not show remorse, nor show any likelihood that the conduct would not reoccur. License annulled; costs of proceeding assessed.

#### Free speech

##### *Committee on Legal Ethics v. Farber*, 408 S.E.2d 274 (1991) (Neely, J.)

Respondent was charged with misrepresenting facts in a motion to disqualify a circuit judge and in allegations against that judge made to a special prosecutor; and with engaging in a pattern of contemptuous and disruptive behavior.

## ATTORNEYS

### Discipline (continued)

#### Free speech (continued)

##### *Committee on Legal Ethics v. Farber*, (continued)

Syl. pt. 1 - “The Disciplinary Rules of the Code of Professional Responsibility state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.” Syl. Pt. 3, *Committee on Legal Ethics of W.Va. v. Tatterson*, 173 W.Va. 613, 319 S.E.2d 381 (1984).

Syl. pt. 2 - “Disciplinary Rule 1-102(A)(4) provides that a lawyer shall not ‘[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.’” Syl. Pt. 5, *Committee on Legal Ethics of W.Va. v. Tatterson*, 173 W.Va. 613, 319 S.E.2d 381 (1984).

Syl. pt. 3 - Disciplinary Rule 1-102(A)(5) provides that a lawyer shall not [e]ngage in conduct that is prejudicial to the administration of justice.”

Syl. pt. 4 - Disciplinary Rule 7-102(A) provides that, in representing a client, a lawyer shall not “knowingly make a false statement or law of fact.”

Syl. pt. 5 - “The Free Speech Clause of the First Amendment protects a lawyer’s criticism of the legal system and its judges, but this protection is not absolute. A lawyer’s speech that presents a serious and imminent threat to the fairness and integrity of the judicial system is not protected. When a personal attack is made upon a judge or other court official, such speech is not protected if it consists of knowingly false statements or false statements made with a reckless disregard of the truth. Finally, statements that are outside of any community concern, and are merely designed to ridicule or exhibit contumacy toward the legal system, may not enjoy First Amendment protection.” Syllabus Point 1, *Committee on Legal Ethics v. Douglas*, 179 W.Va. 490, 370 S.E.2d 325 (1988).

Syl. pt. 6 - “This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys’ licenses to practice law.” Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).

Syl. pt. 7 - When we suspend a lawyer’s license, we may require that the lawyer furnish proof of rehabilitation as a condition of readmission, just as we require proof of rehabilitation from a disbarred lawyer seeking re-admission.

**Discipline** (continued)

**Free speech** (continued)

*Committee on Legal Ethics v. Farber*, (continued)

Syl. pt. 8 - “The general rule for reinstatement is that a disbarred attorney in order to regain admission to the practice of law bears the burden of showing that he presently possesses the integrity, moral character and legal competence to resume the practice of law. To overcome the adverse effect of the previous disbarment he must demonstrate a record of rehabilitation. In addition, the court must conclude that such reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice and in this regard the seriousness of the conduct leading to disbarment is an important consideration.” Syl. Pt. 1, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980).

Syl. pt. 9 - “Rehabilitation is demonstrated by a course of conduct that enables the court to conclude there is little likelihood that after such rehabilitation is completed and the applicant is readmitted to the practice of law he will engage in unprofessional conduct.” Syl. Pt. 2, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980).

Here, because of the unusual nature of respondent’s transgressions, he was ordered to submit to a psychiatric examination prior to reinstatement and required to obtain a supervising attorney for two years after reinstatement. Because three months is not sufficient time to establish a pattern or “course of conduct” showing fitness, he was ordered to show satisfactory proof that he has taken reasonable steps to alleviate any contributing emotional problems. Failure to do so may result in permanent disbarment or until such time that he takes the required steps.

**Generally**

*Committee on Legal Ethics v. Charonis*, 410 S.E.2d 418 (1991) (Per Curiam)

Respondent failed to comply with a supervised practice plan approved in *Committee on Legal Ethics v. Charonis*, 184 W.Va. 268, 400 S.E.2d 276 (1990). Respondent did not even answer Bar counsel’s letter advising him compliance was expected by 20 July 1991. The Committee recommended suspension.

Syl. pt. - “This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys’ licenses to practice law.” Syl. pt. 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).

## ATTORNEYS

### Discipline (continued)

#### Generally (continued)

##### *Committee on Legal Ethics v. Charonis*, (continued)

The Court noted that a two-month suspension was imposed in *Charonis, supra*, along with a one-year supervised practice. License suspended for one year; costs imposed.

##### *Committee on Legal Ethics v. Hobbs*, 439 S.E.2d 629 (1993) (Per Curiam)

Respondent paid a part of a medical malpractice fee to the wife of Judge Grubb, who was assigned to the case. He failed to inform anyone until six years after the payment when the judge was indicted on federal corruption charges. The judge was acquitted of the extortion charge resulting from respondent's information.

The payment was made after Judge Grubb recommended to respondent that he talk with the judge's wife, who worked in the hospital where respondent's client's wife died. The judge's wife demanded 4% of the fee, which respondent paid.

Respondent claimed an atmosphere of intimidation by the judge, noting that he was fined \$100 for late discovery and was jailed for being late for a hearing.

Syl. pt. 1 - "Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Ethics Committee . . . are to be given substantial consideration." Syl. pt. 3, in part, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980).

Syl. pt. 2 - "In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession." Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987). Syllabus Point 5, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989)." Syl. Pt. 2, *Committee on Legal Ethics v. Craig*, 187 W.Va. 14, 415 S.E.2d 255 (1992).

## ATTORNEYS

### Discipline (continued)

#### Generally (continued)

##### *Committee on Legal Ethics v. Hobbs*, (continued)

Syl. pt. 3 - ““In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances [in each case], including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate, and when the committee on legal ethics initiates proceedings before this Court, it has a duty to advise this Court of all pertinent facts with reference to the charges and the recommended disciplinary action.” Syl. pt. 2, *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976). Syllabus Point 2, *Committee on Legal Ethics v. Higinbotham*, 176 W.Va. 186, 342 S.E.2d 152 (1986).” Syl. Pt. 4, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

Noting respondent’s relative youth and inexperience at the time of the alleged extortion (or bribery), the climate of intimidation and respondent’s ultimate voluntary disclosure, the Court still found that secret payments to a judge, however motivated, strike at the heart of the legal system. Other jurisdictions have imposed disbarment.

Although annulment was appropriate here, comparing other disciplinary action against the gravity of this offense, the Court imposed a two-year suspension on account of mitigating factor, and costs.

#### Lawyer as witness

##### *State ex rel. Karr v. McCarty*, 417 S.E.2d 120 (1992) (Per Curiam)

Petitioner sought a writ of prohibition to prevent his disqualification as prosecuting attorney in a case wherein he was called as a witness regarding tape recordings which were in the prosecution’s possession. The defendant’s expert claimed several anomalies existed in copies of the tapes sufficient to question their integrity.

Petitioner had participated in copying the tapes and had been in exclusive possession of them at his residence, in his office, in his car and at his father’s residence.

Syl. pt. - “Disciplinary Rule 5-102 of the Code of Professional Responsibility and current Rule 3.7 of the Rules of Professional Conduct state that it is unethical for a lawyer representing a client to appear as a witness on behalf of the client except under very limited conditions.” Syl. Pt. 1, *Smithson v. United States Fidelity & Guar. Co.*, 186 W.Va. 195, 411 S.E.2d 850 (1991).

## ATTORNEYS

### Discipline (continued)

#### Lawyer as witness (continued)

##### *State ex rel. Karr v. McCarty*, (continued)

Rule 3.7(a) of the West Virginia Rules of Professional Conduct provides as follows:

“(a) A lawyer shall not act as advocate at a trial which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or,
- (3) disqualification of the lawyer would work substantial hardship upon the client.”

Here, petitioner was in effect a witness for his own client (the State), not a witness for an opposing party, as in *Smithson*. The deciding issue, however, was whether petitioner’s testimony related to the contested issue of the tapes’ integrity. (Rule 3.7 (a), West Virginia Rules of Professional Conduct; a lawyer may testify where the testimony relates to an uncontested issue). The issue here was contested; disqualification not necessary. Writ granted.

#### Misconduct in another jurisdiction

##### *Committee on Legal Ethics v. Battistelli*, 405 S.E.2d 242 (1991) (Miller, C.J.)

See ATTORNEYS Discipline, Disciplinary action in foreign jurisdiction, (p. 68) for discussion of topic.

#### Misrepresentation to court

##### *Committee on Legal Ethics v. Cowgill*, No. 21518 (2/24/93) (Per Curiam)

See ATTORNEYS Discipline, Failure to file appeal, (p. 74) for discussion of topic.

**Discipline** (continued)

**Moral turpitude**

*Committee on Legal Ethics v. Taylor*, 415 S.E.2d 280 (1992) (Miller, J.)

Respondent issued a check without sufficient funds to a travel agency. In addition, he was indicted for two other worthless check violations in October, 1988. As a result of a plea agreement two of the counts were dropped and the third reduced to a misdemeanor. Respondent was sentenced to six months in jail and fined \$200.00. The sentence was suspended and he was put on probation with the condition that he would serve thirty days in jail on weekends, make restitution with ten percent interest and perform 300 hours of community service. No restitution had been made as of the date of the ethics hearing.

The Committee found respondent violated DR1-102(A)(3), (4) and (6), engaging in conduct involving moral turpitude and dishonesty, showing an adverse effect on fitness to practice law.

Syl. pt. 1 - “The best general definition of the term ‘moral turpitude’ is that it imports an act of baseness, vileness or depravity in the duties which one person owes to another or to society in general, which is contrary to the usual, accepted and customary rule of right and duty which a person should follow.” Syllabus Point 2, *Committee on Legal Ethics v. Scherr*, 149 W.Va. 721, 143 S.E.2d 141 (1965).

Syl. pt. 2 - The writing of a bad check by an attorney ordinarily does not constitute an act or crime involving moral turpitude.

Syl. pt. 3 - Where an attorney writes a worthless check under circumstances that demonstrate dishonesty or misrepresentation under Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility or conduct that adversely reflects on fitness to practice law under Disciplinary Rule 1-102(A)(6) of the Code of Professional Responsibility, disciplinary punishment is warranted. It should be shown that the attorney was either aware that the check was worthless when it was written or failed to make it good within a reasonable period of time after the attorney was aware the account had insufficient funds.

Respondent clearly demonstrated moral turpitude. He delayed two years in paying the check at issue here. The Court noted that the law as applied to worthless checks is now clarified and a stiffer penalty is appropriate in future. Public reprimand.

**Discipline** (continued)

**Perjury before grand jury**

*Committee on Legal Ethics v. Craig*, 415 S.E.2d 255 (1992) (Miller, J.)

Respondent was ex-Governor Moore's campaign manager in 1984. During the campaign, another worker told respondent that cash was needed "for the precincts." Moore gave respondent \$100,000 in hundred dollar bills and respondent distributed the money.

After the election Moore gave respondent \$5,000 in cash as partial payment for the difference between his promised and actual campaign salary. Moore told respondent not to report the payment and respondent treated it as a gift. After investigations began, respondent later declared the income and paid taxes and penalties.

During the 1989 U.S. grand jury investigation of Moore's manipulation of Workers Compensation regulations, the 1984 campaign practices were discussed. Respondent repeatedly denied that cash payments were made. He later admitted lying to the grand jury and obtained immunity. The Committee found respondent in violation of Rules 8.4(c) and (d) and recommended a two-year suspension.

Syl. pt. 1 - "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 783 (1985).

Syl. pt. 2 - "In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession." Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987)." Syllabus Point 5, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

Syl. pt. 3 - Perjured testimony before a grand jury by an attorney will be grounds for disciplinary charges even though no criminal indictment has resulted.

Syl. pt. 4 - False testimony on a material issue is a serious breach of basic standards as well as a breach of the attorney's oath of office and his duties as an attorney. Grounds for disciplinary action will lie even though no harm results from such wrongful acts.

**Discipline** (continued)

**Perjury before grand jury** (continued)

*Committee on Legal Ethics v. Craig*, (continued)

Respondent was technically not guilty of perjury before the grand jury because he corrected his testimony before the session of the grand jury was completed. 18 U.S.C. 1623(d). Nonetheless, the Court noted that respondent did testify falsely and was aware of election law violations and did not report them. Three year suspension and costs.

**Practicing without a license**

*Committee on Legal Ethics v. Taylor*, 437 S.E.2d 443 (1993) (Per Curiam)

Respondent was charged with practicing law while his license was suspended for failure to complete continuing legal education requirements. Respondent also failed to disclose that he was under indictment for uttering worthless checks when he applied to the 30th Circuit Public Defender office, a transgression which was also made a part of these charges.

Although he received a notice of hearing for practicing while suspended he failed to appear, sending an answer some time later. He then failed to appear at a second hearing.

Syl. pt. 1 - "In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar for the purpose of having suspended the license of an attorney to practice law for a designated period of time, the burden is on the Committee to prove by full, preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee. " Syl. pt. 1, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

Syl. pt. 2 - "Prior discipline is an aggravating factor in a pending disciplinary proceeding because it calls into question the fitness of the attorney to continue to practice a profession imbued with a public trust." Syl. pt. 5, *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986).

The Court imposed two consecutive six-month suspensions of respondent's license. Respondent must pass the Multistate Professional Responsibility Examination and pay all costs as a condition of reinstatement.

## ATTORNEYS

### Discipline (continued)

#### Prior discipline

*Committee on Legal Ethics v. Taylor*, 437 S.E.2d 443 (1993) (Per Curiam)

See ATTORNEYS Discipline, Practicing without a license, (p. 83) for discussion of topic.

#### Prosecuting attorney

*Committee on Legal Ethics v. Goode*, No. 21857 (11/23/93) (Per Curiam)

Respondent Goode, while acting as prosecuting attorney, improperly accepted private employment in a matter for which he was substantially responsible as a public employee. A woman who was recently divorced sought criminal contempt action for non-support. Before the petition was filed, her ex-husband got a criminal warrant against her and her boyfriend, charging abuse and neglect of the children by the marriage.

The ex-husband then obtained respondent Tiller, an assistant prosecuting attorney, to represent him in the contempt proceedings. Tiller was apparently unaware of the other charges against the woman. He filed a petition to modify custody, alleging abuse and neglect by the mother. At the subsequent hearing the husband testified that criminal warrants had been filed.

A criminal trial prosecuted by Goode resulted in the woman's conviction. The contempt petition she filed was not acted upon. Goode also acted as prosecuting attorney in the woman's boyfriend's case. The woman appealed her conviction to circuit court but the day of the hearing respondent Tiller met with her and with the husband and he agreed to drop charges if the woman would surrender custody to him. Tiller prepared an order to that effect. The woman's civil attorney later objected and a new order was prepared with the objections.

Respondent Goode signed the order dismissing the charges. He later aided the husband in modifying the visitation provisions of the custody agreement. The woman got a new attorney who objected to Goode's participation. The family law master ultimately ruled that the order modifying custody was not the result of fraud, duress or undue influence.

## ATTORNEYS

### Discipline (continued)

#### Prosecuting attorney (continued)

##### *Committee on Legal Ethics v. Goode*, (continued)

The Court noted that both criminal and change of custody proceedings handled by Goode involved the same questions and the same parties. Further, although respondent Tiller may not have initially known of the prior criminal charges, he later became aware of them. Both respondents acted unethically; public reprimands, costs of the proceeding and successful completion of the Multistate Professional Responsibility Examination for respondent Goode. Further, respondent Goode was ordered to submit a procedure for himself and his assistants to avoid future conflicts.

#### Public reprimand

##### *Committee on Legal Ethics v. Frame & Benninger*, 433 S.E.2d 579 (1993) (Per Curiam)

The Committee on Legal Ethics found respondent violated Rule 1.7(a) of the *Rules of Professional Conduct* for failing to act on a conflict of interest. A member of respondent's law firm filed an action involving a knee injury sustained in a mobile home sales lot. The majority stockholder in the mobile home sales company turned over the matter to her insurer and was told by an insurance company representative that an offer to settle would be made.

The stockholder subsequently contacted respondent regarding a divorce action. She discussed her interest in the mobile home company and her concern that her husband not receive any part of the company. Apparently respondent asked her if his firm was suing the corporation. She responded that she thought the matter was settled. Respondent filed the divorce action.

The personal injury action, which had not settled, was scheduled for trial just prior to the divorce action. Respondent was listed as counsel in both matters. An associate of respondent's firm (corespondent here) noticed the conflict and called it to respondent's attention. Respondent concluded that no conflict existed since the insurance company was the defendant. Despite opposing counsel's objection, the trial court found no conflict of interest, ruling that no confidential information had been disclosed.

Syl. pt. 1 - "The . . . [Rules of Professional Conduct] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Syl. Pt. 3, *Committee on Legal Ethics v. Tatterson*, 173 W.Va. 613, 319 S.E.2d 381 (1984).

## ATTORNEYS

### Discipline (continued)

#### Public reprimand (continued)

##### *Committee on Legal Ethics v. Frame & Benninger*, (continued)

Syl. pt. 2 - “This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys’ licenses to practice law.’ Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).” Syl. Pt. 1, *Committee on Legal Ethics v. Charonis*, 184 W.Va. 268, 400 S.E.2d 276 (1990).

The Court, citing Rule 1.7(a) and its commentary, found respondent’s actions insufficient. While acknowledging that no harm was done, nor even any information disclosed, the Court found the interests here were “directly adverse” in that respondent was called upon to cross-examine one client in the course of representing another client. See Formal Opinion 92-367, ABA committee on Ethics and Professional Responsibility, ABA/BNA Lawyers’ Manual on Professional Conduct Sec. 1001: 149 (1993). Public reprimand.

##### *Committee on Legal Ethics v. Goode*, No. 21857 (11/23/93) (Per Curiam)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 84) for discussion of topic.

##### *Committee on Legal Ethics v. Matthews*, 411 S.E.2d 265 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 54) for discussion of topic.

#### Repayment of funds

##### *Committee on Legal Ethics v. Hess*, 413 S.E.2d 169 (1991) (Miller, C.J.)

See ATTORNEYS Discipline, Duty to law partners, (p. 69) for discussion of topic.

## ATTORNEYS

### Discipline (continued)

#### Suspensions

*Committee on Legal Ethics v. Cometti*, 430 S.E.2d 320 (1993) (Miller, J.)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 48) for discussion of topic.

*Committee on Legal Ethics v. Ikner*, 438 S.E.2d 613 (1993) (McHugh, J.)

Respondent apparently fled the jurisdiction following filing of a statement of charges by the Committee regarding misappropriation of funds from his client trust account. A hearing was held at which respondent appeared and represented that he had repaid all amounts in question. The hearing panel directed him to present documentation at a future date.

Chief Disciplinary Counsel received information indicating respondent subsequently had negative balances in his trust account. Counsel requested bank records through June, 1993, including all checks and deposit slips for indicated months. Although respondent appeared in Charleston on 24 September 1993 for a meeting with Counsel, he would not allow Counsel to retain the original documents he brought with him.

On 1 October 1993 Counsel received information that respondent may have negotiated an insurance settlement check without his client's knowledge. On 6 October 1993 Counsel obtained a copy of the check and discussed the matter with respondent. Although he agreed to consult with his attorney the following day, he apparently left his home early on 7 October 1993 and has not been seen since. On 8 October 1993 a warrant issued for his arrest on charges of forgery and embezzlement.

The Committee sought an order suspending respondent's license pending his apprehension and trial on the criminal charges.

Syl. pt. 1 - "This Court is the final arbiter of legal ethic problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law.' Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984)." Syl. pt. 1, *Committee on Legal Ethics v. Charonis*, 184 W.Va. 268, 400 S.E.2d 276 (1990).

## ATTORNEYS

### Discipline (continued)

#### Suspensions (continued)

##### *Committee on Legal Ethics v. Ikner*, (continued)

Syl. pt. 2 - Under the authority of the Supreme Court of Appeal's inherent power to supervise, regulate and control the practice of law in this State, the Supreme Court of Appeals may suspend the license of a lawyer or may order such other actions as it deems appropriate, after providing the lawyer with notice and an opportunity to be heard, when there is evidence that a lawyer (1) has committed a violation of the Rules of Professional Conduct or is under a disability and (2) poses a substantial threat of irreparable harm to the public until the underlying disciplinary proceeding has been resolved.

The Court rejected respondent's attorney's claim that suspension without a hearing would violate respondent's right to due process. The Court noted that respondent not only disappeared while a disciplinary action was pending but he abandoned his clients in the process. Respondent was ordered to appear on 30 November 1993 before the Court and did not. License suspended.

##### *Committee on Legal Ethics v. McCreight*, No. 21507 (3/26/93) (Per Curiam)

See ATTORNEYS Discipline, Estates, (p. 72) for discussion of topic.

##### *Committee on Legal Ethics v. Taylor*, 437 S.E.2d 443 (1993) (Per Curiam)

See ATTORNEYS Discipline, Practicing without a license, (p. 83) for discussion of topic.

### Uttering

##### *Committee on Legal Ethics v. Taylor*, 437 S.E.2d 443 (1993) (Per Curiam)

See ATTORNEYS Discipline, Practicing without a license, (p. 83) for discussion of topic.

## ATTORNEYS

### Duty to report disciplinary action

*Committee on Legal Ethics v. Battistelli*, 405 S.E.2d 242 (1991) (Miller, C.J.)

See ATTORNEYS Discipline, Disciplinary action in foreign jurisdiction, (p. 68) for discussion of topic.

### Embezzlement

*Committee on Legal Ethics v. Ikner*, 438 S.E.2d 613 (1993) (McHugh, J.)

See ATTORNEYS Discipline, Suspensions, (p. 87) for discussion of topic.

### Estate settlement

*Committee on Legal Ethics v. Veneri*, 411 S.E.2d 865 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 55) for discussion of topic.

### Fiduciary responsibility

*Committee on Legal Ethics v. Ikner*, 438 S.E.2d 613 (1993) (McHugh, J.)

See ATTORNEYS Discipline, Suspensions, (p. 87) for discussion of topic.

*Committee on Legal Ethics v. Lambert*, 428 S.E.2d 65 (1993) (Per Curiam)

See ATTORNEYS Discipline, Fiduciary responsibility, (p. 74) for discussion of topic.

### Fines

*Committee on Legal Ethics v. Battistelli*, 405 S.E.2d 242 (1991) (Miller, C.J.)

See ATTORNEYS Discipline, Disciplinary action in foreign jurisdiction, (p. 68) for discussion of topic.

## ATTORNEYS

### Impairment

*Committee on Legal Ethics v. Wilson*, 408 S.E.2d 350 (1991) (McHugh, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

### Inadequate record

*State v. Bess*, 406 S.E.2d 721 (1991) (Per Curiam)

See ATTORNEYS Ineffective assistance, (p. 92) for discussion of topic.

### Incapacitation

#### Drug or alcohol test

*Committee on Legal Ethics v. Adams*, No. 21867 (12/9/93) (Per Curiam)

Respondent retained funds pursuant to work on two estates. Respondent failed to disburse the funds and was sued by the personal representatives of both estates, resulting in judgments of \$50,000 and \$165,847, respectively. Some indication exists that respondent may be missing statutes of limitations deadlines, not appearing at trial dates and mishandling other clients' funds. The Committee found that this dereliction may, in part, be attributable to mental illness.

Art. VI, § 24 of the By-Laws of the West Virginia State Bar requires that:

Whenever a judgment or decree shall be standing or rendered in any court against an attorney for money collected by him as such, such court shall suspend the license of such attorney until such judgment or decree shall be satisfied.

The Court ordered respondent to submit to psychiatric evaluations, forward them to the court, and select an attorney to inventory his files and financial records and take whatever action may be necessary. Suspension pending further order.

## ATTORNEYS

### **Incapacitation** (continued)

#### **Drug or alcohol test** (continued)

*Committee on Legal Ethics v. Lambert*, No. 20970 (7/10/92) (Per Curiam)

The Committee on Legal Ethics' Investigative Panel petitioned the Court to order a medical and psychological examination of respondent Sherman Lambert to determine whether he is incapacitated by drugs or other intoxicants.

On April 12, 1988 the Court ordered respondent to submit to a physical examination; respondent refused and was suspended indefinitely on May 18, 1988. Upon a subsequent examination respondent admitted to alcohol use but denied cocaine addiction as suspected by the examining physician.

Since that time, respondent has failed to pursue an appeal after assuring bar counsel that he would do so; he was arrested for possession of crack cocaine in Maryland; he failed to appear before a magistrate in a juvenile proceeding, resulting in contempt charges; he failed to appear before another magistrate in a criminal proceeding; and he failed to appear at a jury trial in federal district court, resulting in a show cause rule for criminal contempt. He also failed to make restitution to two clients to whom he owed settlement funds.

The Court ordered an examination and suspended respondent's license pending the outcome. Pending disciplinary actions were not stayed.

#### **Mental disorder**

*Committee on Legal Ethics v. Keenan*, 427 S.E.2d 471 (1993) (Per Curiam)

See ATTORNEYS Discipline, Failure to communicate with clients, (p. 73) for discussion of topic.

#### **Suspension**

*Committee on Legal Ethics v. Gordon*, No. 21979 (12/9/93) (Per Curiam)

An involuntary commitment petition was filed on respondent before the Marshall County Mental Hygiene Commission. At the conclusion of the hearing respondent was temporarily confined, not to exceed thirty days, pending a final decision. She has also been criminally charged for trespassing and harassing a priest. The Committee found respondent has recently been demonstrating poor legal performance.

## ATTORNEYS

### **Incapacitation** (continued)

#### **Suspension** (continued)

##### *Committee on Legal Ethics v. Gordon*, (continued)

The Court suspended respondent indefinitely pending further order.

##### *Committee on Legal Ethics v. Keenan*, 427 S.E.2d 471 (1993) (Per Curiam)

See ATTORNEYS Discipline, Failure to communicate with clients, (p. 73) for discussion of topic.

### **Ineffective assistance**

##### *State v. Bess*, 406 S.E.2d 721 (1991) (Per Curiam)

Appellant was convicted of felony-murder. He claimed that he was denied effective assistance of counsel in that counsel did not prevent him from making statements to police, allowed him to accompany police in looking for the murder weapon and failed to request a suppression hearing regarding confessions allegedly coerced by police.

Syl. pt. 2 - "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 attorney would have so acted in the defense of an accused." Syllabus point 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 3 - "Where the record on appeal is inadequate to resolve the merits of a claim of ineffective assistance of counsel, we will decline to reach the claim so as to permit the defendant to develop an adequate record in *habeas corpus*." Syllabus point 11, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

The Court found the record here inadequate and suggested that the issue be developed on *habeas corpus*.

##### *State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See INEFFECTIVE ASSISTANCE Inadequate record, (p. 303) for discussion of topic.

## ATTORNEYS

### Ineffective assistance (continued)

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 308) for discussion of topic.

*State v. Wickline*, 399 S.E.2d 42 (1990) (Miller, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 309) for discussion of topic.

### Failure to present evidence on capacity to waive rights

*Wickline v. House*, 424 S.E.2d 579 (1992) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 310) for discussion of topic.

### Standard for

*Dietz v. Legursky*, 425 S.E.2d 202 (1992) (McHugh, C.J.)

See EVIDENCE Character of victim, (p. 227) for discussion of topic.

*State ex rel. Redman v. Hedrick*, 408 S.E.2d 659 (1991) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 305) for discussion of topic.

*State v. Delaney*, 417 S.E.2d 903 (1992) (Brotherton, J.)

See DISCOVERY Psychological tests, Judge's discretion, (p. 164) for discussion of topic.

*State v. Jones*, 420 S.E.2d 736 (1992) (Miller, J.)

See INEFFECTIVE ASSISTANCE Presumption of, Appointment one day prior to trial, (p. 304) for discussion of topic.

## ATTORNEYS

### Ineffective assistance (continued)

#### Standard for (continued)

*State v. Stewart*, 419 S.E.2d 683 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Duty, Generally, (p. 473) for discussion of topic.

*Wickline v. House*, 424 S.E.2d 579 (1992) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 310) for discussion of topic.

### Malpractice

#### Release from

*Committee on Legal Ethics v. Cometti*, 430 S.E.2d 320 (1993) (Miller, J.)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 48) for discussion of topic.

### Mental illness

*Committee on Legal Ethics v. Farber*, 408 S.E.2d 274 (1991) (Neely, J.)

See ATTORNEYS Discipline, Free speech, (p. 75) for discussion of topic.

*Committee on Legal Ethics v. Wilson*, 408 S.E.2d 350 (1991) (McHugh, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

### Moral turpitude

#### Defined

*Committee on Legal Ethics v. Taylor*, 415 S.E.2d 280 (1992) (Miller, J.)

See ATTORNEYS Discipline, Moral turpitude, (p. 81) for discussion of topic.

## ATTORNEYS

### Professional responsibility

#### Attorney-client relationship

*Committee on Legal Ethics v. Cometti*, 430 S.E.2d 320 (1993) (Miller, J.)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 48) for discussion of topic.

*Committee on Legal Ethics v. Hobbs*, 439 S.E.2d 629 (1993) (Per Curiam)

See ATTORNEYS Discipline, Generally, (p.78 78) for discussion of topic.

*Committee on Legal Ethics v. Simmons*, 399 S.E.2d 894 (1990) (Per Curiam)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 51) for discussion of topic.

#### Burden of proof

*Committee on Legal Ethics v. Charonis*, 400 S.E.2d 276 (1990) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 52) for discussion of topic.

*Committee on Legal Ethics v. Gorrell*, 407 S.E.2d 923 (1991) (Brotherton, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 60) for discussion of topic.

*Committee on Legal Ethics v. Keenan*, 427 S.E.2d 471 (1993) (Per Curiam)

See ATTORNEYS Discipline, Failure to communicate with clients, (p. 73) for discussion of topic.

## ATTORNEYS

### Professional responsibility

#### Burden of proof (continued)

*Committee on Legal Ethics v. Lambert*, 428 S.E.2d 65 (1993) (Per Curiam)

See ATTORNEYS Discipline, Fiduciary responsibility, (p. 74) for discussion of topic.

*Committee on Legal Ethics v. Matthews*, 411 S.E.2d 265 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 54) for discussion of topic.

*Committee on Legal Ethics v. Mitchell*, 418 S.E.2d 733 (1992) (Neely, J.)

See ATTORNEYS Annulment, Community service, (p. 40) for discussion of topic.

*Committee on Legal Ethics v. Moore*, 411 S.E.2d 452 (1991) (Brotherton, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 63) for discussion of topic.

*Committee on Legal Ethics v. Morton*, 410 S.E.2d 279 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 55) for discussion of topic.

*Committee on Legal Ethics v. Veneri*, 411 S.E.2d 865 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 55) for discussion of topic.

#### Campaign law violations

*Committee on Legal Ethics v. Craig*, 415 S.E.2d 255 (1992) (Miller, J.)

See ATTORNEYS Discipline, Perjury before grand jury, (p. 82) for discussion of topic.

## ATTORNEYS

### Professional responsibility (continued)

#### Conflict of interest

*Committee on Legal Ethics v. Veneri*, 411 S.E.2d 865 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 55) for discussion of topic.

*Cooper v. Murensky*, No. 21438 (12/18/92) (Per Curiam)

See ATTORNEYS Conflict of interest, Court-appointed counsel, (p. 44) for discussion of topic.

#### Conviction of crimes

*Committee on Legal Ethics v. Boettner*, 422 S.E.2d 478 (1992) (Miller, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 57) for discussion of topic.

*Committee on Legal Ethics v. Carman*, No. 20161 (7/16/91) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 58) for discussion of topic.

*Committee on Legal Ethics v. Dues*, No. 21424 (12/11/92) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 59) for discussion of topic.

*Committee on Legal Ethics v. Folio*, 401 S.E.2d 248 (1990) (Workman, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 59) for discussion of topic.

*Committee on Legal Ethics v. Gorrell*, 407 S.E.2d 923 (1991) (Brotherton, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 60) for discussion of topic.

## ATTORNEYS

### Professional responsibility (continued)

#### Conviction of crimes (continued)

*Committee on Legal Ethics v. Grubb*, 420 S.E.2d 744 (1992) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 61) for discussion of topic.

*Committee on Legal Ethics v. Hart*, 410 S.E.2d 714 (1991) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 62) for discussion of topic.

*Committee on Legal Ethics v. Moore*, 411 S.E.2d 452 (1991) (Brotherton, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 63) for discussion of topic.

*Committee on Legal Ethics v. White*, 428 S.E.2d 556 (1993) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 64) for discussion of topic.

*Committee on Legal Ethics v. Wilson*, 408 S.E.2d 350 (1991) (McHugh, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

#### Desuetude

*Committee on Legal Ethics v. Printz*, 416 S.E.2d 720 (1992) (Neely, J.)

See ATTORNEYS Discipline, Desuetude, (p. 67) for discussion of topic.

## ATTORNEYS

### Professional responsibility (continued)

#### Disciplinary action in foreign jurisdiction

*Committee on Legal Ethics v. Battistelli*, 405 S.E.2d 242 (1991) (Miller, C.J.)

See ATTORNEYS Discipline, Disciplinary action in foreign jurisdiction, (p. 68) for discussion of topic.

#### Duty to law partners

*Committee on Legal Ethics v. Hess*, 413 S.E.2d 169 (1991) (Miller, C.J.)

See ATTORNEYS Discipline, Duty to law partners, (p. 69) for discussion of topic.

#### Embezzlement

*Committee on Legal Ethics v. Ikner*, 438 S.E.2d 613 (1993) (McHugh, J.)

See ATTORNEYS Discipline, Suspensions, (p. 87) for discussion of topic.

#### Estates

*Committee on Legal Ethics v. McCreight*, No. 21507 (3/26/93) (Per Curiam)

See ATTORNEYS Discipline, Estates, (p. 72) for discussion of topic.

#### Estate administration

*Committee on Legal Ethics v. Smith*, 399 S.E.2d 36 (1990) (Per Curiam)

See ATTORNEYS Discipline, Estate administration, (p. 71) for discussion of topic.

#### Estate settlement

*Committee on Legal Ethics v. Veneri*, 411 S.E.2d 865 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 55) for discussion of topic.

## ATTORNEYS

### Professional responsibility (continued)

#### *Ex parte* communications

*In the Matter of Kaufman*, 416 S.E.2d 480 (1992) (Brotherton, J.)

See JUDGES *Ex parte* communications, (p. 347) for discussion of topic.

#### Failure to file appeal

*Committee on Legal Ethics v. Cowgill*, No. 21518 (2/24/93) (Per Curiam)

See ATTORNEYS Discipline, Failure to file appeal, (p. 74) for discussion of topic.

#### Failure to respond to Bar counsel

*Committee on Legal Ethics v. Martin*, 419 S.E.2d 4 (1992) (Workman, J.)

See ATTORNEYS Discipline, Admission of guilt, (p. 47) for discussion of topic.

#### Failure to respond to clients

*Committee on Legal Ethics v. Keenan*, 427 S.E.2d 471 (1993) (Per Curiam)

See ATTORNEYS Discipline, Failure to communicate with clients, (p. 73) for discussion of topic.

#### Free speech

*Committee on Legal Ethics v. Farber*, 408 S.E.2d 274 (1991) (Neely, J.)

See ATTORNEYS Discipline, Free speech, (p. 75) for discussion of topic.

#### Generally

*Committee on Legal Ethics v. Charonis*, 410 S.E.2d 418 (1991) (Per Curiam)

See ATTORNEYS Discipline, Generally, (p. 77) for discussion of topic.

## ATTORNEYS

### Professional responsibility (continued)

#### Generally (continued)

*Committee on Legal Ethics v. Farber*, 408 S.E.2d 274 (1991) (Neely, J.)

See ATTORNEYS Discipline, Free speech, (p. 75) for discussion of topic.

*Committee on Legal Ethics v. Morton*, 410 S.E.2d 279 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 55) for discussion of topic.

#### Impairment

*Committee on Legal Ethics v. Farber*, 408 S.E.2d 274 (1991) (Neely, J.)

See ATTORNEYS Discipline, Free speech, (p. 75) for discussion of topic.

*Committee on Legal Ethics v. Wilson*, 408 S.E.2d 350 (1991) (McHugh, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

#### Incapacitation

*Committee on Legal Ethics v. Lambert*, No. 20970 (7/10/92) (Per Curiam)

See ATTORNEYS Incapacitation, Drug or alcohol test, (p. 91) for discussion of topic.

#### Lawyer as witness

*State ex rel. Karr v. McCarty*, 417 S.E.2d 120 (1992) (Per Curiam)

See ATTORNEYS Discipline, Lawyer as witness, (p. 79) for discussion of topic.

## ATTORNEYS

### Professional responsibility (continued)

#### Misrepresentation to court

*Committee on Legal Ethics v. Cowgill*, No. 21518 (2/24/93) (Per Curiam)

See ATTORNEYS Discipline, Failure to file appeal, (p. 74) for discussion of topic.

#### Mitigation hearing

*Committee on Legal Ethics v. Boettner*, 422 S.E.2d 478 (1992) (Miller, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 57) for discussion of topic.

*Committee on Legal Ethics v. Carman*, No. 20161 (7/16/91) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 58) for discussion of topic.

*Committee on Legal Ethics v. Folio*, 401 S.E.2d 248 (1990) (Workman, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 59) for discussion of topic.

*Committee on Legal Ethics v. Hart*, 410 S.E.2d 714 (1991) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 62) for discussion of topic.

*Committee on Legal Ethics v. Moore*, 411 S.E.2d 452 (1991) (Brotherton, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 63) for discussion of topic.

*Committee on Legal Ethics v. Wilson*, 408 S.E.2d 350 (1991) (McHugh, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

## ATTORNEYS

### Professional responsibility (continued)

#### Moral turpitude

*Committee on Legal Ethics v. Taylor*, 415 S.E.2d 280 (1992) (Miller, J.)

See ATTORNEYS Discipline, Moral turpitude, (p. 81) for discussion of topic.

#### Perjury

*Committee on Legal Ethics v. Craig*, 415 S.E.2d 255 (1992) (Miller, J.)

See ATTORNEYS Discipline, Perjury before grand jury, (p. 82) for discussion of topic.

#### Practicing law without a license

*Committee on Legal Ethics v. Taylor*, 437 S.E.2d 443 (1993) (Per Curiam)

See ATTORNEYS Discipline, Practicing without a license, (p. 83) for discussion of topic.

#### Public reprimand

*Committee on Legal Ethics v. Frame & Benninger*, 433 S.E.2d 579 (1993) (Per Curiam)

See ATTORNEYS Discipline, Public reprimand, (p. 85) for discussion of topic.

*Committee on Legal Ethics v. Goode*, No. 21857 (11/23/93) (Per Curiam)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 84) for discussion of topic.

#### Rehabilitation

*Committee on Legal Ethics v. Farber*, 408 S.E.2d 274 (1991) (Neely, J.)

See ATTORNEYS Discipline, Free speech, (p. 75) for discussion of topic.

## ATTORNEYS

### Professional responsibility (continued)

#### Suspension

*Committee on Legal Ethics v. Ikner*, 438 S.E.2d 613 (1993) (McHugh, J.)

See ATTORNEYS Discipline, Suspensions, (p. 87) for discussion of topic.

#### Prosecuting

##### Comments at trial

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 463) for discussion of topic.

*State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 465) for discussion of topic.

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments made during closing argument, (p. 466) for discussion of topic.

##### Conflict of interest

*Bayles v. Hedrick*, 422 S.E.2d 524 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Conflict of interest, (p. 467) for discussion of topic.

*State ex rel. Bailey v. Facemire*, 413 S.E.2d 183 (1991) (Workman, J.)

and

*Justice v. Thompson*, 413 S.E.2d 183 (1991) (Workman, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 468) for discussion of topic.

## ATTORNEYS

### Prosecuting (continued)

#### Conflict of interest (continued)

*State v. James R.*, 422 S.E.2d 521 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 470) for discussion of topic.

#### Conflict with private practice

*Committee on Legal Ethics v. Goode*, No. 21857 (11/23/93) (Per Curiam)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 84) for discussion of topic.

#### Disqualification

*Kutsch v. Broadwater*, 404 S.E.2d 249 (1991) (Per Curiam)

See PROSECUTING ATTORNEY Disqualification, (p. 471) for discussion of topic.

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See PROSECUTING ATTORNEY Disqualification, Reasons to appear on record, (p. 472) for discussion of topic.

#### Duty generally

*State v. Stewart*, 419 S.E.2d 683 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Duty, Generally, (p. 473) for discussion of topic.

#### Effect of disqualification on indictment

*State ex rel. Knotts v. Watt*, 413 S.E.2d 173 (1991) (Miller, C.J.)

See INDICTMENT Dismissal of, Prosecuting attorney disqualified, (p. 294) for discussion of topic.

## ATTORNEYS

### Prosecuting (continued)

#### Exculpatory evidence

*State v. James*, 411 S.E.2d 692 (1991) (Neely, J.)

See EVIDENCE Exculpatory, Duty to disclose, (p. 232) for discussion of topic.

#### Grand jury influenced by

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See PROSECUTING ATTORNEY Grand jury, Evidence presented to, (p. 478) for discussion of topic.

#### Misstating evidence

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments made during closing argument, (p. 466) for discussion of topic.

#### Withholding evidence

*State v. James*, 411 S.E.2d 692 (1991) (Neely, J.)

See EVIDENCE Exculpatory, Duty to disclose, (p. 232) for discussion of topic.

### Public official

#### Ethical violations by

*Committee on Legal Ethics v. White*, 428 S.E.2d 556 (1993) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 64) for discussion of topic.

### Public reprimand

*Committee on Legal Ethics v. Dues*, No. 21424 (12/11/92) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 59) for discussion of topic.

## ATTORNEYS

### Public reprimand (continued)

*Committee on Legal Ethics v. Frame & Benninger*, 433 S.E.2d 579 (1993) (Per Curiam)

See ATTORNEYS Discipline, Public reprimand, (p. 85) for discussion of topic.

*Committee on Legal Ethics v. Martin*, 419 S.E.2d 4 (1992) (Workman, J.)

See ATTORNEYS Discipline, Admission of guilt, (p. 47) for discussion of topic.

*Committee on Legal Ethics v. Matthews*, 411 S.E.2d 265 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 54) for discussion of topic.

*Committee on Legal Ethics v. Morton*, 410 S.E.2d 279 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 55) for discussion of topic.

*Committee on Legal Ethics v. Taylor*, 415 S.E.2d 280 (1992) (Miller, J.)

See ATTORNEYS Discipline, Moral turpitude, (p. 81) for discussion of topic.

### Suspensions

*Committee on Legal Ethics v. Adams*, No. 21867 (12/9/93) (Per Curiam)

See ATTORNEYS Incapacitation, Drug or alcohol test, (p. 90) for discussion of topic.

*Committee on Legal Ethics v. Boettner*, 422 S.E.2d 478 (1992) (Miller, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 57) for discussion of topic.

## ATTORNEYS

### Suspensions (continued)

*Committee on Legal Ethics v. Charonis*, 400 S.E.2d 276 (1990) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 52) for discussion of topic.

*Committee on Legal Ethics v. Charonis*, 410 S.E.2d 418 (1991) (Per Curiam)

See ATTORNEYS Discipline, Generally, (p. 77) for discussion of topic.

*Committee on Legal Ethics v. Cometti*, 430 S.E.2d 320 (1993) (Miller, J.)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 48) for discussion of topic.

*Committee on Legal Ethics v. Cowgill*, No. 21518 (2/24/93)(Per Curiam)

See ATTORNEYS Discipline, Failure to file appeal, (p. 74) for discussion of topic.

*Committee on Legal Ethics v. Craig*, 415 S.E.2d 255 (1992) (Miller, J.)

See ATTORNEYS Discipline, Perjury before grand jury, (p. 82) for discussion of topic.

*Committee on Legal Ethics v. Farber*, 408 S.E.2d 274 (1991) (Neely, J.)

See ATTORNEYS Discipline, Free speech, (p. 75) for discussion of topic.

*Committee on Legal Ethics v. Gordon*, No. 21979 (12/9/93) (Per Curiam)

See ATTORNEYS Incapacitation, Suspension, (p. 91) for discussion of topic.

*Committee on Legal Ethics v. Hess*, 413 S.E.2d 169 (1991) (Miller, C.J.)

See ATTORNEYS Discipline, Duty to law partners, (p. 69) for discussion of topic.

## ATTORNEYS

### Suspensions (continued)

*Committee on Legal Ethics v. Hobbs*, 439 S.E.2d 629 (1993) (Per Curiam)

See ATTORNEYS Discipline, Generally, (p. 78) for discussion of topic.

*Committee on Legal Ethics v. Ikner*, 438 S.E.2d 613 (1993) (McHugh, J.)

See ATTORNEYS Discipline, Suspensions, (p. 87) for discussion of topic.

*Committee on Legal Ethics v. Keenan*, 427 S.E.2d 471 (1993) (Per Curiam)

See ATTORNEYS Discipline, Failure to communicate with clients, (p. 73) for discussion of topic.

*Committee on Legal Ethics v. McCreight*, No. 21507 (3/26/93) (Per Curiam)

See ATTORNEYS Discipline, Estates, (p. 72) for discussion of topic.

*Committee on Legal Ethics v. Mitchell*, 418 S.E.2d 733 (1992) (Neely, J.)

See ATTORNEYS Annulment, Community service, (p. 40) for discussion of topic.

*Committee on Legal Ethics v. Simmons*, 399 S.E.2d 894 (1990) (Per Curiam)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 51) for discussion of topic.

*Committee on Legal Ethics v. Smith*, 399 S.E.2d 36 (1990) (Per Curiam)

See ATTORNEYS Discipline, Estate administration, (p. 71) for discussion of topic.

*Committee on Legal Ethics v. Veneri*, 411 S.E.2d 865 (1991) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 55) for discussion of topic.

## ATTORNEYS

### **Suspensions** (continued)

*Committee on Legal Ethics v. White*, 428 S.E.2d 556 (1993) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 64) for discussion of topic.

### **Worthless checks**

#### **Aggravating factor**

*Committee on Legal Ethics v. Taylor*, 437 S.E.2d 443 (1993) (Per Curiam)

See ATTORNEYS Discipline, Practicing without a license, (p. 83) for discussion of topic.

#### **When constitutes moral turpitude**

*Committee on Legal Ethics v. Taylor*, 415 S.E.2d 280 (1992) (Miller, J.)

See ATTORNEYS Discipline, Moral turpitude, (p. 81) for discussion of topic.

## **BAIL**

### **Discretion of court**

*State ex rel. Woods v. Wolverton*, No. 20165 (7/11/91) (Per Curiam)

See ABUSE OF DISCRETION Bail, (p. 12) for discussion of topic.

### **Revocation of**

#### **First-degree sexual assault**

*State ex rel. Spaulding v. Watt*, 423 S.E.2d 217 (1992) (Miller,)

See SEXUAL ATTACKS Bail, Right to in sexual assault, (p. 564) for discussion of topic.

#### **Hearing required**

*State v. Harding*, 422 S.E.2d 619 (1992) (Per Curiam)

Appellant was charged with burglary and grand larceny while on parole for aggravated robbery. The jury hung and a mistrial was declared, resulting in appellant's being put on personal recognizance bond pending retrial, with directions to report weekly to his probation officer.

Appellant failed to report for two consecutive weeks and bond was revoked. Appellant also failed to appear at the scheduled retrial and was indicted pursuant to *W.Va. Code*, 62-1C-17b. He was found guilty and sentenced to one to five. On appeal he claimed that the trial court should not have allowed evidence of the bond revocation; that the revocation was immaterial and irrelevant; and that the procedure in *Marshall v. Casey*, 174 W.Va. 204, 324 S.E.2d 346 (1984) was not followed.

At the hearing testimony was introduced on the revocation by cross-examination of two prosecution witnesses by appellant's counsel. An additional witness was called to clarify the revocation issue. No objection was made.

Further, appellant attempted to reopen his case after the jury had begun deliberations. The jury had sent a question regarding whether appellant had received a copy of the order to appear at the original hearing. The trial court denied the motion to reopen.

## BAIL

### Revocation of (continued)

#### Hearing required (continued)

##### *State v. Harding*, (continued)

Syl. pt. 1 - “An accused admitted to bail pursuant to *W.Va. Code*, 62-1C-1 [1983], *et seq.*, whose bail is subsequently revoked, upon credible evidence reflected in a sworn affidavit by the prosecuting attorney, a law enforcement officer, surety or other appropriate person, for alleged violations of law or conditions of the bail, may, by motion, challenge the revocation of bail and seek readmission to bail and upon that motion, the accused shall be entitled revocation of bail and requested readmission to bail shall be governed by subdivision (h) of Rule 46 of the West Virginia Rules of Criminal Procedure, which subdivision provides for ‘Bail Determination Hearings’ in certain bail matters.” Syl. Pt. 2, *Marshall v. Casey*, 174 W.Va. 204, 324 S.E.2d 346 (1984).

Syl. pt. 2 - “Where a party objects to incompetent evidence, but subsequently introduces the same evidence, he is deemed to have waived his objection.” Syl. Pt. 3, in part, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987).

Syl. pt. 3 - “Whether a party shall be permitted to introduce further evidence after the case has been closed and submitted to the jury, and before the jury returns a verdict, is a matter of sound discretion of the trial court, and its exercise of this discretionary power will not be cause for reversal except in case of the abuse of the discretion, and that it plainly appears that the person making the request has been injured by the refusal.” Syl. pt. 4, *State v. Littleton*, 77 W.Va. 804, 88 S.E. 458 (1916).” Syl. Pt. 4, *State v. Sandler*, 175 W.Va. 572, 336 S.E.2d 535 (1985).

The Court found the procedure proper; a motion to revoke was filed with supporting statement from the probation officer setting forth appellant’s failure to report. No abuse of discretion is denying appellant’s motion to reopen. No showing of prejudice by denial. No error.

### Right to

#### After conviction of codefendant

*State ex rel. Woods v. Wolverton*, No. 20165 (7/11/91) (Per Curiam)

See ABUSE OF DISCRETION Bail, (p. 12) for discussion of topic.

## **BAIL**

### **Right to** (continued)

#### **First-degree sexual assault of children**

*State ex rel. Spaulding v. Watt*, 423 S.E.2d 217 (1992) (Miller,)

See SEXUAL ATTACKS Bail, Right to in sexual assault, (p. 564) for discussion of topic.

## **BURGLARY**

### **Dwelling house**

#### **When ceases to be**

*State v. Scarberry*, 418 S.E.2d 361 (1992) (Per Curiam)

See INDICTMENT Sufficiency of, Specific acts alleged, (p. 300) for discussion of topic.

### **Sentencing**

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See SENTENCING Burglary, (p. 548) for discussion of topic.

### **Sufficiency of evidence**

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

Appellant was found guilty of daytime burglary by entering without breaking in the looting of his mother's home. Missing were a diamond ring, a key to Mrs. Ward's safety deposit box and her will. The diamond ring and will were never recovered. Appellant entered the safety deposit box on or about the time of the burglary. Mrs. Ward was then very ill and in the hospital. Appellant was not a beneficiary under the will but would have inherited the estate if Mrs. Ward died without a will. One witness placed appellant outside his mother's home during the day at time of the burglary. Appellant had possession of his mother's house and car keys and refused to return them. Mrs. Ward had given the keys to a neighbor and did not intend her son to have possession of them.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.' Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978)." Syllabus Point 1, *State v. Craft*, 165 W.Va. 741, 272 S.E.2d 46 (1980).

## BURGLARY

### Sufficiency of evidence (continued)

#### *State v. Ward*, (continued)

Syl. pt. 2 - “Evidence of the exclusive possession by an accused person of recently stolen goods, corroborated by other proper evidence, facts and circumstances tending to prove guilt, may be sufficient to convict the possessor of the theft of such goods, even though the corroborating evidence, facts and circumstances alone would be insufficient to support a conviction. Whether, in such circumstances, the evidence is sufficient to establish the guilt of the accused beyond reasonable doubt is ordinarily a question of fact for the jury.’ Syllabus Point 2, *State v. Etchell*, 147 W.Va. 338, 127 S.E.2d 609 (1962).” Syllabus point 4, *State v. Craft*, 165 W.Va. 741, 272 S.E.2d 46 (1980).

Here, although appellant claimed that he had his own key to the safety deposit box the jury chose to believe otherwise. Evidence sufficient. No error.

## CERTIFIED QUESTION

### Conflict of interest

#### Prosecuting attorney

*Bayles v. Hedrick*, 422 S.E.2d 524 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Conflict of interest, (p. 467) for discussion of topic.

#### Prosecuting attorney

#### Conflict of interest

*Bayles v. Hedrick*, 422 S.E.2d 524 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Conflict of interest, (p. 467) for discussion of topic.

#### Use in criminal cases

*State v. Lewis*, 422 S.E.2d 807 (1992) (Miller, J.)

See PROSECUTING ATTORNEY Appeal by, Prohibition, (p. 461) for discussion of topic.

#### Video poker declared unlawful

*United States v. Dobkin*, 423 S.E.2d 612 (1992) (Neely, J.)

See VIDEO POKER Declared unlawful, (p. 613) for discussion of topic.

## **CHILD CUSTODY**

### **Guidelines for changing**

*James M. v. Maynard*, 408 S.E.2d 400 (1991) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Improvement period, (p. 9) for discussion of topic.

### **Termination of parental rights**

*James M. v. Maynard*, 408 S.E.2d 400 (1991) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Improvement period, (p. 9) for discussion of topic.

### **Recision of voluntary relinquishment**

*Snyder v. Scheerer*, 436 S.E.2d 299 (1993) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Subsequent recision of, (p. 596) for discussion of topic.

### **Standard of proof**

*State v. Krystal T.*, 407 S.E.2d 395 (1991) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 596) for discussion of topic.

### **Subsequent recision of**

*Snyder v. Scheerer*, 436 S.E.2d 299 (1993) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Subsequent recision of, (p. 596) for discussion of topic.

## CITIZEN COMPLAINTS

### **Basis for warrant**

*Harman v. Frye*, 425 S.E.2d 566 (1992) (McHugh, C.J.)

See WARRANTS Citizen's complaint as basis for, (p. 617) for discussion of topic.

## CIVIL PENALTY

### Distinguished from criminal

*State ex rel. Palumbo v. Graley's*, 425 S.E.2d 177 (1992) (McHugh, C.J.)

See PENALTIES Civil distinguished from criminal, (p. 414) for discussion of topic.

## CLOTHING

### Prison attire

#### Defendant's right to appear without

*State v. Rood*, 422 S.E.2d 516 (1992) (Per Curiam)

See DUE PROCESS Prison uniforms, Trial while wearing, (p. 188) for discussion of topic.

## **COLLATERAL CRIMES**

### **Admissibility**

*State v. Dorisio*, 434 S.E.2d 707 (1993) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 206) for discussion of topic.

*State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 207) for discussion of topic.

### **Generally**

*State v. Bunda and Devault*, 419 S.E.2d 457 (1992) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 205) for discussion of topic.

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 208) for discussion of topic.

### **Use of in abuse and neglect or termination proceeding**

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Abuse and neglect, Evidence of prior abuse, (p. 588) for discussion of topic.

## COMPETENCY

### Failure to challenge

#### Ineffective assistance of counsel

*Wickline v. House*, 424 S.E.2d 579 (1992) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 310) for discussion of topic.

### Right to psychiatric evaluation

*State v. Hatfield*, 413 S.E.2d 162 (1991) (McHugh, J.)

See COMPETENCY Suicide attempt, Effect of, (p. 122) for discussion of topic.

### Standard for

*State v. Hatfield*, 413 S.E.2d 162 (1991) (McHugh, J.)

See COMPETENCY Suicide attempt, Effect of, (p. 122) for discussion of topic.

### Suicide attempt

#### Effect of

*State v. Hatfield*, 413 S.E.2d 162 (1991) (McHugh, J.)

Appellant pled guilty to first-degree murder and two counts of malicious wounding. He was sentenced to life without mercy for the murder and two to ten years for each count of malicious wounding. Following indictment appellant attempted suicide twice. Numerous motions were filed and findings were made regarding appellant's competency. His guilty plea was entered against the advice of counsel.

## COMPETENCY

### Suicide attempt (continued)

#### Effect of (continued)

##### *State v. Hatfield*, (continued)

Syl. pt. 1 - “When a criminal defendant proposes to enter a plea of guilty, the trial judge should interrogate such defendant on the record with regard to his intelligent understanding of the following rights, some of which he will waive by pleading guilty: 1) the right to retain counsel of his choice, and if indigent, the right to court appointed counsel; 2) the right to consult with counsel and have counsel prepare the defense; 3) the right to a public trial by an impartial jury of twelve persons; 4) the right to have the State prove its case beyond a reasonable doubt and the right of the defendant to stand mute during the proceedings; 5) the right to confront and cross-examine his accusers; 6) the right to present witnesses in his own defense and to testify himself in his own defense; 7) the right to appeal the conviction for any errors of law; 8) the right to suppress illegally obtained evidence and illegally obtained confessions; and, 9) the right to challenge in the trial court and on appeal all Pre-trial proceedings.” Syl. pt. 3, *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975).

Syl. pt. 2 - “When a trial judge is made aware of a possible problem with a defendant’s competency, it is abuse of discretion to deny a motion for psychiatric evaluation.” Syl. pt. 4, in part, *State v. Demastus*, 165 W.Va. 572, 270 S.E.2d 649 (1980).

Syl. pt. 3 - “Genuine attempts at suicide constitute evidence of irrational behavior. When these acts are brought to the attention of a trial judge, he should order a psychiatric examination of a defendant.” Syl. pt. 2, *State v. Watson*, 173 W.Va. 553, 318 S.E.2d 603 (1984).

Syl. pt. 4 - “The test for mental competency to stand trial and the test for mental competency to plead guilty are the same.” Syl. pt. 2, *State v. Cheshire*, 170 W.Va. 217, 292 S.E.2d 628 (1982).

Syl. pt. 5 - “It is a fundamental guaranty of due process that a defendant cannot be tried or convicted for a crime while he or she is mentally incompetent.” *State v. Cheshire*, 170 W.Va. 217, 292 S.E.2d 628, 630 (1982).

## COMPETENCY

### Suicide attempt (continued)

#### Effect of (continued)

##### *State v. Hatfield*, (continued)

Syl. pt. 6 - Where a circuit court has found that a defendant in a criminal case where the possible punishment is life imprisonment without mercy is competent to stand trial, but subsequent to the competency hearing, the defendant attempts to commit suicide, then against advice of counsel indicates his desire to plead guilty to the charges in the indictment, before taking the plea of guilty, the trial judge should make certain inquiries of the defendant and counsel for the defendant in addition to those mandated in *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975). The court should require counsel to state on the record the reason why that counsel opposes the guilty plea. The court should then ask the defendant to acknowledge on the record that he understands his counsel's statements and if in view of them he still desires to plead guilty. If the defendant then states he still desires to plead guilty, the court may accept the plea.

The Court noted that the advice the trial court gave to appellant would normally be sufficient to enter a guilty plea. (See *W.Va.R.Crim.P.*, Rule 11.) Here, however, appellant's second suicide attempt came after he was adjudged competent to stand trial. The trial court did not go far enough in questioning appellant's decision to plead guilty and his understanding of the consequences. Reversed and remanded.

## CONCERTED ACTS

### Liability for

*State v. Lola Mae C.*, 408 S.E.2d 31 (1991) (Workman, J.)

See SEXUAL ATTACKS Multiple acts of intercourse, (p. 568) for discussion of topic.

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

Appellant was found guilty of four incidents of breaking and entering. On appeal he claimed the evidence as to one count was insufficient in that the prosecution did not show appellant participated with his co-defendant. The prosecution claimed appellant was guilty under the principle of concerted action.

Syl. pt. 4 - “Under the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator.” Syl. pt. 11, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 5 - “In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.” Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The Court found the evidence sufficient to establish concerted action. No error.

## CONDITIONS OF CONFINEMENT

### Rules regarding

#### Promulgation of

*Kincaid v. Mangum*, 432 S.E.2d 74 (1993) (McHugh, J.)

See PRISON/JAIL CONDITIONS Overcrowding and rules for exercise, Promulgation of rules regarding, (p. 435) for discussion of topic.

## CONFESSION OF ERROR

### Effect of

*State v. Walter*, 423 S.E.2d 222 (1992) (Per Curiam)

Appellant was convicted of first-degree sexual abuse and sexual assault. After trial the defense moved for judgment notwithstanding the verdict and the prosecution conceded on the record that the evidence was insufficient to support the verdict.

Syl. pt. 1 - “In a criminal case where the state confesses error, urges that the judgment be reversed and that the defendant be granted a new trial, this Court, upon ascertaining that the errors confessed are reversible errors and do in fact constitute cause for the reversal of the judgment of conviction, will reverse the judgment and grant the defendant a new trial.” Syllabus, *State v. Goff*, 159 W.Va. 348, 221 S.E.2d 891 (1976).

Syl. pt. 2 - “This Court is not obligated to accept the State’s confession of error in a criminal case. We will do so when, after a proper analysis, we believe error occurred.” Syllabus point 8, *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

The Court accepted the prosecution’s admission that the evidence was insufficient to support the necessary element of intrusion in the assault charges. The only evidence was hearsay testimony by a sexual assault counselor who interviewed the victims. The victims, who were minors, did not testify.

Because of the cumulative prejudicial effect of the improper assault convictions, the Court also reversed the abuse conviction. Reversed and remanded.

## CONFESSIONS

### Admissibility

#### Generally

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See EVIDENCE Admissibility, Confessions, (p. 203) for discussion of topic.

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See CONFESSIONS Admissibility, Warrantless arrest, (p. 128) for discussion of topic.

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 537) for discussion of topic.

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 539) for discussion of topic.

*State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 540) for discussion of topic.

#### Warrantless arrest

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

Appellant was convicted of eight counts of sexual assault involving her sixth grade pupil. She was interviewed by police officers her home and agreed to give a voluntary statement after being told she was not under arrest; and having signed a waiver of her rights and a statement that she was not coerced or induced into giving the statement. She also executed a written version of her statement, acknowledging its accuracy.

On appeal she claimed that the warrantless arrest in her home was improper and therefore the confession should be suppressed as a product of that arrest.

## CONFESSIONS

### Admissibility (continued)

#### Warrantless arrest (continued)

##### *State v. Koon*, (continued)

Syl. pt. 4 - “Exclusion of a confession obtained as a result of an illegal arrest without a warrant is mandated unless the causal connection between the arrest and the confession has been clearly broken.” Syl. pt. 3, *State v. Canby*, 162 W.Va. 666, 252 S.E.2d 164 [1979].

Syl. pt. 3, *State v. Sprouse*, 171 W.Va. 58, 297 S.E.2d 833 (1982).” Syllabus point 4, *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987).

The Court noted the statement was obtained before her arrest. No error.

#### Admissibility for impeachment

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 220) for discussion of topic.

#### Generally

*State v. Slaman*, 431 S.E.2d 91 (1993) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 204) for discussion of topic.

#### Coerced

*State ex rel. Justice v. Allen*, 432 S.E.2d 199 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 535) for discussion of topic.

#### Involuntary

##### Admissibility

*State v. Smith*, 410 S.E.2d 269 (1991) (Neely, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 307) for discussion of topic.

## CONFESSIONS

### Voluntariness

*State v. Bess*, 406 S.E.2d 721 (1991) (Per Curiam)

Appellant was convicted of felony murder. He was connected with the killing by a neighbor of the victim who saw appellant's car near the victim's house several days prior to the killing. A pistol then in the victim's possession was sold by appellant, as was appellant's own car.

Following his arrest, appellant was taken before a magistrate and advised of his rights. He did not request an attorney. While in the restroom with a police officer, appellant claimed he was coerced into confessing. Appellant was again advised of his rights, again waived them, and confessed on tape. The trial court admitted the statements.

Syl. pt. 1 - "A trial court's decision regarding the Voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syllabus point 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Syl. pt. 2 - "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 attorney would have so acted in the defense of an accused." Syllabus point 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 3 - "Where the record on appeal is inadequate to resolve the merits of a claim of ineffective assistance of counsel, we will decline to reach the claim so as to permit the defendant to develop an adequate record in *habeas corpus*." Syllabus point 11, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

Syl. pt. 4 - "The delay between the time of arrest or custodial interrogation and the giving of a confession is most critical for prompt presentment purposes because during this time period custodial confinement and interrogation can be used to attempt to produce a confession." Syllabus point 4, *State v. Wickline*, 184 W.Va. 12, 399 S.E.2d 42 (1990).

No indication of coercion here. No error.

*State v. Bunda and Devault*, 419 S.E.2d 457 (1992) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 535) for discussion of topic.

## CONFESSIONS

### Voluntariness (continued)

*State v. George*, 408 S.E.2d 291 (1991) (Workman, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 536) for discussion of topic.

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See EVIDENCE Admissibility, Confessions, (p. 203) for discussion of topic.

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 537) for discussion of topic.

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 539) for discussion of topic.

### Coercion

*State ex rel. Justice v. Allen*, 432 S.E.2d 199 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 535) for discussion of topic.

*State v. Gray*, 418 S.E.2d 597 (1992) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 536) for discussion of topic.

### Delay in producing written statement

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See RIGHT TO COUNSEL Recanting request for, (p. 502) for discussion of topic.

## CONFESSIONS

### Voluntariness (continued)

#### Delay in taking before magistrate

*State v. Bess*, 406 S.E.2d 721 (1991) (Per Curiam)

See CONFESSIONS Voluntariness, (p. 130) for discussion of topic.

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See RIGHT TO COUNSEL Recanting request for, (p. 502) for discussion of topic.

*State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Statement written by police officer, (p. 547) for discussion of topic.

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 220) for discussion of topic.

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 538) for discussion of topic.

*State v. Wickline*, 399 S.E.2d 42 (1990) (Miller, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Delay in taking before magistrate, (p. 545) for discussion of topic.

## CONFLICT OF INTEREST

### Attorney-client relationship

#### Business relations with client

*Committee on Legal Ethics v. Cometti*, 430 S.E.2d 320 (1993) (Miller, J.)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 48) for discussion of topic.

### Prosecuting attorney

*State ex rel. Bailey v. Facemire*, 413 S.E.2d 183 (1991) (Workman, J.)

and

*Justice v. Thompson*, 413 S.E.2d 183 (1991) (Workman, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 468) for discussion of topic.

*State ex rel. McClanahan v. Hamilton*, 430 S.E.2d 569 (1993) (Miller, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 469) for discussion of topic.

## CONSPIRACY

### Sufficiency of evidence

*State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

Appellant was convicted of conspiracy to commit grand larceny. At trial, counsel moved for judgment of acquittal at the close of the prosecution's evidence and again at the end of the trial, which motions were denied.

Syl. pt. 7 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 8 - "In order for the State to prove a conspiracy under *W.Va. Code*, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy." Syllabus Point 4, *State v. Less*, 170 W.Va. 259, 294 S.E.2d 62 (1981).

Syl. pt. 9 - "Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived." Syllabus Point 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981).

The evidence here was sufficient. No error.

*State v. Stevens*, 436 S.E.2d 312 (1993) (Per Curiam)

Appellant was convicted of conspiracy to commit breaking and entering. The prosecution presented an eyewitness who claimed to have seen appellant and his co-defendant exit a store through a broken window carrying a crowbar. A tire iron and two bricks were found in the store. The area was well-lit and the eyewitness was within a few feet of the store. Appellant was stopped twelve minutes later one and one-half blocks away and identified.

Appellant claimed to have been drinking heavily with his co-defendant the day of the incident. He claimed that he and the co-defendant were separated during the evening.

## CONSPIRACY

### Sufficiency of evidence (continued)

#### *State v. Stevens*, (continued)

Syl. pt. 1 - “ “Upon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.” *State v. West*, 153 W.Va. 325, 168 S.E.2d 716 (1969).” Syl. pt. 1, *State v. Fischer*, 158 W.Va. 72, 211 S.E.2d 666 (1974).” Syllabus Point 10, *State v. Davis*, 176 W.Va. 454, 345 S.E.2d 549 (1986).

Syl. pt. 2 - ““*W.Va. Code*, 61-10-31(1), is a general conspiracy statute and the agreement to commit any act which is made a felony or misdemeanor by the law of this State is a conspiracy to commit an “offense against the State” as that term is used in the statute.’ Syllabus Point 1, *State v. Less*, 170 W.Va. 259, 294 S.E.2d 62 (1981).” Syllabus Point 5, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).

Syl. pt. 3 - ““In order for the State to prove a conspiracy under *W.Va. Code*, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy.’ Syllabus Point 4, *State v. Less*, 170 W.Va. 259, 294 S.E.2d 62 (1981).” Syllabus Point 6, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).

The Court noted that “an agreement may be inferred from the words and actions of the conspirators, or other circumstantial evidence....” (quoting from *Less, supra*). The Court found that a jury could reasonably have inferred that use of the tire iron, crowbar and bricks required advance planning and collusion. No error.

## CONTEMPT

### Civil

#### For invoking right against self-incrimination

*Kelly v. Allen*, No. 20663 (12/19/91) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Right to invoke, (p. 543) for discussion of topic.

#### Misrepresentation by attorney

*State v. Smarr*, 418 S.E.2d 592 (1992) (Per Curiam)

Appellant Paul Cowgill was held in contempt of court and fined \$500.00 for misrepresenting to the trial court that an appeal on behalf of his client, Jackie Lee Smarr, had been filed or was in the process of being completed. Appellant filed a motion for continuance at the show cause hearing, asking for time to obtain the attorney of his choice, which motion was denied. The trial court then found him in contempt.

Syl. pt. - “A circuit court has no power to proceed summarily to punish for contempt of such court except in the instance enumerated in Code, 1931, 61-5-26.” Syllabus point 2, *State ex rel. Arnold v. Conley*, 151 W.Va. 584, 153 S.E.2d 681 (1966).

The Court recognized that jury trials are not required; a trial court may punish summarily for contempt for instances in *W.Va. Code*, 61-5-26. *Hendershot v. Hendershot*, 164 W.Va. 190, 263 S.E.2d 90 (1980); *State v. Boyd*, 166 W.Va. 690, 276 S.E.2d 829 (1981). Since an officer of the court is included in the statute, an attorney may be so punished.

Here, the attorney repeatedly misrepresented the status of his client’s case, thereby delaying the execution of a sentence. The misrepresentation therefore amounted to obstruction of justice. *State v. Boyd*, 166 W.Va. 690, 276 S.E.2d 829 (1981). No error.

## CONTINUANCE

### Discretion in granting

*Lewis v. Henry*, 400 S.E.2d 567 (1990) (Per Curiam)

Relator sought a writ of mandamus to force respondent judge to dismiss charges or to schedule a trial. Relator was arrested 21 February 1990 for aiding and abetting in his wife's murder. Bail was set on 7 March 1990 and relator has been free on bond since then. Relator was charged by a grand jury on 16 May 1990; he pled not guilty at the arraignment and trial was set for 21 August 1990.

Trial was continued to allow for forensic testing to be completed. Because all October term dates were taken, the trial was scheduled for 21 February 1991. Relator claimed that his right to a speedy trial under *W.Va. Code*, 62-3-1 has been denied.

Syl. pt. 1 - "The determination of what is good cause, pursuant to *W.Va. Code*, 62-3-1, for a continuance of a trial beyond the term of indictment is in the sound discretion of the trial court, and when good cause is determined a trial court may, pursuant to *W.Va. Code*, 62-3-1, grant a continuance of a trial beyond the term of indictment at the request of either the prosecutor or defense, or upon the court's own motion." Syllabus Point 2, *State ex rel. Shorter v. Hey*, 170 W.Va. 249, 294 S.E.2d 51 (1981).

Syl. pt. 2 - "The possible reasons justifying good cause for continuance under *W.Va. Code*, 62-3-1, are broader than the causes listed in *W.Va. Code*, 62-3-21, as valid reasons for not counting a particular term. As a consequence, the causes justifying continuances listed in the three-term rule, *W.Va. Code*, 62-3-21, may be applied in a one-term rule situation, but the general good cause standard in *W.Va. Code*, 62-3-1, may not be applied in *W.Va. Code*, 62-3-21 situation." Syllabus Point 4, *Good v. Handlan*, 176 W.Va. 145, 342 S.E.2d 111 (1986).

The Court noted that *W.Va. Code*, 62-3-1 simply codified the constitutional right to a speedy trial. Article III, § 14, *West Virginia Constitution*. *State v. Adkins*, 182 W.Va. 443, 388 S.E.2d 316 (1989). Continuances should not be granted merely for prosecutorial convenience although crowded dockets can justify a continuance.

The Court urged that relator be tried without delay but found no abuse of discretion in the continuances here. Writ denied.

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 405) for discussion of topic.

## CONTROLLED SUBSTANCES

### **Joinder of repeated offenses**

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See EVIDENCE Admissibility, Discretion of judge, (p. 209) for discussion of topic.

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See JOINDER Discretion of judge, (p. 327) for discussion of topic.

### **Proof of acquiring**

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See EVIDENCE Admissibility, Discretion of judge, (p. 209) for discussion of topic.

### **Questioning regarding prescription**

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See SELF-INCRIMINATION Controlled substance prescription, (p. 534) for discussion of topic.

## CORPORATIONS

### Indictment of officers

*State v. Childers*, 415 S.E.2d 460 (1992) (Miller, J.)

See INDICTMENT Sufficiency of, Corporate officer, (p. 298) for discussion of topic.

## COUNTY/REGIONAL JAILS

### Double celling

*Wagner v. Burke*, 420 S.E.2d 298 (1992) (Per Curiam)

See PRISON/JAIL CONDITIONS Exercise room in regional jail, (p. 431) for discussion of topic.

### Exercise room in regional jail

*Wagner v. Burke*, 420 S.E.2d 298 (1992) (Per Curiam)

See PRISON/JAIL CONDITIONS Exercise room in regional jail, (p. 431) for discussion of topic.

### Overcrowding

*State ex rel. Cooper v. Schlaegel*, No. 21481 (2/16/93) (Per Curiam)

See JUDGES Duties, To render decisions, (p. 343) for discussion of topic.

*State ex rel. Smith v. Skaff*, 428 S.E.2d 54 (1993) (Per Curiam)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 438) for discussion of topic.

### State's duty to incarcerate

*State ex rel. Smith v. Skaff*, 420 S.E.2d 922 (1992) (Workman, J.)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 437) for discussion of topic.

## COURT COSTS

### Special prosecutor fees

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See PROBATION Conditions of, Special prosecutor fees, (p. 443) for discussion of topic.

## COURT REPORTER

### Administrative director's authority over

*State ex rel. Philyaw v. Williams*, 438 S.E.2d 64 (1993) (Per Curiam)

See COURT REPORTER Transcript, Failure to provide, (p. 142) for discussion of topic.

### Civil liability for failure to produce transcript

*State ex rel. Philyaw v. Williams*, 438 S.E.2d 64 (1993) (Per Curiam)

See COURT REPORTER Transcript, Failure to provide, (p. 142) for discussion of topic.

## Transcript

### Failure to provide

*Philyaw v. Bogovich*, No. 21541 (4/28/93) (Per Curiam)

and

*State ex rel. Scott v. Bogovich*, No. 21480 (2/10/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 599) for discussion of topic.

*State ex rel. Hodge v. Reid-Williams*, No. 21621 (4/28/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 600) for discussion of topic.

*State ex rel. Jenkins v. Marchbank*, No. 21428 (2/10/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 601) for discussion of topic.

*State ex rel. Philyaw v. Williams*, 438 S.E.2d 64 (1993) (Per Curiam)

Respondent, a court reporter, failed to produce a transcript as requested while employed as a court reporter for the Circuit Court of Mercer County. Three years after the transcript was requested, the Court issued a rule to show cause, returnable 5 October 1993.

# COURT REPORTER

## Transcript (continued)

### Failure to provide (continued)

#### *State ex rel. Philyaw v. Williams*, (continued)

By letter dated 27 September 1993, respondent claimed she had lost her notes. The Court remanded to the Circuit Court with directions to hold a hearing pursuant to Rule 80(e) of the Rules of Civil Procedure. Another rule to show cause was issued to respondent, directing her to state why her employment should not be terminated. Respondent's reply stated she gave priority to cases wherein an appeal was contemplated (unlike the case in question) and that she had suffered a miscarriage during the time in question, had become pregnant again and delivered.

Syl. pt. 1 - "Although subject to the direction and supervision of the circuit judges to whom they are assigned, court reporters, as employees of the Supreme Court of Appeals, whose primary functions consist of recording, transcribing, and certifying records of proceedings for purposes of appellate review, are subject to the ultimate regulation, control, and discipline of the Supreme Court of Appeals." Syllabus Point 3, *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985).

Syl. pt. 2 - "A writ of mandamus will not be issued in any case when it is unnecessary or where, if used, it would prove unavailing, fruitless or nugatory." Syllabus Point 6, *Delardas v. Morgantown Water Commission*, 148 W.Va. 776, 137 S.E.2d 426 (1964).

The Court noted that performance here was impossible. Although denying the writ, the Court noted respondent's similar past behavior and remanded the case to the Administrative Director for appropriate sanctions. The Court also noted that court reporters are not immune from civil liability for excessive delay. *Antoine v. Byers & Associates*, U.S., 113 S.Ct. 2167, 124 L.Ed.2d 391 (1993).

*State ex rel. Stephens v. Bratton*, No. 21619 (4/28/93) (Per Curiam)

and

*State ex rel. Hall v. Bratton*, No. 21618 (4/28/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 601) for discussion of topic.

*State ex rel. Stine v. Gagich*, No. 21962 (12/1/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 602) for discussion of topic.

## COURT REPORTER

**Transcript** (continued)

**Failure to provide** (continued)

*State ex rel. Walker v. Miller*, No. 21496 (2/10/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 602) for discussion of topic.

## CRIMINAL PENALTY

### Distinguished from civil

*State ex rel. Palumbo v. Graley's*, 425 S.E.2d 177 (1992) (McHugh, C.J.)

See PENALTIES Civil distinguished from criminal, (p. 414) for discussion of topic.

## CRITICAL STAGES

### Right to be present

*State ex rel. Redman v. Hedrick*, 408 S.E.2d 659 (1991) (McHugh, J.)

See RIGHT TO CONFRONT Critical stages, (p. 500) for discussion of topic.

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

See RIGHT TO BE PRESENT Waiver of, (p. 497) for discussion of topic.

## CROSS-EXAMINATION

### Credibility of witnesses

*State v. Gibson*, 413 S.E.2d 120 (1991) (Per Curiam)

See WITNESSES Cross-examination of, Generally, (p. 621) for discussion of topic.

### Prejudice or bias

*State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

See WITNESSES Cross-examination, Prejudice or bias, (p. 622) for discussion of topic.

### Scope of

*State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

Appellant was found guilty of unlawful assault. Appellant's wife was granted immunity to testify for appellant. She testified that she hit the victim during the fight. On cross-examination, the prosecution questioned her credibility based on her grant of immunity and argued the matter during closing. Defense counsel did not object.

Appellant argued that the prosecution's argument about immunity was so misleading as to require a new trial. The immunity did not extend to perjury.

Syl. pt. 2 - "Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term 'credibility' includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination." Syllabus Point 4, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982).

Syl. pt. 3 - "Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." Syllabus Point 6, *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945)." Syllabus Point 7, *State v. Cirullo*, 142 W.Va. 56, 93 S.E.2d 526 (1956).

## CROSS-EXAMINATION

### Scope of (continued)

#### *State v. Asbury*, (continued)

The Court found that questioning appellant's wife's credibility via the grant of immunity was proper; appellant's failure to object kept the trial court from instructing the jury on the limits of the grant. The issue is therefore waived. No error.

#### *State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

Appellant was convicted of conspiracy to commit grand larceny. At trial the court restricted cross-examination of an informant. Appellant wanted to elicit testimony regarding conversations with a state policeman other than the written statement given.

Syl. pt. 2 - "Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term 'credibility' includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination." Syllabus Point 4, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982).

Syl. pt. 3 - "The extent of the cross-examination of a witness is a matter within the sound discretion of the trial court; and in the exercise of such discretion, in excluding or permitting questions on cross-examination, its action is not reviewable except in case of manifest abuse or injustice." Syl. pt. 4, *State v. Carduff*, 142 W.Va. 18, 93 S.E.2d 502 (1956)." Syllabus, *State v. Wood*, 167 W.Va. 700, 280 S.E.2d 309 (1981).

The Court noted that appellant's counsel was able to cross-examine the witness about inconsistencies with his written statement and trial testimony. No error.

## CUMULATIVE ERROR

### Setting aside verdict

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See HOMICIDE Sufficiency of evidence, (p. 285) for discussion of topic.

## DANGEROUS OR DEADLY WEAPON

### Inferences

#### Instruction on

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See INSTRUCTIONS Right to, (p. 319) for discussion of topic.

#### Malice

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See HOMICIDE Malice, Inferred from deadly weapon, (p. 283) for discussion of topic.

## DEADLY FORCE

### When permissible

*State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

See SELF-DEFENSE Force permissible, (p. 532) for discussion of topic.

## DEPOSITION

### Basis for compelling

*State ex rel. Spaulding v. Watt*, 411 S.E.2d 450 (1991) (Miller, C.J.)

Relator sought to prevent the trial court from requiring a prosecution witness to give a deposition to the defense. The defendant had previously dated the deceased's granddaughter. Defense counsel's motion to compel stated that the granddaughter had refused to speak either to an investigator or to defense counsel and that she would be "unavailable" for trial. Defense counsel sought discovery on the ground that the prosecution's witness statement from her did not reveal her relationship with the defendant.

Syl. pt. 1 - Rule 15 of the West Virginia Rules of Criminal Procedure permits a deposition to be compelled in a criminal case only under very limited conditions, *i.e.*, where, due to exceptional circumstances, the deposition is necessary, in the interest of justice, to preserve the deponent's testimony for use at trial.

Syl. pt. 2 - Rule 15 of the West Virginia Rules of Criminal Procedure authorizes a court to order a deposition only when the witness is unavailable for trial and the deposition is needed to preserve the testimony for trial. It is to be read in conjunction with *W.Va. Code*, 62-3-1 (1981).

Syl. pt. 3 - The fact that a potential witness in a criminal proceeding is unwilling to talk to a defendant's attorney or investigator is not, alone, sufficient to authorize a court-ordered deposition under Rule 15 of the West Virginia Rules of Criminal Procedure and *W.Va. Code*, 62-3-1 (1981).

Syl. pt. 4 - " " "A writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction exceeds its legitimate powers." Syl. pt. 1, *State ex rel. UMWA International Union v. Maynard*, 176 W.Va. 131, 342 S.E.2d 96 (1985). Syl. pt. 4, *State ex rel. Ayers v. Cline*, 176 W.Va. 123, 342 S.E.2d 89 (1985). Syl. pt. 3, *State ex rel. Moomau v. Hamilton*, 184 W.Va. 251, 400 S.E.2d 259 (1990).

Here, there was no showing (absent defense counsel's assertion) that the witness would be unavailable at trial. Further, counsel had two written statements she had given to the prosecution and she had been interviewed by a defense psychiatrist. Writ of prohibition granted.

## **DETENTION**

### **Juveniles**

#### **Standards for**

*Facilities Review Panel v. Coe*, 420 S.E.2d 532 (1992) (Brotherton, J.)

See JUVENILES Detention centers, Standards for, (p. 366) for discussion of topic.

## DETENTION CENTERS

### Standards for

*Facilities Review Panel v. Coe*, 420 S.E.2d 532 (1992) (Brotherton, J.)

See JUVENILES Detention centers, Standards for, (p. 366) for discussion of topic.

## **DIRECTED VERDICT**

### **Entrapment**

*State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

See ENTRAPMENT Grounds for, (p. 192) for discussion of topic.

### **Standard for granting**

*State v. Stevens*, 436 S.E.2d 312 (1993) (Per Curiam)

See CONSPIRACY Sufficiency of evidence, (p. 134) for discussion of topic.

## DISCIPLINE

### Bias

*In the Matter of Shaver*, No. 19689 (10/26/90) (Per Curiam)

Respondent allegedly made statements about a deputy sheriff which suggested that respondent was biased against the deputy. Subsequent to a complaint being filed, the Judicial Hearing Board learned that all of the witnesses against respondent had been convicted in federal district court. The Board recommended dismissal of the charges.

Charges must be proved by clear and convincing evidence. *In the Matter of Ferrell*, 180 W.Va. 620, 378 S.E.2d 662 (1989); *In the Matter of Mendez*, 176 W.Va. 401, 344 S.E.2d 396 (1986). The Court noted that respondent was no longer serving as a magistrate. In light of the futility of sanctions and the lack of credibility of the witnesses, charges dismissed.

### Campaign funds

*In the Matter of Suder*, 398 S.E.2d 162 (1990) (Per Curiam)

Respondent was elected magistrate in 1980, 1984 and 1988. In none of these elections did he form a committee to receive or solicit campaign funds, despite being advised before the May, 1988 primary election that a committee was necessary. He filed a campaign financial report signed by his wife as treasurer, reporting \$300 in unsolicited contributions.

The Judicial Investigation Commission found that Magistrate Suder did not commit a deceitful act but recommended that he be admonished.

Syl. pt. 1 - "When the language of a canon under the *Judicial Code of Ethics* is clear and unambiguous, the plain meaning of the canon is to be accepted and followed without resorting to interpretation or construction." Syllabus Point 1, *In the Matter of Karr*, 182 W.Va. 221, 387 S.E.2d 126 (1989).

Syl. pt. 2 - "When a candidate, including an incumbent judge, for a judicial office that is to be filled by public election between competing candidates personally solicits or personally accepts campaign funds, such action is in violation of Canon 7B(2) of the *Judicial Code of Ethics*. A committee established by a judicial candidate, including an incumbent judge, may solicit or accept funds for such candidate's campaign." Syllabus Point 2, *In the Matter of Karr*, 182 W.Va. 221, 387 S.E.2d 126 (1989).

The Court found a violation of Canon 7B of the *Judicial Code of Ethics*. Magistrate Suder was admonished.

## DISCIPLINE

### Dismissal of

#### Charges improper

*In the Matter of Eplin*, 416 S.E.2d 248 (1992) (Per Curiam)

A Mr. Homonai was involved in an automobile accident and fled the scene. Mr. Homonai was arrested and charged with “hit and run” pursuant to *W.Va. Code*, 17C-4-2 and failure to maintain insurance pursuant to *W.Va. Code*, 17D-2A-4. Respondent received a call from State Senator Ned Jones informing him that Mr. Homonai was Jones’ employee and seeking to determine the nature of the charges.

Although Senator Jones did not seek to gain favorable treatment for his employee, respondent asked the arresting officer to drop the charges as a favor to Jones. A continuance was granted and trial was set before another magistrate. Before the trial date respondent accepted a guilty plea to the hit and run charges and dismissed the failure to maintain insurance, even though the record showed clearly no insurance was in force.

In order to dismiss the insurance charge respondent sought an assistant prosecutor, telling her that the original prosecutor assigned to the case agreed to the dismissal, even though he had not. The arresting officer discovered the deal and filed an ethics complaint. The Judicial Hearing Board found violations of Canons 1, 2, 3A(1), 3A(4) and 3C(1)(a) and recommended a six month suspension without pay.

Syl. pt. 1 - “Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding ‘must be proved by clear and convincing evidence.’” Syl. pt. 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 2 - “ ‘ “The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceeding.” Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).’ Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 (1985).” Syl. pt. 1, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

Syl. pt. 3 - “A magistrate’s violation of court rules or related administrative procedures can result in disciplinary action.” Syl. pt. 5, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

## DISCIPLINE

### Dismissal of (continued)

#### Charges improper (continued)

##### *In the Matter of Eplin*, (continued)

Syl. pt. 4 - “An *ex parte* dismissal by a magistrate of a criminal or civil case, without authorization by statute or rule or without other good cause shown, is a violation of Canon 3 of the *Judicial Code of Ethics*.” Syl. pt. 4, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

The Court upheld the Board. Six-month suspension without pay and costs.

### Sexual impropriety

##### *In the Matter of Wilson*, 411 S.E.2d 847 (1991) (Per Curiam)

Respondent allegedly tried to hug and kiss a woman whose son was to be arraigned. After being rejected, respondent ordered the son to be taken before another magistrate. The Judicial Investigation Commission found other improper sexual advances and the Board charged respondent with violating *Judicial Code of Ethics* Canons 1, 2A and 3A(1), (2), (3) and (4).

Prior to hearing, the Board dismissed charges in return for respondent’s resignation. The Board also considered respondent’s age and ill health. The Court affirmed the dismissal but noted that this case is unique on its facts. Cf. *West Virginia Judicial Hearing Board v. Romanello*, 175 W.Va. 577, 336 S.E.2d 540 (1985).

### Signing

#### Forms in blank

##### *In the Matter of Eplin*, 410 S.E.2d 273 (1991) (Per Curiam)

Respondent signed blank “Jail Commitment or Release Forms” and “Rearrest Forms” which were found in public areas and in the magistrate court files of the Cabell County Court House in violation of *Judicial Code of Ethics* Canons 2A, 3A(1) and (5); and Canon 3B (1) and (2).

Syl. pt. 1 - ““The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.’ Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980). Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 (1985).” Syllabus Point 1, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

## DISCIPLINE

### Signing (continued)

#### Forms in blank (continued)

##### *In the Matter of Eplin*, (continued)

Syl. pt. 2 - ““Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding ‘must be proved by clear and convincing evidence.’ Syllabus Point 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).” Syllabus Point 3, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

Allegations proven. Public reprimand and costs assessed.

## DISCOVERY

### Failure to disclose

#### Consequences of

*State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Failure to disclose, Exculpatory evidence, (p. 476) for discussion of topic.

#### Demonstrative evidence

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See EVIDENCE Admissibility, Generally, (p. 211) for discussion of topic.

#### Exculpatory evidence

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

Appellant was convicted of grand larceny. Prior to trial he moved for a bill of particulars which was supplied in a one-page list. At trial, the state's main witness made reference to a two-page list. Appellant alleged that failure to supply the second page constitutes withholding of exculpatory evidence.

Syl. pt. 6 - "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812, 820 (1989), quoting, *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494 (1985).

Here, no showing was made as to whether the allegedly missing page contained exculpatory evidence; in fact, the record showed that counsel knew that the initial list at issue contained two or three pages and failed to take further action. No showing was made that the missing material would have changed the result. No error.

#### Informants

*State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

Appellant was convicted of conspiracy to commit grand larceny. Information from a confidential informant led to appellant's arrest. The trial court refused to order disclosure of the informant's identity.

## DISCOVERY

### Failure to disclose (continued)

#### Informants (continued)

##### *State v. Green*, (continued)

Syl. pt. 1 - “When the State in a criminal action refused to disclose to the defendant the identity of an informant, the trial court upon motion shall conduct an *in camera* inspection of written statements submitted by the State as to why discovery by the defendant of the identity of the informant should be restricted or not permitted. A record shall be made of both the in court proceedings and the statements inspected *in camera* upon the disclosure issue. Upon the entry of an order granting to the State non-disclosure to the defendant of the identity of the informant, the entire record of the *in camera* inspection shall be sealed, preserved in the records of the court, and made available to this Court in the event of an appeal. In ruling upon the issue of disclosure of the identity of an informant, the trial court shall balance the need of the State for non-disclosure in the promotion of law enforcement with the consequences of non-disclosure upon the defendant’s ability to receive a fair trial. The resolution of the disclosure issue shall rest within the sound discretion of the trial court, and only an abuse of discretion will result in reversal. *W.Va.R.Crim.P.* 16(d)(1).” Syllabus Point 3, *State v. Tamez*, 169 W.Va. 382, 290 S.E.2d 14 (1982).

The trial court considered the prosecution’s written objections to disclosure and sealed the record. The Court agreed that the need for secrecy was great and the prejudice to appellant slight. The witness list included the informant. No error.

#### Late-discovered evidence

##### *State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

Appellant was convicted of conspiracy to commit grand larceny. At trial, appellant’s former wife, then married to an informant, testified. The prosecution disclosed her as a witness the day before trial, claiming she had just come forward. After allowing appellant’s counsel to interview her, the trial court allowed her testimony.

Syl. pt. 4 - “Where the State is unaware until the time of trial of material evidence which it would be required to disclose under a Rule 16 discovery request, the State may use the evidence at trial provided that: (1) the State discloses the information to the defense as soon as reasonably possible; and (2) the use of the evidence at trial would not unduly prejudice the defendant’s preparation for trial.” Syllabus, *State v. Hager*, 176 W.Va. 313, 342 S.E.2d 281 (1986).

## DISCOVERY

### Failure to disclose (continued)

#### Late-discovered evidence (continued)

##### *State v. Green*, (continued)

Syl. pt. 5 - “Our traditional appellate standard for determining whether the failure to comply with court-ordered pretrial discovery is prejudicial is contained in Syllabus Point 2 of *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980). This was evolved prior to the adoption of our Rules of Criminal Procedure, but is applied to Rule 16 discovery.” Syllabus Point 4, *State v. Miller*, 178 W.Va. 618, 363 S.E.2d 504 (1987).

Syl. pt. 6 - ““When a trial court grants a pretrial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant’s case.’ Syllabus Point 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980).” Syllabus Point 2, *State v. Miller*, 178 W.Va. 618, 363 S.E.2d 504 (1987).

Here, the prosecution offered a supplemental statement of disclosure as soon as it could. No prejudicial surprise to appellant. No error.

#### Standard for prejudice

*State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

See DISCOVERY Failure to disclose, Late-discovered evidence, (p. 161) for discussion of topic.

#### Witnesses

*State v. Gary F.*, 432 S.E.2d 793 (1993) (Workman, C.J.)

See JUVENILES Transfer to adult jurisdiction, Right to confront, (p.372 372) for discussion of topic.

## DISCOVERY

### Failure to disclose (continued)

#### Witnesses (continued)

*State v. Ward*, 424 S.E.2d 725 (1991) (Workman, J.)

Appellant was convicted of first-degree murder and aggravated robbery and sentenced to life without mercy. The trial court sequestered the witnesses but a defense witness was present during testimony which related to his own. The witness testified *in camera* that he did not know of the sequestration. The prosecution also objected to not being given the witness' name prior to trial. Defense counsel apparently was aware of the witness several months before trial. The trial court excluded the witness' testimony.

Syl. pt. 1 - Where a trial court is presented with a defendant's failure to disclose the identity of witnesses in compliance with West Virginia Rule Criminal Procedure 16, the trial court must inquire into the reasons for the defendant's failure to comply with the discovery request. If the explanation offered indicates that the omission of the witness' identity was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it is consistent with the purposes of the compulsory process clause of the sixth amendment to the *United States Constitution* and article II, section 14 of the *West Virginia Constitution* to preclude the witness from testifying.

Syl. pt. 2 - "Where a sequestered witness does not withdraw when ordered, or afterwards returns into the courtroom and is present during the examination of other witnesses, it is discretionary with the judge whether or not he will allow this witness to be examined." Syllabus Point 7, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974)." Syl. Pt. 3, *State v. Steele*, 178 W.Va. 330, 359 S.E.2d 558 (1987).

Syl. pt. 3 - The preclusion of testimony by a defense witness for violating a court's sequestration order is permissible where such violation vitiated the integrity of the evidence sought to be presented.

The Court emphasized that the combination of presence of the witness and non-disclosure of his name justified the exclusion of testimony. No error.

#### Judge's discretion

*State v. Delaney*, 417 S.E.2d 903 (1992) (Brotherton, J.)

See DISCOVERY Psychological tests, Judge's discretion, (p. 164) for discussion of topic.

## DISCOVERY

### Physical examinations

#### Judge's discretion

*State v. Delaney*, 417 S.E.2d 903 (1992) (Brotherton, J.)

See DISCOVERY Psychological tests, Judge's discretion, (p. 164) for discussion of topic.

### Psychological tests

#### Judge's discretion

*State v. Delaney*, 417 S.E.2d 903 (1992) (Brotherton, J.)

Appellant was found guilty of six counts of sexual assault of his nieces and daughter. While in custody, he allegedly confessed to his father-in-law and said he could not plead guilty because he was not represented by counsel; he also asked that the father-in-law have the girls recant. In a telephone conversation to his by then ex-wife, overheard by her sister, he again confessed and asked that the girls recant.

Appellant was denied separate physical and psychological tests on the victims but was given court appointed experts to evaluate tests performed by the physician and sexual abuse counselor.

He claimed ineffective assistance of counsel, improper introduction of his wife's testimony, hearsay as to statements made to her and his ex-father-in-law, and improper refusal of his request for separate physical and psychological tests.

Syl. pt. 1 - "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 interest, unless no reasonably qualified defense attorney would have so acted in the defense of an accused." Syllabus point 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 2 - "A statement is not hearsay if the statement is offered against a party and is his own statement, in either his individual or a representative capacity." Syllabus point 1, *Heydinger v. Adkins*, 178 W.Va. 463, 360 S.E.2d 240 (1987).

## DISCOVERY

### Psychological tests (continued)

#### Judge's discretion (continued)

##### *State v. Delaney*, (continued)

Syl. pt. 3 - In order for a trial court to determine whether to grant a party's request for additional physical or psychological examinations, the requesting party must present the judge with evidence that he has a compelling need or reason for the additional examinations. In making the determination, the judge should consider: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use.

The Court found appellant's counsel effective and rejected appellant's marital privilege argument as disallowed by statute (see *W.Va. Code*, 57-3-3, specifically allowing testimony in cases of offenses against children of the marriage).

Appellant's admissions were not hearsay and therefore admissible. As to separate testing, the Court found the trial court did not abuse its discretion in refusing his requests. The Court noted especially that the passage of time would have obliterated any physical evidence obtainable by additional medical tests. Appellant failed to state reasons for his request for an additional psychological examination. No error.

### Witnesses

#### Failure to disclose

*State v. Ward*, 424 S.E.2d 725 (1991) (Workman, J.)

See DISCOVERY Failure to disclose, Witnesses, (p. 163) for discussion of topic.

#### Prior statements

*State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Failure to disclose, Exculpatory evidence, (p. 476) for discussion of topic.

# DISCRIMINATION

## Racial

### Jury selection

*State v. Bass*, 432 S.E.2d 86 (1993) (Per Curiam)

Appellant, a black man, was convicted of unlawful wounding. The only potential black juror was peremptorily struck by the prosecuting attorney following the juror's statement that he had met the defendant at two political rallies when the defendant was running for magistrate and that the prosecutor had participated in a case wherein the juror's son sought a warrant in magistrate court. The juror also stated that he had no knowledge of the facts of the case and felt he could reach an impartial verdict.

Following defense counsel's motion for mistrial the prosecutor explained he struck the juror because of his attendance at the political rally and the prosecutor's belief that the juror's wife disliked the prosecutor (she had notarized an ethics complaint against the prosecutor and worked for a group that the prosecutor believed supported the defendant for political office).

Syl. pt. 1 - "It is violation of the Equal Protection Clause of the Fourteenth Amendment to the *U.S. Constitution* for a member of a cognizable racial group to be tried on criminal charges by a jury from which members of his race have been purposely excluded." Syllabus Point 1, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

Syl. pt. 2 - "To establish a *prima facie* case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State, 'the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.' [Citations omitted.] *Batson v. Kentucky*, 476 U.S. 79 at 96, 106 S.Ct. 1712 at 1722, 90 L.Ed.2d 69 [at 87-88 (1986).]" Syllabus Point 2, *State v. Marrs*, 180 W.Va. 693 379 S.E.2d 497 (1989).

Syl. pt. 3 - "The State may defeat a defendant's *prima facie* case of a violation of equal protection due to racial discrimination in selection of a jury by providing nonracial, credible reasons for using its peremptory challenges to strike members of the defendant's race from the jury." Syllabus Point 3, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

## DISCRIMINATION

### Racial (continued)

#### Jury selection (continued)

##### *State v. Bass*, (continued)

Syl pt. 4 - “The Fourteenth Amendment’s mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system. The U.S. Supreme Court has held, for example, that prosecutorial discretion cannot be exercised on the basis of race and that, where racial bias is likely to influence a jury, *an inquiry* must be made into such bias. The prohibition on discrimination in the selection of jurors makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system’s own commitment to the commands of the *Constitution*. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition.” Syllabus Point 2, *State v. Harris*, 189 W.Va. 423, 432 S.E.2d 93 (1993). (Emphasis in original).

The Court held defense counsel met the first two parts of the *prima facie* test; defendant is a member of a racial group, the only member of which was struck peremptorily by the prosecutor. The Court inferred that the juror was struck because he was black.

However, the prosecutor need not justify the strike as if the challenge were for cause. *Batson*, 467 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88. Here, the prosecutor’s reasons were sufficient to overcome any showing of prejudice. No error.

##### *State v. Harris*, 432 S.E.2d 93 (1993) (Neely, J.)

Appellant, a black juvenile, was convicted of sexual assault. During *voir dire* two black jurors were struck peremptorily on the prosecutor’s motion. Defense counsel objected. After a third black juror was struck on motion of the prosecutor, counsel moved to discharge the jury, also asking that the prosecuting attorney state her reasons for striking the three black jurors.

Syl. pt. 1 - “The plain error doctrine of *W.Va.R.Crim.P.* 52(b), whereby the court may take notice of plain errors or defects affecting substantial rights although they were not brought to the attention of the court, is to be used sparingly and only in those circumstances where a miscarriage of justice would otherwise result.” Syl. pt. 4, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

## DISCRIMINATION

### Racial (continued)

#### Jury selection (continued)

##### *State v. Harris*, (continued)

Syl. pt. 2 - The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system. The U.S. Supreme Court has held, for example, that prosecutorial discretion cannot be exercised on the basis of race and that, where racial bias is likely to influence a jury, *an inquiry* must be made into such bias. The prohibition on discrimination in the selection of jurors makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the *Constitution*. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition.

The Court noted that *Batson v. Kentucky*, 476 U.S. 79 (1986) and *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989) require a statement on the record of why peremptory strikes are not discriminatory when a *prima facie* showing is made of intentional discrimination. See also *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); criminal defendant has third-party standing to sue on behalf of dismissed jurors as well as himself. Reversed.

*State v. Harris*, 432 S.E.2d 93 (1993) (Neely, J.)

See DISCRIMINATION Racial, Jury selection, (p. 167) for discussion of topic.

### Racial bias in jury selection

#### Equal protection

*State v. Bass*, 432 S.E.2d 86 (1993) (Per Curiam)

See DISCRIMINATION Racial, Jury selection, (p. 166) for discussion of topic.

## DOUBLE JEOPARDY

### Attempted murder and malicious assault

*State v. George*, 408 S.E.2d 291 (1991) (Workman, J.)

See DOUBLE JEOPARDY Multiple offenses, Attempted murder and malicious assault, (p. 172) for discussion of topic.

### Felony-murder

*State v. Elliott*, 412 S.E.2d 762 (1991) (Workman, J.)

Appellant was convicted of felony-murder, first-degree sexual assault, fourth degree arson and attempted murder. The arson and sexual assault convictions were the underlying felonies for felony-murder purposes. On appeal he contended that conviction of both arson and felony-murder violates double jeopardy principles. Appellant allegedly killed a woman; attempted to burn her trailer; and bludgeoned and sexually assaulted her ten year old daughter.

Syl. pt. 1 - "Double jeopardy prohibits an accused charged with felony-murder, as defined by *W.Va. Code* § 61-2-1 (1977 Replacement Vol.), from being separately tried or punished for both murder and the underlying enumerated felony." Syl. Pt. 8, *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

Syl. pt. 2 - "When a defendant commits two separate aggravated robberies, and in the course thereof kills one of the victims, he can be convicted of both the aggravated robbery of one victim and the felony murder of the other." Syllabus, *State ex rel. Lehman v. Strickler*, 174 W.Va. 809, 329 S.E.2d 882 (1985).

Syl. pt. 3 - Where there is more than one underlying felony supporting a felony murder conviction and one of the underlying felonies is committed upon a separate and distinct victim from the victim who was actually murdered, that underlying felony conviction does not merge with the felony murder conviction for the purposes of double jeopardy.

As to the arson charge, the Court found double jeopardy violated. As to the sexual assault, no violation occurred because the sexual assault victim was different than the murder victim. Where a crime is against more than one person, there can be as many offenses as people victimized. *State v. Myers*, 171 W.Va. 277, 298 S.E.2d 813 (1982).

Quoted in *Lehman, supra*. Reversed in part; affirmed in part.

## DOUBLE JEOPARDY

### Felony-murder (continued)

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

Appellant was convicted of arson, attempted murder, felony-murder and malicious assault. Although the underlying offense for felony-murder was arson, appellant was convicted and sentenced for both arson and felony- murder. He claimed on appeal that double jeopardy principles of both Amendment V of the *United States Constitution* and Article III, Section 5 of the *West Virginia Constitution* were violated. The State confessed error.

Syl. pt. 8 - This Court is not obligated to accept the State's confession of error in a criminal case. We will do so when, after a proper analysis, we believe error occurred.

Syl. pt. 9 - "The Double Jeopardy Clauses of both the federal and State constitutions protect an accused in a criminal proceeding from 'multiple punishments for the same offenses.'" Syllabus Point 1, in part, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977).

Syl. pt. 10 - "Double jeopardy prohibits an accused charged with felony-murder, as defined by *W.Va. Code* § 61-2-1 (1977 Replacement Vol.) from being separately tried or punished for both murder and the underlying enumerated felony." Syllabus Point 8, *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983).

The test for determining double jeopardy is the "same evidence" test of *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932); see also, *State v. Pancake*, 170 W.Va. 690, 296 S.E.2d 37 (1982), *i.e.*, whether each offense requires proof of a fact that the other does not. Felony-murder does not require proof of malice, premeditation or intent to kill. However, because the underlying felony must be proven, double jeopardy precludes a separate conviction on that felony. Arson conviction reversed, felony-murder, attempted murder and malicious assault convictions affirmed. Remanded for Resentencing.

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

## DOUBLE JEOPARDY

### Indictments

#### New indictment after dismissal

*State v. Seibert*, 429 S.E.2d 243 (1992) (Brotherton, J.)

See INDICTMENT Dismissal of, Effect of on new indictment, (p. 293) for discussion of topic.

### Legislative intent

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See DOUBLE JEOPARDY Multiple punishments, (p. 174) for discussion of topic.

### Malicious assault and attempted murder

*State v. George*, 408 S.E.2d 291 (1991) (Workman, J.)

See DOUBLE JEOPARDY Multiple offenses, Attempted murder and malicious assault, (p. 172) for discussion of topic.

### Mistrial

#### Manifest necessity

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

Appellant was convicted of daytime burglary by entering without breaking in the looting of his mother's home. At the first trial the judge, *sua sponte*, declared a mistrial upon the voluntary admission by a juror that the juror knew the defendant's wife. A verdict had not been rendered. Appellant now asserts that the second trial violated double jeopardy principles.

Syl. pt. 3 - "The power of a court in a criminal case to discharge a jury without rendering a verdict is discretionary.' Syllabus Point 2, in part, *State ex rel. Brooks v. Worrell*, 156 W.Va. 8, 190 S.E.2d 474 (1972)." Syllabus point 6, *State v. Oldaker*, 172 W.Va. 258, 304 S.E.2d 843 (1983).

Syl. pt. 4 - "Termination of a criminal trial arising from a manifest necessity will not result in double jeopardy barring a retrial.' Syl. Pt. 4, *Keller v. Ferguson*, 177 W.Va. 616, 355 S.E.2d 405 (1987)." Syllabus point 2, *State v. Gibson*, 181 W.Va. 747, 384 S.E.2d 358 (1989).

## **DOUBLE JEOPARDY**

### **Mistrial (continued)**

#### **Manifest necessity (continued)**

*State v. Ward*, (continued)

No abuse of discretion here. Because a manifest necessity existed, no violation of double jeopardy.

### **Multiple indictments**

*State v. Seibert*, 429 S.E.2d 243 (1992) (Brotherton, J.)

See INDICTMENT Dismissal of, Effect of on new indictment, (p. 293) for discussion of topic.

### **Multiple offenses**

*State v. Gill*, 416 S.E.2d 253 (1992) (Miller, J.)

See DOUBLE JEOPARDY Sexual assault, Abuse (by a parent or guardian), (p. 178) for discussion of topic.

### **Attempted murder and malicious assault**

*State v. George*, 408 S.E.2d 291 (1991) (Workman, J.)

Appellant was convicted of malicious assault and attempted murder of the same victim and sentenced to two consecutive terms of two to ten years and one to five years, respectively. Appellant claimed violation of double jeopardy principles in that he was being punished twice for the same crime.

Syl. pt. 1 - "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Syl. Pt. 8, *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983).

Syl. pt. 2 - A defendant may be convicted for both malicious assault and attempted murder in the first-degree without violating the proscription against double jeopardy found within article III, section 5 of the *West Virginia Constitution* since the provisions for each offense require proof of an additional fact which the other does not.

## DOUBLE JEOPARDY

### Multiple offenses (continued)

#### Attempted murder and malicious assault (continued)

##### *State v. George*, (continued)

The Court noted that malicious assault requires proof of serious bodily injury while attempted murder does not. Conversely, attempted murder requires proof of premeditation or lying in wait with an intent to kill which malicious assault does not.

#### Separate punishments

##### *State v. Drennen*, 408 S.E.2d 24 (1991) (Per Curiam)

Appellant was convicted of three counts of delivery of marijuana and sentenced to three concurrent terms of one to five years. On appeal he claimed that the multiple punishments all arose from a single offense in violation of double jeopardy principles.

Appellant was approached by three juveniles who wanted marijuana. Police officers observed appellant going to a residence they were watching for drug dealing. Appellant's vehicle was stopped for running a red light. Another passenger of the car admitted that marijuana was present and that appellant had obtained it. There was only one bag of marijuana and it was not subdivided.

Syl. pt. 1 - Although under double jeopardy principles the proper procedure is a trial of all offenses arising out of the same 'criminal transaction' jointly, separate punishments may be imposed for separate offenses arising out of a single criminal transaction." Syllabus point 3, *State ex rel. Johnson v. Hamilton*, 164 W.Va. 682, 266 S.E.2d 125 (1980).

The Court also cited the "same evidence" test of *State ex rel. Dowdy v. Robinson*, 163 W.Va. 154, 257 S.E.2d 167 (1979); when the same evidence is used to prove different offenses, only one sentence may be imposed. *Johnson, supra*, discussed both the "same transaction" and the same evidence tests; the "same transaction" test is to be used for determining whether offenses can be joined but the "same evidence" test is for determining if multiple sentences can be imposed.

Here, proof of actual delivery and constructive delivery, as well as intent, was necessary as to each of the juveniles; therefore, conviction on three offenses was proper. No error.

## DOUBLE JEOPARDY

### Multiple offenses (continued)

#### Separate punishments (continued)

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See DOUBLE JEOPARDY Multiple punishments, (p. 174) for discussion of topic.

### Multiple punishments

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

Appellant was convicted of two counts of sexual abuse and sentenced to two concurrent terms. On appeal he contended that the sentences constituted double jeopardy in that they arose from the same transaction.

Appellant allegedly followed the victim on a public street until he got the opportunity to grab her, whereupon he put one hand between her legs, rubbed roughly and put the other up her shirt, grabbing her breasts. She managed to break free but he caught her again, falling on top of her and fondling her breasts once more. She finally broke free and reached a pay phone from which she telephoned the police.

Syl. pt. 1 - “The Double Jeopardy Clause in Article III, Section 5 of the *West Virginia Constitution*, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.” Syllabus Point 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977).

Syl. pt. 2 - “Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” Syllabus Point 8, *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983).

Syl. pt. 3 - “A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment.” Syllabus Point 7, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

## DOUBLE JEOPARDY

### Multiple punishments (continued)

#### *State v. Rummer*, (continued)

Syl. pt. 4 - “In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to determine whether each offense requires an element of proof the other does not. If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses.” Syllabus Point 8, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 5 - *W.Va. Code*, 61-8B-7 (1984), which defines sexual abuse in the first-degree, involves “sexual contact” with another person. The term “sexual contact” is defined in *W.Va. Code*, 61-8B-1(6) (1986), and identifies several different acts which constitutes sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles.

Here, the Court found appellant committed separate proscribed acts of “sexual contact” as defined by *W.Va. Code*, 61-8B-1(6). Therefore, no violation of double jeopardy principles to have two separate punishments.

### Murder

#### *State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

### Prohibition writ not to offend

#### *State ex rel. Spaulding v. Watt*, 422 S.E.2d 818 (1992) (Per Curiam)

See NEW TRIAL Newly discovered evidence, (p. 403) for discussion of topic.

#### *State v. Hott*, 421 S.E.2d 500 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Appeal by, Prohibition, (p. 461) for discussion of topic.

## DOUBLE JEOPARDY

### Prohibition writ not to offend (continued)

*State v. Lewis*, 422 S.E.2d 807 (1992) (Miller, J.)

See PROSECUTING ATTORNEY Appeal by, Prohibition, (p. 461) for discussion of topic.

### Recidivism

*Gibson v. Legursky*, 415 S.E.2d 457 (1992) (Miller, J.)

On 15 June, 1978 petitioner was convicted of voluntary manslaughter; on 19 February 1982 and again on 5 August 1985 he was convicted of burglary. Pursuant to *W.Va. Code*, 61-11-18, the prosecuting attorney filed a recidivist information and petitioner was sentenced to life imprisonment. Thereafter, petitioner was charged with conspiracy to commit murder and a second recidivist information filed. Pursuant to a plea agreement petitioner acknowledged his three previous felony convictions, waived trial and was given a second recidivist life sentence.

He claimed that imposition of the second life sentence, based on the same felony convictions giving rise to the first life sentence, violated double jeopardy principles.

Syl. pt. 1 - In applying the recidivist life penalty, the trial court does not impose a separate sentence for the last felony conviction, but upon the jury's conviction in the recidivist proceeding it imposes a life sentence on the last felony conviction. In order to establish a life recidivist conviction, another felony must be proven beyond those for which the defendant has been previously sentenced.

Syl. pt. 2 - Double jeopardy principles are not offered merely because earlier convictions used to establish a recidivist conviction are subsequently utilized to prove a second recidivist conviction.

Writ denied.

### Retrial

*State v. Childers*, 415 S.E.2d 460 (1992) (Miller, J.)

See INDICTMENT Sufficiency of, Corporate officer, (p. 298) for discussion of topic.

## DOUBLE JEOPARDY

### Same transaction test

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See DOUBLE JEOPARDY Multiple punishments, (p. 174) for discussion of topic.

### Sexual assault

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See DOUBLE JEOPARDY Multiple punishments, (p. 174) for discussion of topic.

### Abuse (by a parent or guardian)

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

Appellant was convicted of incest, sexual assault and sexual abuse by a custodian or guardian. The issue presented was whether appellant could be convicted of both incest and sexual abuse by a custodian.

Appellant claimed double jeopardy, in that both offenses specifically call for intercourse.

Syl. pt. 2 - “The Double Jeopardy Clause of the Fifth Amendment to the *United States Constitution* consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” Syllabus point 1, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 3 - “The Double Jeopardy Clause in Article III, Section 5 of the *West Virginia Constitution*, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.’ Syllabus Point 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977).” Syllabus Point 2, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 4 - “Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” Syllabus Point 8, *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983).

## DOUBLE JEOPARDY

### Sexual assault (continued)

#### Abuse (by a parent or guardian) (continued)

##### *State v. George W.H.*, (continued)

Syl. pt. 5 - “A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment.” Syllabus Point 7, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 6 - “In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to determine whether each offense requires an element of proof that is different, then the presumption is that the legislature intended to create separate offenses.” Syllabus Point 8, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 7 - “*W.Va. Code*, 61-8D-5(a) (1988), states, in part: ‘In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection[.]’ Thus, the legislature has clearly and unequivocally declared its intention that sexual abuse involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from general sexual offenses, *W.Va. Code*, 61-8B-1, *et seq.*, for purposes of punishment.” Syllabus Point 9, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

As in *Gill, supra*, the Court found no violation of double jeopardy principles; the Legislature clearly intended for two separate offenses. No error (reversed on other grounds).

##### *State v. Gill*, 416 S.E.2d 253 (1992) (Miller, J.)

Appellant was convicted of fourteen sex-related crimes: three counts of first-degree sexual assault (*W.Va. Code*, 61-8B-3(a) (2)); three counts of first-degree sexual abuse (*W.Va. Code*, 61-8B-7(a)(3)); and the same charges with regard to sexual abuse by a parent, custodian or guardian (*W.Va. Code*, 61-8D-5. Two additional convictions related to forcing the victim to urinate in his mouth pursuant to *W.Va. Code*, 61-8D-5. Appellant was sentenced to a term of 88 to 170 years.

## DOUBLE JEOPARDY

### Sexual assault (continued)

#### Abuse (by a parent or guardian) (continued)

##### *State v. Gill*, (continued)

Appellant claimed that convictions under both sets of statutes violated the Double Jeopardy Clause of the Fifth Amendment to the *United States Constitution* and Article III, § 5 of the *West Virginia Constitution*; and that the evidence was insufficient to support a conviction under 61-8B-7(a)(3) and 61-8D-5.

Syl. pt. 1 - The Double Jeopardy Clause of the Fifth Amendment to the *United States Constitution* consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Syl. pt. 2 - “The Double Jeopardy Clause in Article III, Section 5 of the *West Virginia Constitution*, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.” Syllabus Point 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977).

Syl. pt. 3 - In *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the United States Supreme Court held that the Fifth Amendment constitutional guarantee against double jeopardy was binding on the states through the Fourteenth Amendment to the *United States Constitution*.

Syl. pt. 4 - “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932).

Syl. pt. 5 - The test of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), is a rule of statutory construction. The rule is not controlling where there is a clear indication of contrary legislative intent.

Syl. pt. 6 - “Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test is to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” Syllabus Point 8, *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131 (1983).

## DOUBLE JEOPARDY

### Sexual assault (continued)

#### Abuse (by a parent or guardian) (continued)

##### *State v. Gill*, (continued)

Syl. pt. 7 - A claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment.

Syl. pt. 8 - In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes. If no such clear legislative intent can be discerned, then the court should analyze the statutes under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to determine whether each offense requires an element of proof the other does not. If there is an element of proof that is different, then the presumption is that the legislature intended to create separate offenses.

Syl. pt. 9 - *W.Va. Code*, 61-8D-5(a) (1988), states, in part: “In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection[.]” Thus, the legislature has clearly and unequivocally declared its intention that the sexual abuse involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from the general sexual offenses, *W.Va. Code*, 61-8D-1, *et seq.*, for purposes of punishment.

Syl. pt. 10 - “In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.” Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Since the legislative intent was clear, separate punishments were permissible. No error.

The evidence here consisted primarily of the victim’s testimony, in which she denied that appellant touched her vagina with his hand, a necessary part of violating 61-8B-7(a)(3) and 61-8D-5. Evidence insufficient. Reversed and remanded.

## **DOUBLE JEOPARDY**

### **Sexual assault (concurring opinion only)**

*State v. Walter*, 423 S.E.2d 222 (1992) (Per Curiam)

See CONFESSION OF ERROR Effect of, (p. 127) for discussion of topic.

# DRIVING UNDER THE INFLUENCE

## Evidence

### Breath test

*State v. Conrad*, 421 S.E.2d 41 (1992) (Per Curiam)

Appellant was convicted of second offense DUI. On appeal he claimed the trial court erred in admitting results of the Breathalyzer test. The Breathalyzer did not print out the proper date and time when the test was performed and the sample was marked “deficient.”

Syl. pt. 1 - “Before the result of a Breathalyzer test for blood alcohol administered pursuant to Code, 17C-5A-1 *et seq.*, as amended, is admissible into evidence in a trial for the offense of operating a motor vehicle while under the influence of intoxicating liquor, a proper foundation must be laid for the admission of such evidence.” Syl. *State v. Hood*, 155 W.Va. 337, 184 S.E.2d 334 (1971).

Syl. pt. 2 - “Upon the trial of a person arrested for the offense of driving a motor vehicle on a public highway or street of the state while under the influence of intoxicating liquor, evidence of the results of a Breathalyzer test, administered in compliance with the requirements of law, showing that there was at the time ten hundredths of one percent or more, by weight, of alcohol in such person’s blood, is admissible as *prima facie* evidence that the person was under the influence of intoxicating liquor. *W.Va. Code*, 17C-5A-5.” Syl. pt. 3, *State v. Dyer*, 160 W.Va. 166, 233 S.E.2d 309 (1977).

Syl. pt. 3 - “In the trial of a person charged with driving a motor vehicle on the public streets or highways of the state while under the influence of intoxicating liquor, a chemical analysis of the accused person’s blood, breath or urine, in order to be admissible in evidence in compliance with provisions of *W.Va. Code*, 17C-5A-5, ‘must be performed in accordance with methods and standards approved by the state department of health.’ When the results of a breathalyzer test, not shown by the record to have been so performed or administered, are received in the trial evidence on which the accused is convicted, the admission of such evidence is prejudicial error and the conviction will be reversed.” Syl. pt. 4, *State v. Dyer*, 160 W.Va. 166, 233 S.E.2d 309 (1977).

The police officer who performed the test was properly qualified; he explained that the machine’s date and time inaccuracies were unrelated to the reading of blood alcohol (and noted his handwritten time and date notations); and he testified that the “deficient sample” reading meant only that the canister was not filled with appellant’s breath. The accuracy of the reading was unaffected and, in fact, had appellant filled the canister the blood alcohol reading would have been higher. No error.

## DRIVING UNDER THE INFLUENCE

### Prior offenses in another state

*State ex rel. Kutsch v. Wilson*, 427 S.E.2d 481 (1993) (Neely, J.)

Earl Thomas Beals was indicted in Ohio County for third offense DUI. His prior offenses included one in West Virginia and one in the state of Ohio. He moved to exclude the Ohio conviction on the grounds it did appear on Ohio court records and the conviction did not meet the West Virginia requirements for an out-of-state conviction described in *W.Va. Code*, 17C-5-2(j)(3).

The trial court granted the motion. The prosecuting attorney sought writ of prohibition to prevent enforcement of the suppression order.

Syl. pt. 1 - Proof that a defendant has been convicted of the offense of driving under the influence of alcohol in another state is similar to proof of any other material fact in a criminal prosecution; once the State has introduced sufficient evidence to lead impartial minds to conclude that the defendant has once before been convicted of driving under the influence of alcohol, the State has made a *prima facie* case.

Syl. pt. 2 - A person convicted of driving under the influence of alcohol under an Ohio statute that makes it an offense to operate a motor vehicle with “a concentration of ten hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath” has committed an offense with “the same elements” as the offense set forth in *W.Va. Code*, 17C-5-2(d)(1)(E) of operating a motor vehicle with “an alcohol concentration in his blood of ten hundredths of one percent or more, by weight.”

The Court found a docket entry in Ohio sufficient proof of the Ohio conviction; absent some proof to the contrary the conviction may be used for enhancement in West Virginia. Further, the Ohio DUI statute is sufficiently similar to West Virginia standards to be used. Writ granted.

### Prompt presentment

*State ex rel. Spaulding v. Watt*, No. 21502 (4/23/93) (Per Curiam)

See PROMPT PRESENTMENT DUI, (p. 453) for discussion of topic.

# DRIVING UNDER THE INFLUENCE

## Sentencing

### Alternative sentencing

*State v. Morris*, 421 S.E.2d 488 (1992) (McHugh, C.J.)

The issue presented in this certified question is whether a defendant, convicted of driving while license revoked for third or subsequent previous DUI violations, is eligible for probation or other form of alternative sentencing.

Syl. pt. - A defendant convicted of driving a motor vehicle on the public highway of this State at a time when his privilege so to do has been lawfully revoked for driving under the influence of alcohol for the third or subsequent offense is not eligible for probation, alternative incarceration under the Home Detention Act, or other alternative sentencing. (Provided that until the State correctional facility under construction at Mt. Olive is completed and open for the housing of felony inmates, home confinement may be used in lieu of confinement in a county facility under the terms and conditions set forth in footnote 2 of this opinion.)

See *W.Va. Code*, 17B-4-3(b) and *State ex rel. Moomau v. Hamilton*, 184 W.Va. 251, 400 S.E.2d 259 (1990). Home detention and probation are similar alternative sentences. The Court found driving without a license, like driving under the influence, also carries a mandatory jail term.

### Third offense

*State ex rel. Moomau v. Hamilton*, 400 S.E.2d 259 (1990) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Third offense DUI, Sentencing, (p. 185) for discussion of topic.

### Work release

*State ex rel. Moomau v. Hamilton*, 400 S.E.2d 259 (1990) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Third offense DUI, Sentencing, (p. 185) for discussion of topic.

## DRIVING UNDER THE INFLUENCE

### Third offense DUI

#### Sentencing

*State ex rel. Moomau v. Hamilton*, 400 S.E.2d 259 (1990) (Per Curiam)

Defendant was convicted of driving under the influence, third offense. The prosecution sought writs of mandamus and prohibition to compel respondent to sentence the defendant to one to three years.

Following a guilty plea, defendant was first sentenced to one to three years but, pursuant to *W.Va. Code*, 62-11B-1, *et seq.*, his motion for home confinement was taken under consideration. Pending resolution of that issue, defendant was allowed home confinement with work release pursuant to *W.Va. Code*, 62-11A-1a (alternative sentencing).

Syl. pt. 1 - “When an individual is convicted of third-offense driving under the influence of alcohol, the term of imprisonment set out in *W.Va. Code*, 17C-5-2(i) of confinement in the penitentiary for not less than one nor more than three years is mandatory[.]” Syllabus Point 2, in part, *State ex rel. Hagg v. Spillers*, 181 W.Va. 387, 382 S.E.2d 581 (1989).

Syl. pt. 2 - “The 1983 amendment contained in *W.Va. Code*, 17C-5-2(m), has altered *State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 305 S.E.2d 268 (1983), by prohibiting probation, but under this section a court may order release for work or other purposes pursuant to *W.Va. Code*, 62-11A-1, *et seq.*, if the authorized sentence is for one year or less.” Syllabus Point 1, *State ex rel. Hagg v. Spillers*, 181 W.Va. 387, 382 S.E.2d 581 (1989).

Syl. pt. 3 - “‘A writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction exceeds its legitimate powers.’ Syl. pt. 1, *State ex rel. UMWA International Union v. Maynard*, 176 W.Va. 131, 342 S.E.2d 96 (1985).” Syllabus Point 4, *State ex rel. Ayers v. Cline*, 176 W.Va. 123, 342 S.E.2d 89 (1985).

The Court held that persons convicted of DUI, third offense, are not eligible for home confinement and that work release is also improper. Only persons sentenced to one year or less are eligible for work release; the Court noted that one of the allowed reasons for being away from home was for work release.

*State v. Morris*, 421 S.E.2d 488 (1992) (McHugh, C.J.)

See DRIVING UNDER THE INFLUENCE Sentencing, Alternative sentencing, (p. 184) for discussion of topic.

## **DUE PROCESS**

### **Appeal**

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See also, *Frank Billotti v. A.V. Dodrill*, 183 W.Va. 48, 394 S.E.2d 32 (1990), Volume IV of the Criminal Law Digest, (p. 154) for discussion of topic.

### **Attorneys**

#### **Annulment of license**

*Committee on Legal Ethics v. Folio*, 401 S.E.2d 248 (1990) (Workman, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 59) for discussion of topic.

### **Confessions**

#### **Tape recording of**

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See EVIDENCE Admissibility, Confessions, (p. 203) for discussion of topic.

### **Defendant's right to testify**

#### **Waiver of**

*Dietz v. Legursky*, 425 S.E.2d 202 (1992) (McHugh, C.J.)

See JUDGES Duties, To declare mistrial, (p. 341) for discussion of topic.

*State v. Gibson*, 413 S.E.2d 120 (1991) (Per Curiam)

Appellant was convicted of first-degree murder. At trial the judge did not advise appellant of his rights to testify or to remain silent and the consequences thereof.

## DUE PROCESS

### Defendant's right to testify (continued)

#### Waiver of (continued)

##### *State v. Gibson*, (continued)

Syl. pt. 1 - “A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that a defendant’s waiver is voluntary, knowing, and intelligent by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him. In connection with the privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right.’ Syllabus point 7, *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988).” Syl. Pt. 3, *State v. Robinson*, 180 W.Va. 400, 376 S.E.2d 606 (1988).

Syl. pt. 2 - “Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

The error as harmless.

### Failure to disclose exculpatory evidence

*State v. Ward*, 424 S.E.2d 725 (1991) (Workman, J.)

See EVIDENCE Exculpatory, Failure to disclose, (p. 234) for discussion of topic.

### Indictment delayed

*State ex rel. Henderson v. Hey*, 424 S.E.2d 741 (1992) (Per Curiam)

See INDICTMENT Dismissal of, Undue delay, (p.295 295) for discussion of topic.

### Indictment delayed for strategic advantage

*State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

See INDICTMENT Dismissal, Undue delay, (p. 296) for discussion of topic.

## **DUE PROCESS**

### **Indictment delayed for strategic advantage** (continued)

#### **Neglect defined**

*State v. De Berry*, 408 S.E.2d 91 (1991) (McHugh, J.)

See ABUSE AND NEGLECT Neglect defined, (p. 3) for discussion of topic.

### **Police interrogation**

#### **Recording of**

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See EVIDENCE Admissibility, Confessions, (p. 203) for discussion of topic.

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

Appellant was found guilty of breaking and entering. Because the voluntariness of his confession was at issue, he claimed that a police interrogation, performed while he was in custody, should have been tape recorded. Failure to do so amounted to a denial of due process of law.

Syl. pt. 7 - “Based on our decision in *State v. Nicholson*, 174 W.Va. 573, 328 S.E.2d 180 (1985), we decline to expand the Due Process Clause of the *West Virginia Constitution*, Article III, § 10, to encompass a duty that police electronically record the custodial interrogation of an accused.” Syl. pt. 10, *State v. Kilmer*, 190 W.Va. 617, 439 S.E.2d 881 (1993).

The Court held the appellant initiated the conversation which resulted in the confession. The police officer had no duty to record the conversation. No error.

### **Prison uniforms**

#### **Trial while wearing**

*State v. Rood*, 422 S.E.2d 516 (1992) (Per Curiam)

Appellant was convicted of breaking and entering. He was forced to wear prison attire during trial because of what was apparently an innocent mistake by jail officials, who claimed they had no notice of the hearing.

## DUE PROCESS

### Prison uniforms (continued)

#### Trial while wearing (continued)

##### *State v. Rood*, (continued)

Syl. pt. - “A criminal defendant has the right under the Due Process Clause of our State and Federal Constitutions not to be forced to trial in identifiable prison attire.” Syllabus Point 2, in part, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979), *cert. denied*, 464 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 112, (1983).

The trial court delayed trial because of concern over the prison clothing and gave a cautionary instruction, after which the jurors claimed they could reach a fair decision. Because the court reporter lost the minutes, the exact wording of the cautionary instruction was lost.

The Court noted that *McMannis, supra*, held that a knowing and intelligent waiver of the right not to wear prison clothing is not required. By reviewing what part of the record could be reconstructed, the Court found appellant was clearly guilty; any error was harmless. Affirmed.

### Right to appeal

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See RIGHT TO APPEAL Constitutional right, Right to counsel, (p. 493) for discussion of topic.

### Right to confront accuser

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See HOMICIDE Sufficiency of evidence, (p. 285) for discussion of topic.

### Right to speedy trial

*State v. Carrico*, 427 S.E.2d 474 (1993) (Neely, J.)

See RIGHT TO SPEEDY TRIAL Standard for determining, (p. 511) for discussion of topic.

## **DUE PROCESS**

### **Right to testify**

*State v. Gibson*, 413 S.E.2d 120 (1991) (Per Curiam)

See DUE PROCESS Defendant's right to testify, Waiver of, (p. 186) for discussion of topic.

### **Sufficiency of statute**

*State v. Blair*, 438 S.E.2d 605 (1993) (McHugh, J.)

See STATUTES Specificity and notice, (p. 574) for discussion of topic.

### **Vagueness**

#### **Worthless checks**

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

See STATUTES Specificity and notice, (p. 575) for discussion of topic.

## EMBEZZLEMENT

### Intent

#### Public official

*State v. Brown*, 422 S.E.2d 489 (1992) (Workman, J.)

The prosecution appealed from an order dismissing felony charges against a former prosecuting attorney of Marion County. The trial court ruled that embezzlement by a public official requires proof of specific intent.

The indictment alleged violations of *W.Va. Code*, 61-3-20 by conversion to his own use restitution money for crime victims and funds in an investigation account; the funds were used for travel advances, State Bar dues, national and state conferences, a computer and a personal gun permit.

Syl. pt. 1 - The crime of embezzlement by a public official, as that offense is set forth in West Virginia Code § 61-3-20 (1989), is not a specific intent crime.

Syl. pt. 2 - While proof of intent to steal or misappropriate is not required, proof that the public official intended to do the act or acts that resulted in the embezzlement is necessary to convict a public official of embezzlement pursuant to the second paragraph of West Virginia Code § 61-3-20 (1989).

The Court noted that *W.Va. Code*, 61-3-20 clearly sets forth two separate offenses, one for public officials and one for other officers of corporations, associations, etc. The Court held that intent to deprive was an element for private officials but not for public officials; in the latter case, only the intent to do the act is necessary. Public officials are held to a higher standard in order to prevent money from being misspent, not merely converted to their own use. Reversed; indictment reinstated.

## ENTRAPMENT

### Grounds for

*State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

Appellant was convicted of fraudulently secreting a public record in violation of *W.Va. Code*, 61-5-23. Appellant was previously convicted in magistrate court of violating *W.Va. Code*, 61-5-22 but the circuit court allowed amendment of the warrant.

Appellant was a records clerk at the Huntington Police Department. She accompanied an informant to a private residence and gave information to the residents regarding ongoing city police drug investigations and police records. As a result, the Sheriff's Department decided to see if appellant would expunge records.

The same informant told appellant he had applied for a job and that his prospective employers would be contacting her about his criminal record. He asked her to "clean them (his felony convictions) out for me." Appellant assured him that she would not disclose the entire record. An undercover state policeman, posing as the informant's employer, then went to appellant's office and was told that appellant had one felony which had either been reduced to a misdemeanor or dropped. Appellant actually had four felony convictions.

A search warrant was then issued for the informant's criminal record. Appellant's desk was searched but no evidence found. Appellant was dismissed. Approximately one and one-half hours later, appellant's supervisor, while conducting an inventory of appellant's desk, found the informant's "rap sheet" hidden in a magazine on top of appellant's desk. Appellant claimed entrapment, both at trial and on appeal and unreasonable search and seizure.

Syl. pt. 1 - "Among the criteria to be considered in determining whether a position is an office or mere employment are whether the position was created by law; whether the position was designated an office; whether the qualifications of the appointee have been prescribed; whether the duties, tenure, salary, bond and oath have been prescribed or required; and whether the one occupying the position has been constituted a representative of the sovereign." Syl. Pt. 5 *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970).

Syl. pt. 2 - A position of mere public employment which requires providing service to the public and dealing with public records is not equivalent to an office in lawful charge of public records for the purposes of West Virginia Code § 61-5-23 (1992).

## ENTRAPMENT

### Grounds for (continued)

#### *State v. Nelson*, (continued)

Syl. pt. 3 - “The essential predicates of plain view warrantless seizure are (1) that the officer did not violate the Fourth Amendment in arriving at the place from which the incriminating evidence could be viewed; (2) that the item was in plain view and its incriminating character was also immediately apparent; and (3) that not only was the officer lawfully located in a place from which the object could be plainly seen, but the officer also had a lawful right of access to the object itself.” Syl. Pt. 3, *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

Syl. pt. 4 - “A trial court may find, as a matter of law, that a defendant was entrapped, if the evidence establishes, to such an extent that the minds of reasonable men could not differ, that the officer or agent conceived the plan and procured or directed its execution in such an unconscionable way that he could only be said to have created a crime for the purpose of making an arrest and obtaining a conviction.” Syl. Pt. 4, *State v. Knight*, 159 W.Va. 924, 230 S.E.2d 732 (1976).

Syl. pt. 5 - “When a defendant presents evidence of police conduct amounting to entrapment, and the State fails to rebut the evidence or prove defendant’s predisposition to commit the crime charged, a trial judge should direct a verdict for defendant as a matter of law.” *State v. Hinkle*, 169 W.Va. 271, 286 S.E.2d 699 (1982).

*W.Va. Code*, 61-5-23 provides sanctions for persons *other* than “an officer in lawful charge thereof,” while *W.Va. Code*, 61-5-22 relates to those officers. To provide guidance for future cases the Court ruled appellant was not a public officer.

As to the second search of appellant’s desk, made without a warrant, the Court found appellant had no reasonable expectation of privacy in the criminal record found, nor was appellant’s private property the subject of the inventory. No error in refusing to suppress the evidence.

As to the entrapment defense, the Court noted appellant was originally the target of a drug investigation. Clearly, no error in refusing to find entrapment as a matter of law.

## EQUAL PROTECTION

### Right to appeal

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See RIGHT TO APPEAL Constitutional right, Right to counsel, (p. 493) for discussion of topic.

*State ex rel. Phillips v. Boggess*, 416 S.E.2d 270 (1992) (McHugh, C.J.)

See PLEA BARGAINS Setting aside, Right to transcript unaffected, (p. 420) for discussion of topic.

### Right to jury free of racial discrimination

*State v. Bass*, 432 S.E.2d 86 (1993) (Per Curiam)

See DISCRIMINATION Racial, Jury selection, (p. 166) for discussion of topic.

## ESCAPE

### From work release center

*Craig v. Legursky*, 398 S.E.2d 160 (1990) (Workman, J.)

See WORK RELEASE Escape from, (p. 627) for discussion of topic.

## **ETHICS**

### **Attorney-client relationship**

*Committee on Legal Ethics v. Cometti*, 430 S.E.2d 320 (1993) (Miller, J.)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 48) for discussion of topic.

### **Burden of proof**

*Committee on Legal Ethics v. Lambert*, 428 S.E.2d 65 (1993) (Per Curiam)

See ATTORNEYS Discipline, Fiduciary responsibility, (p. 74) for discussion of topic.

### **Conviction of crimes**

*Committee on Legal Ethics v. Dues*, No. 21424 (12/11/92) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 59) for discussion of topic.

*Committee on Legal Ethics v. White*, 428 S.E.2d 556 (1993) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 64) for discussion of topic.

### **Disciplinary action in another jurisdiction**

*Committee on Legal Ethics v. Battistelli*, 405 S.E.2d 242 (1991) (Miller, C.J.)

See ATTORNEYS Discipline, Disciplinary action in foreign jurisdiction, (p. 68) for discussion of topic.

### **Duty to law partners**

*Committee on Legal Ethics v. Hess*, 413 S.E.2d 169 (1991) (Miller, C.J.)

See ATTORNEYS Discipline, Duty to law partners, (p. 69) for discussion of topic.

## ETHICS

### Fiduciary responsibility

*Committee on Legal Ethics v. Lambert*, 428 S.E.2d 65 (1993) (Per Curiam)

See ATTORNEYS Discipline, Fiduciary responsibility, (p. 74) for discussion of topic.

### Generally

*Committee on Legal Ethics v. Boettner*, 422 S.E.2d 478 (1992) (Miller, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 57) for discussion of topic.

*Committee on Legal Ethics v. Charonis*, 400 S.E.2d 276 (1990) (Per Curiam)

See ATTORNEYS Discipline, Burden of proof, (p. 52) for discussion of topic.

*Committee on Legal Ethics v. Craig*, 415 S.E.2d 255 (1992) (Miller, J.)

See ATTORNEYS Discipline, Perjury before grand jury, (p. 82) for discussion of topic.

*Committee on Legal Ethics v. Folio*, 401 S.E.2d 248 (1990) (Workman, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 59) for discussion of topic.

*Committee on Legal Ethics v. Hobbs*, 439 S.E.2d 629 (1993) (Per Curiam)

See ATTORNEYS Discipline, Generally, (p. 78) for discussion of topic.

*Committee on Legal Ethics v. Ikner*, 438 S.E.2d 613 (1993) (McHugh, J.)

See ATTORNEYS Discipline, Suspensions, (p. 87) for discussion of topic.

*Committee on Legal Ethics v. Printz*, 416 S.E.2d 720 (1992) (Neely, J.)

See ATTORNEYS Discipline, Desuetude, (p. 67) for discussion of topic.

## ETHICS

### Generally (continued)

*Committee on Legal Ethics v. Simmons*, 399 S.E.2d 894 (1990) (Per Curiam)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 51) for discussion of topic.

*Committee on Legal Ethics v. Smith*, 399 S.E.2d 36 (1990) (Per Curiam)

See ATTORNEYS Discipline, Estate administration, (p. 71) for discussion of topic.

*Committee on Legal Ethics v. White*, 428 S.E.2d 556 (1993) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 64) for discussion of topic.

*In the Matter of Bivens*, No. 19378 (11/9/90) (Per Curiam)

See JUDGES Discipline, (p. 330) for discussion of topic.

*In the Matter of Hey*, 425 S.E.2d 221 (1992) (McHugh, C.J.)

See JUDGES Discipline, Statements regarding a case, (p. 334) for discussion of topic.

*In the Matter of Shaver*, No. 19689 (10/26/90) (Per Curiam)

See DISCIPLINE Bias, (p. 156) for discussion of topic.

*In the Matter of Suder*, 398 S.E.2d 162 (1990) (Per Curiam)

See DISCIPLINE Campaign funds, (p. 156) for discussion of topic.

*State ex rel. Karr v. McCarty*, 417 S.E.2d 120 (1992) (Per Curiam)

See ATTORNEYS Discipline, Lawyer as witness, (p. 79) for discussion of topic.

## ETHICS

### Judges

*In the Matter of Hill*, 437 S.E.2d 738 (1993) (Brotherton, J.)

See JUDGES Discipline, Election endorsements, (p. 331) discussion of topic.

### Judicial discipline

*In the Matter of Boese*, 410 S.E.2d 282 (1991) (Per Curiam)

See MAGISTRATE COURT Judicial ethics, (p. 387) for discussion of topic.

*In the Matter of Eplin*, 410 S.E.2d 273 (1991) (Per Curiam)

See DISCIPLINE Signing, Forms in blank, (p. 158) for discussion of topic.

*In the Matter of Eplin*, 416 S.E.2d 248 (1992) (Per Curiam)

See DISCIPLINE Dismissal of, Charges improper, (p. 157) for discussion of topic.

*In the Matter of Wilson*, 411 S.E.2d 847 (1991) (Per Curiam)

See DISCIPLINE Sexual impropriety, (p. 158) for discussion of topic.

### Magistrates

*In the Interest of Betty L. Taylor*, No. 21302 (4/23/93) (Per Curiam)

See MAGISTRATE COURT Discipline, Ruling on son-in-law's case, (p. 383) for discussion of topic.

*In the Matter of Codisposti*, 438 S.E.2d 549 (1993) (Per Curiam)

See MAGISTRATE COURT Election improprieties, (p. 381) for discussion of topic.

*In the Matter of Damron*, No. 21499 (10/18/93) (Per Curiam)

See JUDGES Discipline, Election improprieties, (p. 332) for discussion of topic.

## **ETHICS**

### **Magistrates (continued)**

*In the Matter of Phillips*, No. 21473 (10/14/93) (Per Curiam)

See MAGISTRATE COURT Discipline, Election finance, (p. 380) for discussion of topic.

*In the Matter of Twyman*, 437 S.E.2d 764 (1993) (Per Curiam)

See MAGISTRATE COURT Discipline, (p. 380) for discussion of topic.

### **Mental incapacity**

*Committee on Legal Ethics v. Keenan*, 427 S.E.2d 471 (1993) (Per Curiam)

See ATTORNEYS Discipline, Failure to communicate with clients, (p. 73) for discussion of topic.

### **Prosecuting attorney**

*Committee on Legal Ethics v. Goode*, No. 21857 (11/23/93) (Per Curiam)

See ATTORNEYS Discipline, Prosecuting attorney, (p. 84) for discussion of topic.

### **Duty generally**

*State v. Stewart*, 419 S.E.2d 683 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Duty, Generally, (p. 473) for discussion of topic.

## **EVIDENCE**

### **Abuse and neglect**

#### **Use in criminal proceeding**

*State v. James R.*, 422 S.E.2d 521 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 470) for discussion of topic.

### **Admissibility**

#### **Abuse in termination proceeding**

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Abuse and neglect, Evidence of prior abuse, (p. 588) for discussion of topic.

### **Blood tests**

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

See SCIENTIFIC TESTS Evidence destroyed, Duty to make record, (p. 518) for discussion of topic.

### **Breath test for DUI**

*State v. Conrad*, 421 S.E.2d 41 (1992) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Evidence, Breath test, (p. 182) for discussion of topic.

### **Character of accused**

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See EVIDENCE Admissibility, Other crimes, (p. 214) for discussion of topic.

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See EVIDENCE Admissibility, Other crimes, (p. 214) for discussion of topic.

## EVIDENCE

### Admissibility (continued)

#### Character of accused (continued)

*State v. Richards*, 438 S.E.2d 331 (1993) (Brotherton, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 207) for discussion of topic.

#### Character of victim

*Dietz v. Legursky*, 425 S.E.2d 202 (1992) (McHugh, C.J.)

See EVIDENCE Character of victim, (p. 227) for discussion of topic.

*State v. Richards*, 438 S.E.2d 331 (1993) (Brotherton, J.)

Appellant was convicted of malicious wounding of his brother and nephew. To form a foundation for introducing evidence of the victims' propensity for violence, appellant introduced evidence of a plastic plate implanted in his skull. He testified that he believed his brother and nephew intended to hit him in the head. The trial court refused to allow testimony relating to community opinion of, reputation of, and habits of the victims.

Syl. pt. 3 - "Rule 404(a)(2) of the West Virginia Rules of Evidence essentially codifies the common law rules on the admission of character evidence of the victim of a crime. In particular, under our traditional rule, a defendant in a homicide, malicious wounding, or assault case who relies on self-defense or provocation may introduce evidence concerning the violent or turbulent character of the victim, including prior threats or attacks on the defendant." Syllabus point 2, *State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519 (1989).

The Court noted appellant clearly relied on self-defense, making evidence of the victims' character admissible. Reversed and remanded.

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 220) for discussion of topic.

## EVIDENCE

### Admissibility (continued)

#### Confessions

*State v. George*, 408 S.E.2d 291 (1991) (Workman, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 536) for discussion of topic.

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

Appellant was convicted of murder. He voluntarily came to the police station and was advised of his rights. After he was unable to contact the lawyer of his choice he made a statement. He claimed on appeal that the officers should have recorded his statement electronically.

Syl. pt. 9 - “A confession or statement made by a suspect is admissible if it is freely and voluntarily made despite the fact that it is written by an arresting officer if the confession or statement is read, translated (if necessary), signed by the accused and admitted by him to be correct.” Syl. Pt. 2, *State v. Nicholson*, 174 W.Va. 573, 328 S.E.2d 180 (1985).

Syl. pt. 10 - Based on our decision in *State v. Nicholson*, 174 W.Va. 573, 328 S.E.2d 180 (1985), we decline to expand the Due Process Clause of the *West Virginia Constitution*, Article III, § 10, to encompass a duty that police electronically record the custodial interrogation of an accused.

The Court found the statement here to be voluntary. Despite strongly suggesting that an electronic recording should be made where feasible, the Court did not require it. Affirmed.

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See CONFESSIONS Admissibility, Warrantless arrest, (p. 128) for discussion of topic.

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 537) for discussion of topic.

## EVIDENCE

### Admissibility (continued)

#### Confessions (continued)

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 220) for discussion of topic.

*State v. Slaman*, 431 S.E.2d 91 (1993) (Per Curiam)

Appellant was convicted for manufacturing marijuana. Police officers seized marijuana plants in appellant's mobile home pursuant to a search warrant. Appellant went to the police station and gave an unrecorded statement waiving his right to counsel and admitting the plants belonged to him. He also gave a subsequent recorded statement.

Appellant believed that he was immune from prosecution following the second statement if he "cooperated." At trial the police officer admitted that he told both appellant and his live-in girlfriend that they would not be charged if they cooperated. By "cooperation" the officer claimed to mean appellant's purchasing marijuana from others as a police informant. The trial court denied appellant's motion to suppress the confession.

Syl. pt. 3 - "It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review." Syl. pt. 2, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Here, because appellant made a knowing and intelligent waiver of his rights prior to confessing, the Court found no error.

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 539) for discussion of topic.

*State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 540) for discussion of topic.

## EVIDENCE

### Admissibility (continued)

#### Confession of juveniles

*Comer v. Tom A.M.*, 403 S.E.2d 182 (1991) (Per Curiam)

See JUVENILES Self-incrimination, Waiver of right to counsel, (p. 368) for discussion of topic.

#### Collateral crimes

*State v. Bunda and Devault*, 419 S.E.2d 457 (1992) (Per Curiam)

Appellants were convicted of arson. Both were involved in a series of arson - burglaries in both Pennsylvania and West Virginia. Pennsylvania officers first questioned appellants and they admitted to several arsons in Pennsylvania. Upon learning of possible arsons in West Virginia, Pennsylvania police summoned officers from West Virginia. Appellants exercised their right to remain silent and did not discuss the West Virginia fires.

Appellants pled guilty to burglary, arson and criminal trespass in Pennsylvania. At trial Pennsylvania officers testified concerning the confessions and pleas in Pennsylvania. Appellants contended that the evidence of other crimes was improper.

Syl. pt. 1 - “Subject to exceptions, it is a well-established common-law rule that in a criminal prosecution, proof which shows or tends to show that the accused is guilty of the commission of other crimes and offenses at other times, even though they are of the same nature as the one charged, is incompetent and inadmissible for the purpose of showing the commission of the particular crime charged, unless such other offenses are an element of or are legally connected with the offense for which the accused is on trial.’ Syllabus Point 11, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).” Syl. pt. 1, *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986).

Syl. pt. 2 - “The exceptions permitting evidence of collateral crimes and charges to be admissible against an accused are recognized as follows: the evidence is admissible if it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial.’ Syllabus Point 12, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).” Syl. pt. 2, *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986).

## EVIDENCE

### Admissibility (continued)

#### Collateral crimes (continued)

##### *State v. Bunda and Devault*, (continued)

Syl. pt. 3 - “In the proper exercise of discretion, the trial court may exclude evidence of collateral crimes and charges if the court finds that its probative value is outweighed by the risk that its admission will create substantial danger of undue prejudice or confuse the issues or misled the jury or unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered.’ Syllabus Point 15, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).” Syl. pt. 4, *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986).

Here, the trial court admitted the testimony for the express purpose of establishing motive, plan scheme, or design. Further, the potential prejudice did not outweigh the probative value. No error.

##### *State v. Dorisio*, 434 S.E.2d 707 (1993) (Per Curiam)

Appellant was convicted of aggravated robbery for the theft of money from a convenience store. At trial a teller from a bank nearby was allowed to testify to seeing a man fitting appellant’s description acting suspiciously in the bank parking lot and inside the bank itself. The car the man was driving was also similar in description to appellant’s car.

In creating an artist’s rendering of the man who robbed the convenience store, the teller’s description was used. The convenience store clerk found the rendering accurate. Appellant alleged on appeal that allowing the teller’s testimony was tantamount to admission of collateral crime evidence. The circuit court did not give a limiting instruction.

Syl. pt. 1 - “Rules 402 and 403 of the *West Virginia Rules of Evidence* [1985] direct the trial judge to admit relevant evidence, but to exclude evidence whose probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” Syllabus point 4, *Gable v. Kroger Co.*, 186 W.Va. 62, 410 S.E.2d 701, 705 (1991).

Syl. pt. 2 - “The exceptions permitting evidence of collateral crimes and charges to be admissible against an accused are recognized as follows: the evidence is admissible if it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial.” Syllabus point 12, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

## EVIDENCE

### Admissibility (continued)

#### Collateral crimes (continued)

##### *State v. Dorisio*, (continued)

The Court noted that during an *in camera* discussion of jury instructions defense counsel did not want a limiting instruction on collateral crimes. More importantly, no bank robbery took place so the teller's testimony did not concern a crime, nor was it introduced to show appellant's propensity to commit a crime. No error.

##### *State v. Lola Mae C.*, 408 S.E.2d 31 (1991) (Workman, J.)

See SEXUAL ATTACKS Evidence, Collateral crimes, (p. 566) for discussion of topic.

##### *State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

Appellant was convicted of fraudulently secreting a public record. She claimed the trial court erred in allowing evidence of a drug transaction in which appellant was involved. This transaction led to appellant's being investigated for falsification or hiding of police arrest records.

The prosecution claimed the evidence was necessary to establish the context in which the secreting of records took place; that it was necessary to fully present the case; and that it was necessary to counter appellant's claim of entrapment.

Citing Rule 404(b), the Court noted *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990), clearly allows admission absent an intent to show "criminal disposition." Here, the Court found the evidence was offered to show why appellant was targeted for investigation and to counter the entrapment defense. The trial court properly conducted an *in camera* hearing prior to admission and gave a cautionary instruction. See *State v. Dolin*, 171 W.Va. 688, 347 S.E.2d 208 (1986). No error.

##### *State v. Richards*, 438 S.E.2d 331 (1993) (Brotherton, J.)

Appellant was convicted of malicious wounding of his brother and nephew and sentenced to two concurrent terms of two to ten years. During opening argument, defense counsel said he would show appellant's reputation as a "peaceful....and law abiding citizen" who was "the mainstay of his family" and a "stable husband and father."

## EVIDENCE

### Admissibility (continued)

#### Collateral crimes (continued)

##### *State v. Richards*, (continued)

The prosecuting attorney argued successfully that appellant's reputation had been placed at issue, allowing for introduction of appellant's past criminal record. Appellant's 1969 and 1975 convictions of possession of stolen property were allowed into evidence.

Syl. pt. 1 - "Character Evidence Generally. -- Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) Character of the Accused -- Evidence of a pertinent trait of his character offered by an accused, or by the prosecutor to rebut the same; . . ." Part, Rule 404(a), *West Virginia Rules of Evidence*.

Syl. pt. 2 - The *West Virginia Rules of Evidence* contemplate that rebuttal evidence be introduced only to rebut actual evidence previously introduced, and the simple mention of character issues during opening argument does not lay a proper foundation for, or open the door for, the introduction of otherwise inadmissible character evidence on rebuttal.

The Court noted that no evidence of appellant's character was introduced, only an assertion during opening argument. Reversed and remanded.

##### *State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

Appellant was convicted of possession of marijuana with intent to deliver. During cross-examination appellant admitted he had used marijuana. Appellant objected that this admission amounted to improper introduction of prior criminal acts, despite the trial court's warning to disregard the answer.

Syl. pt. 4 - "Protection against unfair prejudice from evidence admitted under Rule 404(b) of the *West Virginia Rules of Evidence* [1985] is provided by: (1) the requirement of Rule 404(b) that the evidence be offered for a proper purpose; (2) the relevancy requirement of Rule 402 -- as enforced through Rule 104(b); (3) the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and, (4) Rule 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted." Syllabus point 8, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992).

No error (reversed on other grounds).

## EVIDENCE

### Admissibility (continued)

#### Defendant's flight

*State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

Appellant was convicted of first-degree murder. The prosecution introduced evidence of defendant's flight after the killing.

Syl. pt. 4 - "In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should hold an *in camera* hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect." Syllabus point 6, *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981).

No error in admitting here.

#### Discretion of judge

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

Appellant was convicted of three counts of obtaining a controlled substance. Two indictments were issued, the first alleging two counts of obtaining by prescriptions dated July 6 and July 20, 1990. The second alleged one count of obtaining by a prescription dated June 6, 1990.

Appellant was alleged to have altered the prescription by writing in the word "Plus" after the drug name; this alteration resulted in his receiving a drug 50% stronger than the one the doctor prescribed. Both the trial court and the Supreme Court found appellant did alter the prescription, in violation of *W.Va. Code*, 60A-4-403. *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

On appeal, appellant argued that joinder of the two indictments was prejudicial. Appellant's first trial on only the first indictment ended in a mistrial; after the second indictment was returned and the two indictments joined for retrial, appellant was convicted.

Syl. pt. 2 - " " "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." *State v. Louk*, 171 W.Va. 623, 301 S.E.2d 596, 599 (1983).' Syl. pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983)." Syl. pt. 4 *State v. Farmer*, 185 W.Va. 232, 406 S.E.2d 458 (1991).

## EVIDENCE

### Admissibility (continued)

#### Discretion of judge (continued)

##### *State v. Bell*, (continued)

Although the evidence was confusing regarding the prescription dates joinder was proper because the State clearly alleged the same offense occurred repeatedly over a period of time. No error.

#### Exclusionary rule

##### *State v. Townsend*, 412 S.E.2d 477 (1991) (Per Curiam)

See SEARCH AND SEIZURE Exclusionary rule, Items outside curtilage, (p. 521) for discussion of topic.

#### Expert opinion

##### *State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See EVIDENCE Expert witnesses, Admissibility of opinions, (p. 235) for discussion of topic.

#### Flight by defendant

##### *State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

See EVIDENCE Admissibility, Defendant's flight, (p. 209) for discussion of topic.

#### Generally

##### *State v. Dorisio*, 434 S.E.2d 707 (1993) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 206) for discussion of topic.

##### *State v. Farmer*, 406 S.E.2d 458 (1991) (Per Curiam)

See EVIDENCE Admissibility, Relevance, (p. 221) for discussion of topic.

## EVIDENCE

### Admissibility (continued)

#### Generally (continued)

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

Appellant was convicted of grand larceny. At trial the prosecution showed two enlarged lists of equipment at issue. The original versions were admitted into evidence but no motion was made as to the enlargements. Similarly, the prosecution also used four photographs for demonstrative purposes which were not moved into evidence.

Appellant objected that the enlargements were inaccurate and incomplete and that neither the enlarged lists nor the photographs were disclosed pursuant to *W.Va.R.Crim.P.* Rule 16, resulting in unfair surprise. The prosecution claimed appellant was aware of the theory of the case and that the documents were used for demonstrative purposes only.

Syl. pt. 5 - “Generally, the admissibility of demonstrative evidence is a matter within the discretion of the trial court.” *State v. Hardway*, 182 W.Va. 1, 7, 385 S.E.2d 62, 68 (1989).

The Court held the evidence here to be demonstrative. Finding no abuse of discretion, no error.

#### Hearsay

*Peyatt v. Kopp*, 428 S.E.2d 535 (1993) (McHugh, J.)

Appellant was charged with first-degree sexual abuse. A preliminary hearing was held in August, 1991. Defense counsel subpoenaed the child victims, along with others; he also issued subpoenas duces tecum to obtain documents in the hands of the investigating officer and a social worker.

Syl. pt. 1 - The magistrate has the discretion to allow hearsay evidence at a preliminary hearing under *W.Va.R.Crim.P.* 5.1 if three conditions are met: (1) the source of the hearsay is credible; (2) there is a factual basis for the information furnished; and (3) an unreasonable burden would be imposed on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing.

The prosecution moved to quash all the subpoenas, which motion was granted. Following a three-day preliminary hearing, the magistrate found probable cause. Defense counsel thereupon moved for writ of mandamus against the magistrate to compel another preliminary hearing and a writ of prohibition against the prosecuting attorney to prevent the matter from going to the grand jury. The circuit court granted both writs, from which the prosecution appealed.

## EVIDENCE

### Admissibility (continued)

#### Hearsay (witness unavailable)

*State v. Phillips*, 417 S.E.2d 124 (1992) (Per Curiam)

See HEARING Witness unavailable, Prosecution's burden, (p. 278) for discussion of topic.

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See HOMICIDE Sufficiency of evidence, (p. 285) for discussion of topic.

#### Identification in court

*State v. Dorisio*, 434 S.E.2d 707 (1993) (Per Curiam)

See IDENTIFICATION In court, Admissibility, (p. 287) for discussion of topic.

#### Identification out of court

*State v. Dorisio*, 434 S.E.2d 707 (1993) (Per Curiam)

See IDENTIFICATION In court, Admissibility, (p. 287) for discussion of topic.

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See IDENTIFICATION Out of court, Admissibility, (p. 288) for discussion of topic.

*State v. Tharp*, 400 S.E.2d 300 (1990) (Per Curiam)

See IDENTIFICATIONS Out of court, Admissibility, (p. 289) for discussion of topic.

#### Intercepted communications

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

See EVIDENCE Admissibility, Wiretaps, (p. 224) for discussion of topic.

## EVIDENCE

### Admissibility (continued)

#### Invited error

*State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

Appellant was convicted of unlawful assault. At trial the victim testified that he had been drinking since early in the evening of the assault but that he was not intoxicated. The prosecution showed that the victim's blood alcohol was twice the legal limit for operating a motor vehicle. On cross-examination, appellant's counsel asked the doctor who treated the victim after the assault whether that blood level indicated intoxication; the doctor replied he did not know and further said that he could not recall if the victim appeared to be intoxicated. On redirect, the prosecution asked if the hospital records indicated intoxication, to which the doctor said no. Appellant objected but the trial court allowed the questions.

Syl. pt. 5 - "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." Syllabus Point 2, *State v. Bowman*, 155 W.Va. 562, 184 S.E.2d 314 (1971).

Appellant's counsel elicited testimony concerning the question of intoxication. No error.

#### Items outside curtilage

*State v. Townsend*, 412 S.E.2d 477 (1991) (Per Curiam)

See SEARCH AND SEIZURE Exclusionary rule, Items outside curtilage, (p. 521) for discussion of topic.

#### Late-discovered evidence

*State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

See DISCOVERY Failure to disclose, Late-discovered evidence, (p. 161) for discussion of topic.

#### Motive or intent

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See EVIDENCE Admissibility, Other crimes, (p. 214) for discussion of topic.

## EVIDENCE

### Admissibility (continued)

#### Other crimes

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

Appellant was convicted of conspiracy to commit malicious wounding and voluntary manslaughter. At trial evidence was allowed of appellant's assault of a woman, attempted arson, burglary and armed robbery; evidence was also introduced to show that appellant gave the actual killer here controlled substances in order to procure his actions.

Syl. pt. 2 - "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *W.Va.R.Evid.* 404(b)." Syllabus point 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

The Court noted that the trial court held the required *in camera* hearing to determine admissibility. An element of the charges here was knowledge of the killer's propensity for violence; the evidence tended to show appellant's involvement in other crimes with the killer. Admissible. No error.

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

Appellant was convicted of first-degree murder. At trial evidence was introduced showing that the victim had told police that appellant was dealing and using controlled substances illegally. The issue here was whether Rule 404(b) allowed introduction of this evidence to show motive.

Syl. pt. 2 - "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *W.Va.R.Evid.* 404(b)." Syl. Pt. 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

The trial court held an *in camera* hearing to determine admissibility. The motive was clear here; the probative value of the evidence outweighed any prejudice. No error.

## EVIDENCE

### Admissibility (continued)

#### Photographs

*State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

Appellant was convicted of malicious wounding, attempted murder and first-degree murder. At trial twelve photographs were introduced which appellant characterized as “gruesome,” along with “blood-stiffened garments.”

Syl. pt. 4 - “ “As a general rule photographs of persons, things, and places, when duly verified and shown by intrinsic evidence to be faithful representations of the objects they purport to portray, are admissible in evidence as aids to the jury in understanding the evidence; and whether a particular photograph or groups of photographs should be admitted in evidence rests in the sound discretion of the trial court and its ruling on the question of the admissibility of such evidence will be upheld unless it clearly appears that its discretion has been abused.” Syl. pt. 1, *Thrasher v. Amere Gas Utilities Co.*, 138 W.Va. 166, 75 S.E.2d 376 (1953), appeal dismissed, 347 U.S. 910, 74 S.Ct. 478, 98 L.Ed. 1067 (1954).’ Syllabus point 2, *State v. Dunn*, 162 W.Va. 63, 246 S.E.2d 245 (1978).” Syllabus point 4, *State v. Deskins*, 181 W.Va. 112, 380 S.E.2d 676 (1989).

See *State v. Clawson*, 165 W.Va. 588, 270 S.E.2d 659 (1980) for definition of gruesome photograph. No abuse of discretion; no error.

#### Physical evidence

*State v. Sharpless*, 429 S.E.2d 56 (1993) (Per Curiam)

Appellant was convicted of receiving stolen property. He claimed on appeal that the trial court improperly admitted evidence of the property because it was illegally seized.

Appellant was arrested at a jewelry store; at some time during the arrest a ring was taken from him. No allegation was made that the arrest was invalid.

Syl. pt. 2 - “It is sufficient in order for an object to be introduced in evidence that such object be satisfactorily identified as being in substantially the same condition as at the time of the occurrence in question.” Syl. Pt. 7, *Johnson v. Monongahela Power Co.*, 146 W.Va. 900, 123 S.E.2d 81 (1961).

The Court found no chain of custody problem, nor problem of identification (the ring here had initials engraved inside). No error.

## EVIDENCE

### Admissibility (continued)

#### Police reports

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See EVIDENCE Police reports, (p. 241) for discussion of topic.

#### Polygraphs

*State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 540) for discussion of topic.

#### Prejudice versus probative value

*State v. Bass*, 432 S.E.2d 86 (1993) (Per Curiam)

Appellant was convicted of unlawful wounding. At trial the court allowed the victim to display his wound, which required 187 stitches to close. On appeal, counsel claimed the viewing was analogous to displaying a gruesome photograph.

Syl. pt. 5 - “Rules 402 and 403 of the *West Virginia Rules of Evidence* [1985] direct the trial judge to admit relevant evidence, but to exclude evidence whose probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” Syllabus Point 4, *Gable v. Kroger Co.*, 186 W.Va. 62, 410 S.E.2d 701 (1991).

Syl. pt. 6 - “ “Rulings on the admissibility of evidence are largely within a” trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.” *State v. Louk*, 171 W.Va. 639, 643, 301 S.E.2d 596, 599 (1983).’ Syl. pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).” Syllabus Point 4, *State v. Farmer*, 185 W.Va. 232, 406 S.E.2d 458 (1991).

Here, the Court found acceptable the trial court’s finding that viewing the scar was probative since a permanent injury was an element of the crime. No abuse of discretion.

## EVIDENCE

### Admissibility (continued)

#### Prior inconsistent statements

*State v. Carrico*, 427 S.E.2d 474 (1993) (Neely, J.)

Appellant was convicted of first-degree arson. She complained that certain evidence was improperly admitted hearsay. A certain John David Miller testified that appellant's son told Miller in appellant's presence that the son was going to set the house on fire at his mother's request. Appellant affirmed that was true.

The Court held Miller's testimony admissible under Rule 801(d)(2)(B) as an adopted admission by a party-opponent, not hearsay.

Appellant's son also made several statements regarding his mother's plan out of appellant's presence both to Mr. Miller and to a Michael Ray Nimmo. The son was asked during his testimony whether he made the statements; a full and fair opportunity to cross-examine was given.

Syl. pt. 5 - Three criteria must be met before evidence of a witness' prior statement may be admitted under Rule 613(b) of the *West Virginia Rules of Evidence* to impeach that witness' trial testimony: (1) The statement must be a prior inconsistent statement of the witness; (2) The witness must be afforded an opportunity to explain or deny having made the statement; and (3) The opposing party must be afforded an opportunity to interrogate the witness concerning the statement.

No error.

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

Appellant was convicted of first-degree murder. He gave several voluntary statements to police after the victim's body was discovered. Following a suppression hearing, the trial court held appellant's prompt presentment rights were violated, making the statements inadmissible as part of the case in chief, but allowed the statements to be used for impeachment purposes.

Syl. pt. 2 - "Where a person who has been accused of committing a crime makes a voluntary statement that is inadmissible as evidence in the State's case in chief because the statement was made after the accused had requested a lawyer, the statement may be admissible solely for impeachment purposes when the accused takes the stand at his trial and offers testimony contradicting the prior voluntary statement knowing that such prior voluntary statement is inadmissible as evidence in the State's case in chief." Syl. Pt. 4, *State v. Goodmon*, 170 W.Va. 123, 290 S.E.2d 260 (1981).

## EVIDENCE

### Admissibility (continued)

#### Prior inconsistent statements (continued)

##### *State v. Knotts*, (continued)

Syl. pt. 3 - Where a person accused of committing a crime makes a voluntary statement which is declared inadmissible in the State's case-in-chief due to a violation of the accused's prompt presentment rights pursuant to West Virginia Code § 62-1-5 (1989) and West Virginia Rules of Criminal Procedure 5(a), the statement may be admissible solely for impeachment purposes if the accused takes the stand at his trial and offers testimony inconsistent with the prior voluntary statement.

No error.

##### *State v. Moore*, 427 S.E.2d 450 (1992) (Per Curiam)

Appellant was convicted of first-degree murder, aggravated robbery, burglary and trespass. He alleged the trial court allowed the prosecution to read a witness' statement during closing argument when the statement was not in evidence.

At trial, one of the prosecution's main witnesses incorrectly referred to the victim as "Calvin Kline" when the correct name was Calvin Tomblin. The witness had previously used the correct name in a statement to police. Although the witness was questioned regarding the inconsistency while on the witness stand the prior statement was not introduced or admitted to evidence. However, the trial court granted a blanket motion by the prosecution for "the admission of all the exhibits in this case that have not been already admitted into evidence."

Syl. pt. 1 - "Under Rule 801(d)(1)(A) of the West Virginia Rules of Evidence, a witness's prior inconsistent statement is not hearsay and may be used as a substantive evidence if it meets certain prerequisites. First, the Statement must have been given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Second, the statement must be inconsistent with the witness's testimony at trial, and the witness must be subject to cross-examination." Syl. Pt. 1, *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (1990).

Syl. pt. 2 - "A prior statement of a witness, even if given under oath, during the course of a police interrogation is not a statement made subject to the penalty of perjury or during a trial, hearing, or other proceeding as required by Rule 801(d)(1)(A) of the West Virginia Rules of Evidence." Syl. Pt. 2, *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (1990).

## EVIDENCE

### Admissibility (continued)

#### Prior inconsistent statements (continued)

##### *State v. Moore*, (continued)

Syl. pt. 3 - “While a specific foundation need not initially be made to impeach a witness with a prior inconsistent statement, the witness must be informed of the general nature of his prior inconsistent statement, and be afforded the opportunity to explain or deny the same. There is also a right, if requested, on the part of his counsel to see any prior written statement or to have disclosed the contents of a prior inconsistent oral statement during the course of interrogation. All of the above is subject to the sound discretion of the trial court.” Syl. Pt. 5, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981).

Syl. pt. 4 - “Where the witness cannot recall the prior statement or denies making it, then under *W.Va.R.Evid.* 613(b), extrinsic evidence as to the out-of-court statement may be shown--that is, the out-of-court statement itself may be introduced or, if oral, through the third party to whom it was made. However, the impeached witness must be afforded an opportunity to explain the inconsistency.” Syl. Pt. 4, *State v. Schoolcraft*, 183 W.Va. 579, 396 S.E.2d 760 (1990).

Syl. pt. 5 - ““Where improper evidence of a non-constitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State’s case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant’s guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.’ Syllabus Point 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).” Syl. Pt. 6, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1978).

The Court found the prior statement inadmissible as substantive evidence because it was not under oath. However, the statement was admissible for purposes of impeachment. The difficulty here was the method used; the trial court should have instructed the jury regarding the limited purpose (impeachment) for which the statement was admitted. Nonetheless, the Court found harmless error. Affirmed.

## EVIDENCE

### Admissibility (continued)

#### Prior inconsistent statements (continued)

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

Appellant was convicted of two counts of sexual abuse. When he came to the police station the night after the incident, he told the investigating officer that he did not know the victim. Appellant testified at trial that he had “picked up” the victim previously and suggested that she was a prostitute. The officer was allowed to relate appellant’s prior inconsistent statement.

Syl. pt. 6 - “Where a person accused of committing a crime makes a voluntary statement which is declared inadmissible in the State’s case-in-chief due to a violation of the accused’s prompt presentment rights pursuant to West Virginia Code § 62-1-5 [1965] and West Virginia Rules of Criminal Procedure 5(a), the statement may be admissible solely for impeachment purposes if the accused takes the stand at his trial and offers testimony inconsistent with the prior voluntary statement.” Syllabus Point 3, *State v. Knotts*, 187 W.Va. 795, 421 S.E.2d 917 (1992).

The Court noted that no proof was in the record that prompt presentment rules were violated; appellant came voluntarily to the police station, he was advised of his rights, the police had already obtained an arrest warrant, and no record was made of how long the questioning went on before he was advised of his rights.

Even assuming that the delay was unreasonable in taking appellant before a magistrate, the Court allowed the testimony based on appellant’s prior inconsistent statement. The prior statement was clearly uncoerced. No error.

#### Prompt complaint

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

Appellant was convicted of first-degree sexual assault. The victim’s mother testified that, three weeks after the event, her daughter described sexual acts appellant forced her to perform. Appellant claims that the statement should have been excluded under the prompt complaint rule.

The Court held that the primary reason for offering the statement was to explain why the victim was taken to a psychologist and to the prosecuting attorney. The victim was present at trial and testified; the mother’s testimony added nothing. See *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

## EVIDENCE

### Admissibility (continued)

#### Relevance

*State v. Dorisio*, 434 S.E.2d 707 (1993) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 206) for discussion of topic.

*State v. Farmer*, 406 S.E.2d 458 (1991) (Per Curiam)

Appellant was convicted of malicious wounding. On appeal she claimed that the trial court erred in allowing testimony regarding prior sexual relations between the victim and her.

Syl. pt. 3 - “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *W.Va.R.Evid.* 401.” Syl. pt. 2, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990).

Syl. pt. 4 - “‘Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.’ *State v. Louk*, 171 W.Va. 623, 301 S.E.2d 596, 599 (1983).” Syl. pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

Here, appellant proceeded on a theory of self-defense, claiming she shot the victim because he attempted to have sex with her. The trial court held an *in camera* hearing on admissibility. No error.

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

Appellant was convicted of incest, sexual assault and sexual abuse by a guardian or custodian. At trial, the prosecuting attorney questioned a defense witness about the victim’s being removed from the family home. The witness was called to testify as to the relationship appellant had with his children and his reputation in the community.

Although defense counsel did not object to stating the victim was removed from the home, on recross, he did object to the prosecutor’s beginning to state what the reason was for the removal. The question was permitted despite counsel’s objection that it led the jury to believe appellant’s guilt was previously determined.

## EVIDENCE

### Admissibility (continued)

#### Relevance (continued)

##### *State v. George W.H.*, (continued)

Syl. pt. 10 - “Rule 402 and Rule 403 of the *West Virginia Rules of Evidence* [1985] direct the trial judge to admit relevant evidence, but to exclude evidence whose probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” Syllabus Point 4, *Gable v. Kroger Co.*, 186 W.Va. 62, 410 S.E.2d 701 (1991).

Syl. pt. 11 - “‘Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.’ *State v. Louk*, 171 W.Va. 639, 643, 301 S.E.2d 596, 599 (1983).’ Syl. pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

The Court noted that the victim’s removal was otherwise established prior to questioning of this witness and that defense counsel did not initially object.

#### Testimony based on personal knowledge

##### *State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

Appellant was convicted of breaking and entering in the theft of guns from a retail store. The assistant store manager testified as to the inventory he and others took to establish what items were missing. Defense counsel objected, based on lack of personal knowledge of what the others did. The witness then testified that the inventory was done in his presence and under his supervision.

Syl. pt. 6 - Rule 602 of the West Virginia Rules of Evidence does not require that the witness’s knowledge be positive or rise to the level of absolute certainty. Evidence is inadmissible under this rule only if in the proper exercise of the trial court’s discretion it finds that the witness could not have actually perceived or observed that which he testifies to.

No abuse of discretion here. See *M.B.A.F.B. Federal Credit Union v. Cumis Insurance Society, Inc.*, 681 F.2d 930 (4th Cir. 1982).

## **EVIDENCE**

### **Admissibility (continued)**

#### **Threats by defendant**

*State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Threats against victim, (p. 544) for discussion of topic.

#### **Threats by victim**

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See EVIDENCE Victim's acts of violence, (p. 248) for discussion of topic.

#### **Victim's acts of violence**

*State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

See EVIDENCE Victim's acts of violence, (p. 248) for discussion of topic.

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See EVIDENCE Victim's acts of violence, (p. 248) for discussion of topic.

#### **Waiver of objection**

*State v. Harding*, 422 S.E.2d 619 (1992) (Per Curiam)

See BAIL Revocation of, Hearing required, (p. 111) for discussion of topic.

## EVIDENCE

### Admissibility (continued)

#### Wiretaps

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

Appellant was convicted of breaking and entering. The break-in occurred at a retail store; several guns were taken, along with other items. Following the incident, police got information that appellant offered to sell rifles to one of his co-workers. The co-worker claimed to have seen the rifles at appellant's lodgings. At police initiation, the co-worker agreed to telephone appellant about the rifles while being tape recorded. Appellant was recorded offering to sell the guns after he filed off the serial numbers. Police obtained a search warrant based on the call and seized the weapons. Appellant claimed on appeal that the call was coerced and the evidence should have been suppressed.

Syl. pt. 1 - 18 U.S.C. § 2515 prohibits the admission of evidence derived from intercepted wire or oral communications.

Syl. pt. 2 - The prohibition in 18 U.S.C. § 2515 is subject to the exceptions contained in 18 U.S.C. § 2511(2)(c), which permit a person acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception.

Syl. pt. 3 - The State has the burden of showing that one of the exceptions in 18 U.S.C. § 2511(2)(c), exists. Where the State claims that one of the parties consented to a telephone call interception, its burden initially can be met by showing that the party placed the telephone call knowing it would be monitored. If there is an allegation that the consent was coerced, the State then must show that there were no undue pressure, threats, or improper inducements.

There was no allegation at trial that the co-worker was coerced. Admissible. (*W.Va. Code*, 62-1D-1 is not applicable here because the crime occurred prior to its enactment.)

## EVIDENCE

### Admissibility (continued)

#### Writing by witness

*State v. Perolis*, 398 S.E.2d 512 (1990) (Neely, C.J.)

Appellant was convicted of second-degree sexual assault, third degree sexual assault and first-degree sexual abuse. At trial, defense counsel attempted to interrogate the victim on the contents of a piece of paper on which she had written numbers which were alleged to have been taken from a particular evening's lottery drawing. The intent was to show that the victim was present in appellant's home after the last assault; she had already testified that she was not present after the last assault.

The trial court granted the prosecution's objection without allowing defense counsel or the prosecution to state grounds; the document was ruled irrelevant.

The Court noted that the victim had testified that she probably had taken the numbers from the television. The parties had stipulated as to the numbers which were drawn on the date in question.

Syl. pt. 2 - "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion. Syl. pt. 5, *Casto v. Martin*, 159 W.Va. 761, 230 S.E.2d 722 (1976), citing Syl. pt. 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955). Syllabus Point 2, *State v. Rector*, 167 W.Va. 748, 280 S.E.2d 597 (1981).' Syl. pt. 3, *State v. Oldaker*, 172 W.Va. 258, 304 S.E.2d 843 (1983)." Syllabus Point 6, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

Discretion abused here when leading questioning of the witness not allowed (See EVIDENCE Witnesses, Hostile, (p. 250). Because the evidence went to the witness' credibility, it should have been admitted. Reversed.

(NOTE: Although not apparently part of the holding, the Court admonished the trial court for failure to allow defense counsel to question the victim as to her plans to run away from home; this motive may have also affected her credibility. Appellant and his wife allegedly told the victim's parents of the plan. The Court noted that this statement was not hearsay in that the statement was not introduced for the truth of the matter asserted but rather whether the statement was made.)

## **EVIDENCE**

### **Bias or prejudice**

*State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

See WITNESSES Cross-examination, Prejudice or bias, (p. 622) for discussion of topic.

### **Breath test**

#### **Foundations for**

*State v. Conrad*, 421 S.E.2d 41 (1992) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Evidence, Breath test, (p. 182) for discussion of topic.

### **Character of accused**

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See EVIDENCE Admissibility, Other crimes, (p. 214) for discussion of topic.

*State v. Richards*, 438 S.E.2d 331 (1993) (Brotherton, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 207) for discussion of topic.

### **Confessions**

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 538) for discussion of topic.

### **Hearsay**

*State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

See RIGHT TO CONFRONT Admissibility of extrajudicial statements, (p. 499) for discussion of topic.

## EVIDENCE

### Character of accused (continued)

#### Motive or intent

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See EVIDENCE Admissibility, Other crimes, (p. 214) for discussion of topic.

#### Other crimes

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See EVIDENCE Admissibility, Other crimes, (p. 214) for discussion of topic.

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See HOMICIDE Sufficiency of evidence, (p. 285) for discussion of topic.

#### Witness unavailable

*State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

See RIGHT TO CONFRONT Admissibility of extrajudicial statements, (p. 499) for discussion of topic.

### Character of victim

*Dietz v. Legursky*, 425 S.E.2d 202 (1992) (McHugh, C.J.)

Appellant was convicted of first-degree murder. His earlier appeal was denied. *State v. Dietz*, 182 W.Va. 544, 390 S.E.2d 15 (1990). In this *habeas corpus* petition he claimed ineffective assistance of counsel in that trial counsel failed to place in the record certain medical records which would have been the basis of expert testimony. He claimed the records would have shown the victim's propensity for violence, strengthening his claim of self-defense.

## EVIDENCE

### Character of victim (continued)

#### *Dietz v. Legursky*, (continued)

Syl. pt. 2 - “Rule 404(a)(2) of the West Virginia Rules of Evidence essentially codifies the common law rules on the admission of character evidence of the victim of a crime. In particular, under our traditional rule, a defendant in a homicide, malicious wounding, or assault case who relies on self-defense or provocation, may introduce evidence concerning the violent or turbulent character of the victim including prior threats or attacks on the defendant. This is reflected by *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596 (1983): ‘In a prosecution for murder, where self-defense is relied upon to excuse the homicide, and there is evidence showing, or tending to show, that the deceased was at the time of the killing, making a murderous attack upon the defendant, it is competent for the defense to prove the character or reputation of the deceased as a dangerous and quarrelsome man, and also to prove prior attacks made by the deceased upon him, as well as threats made to other parties against him; and, if the defendant has knowledge of specific acts of violence by the deceased against other parties, he should be allowed to give evidence thereof.’ (Citations omitted).” Syl. pt. 2, *State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519 (1989).

Syl. pt. 3 - In a homicide case, malicious wounding, or assault where the defendant relies on self-defense or provocation, under Rule 404(a)(2) and Rule 405(a) of the *West Virginia Rules of Evidence*, character evidence in the form of opinion testimony may be admitted to show that the victim was the aggressor if the probative value of such evidence is not outweighed by the concerns set forth in the balancing test of Rule 403.

Syl. pt. 4 - “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 attorney would have so acted in the defense of an accused.” Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The Court found the medical evidence admissible and noted that the evidence would have tended to demonstrate the victim’s propensity for violence. Trial counsel admitted that his failure to include them was an oversight. The Court found ineffective assistance. Reversed and remanded.

#### *State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

See EVIDENCE Victim’s acts of violence, (p. 248) for discussion of topic.

## EVIDENCE

### Character of victim (continued)

*State v. Richards*, 438 S.E.2d 331 (1993) (Brotherton, J.)

See EVIDENCE Admissibility, Character of victim, (p. 202) for discussion of topic.

*State v. Richards*, 438 S.E.2d 331 (1993) (Brotherton, J.)

Appellant was convicted of malicious wounding of his brother and nephew. To form a foundation for introducing evidence of the victims' propensity for violence, appellant introduced evidence of a plastic plate implanted in his skull. He testified that he believed his brother and nephew intended to hit him in the head. The trial court refused to allow testimony relating to community opinion of, reputation of, and habits of the victims.

Syl. pt. 3 - "Rule 404(a)(2) of the West Virginia Rules of Evidence essentially codifies the common law rules on the admission of character evidence of the victim of a crime. In particular, under our traditional rule, a defendant in a homicide, malicious wounding, or assault case who relies on self-defense or provocation may introduce evidence concerning the violent or turbulent character of the victim, including prior threats or attacks on the defendant." Syllabus point 2, *State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519 (1989).

The Court noted appellant clearly relied on self-defense, making evidence of the victims' character admissible. Reversed and remanded.

### Circumstantial

#### Sufficiency of

*State v. Nelson*, 436 S.E.2d 308 (1993) (Neely, J.)

See SUFFICIENCY OF EVIDENCE Circumstantial evidence, (p. 580) for discussion of topic.

### Collateral crimes

*State v. Dorisio*, 434 S.E.2d 707 (1993) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 206) for discussion of topic.

## EVIDENCE

### Collateral crimes (continued)

*State v. Lola Mae C.*, 408 S.E.2d 31 (1991) (Workman, J.)

See SEXUAL ATTACKS Evidence, Collateral crimes, (p. 566) for discussion of topic.

*State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 207) for discussion of topic.

*State v. Richards*, 438 S.E.2d 331 (1993) (Brotherton, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 207) for discussion of topic.

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 208) for discussion of topic.

### Abuse

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Abuse and neglect, Evidence of prior abuse, (p. 588) for discussion of topic.

### Character of accused

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See HOMICIDE Sufficiency of evidence, (p. 285) for discussion of topic.

## EVIDENCE

### Confessions

#### Admissibility

*State v. Bunda and Devault*, 419 S.E.2d 457 (1992) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 535) for discussion of topic.

*State v. George*, 408 S.E.2d 291 (1991) (Workman, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 536) for discussion of topic.

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See EVIDENCE Admissibility, Confessions, (p. 203) for discussion of topic.

*State v. Slaman*, 431 S.E.2d 91 (1993) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p.204 204) for discussion of topic.

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 539) for discussion of topic.

#### Defendant's flight

*State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

See EVIDENCE Admissibility, Defendant's flight, (p. 209) for discussion of topic.

#### Destruction of in testing

##### State's duty to document

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

See SCIENTIFIC TESTS Evidence destroyed, Duty to make record, (p. 518) for discussion of topic.

## **EVIDENCE**

### **Disclosure of**

#### **Accessible to prosecution**

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See PROSECUTING ATTORNEY Failure to disclose, Evidence available to prosecutor, (p. 475) for discussion of topic.

### **Documents**

#### **Written by witness**

*State v. Perolis*, 398 S.E.2d 512 (1990) (Neely, C.J.)

See EVIDENCE Admissibility, Writing by witness, (p. 225) for discussion of topic.

### **Exculpatory**

#### **Duty to disclose**

*State v. James*, 411 S.E.2d 692 (1991) (Neely, J.)

Appellant was convicted of first-degree sexual abuse and first-degree sexual assault. He claimed that the prosecution failed to disclose exculpatory evidence regarding a co-defendant who had struck a plea with the prosecution. The co-defendant testified that he was a member of the United States Navy but did not mention that he was AWOL at the time of the crime, nor that he had lied about his AWOL status to the probation office; he also testified that the prosecution did not promise him probation in exchange for his testimony, when an explicit agreement was made.

Syl. pt. 1 - “A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the *West Virginia Constitution*.” Syl. Pt. 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

Syl. pt. 2 - The prosecution must disclose any and all inducements given to its witnesses in exchange for their testimony at the defendant’s trial.

## EVIDENCE

### Exculpatory (continued)

#### Duty to disclose (continued)

##### *State v. James*, (continued)

The Court noted that the AWOL status could not have been exculpatory given the victim's independent identification of appellant. The impeachment evidence must show "bias or interest" to be exculpatory. *United States v. Bagley*, 473 U.S. 667 (1985). Although refusing to overturn on the possibility of corrupt testimony as a result of the offer of probation, the Court strongly suggested that appellant file a *habeas corpus* petition in order to make a record. Affirmed.

##### *State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See DISCOVERY Failure to disclose, Exculpatory evidence, (p. 160) for discussion of topic.

##### *State v. Miller*, 400 S.E.2d 897 (1990) (Per Curiam)

Appellant was convicted of unlawful assault. Immediately after the wounding, appellant telephoned an emergency help service. At trial, appellant's main defense was intoxication; he claimed on appeal that the tape of the phone call was the "best evidence" of his condition and that the prosecution failed to disclose the existence of the tape.

The prosecution claimed it responded to a discovery request by stating that the "defendant called for an ambulance upon shooting the victim." The state's first witness and a defense witness testified that the appellant called for an ambulance.

"A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, § 14 of the *West Virginia Constitution*." Syl. Pt. 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

"The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989), quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494 (1985).

## EVIDENCE

### Exculpatory (continued)

#### Duty to disclose (continued)

##### *State v. Miller*, (continued)

Evidence of the call was not introduced. The court did not find a reasonable probability that the result would have been different if it had. No error (reversed on other grounds).

*State v. Miller*, 400 S.E.2d 897 (1990) (Per Curiam)

See EVIDENCE Exculpatory, Duty to disclose, (p. 233) for discussion of topic.

#### Failure to disclose

##### *State v. Ward*, 424 S.E.2d 725 (1991) (Workman, J.)

Appellant was convicted of aggravated robbery and first-degree murder. On appeal he claimed that the prosecution failed to disclose exculpatory evidence. The prosecution claimed ignorance and that the non-disclosure was inadvertent; and that the evidence in question was not material.

Syl. pt. 4 - “A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the *West Virginia Constitution*.’ Syllabus Point 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).” Syl. Pt. 4, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

The Court noted that a lengthy post-trial hearing was held to determine if the evidence was exculpatory; the circuit court determined that regardless of other evidence there was sufficient evidence to convict appellant. Here, no reasonable doubt as to guilt could have been established by the neglected evidence. No error.

## EVIDENCE

### Expert witnesses

#### Admissibility of opinions

*State v. Hose*, 419 S.E.2d 690 (1992) (Per Curiam)

Appellant, a professional truck driver, was convicted of involuntary manslaughter. At trial, evidence was introduced that showed appellant had been in his vehicle from 1:00 a.m. until 10:45 p.m., exceeding federal and state limits for commercial drivers. A state policeman, characterized as an accident reconstruction expert, testified that appellant did not apply brakes until he left the highway. Appellant contended that the evidence was insufficient to convict and that the policeman was not qualified to testify.

Syl. pt. 1 - “In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.” Syllabus point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - “Although a witness may be qualified as an expert by practical experience in a field of activity conferring special knowledge not shared by mankind in general, the question of whether a witness qualifies as an expert rests in the sound discretion of the trial court, whose decision will not be disturbed unless it is clearly wrong.” Syllabus point 2, *State v. Baker*, 180 W.Va. 233, 376 S.E.2d 127 (1988).

The evidence was not manifestly inadequate here, nor did the trial court abuse its discretion in allowing the policeman to testify as to the cause of the accident. No error.

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

Appellant was convicted of first-degree murder for stabbing a man. At trial the prosecuting attorney asked the medical examiner whether the victim received the fatal stab wound by falling on the knife, to which the examiner said that was not possible.

The prosecuting attorney thereupon went through a litany of other possible accidents which could occur while appellant held the knife, all of which the examiner deemed impossible.

## EVIDENCE

### Expert witnesses (continued)

#### Admissibility of opinions (continued)

##### *State v. Triplett*, (continued)

Appellant challenged the examiner's competency to testify outside his field of expertise, to testify to the impossibility, and to testify as to the ultimate issue.

Citing Rule 704 of the Rules of Evidence, the Court held that the ultimate issue was properly addressed. Further, *State v. Clark*, 171 W.Va. 74, 297 S.E.2d 849 (1982), allowed a medical examiner to give an opinion as to the cause of death. *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188, 191 n. 1 (1978), allowed a medical examiner to testify that a gunshot wound was not self-inflicted. No error.

### Extrajudicial statement

##### *State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See HOMICIDE Sufficiency of evidence, (p. 285) for discussion of topic.

### Flight of defendant

##### *State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

See EVIDENCE Admissibility, Defendant's flight, (p. 209) for discussion of topic.

### Hearsay

#### Admissibility

##### *Peyatt v. Kopp*, 428 S.E.2d 535 (1993) (McHugh, J.)

See EVIDENCE Admissibility, Hearsay, (p. 211) for discussion of topic.

#### Admissibility of extrajudicial statements

##### *State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

See RIGHT TO CONFRONT Admissibility of extrajudicial statements, (p. 499) for discussion of topic.

## **EVIDENCE**

### **Hearsay (continued)**

#### **Juvenile transfer based on**

*Comer v. Tom A.M.*, 403 S.E.2d 182 (1991) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Probable cause, (p. 370) for discussion of topic.

#### **Prior inconsistent statements**

*State v. Moore*, 427 S.E.2d 450 (1992) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 218) for discussion of topic.

#### **Right to confront accuser**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See HOMICIDE Sufficiency of evidence, (p. 285) for discussion of topic.

#### **Spontaneous declaration/excited utterance**

*State v. Farmer*, 406 S.E.2d 458 (1991) (Per Curiam)

See HEARING Spontaneous declaration/excited utterance, (p. 277) for discussion of topic.

*State v. Wickline*, 399 S.E.2d 42 (1990) (Miller, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Delay in taking before magistrate, (p. 545) for discussion of topic.

### **Identification of defendant**

#### **Admissibility**

*State v. James*, 411 S.E.2d 692 (1991) (Neely, J.)

See IDENTIFICATION Out-of-court, Admissibility, (p. 288) for discussion of topic.

## EVIDENCE

### Identification of defendant (continued)

#### Admissibility (continued)

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See IDENTIFICATION Out of court, Admissibility, (p. 288) for discussion of topic.

### Impeachment

#### Mental health records

*Nelson v. Ferguson*, 399 S.E.2d 909 (1990) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Records relating to, (p. 243) for discussion of topic.

#### Prior inconsistent statement

*State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

See WITNESSES Cross-examination, Prejudice or bias, (p. 622) for discussion of topic.

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 217) for discussion of topic.

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See EVIDENCE Police reports, (p. 241) for discussion of topic.

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 220) for discussion of topic.

## **EVIDENCE**

### **Insanity**

#### **Sufficient to rebut presumption**

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See INSANITY Presumptions, (p. 314) for discussion of topic.

### **Introduction after case closed**

*State v. Harding*, 422 S.E.2d 619 (1992) (Per Curiam)

See BAIL Revocation of, Hearing required, (p. 111) for discussion of topic.

### **Introduction of incompetent evidence**

#### **Waiver of objection**

*State v. Harding*, 422 S.E.2d 619 (1992) (Per Curiam)

See BAIL Revocation of, Hearing required, (p. 111) for discussion of topic.

### **Invited error**

*State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

See EVIDENCE Admissibility, Invited error, (p. 213) for discussion of topic.

### **Judicial notice**

#### **Blood tests**

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

See SCIENTIFIC TESTS Evidence destroyed, Duty to make record, (p. 518) for discussion of topic.

### **Jury's use of evidence**

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See JURY Note-taking, Use of notes, (p. 359) for discussion of topic.

## **EVIDENCE**

### **Mental health records**

*Nelson v. Ferguson*, 399 S.E.2d 909 (1990) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Records relating to, (p. 243) for discussion of topic.

### **Miranda rights**

#### **As showing of prior offenses**

*State v. Farmer*, 406 S.E.2d 458 (1991) (Per Curiam)

See EVIDENCE Prior offenses, Reading of rights, (p. 243) for discussion of topic.

### **Newly-discovered evidence**

#### **Sufficient for new trial**

*In the Matter of W.Va. State Police Crime Lab.*, 438 S.E.2d 501 (1993) (Miller, J.)

See NEW TRIAL Newly discovered evidence, (p. 402) for discussion of topic.

*State v. O'Donnell*, 433 S.E.2d 566 (1993) (Workman, C.J.)

See NEW TRIAL Newly-discovered evidence, Sufficient for new trial, (p. 405) for discussion of topic.

### **Photographs**

*State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

See EVIDENCE Admissibility, Photographs, (p. 215) for discussion of topic.

### **Physical objects**

*State v. Sharpless*, 429 S.E.2d 56 (1993) (Per Curiam)

See EVIDENCE Admissibility, Physical evidence, (p. 215) for discussion of topic.

## EVIDENCE

### Police reports

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

Appellant was convicted of first-degree murder. On appeal, he claimed that police reports were not produced. The first request came at an *in camera* hearing on appellant's motion in limine seeking to prohibit evidence of the victim's attempt to turn the appellant in for drug dealing; it was not renewed after the officer testified.

The second request, for a second officer's report, occurred after the conclusion of his direct testimony. *W.Va.R.Crim.P.26.2*. The prosecution claimed that appellant was not entitled to either report since neither witness relied upon it and neither report was a final report. *State v. Gale*, 177 W.Va. 337, 352 S.E.2d 87 (1986). Both, it was argued, fell within the non-disclosure provision of *Rule of Criminal Procedure* 16(a)(2).

Syl. pt. 1 - “ “After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the State or the defendant and his attorney, as the case may be, to produce for the examination and use of the moving party any statement of the witness that is in their possession that relates to the subject matter concerning which the witness has testified.” Rule 26.2, West Virginia Rules of Criminal Procedure. Syllabus point 1, *State v. Tanner*, 175 W.Va. 264, 332 S.E.2d 277 (1985).” Syllabus, *State v. Gale*, 177 W.Va. 337, 352 S.E.2d 87 (1986).

It appeared from testimony that the first officer made a report to the grand jury which may have been his final report. The trial court ordered the prosecutor to produce the report and the witness testified that the report did not contain the information appellant sought.

When defense counsel requested the second report after the second officer's testimony, the trial court ruled that Rule 26.2 did not apply to work product of the investigating officer. Ultimately, however, the trial court made the report a part of the record.

The Court ruled that an officer's final report is producible after testifying; he need not have refreshed his memory from it, nor is it necessary for the report to be in the witness' possession. The prosecuting attorney need only have access to it.

Because the report was not included in the record, the Court was unable to determine if the error was reversible. Remanded for further development.

## EVIDENCE

### Polygraphs

*State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 540) for discussion of topic.

### Prejudicial to defendant

*State v. Bass*, 432 S.E.2d 86 (1993) (Per Curiam)

See EVIDENCE Admissibility, Prejudice versus probative value, (p. 216) for discussion of topic.

### Prior inconsistent statements

*State v. Carrico*, 427 S.E.2d 474 (1993) (Neely, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 217) for discussion of topic.

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 217) for discussion of topic.

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See EVIDENCE Police reports, (p. 241) for discussion of topic.

*State v. Moore*, 427 S.E.2d 450 (1992) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 218) for discussion of topic.

## EVIDENCE

### Prior offenses

#### Abuse of children in termination proceeding

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Abuse and neglect, Evidence of prior abuse, (p. 588) for discussion of topic.

#### Reading of rights

*State v. Farmer*, 406 S.E.2d 458 (1991) (Per Curiam)

Appellant was convicted of malicious wounding. On appeal she alleged that evidence of past crimes was improperly admitted at trial. The investigating officer stated that appellant understood her rights because she said that she had heard them read several times.

The trial court has discretion as to what constitutes a “manifest necessity” requiring a mistrial. *State v. Ayers*, 179 W.Va. 365, 369 S.E.2d 22 (1988); *State v. Williams*, 172 W.Va. 295, 305 S.E.2d 251 (1983). Introduction of inadmissible evidence does not alone create a manifest necessity. *State ex rel. Dandy v. Thompson*, 148 W.Va. 263, 134 S.E.2d 730 (1964), *cert. denied*, 379 U.S. 819, 85 S.Ct. 39, 13 L.Ed.2d 30 (1964).

Here, the trial court immediately instructed the jury to disregard the officer’s remarks. No manifest necessity and no error.

### Proffer for appeal

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See APPEAL Failure to preserve, Failure to develop record, (p. 20) for discussion of topic.

### Psychiatric or psychological disability

#### Records relating to

*Nelson v. Ferguson*, 399 S.E.2d 909 (1990) (Per Curiam)

Leigh Ann H., at the time sixteen years old, had a cross burned in her yard. She accused a policeman of making derogatory comments concerning her interracial dating (Ms. H. is white). Ms. H. had been in contact with the police officer during several incorrigibility petitions filed against her by her mother and school principal.

## EVIDENCE

### Psychiatric or psychological disability (continued)

#### Records relating to (continued)

##### *Nelson v. Ferguson*, (continued)

During the resulting police civil service proceeding, the circuit court was asked to determine whether Ms. H.'s mental health records were discoverable by subpoena. *Allen v. Smith*, 179 W.Va. 360, 368 S.E.2d 924 (1988). Petitioner then filed a writ of prohibition to prevent disclosure and a writ of mandamus to allow intervention by the Human Rights Commission.

Syl. pt. 1 - "A subpoena is issued automatically by a clerk of court upon the *ex parte* application of one party litigant, and although a subpoena is enforceable through the court's power of contempt until it has been quashed by regular, in-court proceedings, a bare subpoena is not the type of binding court order contemplated by *W.Va. Code*, 27-3-1(b)(3) [1977]." Syllabus Point 3, *Allen v. Smith*, 179 W.Va. 360, 368 S.E.2d 924 (1988).

Syl. pt. 2 - When a party requests the production of mental health records deemed confidential under *W.Va. Code*, 27-3-1 [1977], but asserted to be probative on the issue of a witness' credibility, the circuit court should first determine if the person whose mental health records are sought will be called as a witness, and if the individual will not be called as a witness, the records need not be produced.

Syl. pt. 3 - When the mental health records of a prospective witness are sought for the purpose of impeaching the witness' credibility, the circuit court should first examine the records *ex parte* to determine if the request is frivolous. If the court finds probable cause to believe that the mental health records contain material relevant to the credibility issue, counsel should be allowed to examine the records, after an *in camera* hearing should be held in which the requesting party's counsel designates the parts of the records he believes relevant, and both sides present arguments on the relevancy of those parts.

Syl. pt. 4 - When a child's mental health records are sought to be produced, and the child is not directly represented in the proceeding, the child should be joined as a party and a guardian *ad litem* must be appointed by the circuit court to protect the child's rights.

The Court noted that a minor's mental health records are especially sensitive. *W.Va. Code*, 49-7-1. Remanded to determine whether the juvenile will be called to testify and to appoint a guardian *ad litem*. Motion for Human Rights Commission to intervene granted.

## **EVIDENCE**

### **Rebuttal evidence**

*State v. Richards*, 438 S.E.2d 331 (1993) (Brotherton, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 207) for discussion of topic.

### **Reputation of victim**

*State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

See EVIDENCE Victim's acts of violence, (p. 248) for discussion of topic.

### **Sanity**

#### **Sufficient to establish**

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See INSANITY Presumptions, (p. 314) for discussion of topic.

### **Sexual relations**

#### **Between victim and attacker (non-rape)**

*State v. Farmer*, 406 S.E.2d 458 (1991) (Per Curiam)

See EVIDENCE Admissibility, Relevance, (p. 221) for discussion of topic.

### **Spontaneous declaration/excited utterance**

*State v. Farmer*, 406 S.E.2d 458 (1991) (Per Curiam)

See HEARING Spontaneous declaration/excited utterance, (p. 277) for discussion of topic.

## EVIDENCE

### Spontaneous declaration/excited utterance (continued)

*State v. Gibson*, 413 S.E.2d 120 (1991) (Per Curiam)

Appellant was convicted of first-degree murder. The trial judge allowed a witness to testify that he heard appellant say “I hope he dies” at the scene of the killing. Appellant claimed the statement was hearsay and did not meet any of the requirements for admissibility under *W.Va.R.Evid.* 803(1) and (2). The witness said he heard the statement as he drove into the parking lot which appellant and his companions were leaving.

Syl. pt. 3 - “An alleged spontaneous declaration must be evaluated in light of the following factors: (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact and not a mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation; and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.” Syl. Pt. 2, *State v. Young*, 166 W.Va. 309, 273 S.E.2d 592 (1980).

The Court held the statement the witness heard arose from a spontaneous natural declaration relating to the act in question (stabbing) and was a factual statement relating to appellant’s malice. No error.

*State v. Wickline*, 399 S.E.2d 42 (1990) (Miller, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Delay in taking before magistrate, (p. 545) for discussion of topic.

### Sufficiency

#### For conviction of larceny

*State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

See GRAND LARCENY Sufficiency of evidence, (p. 264) for discussion of topic.

## **EVIDENCE**

### **Surviving spouse**

*State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

Appellant was convicted of malicious wounding, attempted murder and first-degree murder. He claimed on appeal that the prosecution inflamed the jury by eliciting irrelevant testimony from the victim's wife. The prosecution claimed that the widow testified as to the victim's identity and the date of death.

Syl. pt. 5 - Evidence that a homicide victim was survived by a spouse or children is generally considered inadmissible in a homicide prosecution where it is irrelevant to any issue in the case and is presented for the sole purpose of gaining sympathy from the jury. For this reason, courts tend to look upon testimony by a surviving spouse with disfavor. However, the admission of such evidence does not necessarily constitute reversible error.

Syl. pt. 6 - "Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury." Syllabus point 2, *State v. Kennedy*, 162 W.Va. 244, 249 S.E.2d 188 (1978).

The Court found the testimony and the prosecution's questions proper. No error.

### **Termination of parental rights**

#### **Evidence of prior abuse**

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Abuse and neglect, Evidence of prior abuse, (p. 588) for discussion of topic.

### **Testimony**

#### **Witness' personal knowledge**

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

See EVIDENCE Admissibility, Testimony based on personal knowledge, (p. 222) for discussion of topic.

## EVIDENCE

### Threats by defendant

*State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Threats against victim, (p. 544) for discussion of topic.

### Victim's acts of violence

*Dietz v. Legursky*, 425 S.E.2d 202 (1992) (McHugh, C.J.)

See EVIDENCE Character of victim, (p. 227) for discussion of topic.

*State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

Appellant was convicted of first-degree murder. He claimed self-defense. He offered evidence of specific instances of misconduct by the victim, which evidence was excluded, along with any character evidence about the victim relating to acts more five years prior to the killing. Apparently appellant did not have knowledge of these acts at the time of the killing.

Syl. pt. 2 - "Under Rule 405(b) of the West Virginia Rules of Evidence, a defendant in a criminal case who relies on self-defense or provocation may introduce specific acts of violence or threats made against him by the victim, and if the defendant has knowledge of specific acts of violence against third parties by the victim, the defendant may offer such evidence." Syllabus point 3, *State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519 (1989).

No error. See also, *State v. Dietz*, 182 W.Va. 544 , 390 S.E.2d 15 (1990) and *Dietz v. Legursky*, 188 W.Va. 526, 425 S.E.2d 202 (1992).

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

Appellant was convicted of sexual assault of her sixth-grade pupil. At trial, defense counsel asked the victim if he had ever attacked appellant. The victim denied all. Counsel then called a girl of the victim's age to the stand to elicit testimony regarding the victim's attempt to remove her shirt. The trial court sustained the prosecution's objection.

Syl. pt. 8 - "Under 405(b) of the West Virginia Rules of Evidence [1993], a defendant in a criminal case who relies on self-defense or provocation may introduce specific acts of violence or threats made against him by the victim, and if the defendant has knowledge of specific acts of violence against third parties by the victim, the defendant may offer such evidence." Syllabus point 3, *State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519 (1989).

## **EVIDENCE**

### **Victim's acts of violence (continued)**

*State v. Koon*, (continued)

The Court held the elicited testimony relevant to the defense that the sexual intercourse was under duress and in self-defense. Evidence improperly excluded, but harmless error.

### **Victim's character or reputation**

*Dietz v. Legursky*, 425 S.E.2d 202 (1992) (McHugh, C.J.)

See EVIDENCE Character of victim, (p. 227) for discussion of topic.

### **Vouching the record**

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See APPEAL Failure to preserve, Failure to develop record, (p. 20) for discussion of topic.

### **Wiretaps**

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

See EVIDENCE Admissibility, Wiretaps, (p. 224) for discussion of topic.

### **Witnesses**

#### **Cross-examination**

*State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

See WITNESSES Cross-examination, Prejudice or bias, (p. 622) for discussion of topic.

## EVIDENCE

### Witnesses (continued)

#### Hostile

*State v. Perolis*, 398 S.E.2d 512 (1990) (Neely, C.J.)

Appellant was convicted of second-degree sexual assault, third degree sexual assault and first-degree sexual abuse. The incidents took place in appellant's house on two separate occasions, one year apart. The victim claimed that she did not return to appellant's house after the second incident.

At trial defense counsel attempted to question the victim as an adverse witness to establish that she did return to appellant's house voluntarily after the second incident. Counsel was prevented from asking a leading question.

Syl. pt. 1 - When a party calls a hostile witness, an adverse witness, or a witness identified with an adverse party, interrogation may be by leading questions.

Syl. pt. 2 - "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion. Syl. pt. 5, *Casto v. Martin*, 159 W.Va. 761, 230 S.E.2d 722 (1976), citing Syl. pt. 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955). Syllabus Point 2, *State v. Rector*, 167 W.Va. 748, 280 S.E.2d 597 (1981).' Syl. pt. 3, *State v. Oldaker*, 172 W.Va. 258, 304 S.E.2d 843 (1983)." Syllabus Point 6, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

The Court noted that Rule 611 of the Federal Rules of Evidence was specifically amended to allow for leading questions of hostile witnesses in criminal cases. *United States v. Duncan*, 712 F. Supp. 124 (S.D. Ohio 1988). See also, *United States v. Hicks*, 748 F.2d 854 (4th Cir. 1984).

The witness was adverse to appellant and counsel should have been allowed to lead. Reversed.

#### Unavailable at transfer hearing

*State v. Gary F.*, 432 S.E.2d 793 (1993) (Workman, C.J.)

See JUVENILES Transfer to adult jurisdiction, Right to confront, (p. 372) for discussion of topic.

## **EVIDENCE**

### **Witnesses unavailable**

#### **Extrajudicial statements**

*State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

See RIGHT TO CONFRONT Admissibility of extrajudicial statements, (p. 499) for discussion of topic.

#### **Juvenile transfer hearing**

*State v. Gary F.*, 432 S.E.2d 793 (1993) (Workman, C.J.)

See JUVENILES Transfer to adult jurisdiction, Right to confront, (p. 372) for discussion of topic.

### **Writings**

*State v. Perolis*, 398 S.E.2d 512 (1990) (Neely, C.J.)

See EVIDENCE Admissibility, Writing by witness, (p. 225) for discussion of topic.

## *EX POST FACTO*

### **Sentencing**

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

Appellant was convicted of incest and sexual assault and sexual abuse by a custodian, all against his daughter. Appellant contended alleged acts in 1984 and 1985 were not punishable as acts by a custodian because the statute did not exist until 1988.

He also contended that the alleged sexual assault is also not punishable because the jury was instructed that forcible compulsion, an element of the crime, meant “fear by a child under sixteen years of age caused by intimidation, expressed or implied by another person four years older than the victim.” This definition was similarly not part of the statute until after the 1984 and 1985 incidents.

Syl. pt. 1 - “Under *ex post facto* principles of the *United States* and *West Virginia Constitutions*, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.” Syllabus Point 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980).

The Court noted the statute in question was amended effective 1 July 1986. (See also, *State v. Hensler*, 187 W.Va. 81, 415 S.E.2d 885 (1992). The Court also noted that the offenses had been enacted and directed the circuit court to resentence based on the earlier statute (should appellant be reconvicted). Reversed and remanded.

## **EXPERT WITNESSES**

### **Qualifying as such**

*State v. Hose*, 419 S.E.2d 690 (1992) (Per Curiam)

See EVIDENCE Expert witnesses, Admissibility of opinions, (p. 235) for discussion of topic.

## EXTRADITION

### Basis for

#### Validity of warrant

*State v. Belcher*, 422 S.E.2d 640 (1992) (Per Curiam)

Appellant was involved in a divorce action in Texas and fled before a final order, taking her two children with her in violation of temporary custody order giving her husband custody. She was indicted in Texas for “interference with child custody.”

Appealing from the circuit court’s denial of her motion for writ of *habeas corpus*, appellant claimed that the extradition warrant signed by Governor Caperton does not specify whether the Texas charges are civil or criminal, felony or misdemeanor or what statutory provisions are at issue. She also claimed the Texas offense is not a crime in West Virginia and therefore extradition is improper.

Syl. pt. - “In *habeas corpus* proceedings instituted to determine the validity of custody where petitioners are being held in connection with extradition proceedings, the asylum state is limited to considering whether the extradition papers are in proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers.” Syllabus point 2, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530, 185 S.E.2d 355 (1971), *cert. denied*, 406 U.S. 946, 92 S.Ct. 2048, 32 L.Ed.2d 333 (1972).

The Court found the extradition affidavit sufficient. See *W.Va. Code*, 5-1-7(b) and (c). The Court dismissed appellant’s claim that the warrant did not charge a crime, finding that both Texas and West Virginia recognize as a crime concealing or removing a child in violation of a court order. *W.Va. Code*, 61-2-14(d); Texas Penal Code & 25.03(a)(1) and (d). Affirmed.

#### Custody while awaiting

*State ex rel. Mikulik v. Fields*, 410 S.E.2d 717 (1991) (Per Curiam)

Appellants resisted extradition to Maryland; they claimed they were not present in the demanding state at the time the criminal offenses were committed because they were both incarcerated in West Virginia. The circuit court denied their writ of *habeas corpus*.

## EXTRADITION

### Custody while awaiting (continued)

#### *State ex rel. Mikulik v. Fields*, (continued)

Syl. pt. 1 - “In *habeas* corpus proceedings instituted to determine the validity of custody where petitioners are being held in connection with extradition proceedings, the asylum state is limited to considering whether the extradition papers are in proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers.’ Point 2, Syllabus, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530, 185 S.E.2d 355 (1971).” Syl. pt. 1, *State ex rel. Gonzales v. Wilt*, 163 W.Va. 270, 256 S.E.2d 15 (1979).

Syl. pt. 2 - “To be a “fugitive from justice,” it is necessary that the person charged as such must have been actually present in the demanding state at the time of the commission of the crime, or, having been there, has then committed some overt act in furtherance of the crime subsequently consummated, and has departed to another jurisdiction. And, if the evidence be clear and convincing that the accused was not personally in the demanding state at the time of the commission of the offense charged, and has committed no prior overt act therein indicative of an intent to commit the crime, or which can be construed as a step in furtherance of the crime afterwards consummated, he should be discharged.’ Syllabus point 2, *State ex rel. Blake v. Doeppe*, 97 W.Va. 203, 124 S.E. 667 (1924).” Syl. pt. 2, *Lott v. Bechtold*, 169 W.Va. 578, 289 S.E.2d 210 (1982).

The Court noted that appellants bear the burden of proving their absence from the demanding state. Since the underlying offense here was cultivating marijuana, an ongoing enterprise, and the indictment states the time period as “on or about” a date certain, appellants did not meet their burden.

Affirmed.

### Fugitives

#### *State ex rel. Mikulik v. Fields*, 410 S.E.2d 717 (1991) (Per Curiam)

See EXTRADITION Custody while awaiting, (p. 254) for discussion of topic.

## FELONY

### Murder

#### Suicide

*State ex rel. Painter v. Zakaib*, 411 S.E.2d 25 (1991) (Brotherton, J.)

Appellant was charged with felony-murder in the suicide of a co-conspirator. The death occurred during a vehicle chase following the commission of a crime set forth in *W.Va. Code*, 61-2-1 (attempted burglary). Appellant sought a writ of prohibition to prevent prosecution. On appeal the State contended that appellant participated in a criminal conspiracy resulting in death, the very type of action which the felony-murder rule was designed to deter.

Syl. pt. 1 - “The crime of felony-murder in this State does not require proof of the elements of malice, premeditation or specific intent to kill. It is deemed sufficient if the homicide occurs accidentally during the commission of, or the attempt to commit, one of the enumerated felonies.” Syllabus point 7, *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978).

Syl. pt. 2 - A person cannot be charged with felony-murder pursuant to *W.Va. Code*, § 61-2-1 (1989) if the only death which occurred in the commission of the underlying felony was the suicide of a co-conspirator in the criminal enterprise.

The Court noted that the death did not occur incidental to the underlying offense. Writ granted.

#### Right to be present at all stages

*State v. Hamilton*, 403 S.E.2d 739 (1991) (Per Curiam)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 496) for discussion of topic.

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 496) for discussion of topic.

## **FELONY-MURDER**

### **Double jeopardy**

*State v. Elliott*, 412 S.E.2d 762 (1991) (Workman, J.)

See DOUBLE JEOPARDY Felony-murder, (p. 169) for discussion of topic.

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See DOUBLE JEOPARDY Felony-murder, (p. 170) for discussion of topic.

### **Election to proceed on**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

### **Elements of**

*State ex rel. Painter v. Zakaib*, 411 S.E.2d 25 (1991) (Brotherton, J.)

See FELONY Murder, Suicide, (p. 256) for discussion of topic.

### **Instructions on**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

## **FIFTH AMENDMENT**

### **Clothing seized during arrest**

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See SEARCH AND SEIZURE Plain view exception, (p. 522) for discussion of topic.

### **Incarceration for invoking**

*Kelly v. Allen*, No. 20663 (12/19/91) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Right to invoke, (p. 543) for discussion of topic.

### **Prescription for controlled substances**

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See SELF-INCRIMINATION Controlled substance prescription, (p. 534) for discussion of topic.

### **Waiver of**

*State v. Leadingham*, 438 S.E.2d 825 (1993) (McHugh, J.)

See PSYCHOLOGICAL/PSYCHIATRIC EVALUATION Self-Incrimination, Waiver during examination, (p. 482) for discussion of topic

## FOURTH AMENDMENT

### Civil liability

#### Hot pursuit without warrant

*Goines v. James*, 433 S.E.2d 572 (1993) (Workman, C.J.)

See SEARCH AND SEIZURE Civil liability, Hot pursuit without warrant, (p. 520) for discussion of topic.

### Plain view exception

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See SEARCH AND SEIZURE Plain view exception, (p. 522) for discussion of topic.

*State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

See ENTRAPMENT Grounds for, (p. 192) for discussion of topic.

### Search warrant

#### Probable cause for

*State v. Hlavacek*, 407 S.E.2d 375 (1991) (Brotherton, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 524) for discussion of topic.

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 526) for discussion of topic.

### Warrantless search

#### Incident to lawful investigative stop

*State v. Hlavacek*, 407 S.E.2d 375 (1991) (Brotherton, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause for, (p. 530) for discussion of topic.

## FOURTH AMENDMENT

### Warrantless search (continued)

#### Lawfully parked car

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See PROBABLE CAUSE Gesture when stopped, (p. 441) for discussion of topic.

## FUGITIVES

### Defined for extradition

*State ex rel. Mikulik v. Fields*, 410 S.E.2d 717 (1991) (Per Curiam)

See EXTRADITION Custody while awaiting, (p. 254) for discussion of topic.

## GAMING DEVICES

### Video poker

*United States v. Dobkin*, 423 S.E.2d 612 (1992) (Neely, J.)

See VIDEO POKER Declared unlawful, (p. 613) for discussion of topic.

## GRAND JURY

### Citizen's access to

*Harman v. Frye*, 425 S.E.2d 566 (1992) (McHugh, C.J.)

See WARRANTS Citizen's complaint as basis for, (p. 617) for discussion of topic.

### Evidence considered by

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

See INDICTMENT Sufficiency of, (p. 297) for discussion of topic.

### Prosecuting attorney influencing

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See PROSECUTING ATTORNEY Grand jury, Evidence presented to, (p. 478) for discussion of topic.

### Prosecuting attorney presenting evidence to

*Peyatt v. Kopp*, 428 S.E.2d 535 (1993) (McHugh, J.)

See PROSECUTING ATTORNEY Prohibition, Not appropriate in grand jury proceedings, (p. 479) for discussion of topic.

### Record required

*State ex rel. Redman v. Hedrick*, 408 S.E.2d 659 (1991) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 305) for discussion of topic.

### Return of multiple indictments

*State v. Seibert*, 429 S.E.2d 243 (1992) (Brotherton, J.)

See INDICTMENT Dismissal of, Effect of on new indictment, (p. 293) for discussion of topic.

## GRAND LARCENY

### Sufficiency of evidence

*State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

Appellant was convicted of grand larceny. He was engaged by a representative of several heirs to remove timber from a piece of property. During the operation appellant removed approximately twenty acres of timber from adjacent property. When approached, appellant agreed to pay for the timber. The parties were unable to agree on the price, leading to appellant's arrest.

Appellant claimed on appeal that he did not have the requisite intent to commit larceny and that the ownership of the property was not proven.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of the evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "To support a conviction for larceny at common law, it must be shown that the defendant took and carried away the personal property of another against his will and with the intent to permanently deprive him of the ownership thereof." Syl. pt. 3, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981).

Syl. pt. 3 - "'An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.'" Syl. pt. 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983)." Syl. pt. 1, *State v. Mullins*, 181 W.Va. 415, 383 S.E.2d 47 (1989).

Syl. pt. 4 - "An indictment for grand larceny that follows the language of *W.Va. Code*, 62-9-10 is sufficient." Syl. pt. 1, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

Viewing the evidence in the light most favorable to the prosecution, the Court noted that appellant had previously cut timber in the area and had expressed interest in the timber at issue here. Appellant's foreman said he was instructed to cut the boundary line fence out of the timber. Appellant was in financial difficulty at the time of the cutting. Although the evidence was in conflict, it was sufficient to establish intent.

Further, the indictment here followed Code language and gives sufficient notice of the charges. The owner testified that the property was taken against his will. No error.

**Abuse and neglect cases**

*James M. v. Maynard*, 408 S.E.2d 400 (1991) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Improvement period, (p. 9) for discussion of topic.

**Duty of counsel**

*In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 593) for discussion of topic.

**Duty to abused children**

*In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 593) for discussion of topic.

*In the Matter of Scottie D.*, 406 S.E.2d 214 (1991) (McHugh, J.)

See ABUSE AND NEGLECT Termination of parental rights, Guardian's duty, (p. 6) for discussion of topic.

**Paternity**

*Cleo A.E. v. Rickie Gene E.*, 438 S.E.2d 886 (1993) (Workman, C.J.)

The Child Advocate Office challenged the voluntary bastardization of a minor child. Cleo and Rickie E. were married in 1981; they had two children, one born in 1981 and one in 1983. They were divorced in 1986, with Cleo awarded child custody.

Although no child support was awarded, the former couple agreed that Rickie E. would Cleo \$250 per month. The agreement was not disputed, although Rickie apparently did not pay. The Child Advocate Office filed a petition to collect and pursuant to URESA, a hearing was held in Florida where Rickie then resided. Rickie appeared at the hearing and challenged his paternity of one child. The Florida court ordered Rickie to pay \$31.24 per week as temporary support. Further, it found Rickie to be the father and awarded \$62.40 per week toward the arrearage of \$18,074. However, an amended final order of divorce was entered in West Virginia that stipulated Rickie was not the father of the child.

**Paternity (continued)**

*Cleo A.E. v. Rickie Gene E.*, (continued)

Syl. pt. 1 - “A guardian *ad litem* should be appointed to represent the interests of the minor child whenever an action is initiated to disprove a child’s paternity.”  
Syl. Pt. 4, *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 387 S.E.2d 866 (1989).

Syl. pt. 2 - The parties to a domestic proceeding cannot by stipulation agree to bastardize children born during their marriage.

Syl. pt. 3 - A child has a right to an establishment of paternity and a child support obligation, and a right to independent representation on matters affecting his or her substantial rights and interests.

Syl. pt. 4 - The guidelines which this Court identified in *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 387 S.E.2d 866 (1989), regarding the admission of blood test evidence on the issue of paternity, should similarly be utilized when making a ruling which has as its effect the bastardization of a minor child.

Syl. pt. 5 - A guardian *ad litem* should be appointed to represent the interests of a minor child whenever the issue of disproving paternity is involved in a proceeding, regardless of whether the proceeding was initiated for the sole purpose of disproving paternity.

The Court found that parties to a domestic petition cannot agree to bastardize children born of their marriage. Viewing the best interests of the child as controlling, the Court reversed the West Virginia divorce adjudication and remanded.

## **GUILTY PLEA**

### **Sentencing**

#### **When judge is bound**

*State ex rel. Forbes v. Kaufman*, 404 S.E.2d 763 (1991) (McHugh, J.)

See PLEA BARGAINS Sentencing, (p. 418) for discussion of topic.

### **Waiver of rights**

*State v. Hatfield*, 413 S.E.2d 162 (1991) (McHugh, J.)

See COMPETENCY Suicide attempt, Effect of, (p. 122) for discussion of topic.

### **Withdrawal of plea**

*State v. Cook*, 403 S.E.2d 27 (1991) (Per Curiam)

See PLEA BARGAINS Withdrawal of, (p. 422) for discussion of topic.

*State v. Donald S.B.*, 399 S.E.2d 898 (1990) (Per Curiam)

See PLEA BARGAINS Setting aside, Necessity for record, (p. 419) for discussion of topic.

## **HABEAS CORPUS**

### **Bail bond**

*State ex rel. Woods v. Wolverton*, No. 20165 (7/11/91) (Per Curiam)

See ABUSE OF DISCRETION Bail, (p. 12) for discussion of topic.

### **Child custody**

#### **Recision of voluntary relinquishment**

*Snyder v. Scheerer*, 436 S.E.2d 299 (1993) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Subsequent recision of, (p. 596) for discussion of topic.

### **Confessions**

#### **Voluntariness**

*State ex rel. Justice v. Allen*, 432 S.E.2d 199 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 535) for discussion of topic.

### **Contempt for invoking right against self-incrimination**

*Kelly v. Allen*, No. 20663 (12/19/91) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Right to invoke, (p. 543) for discussion of topic.

### **Custody awaiting extradition**

*State ex rel. Mikulik v. Fields*, 410 S.E.2d 717 (1991) (Per Curiam)

See EXTRADITION Custody while awaiting, (p. 254) for discussion of topic.

### **Distinguished from appeal**

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See RIGHT TO APPEAL Constitutional right, Right to counsel, (p. 493) for discussion of topic.

## **HABEAS CORPUS**

### **Distinguished from appeal (continued)**

*State ex rel. Phillips v. Legursky*, 420 S.E.2d 743 (1992) (Per Curiam)

Relator was denied a transcript of an *in camera* hearing preceding his trial on first-degree murder charges. He was convicted, sentenced to life without mercy and the conviction affirmed. *State v. Phillips*, 176 W.Va. 244, 342 S.E.2d 210 (1986). The trial court also denied his writ of *habeas corpus* requesting the transcript.

Syl. pt. - “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.” Syllabus Point 4, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979), *cert. denied*, 464 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 112 (1983).

The Court noted that the *in camera* hearing was not transcribed and was not part of the original appeal. In addition, the error here, if any, was ordinary trial error, not constitutional error. No error in denying relator’s writ.

### **Distinguished from writ of error**

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See also, *Frank Billotti v. A.V. Dodrill*, 183 W.Va. 48, 394 S.E.2d 32 (1990), Volume IV of the Criminal Law Digest, (p. 253) for discussion of topic.

*State ex rel. Phillips v. Legursky*, 420 S.E.2d 743 (1992) (Per Curiam)

See *HABEAS CORPUS Distinguished from appeal*, (p. 269) for discussion of topic.

### **Double jeopardy**

#### **Recidivism**

*Gibson v. Legursky*, 415 S.E.2d 457 (1992) (Miller, J.)

See *DOUBLE JEOPARDY Recidivism*, (p. 176) for discussion of topic.

## **HABEAS CORPUS**

### **Extradition**

*State v. Belcher*, 422 S.E.2d 640 (1992) (Per Curiam)

See EXTRADITION Basis for, Validity of warrant, (p. 254) for discussion of topic.

### **Generally**

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See RIGHT TO APPEAL Constitutional right, Right to counsel, (p. 493) for discussion of topic.

*State ex rel. Roach v. Dietrick*, 404 S.E.2d 415 (1991) (Miller, C.J.)

See SENTENCING Good time credit, (p. 555) for discussion of topic.

### **Habeas corpus relief**

*State ex rel. Riggall v. Duncil*, No. 21138 (7/26/92) (Per Curiam)

See HABEAS CORPUS Parole, (p. 270) for discussion of topic.

### **Ineffective assistance**

#### **Effect of direct appeal**

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 308) for discussion of topic.

### **Parole**

*State ex rel. Riggall v. Duncil*, No. 21138 (7/26/92) (Per Curiam)

Relator was granted an original writ of *habeas corpus*, asking respondent to demonstrate whether relator had been given credit for time served prior to sentencing. Respondent claimed 350 days had been credited. Relator was a juvenile who had been sentenced to six months at Anthony Center and given two years probation. He violated his probation and was sentenced to one to ten, with credit given for the time at Anthony, the time at the diagnostic center and the time spent awaiting disposition of the probation violation.



## **HABEAS CORPUS**

### **Parole (continued)**

#### ***State ex rel. Riggall v. Duncil*, (continued)**

Relator challenged the Board of Probation and Parole's refusal to grant parole even though the minimum sentence was served. The Court, citing *Tasker v. Mohn*, 165 W.Va. 55, 267 S.E.2d 183 (1980), reiterated that parole is discretionary and not reviewable absent abuse of discretion. (See also *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981). Writ dismissed.

### **Parole from regional or county jails**

#### ***State ex rel. Smith v. Skaff*, 420 S.E.2d 922 (1992) (Workman, J.)**

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 437) for discussion of topic.

### **Prison/jail conditions**

#### ***State ex rel. Smith v. Skaff*, 420 S.E.2d 922 (1992) (Workman, J.)**

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 437) for discussion of topic.

#### ***State ex rel. Smith v. Skaff*, 428 S.E.2d 54 (1993) (Per Curiam)**

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 438) for discussion of topic.

### **Probation**

#### ***Davis v. Duncil*, No. 19652 (11/9/90) (Per Curiam)**

Relator pled guilty to unlawful wounding. The circuit court delayed sentencing even though it found relator ineligible for probation. Five years after entry of the plea the court ordered relator's arrest and he was sent to Huttonsville. Relator claimed that the court's allowing him to remain free was a form of constructive probation and his arrest and subsequent commitment were improper.

## **HABEAS CORPUS**

### **Probation (continued)**

#### *Davis v. Duncil*, (continued)

*State v. Reel*, 152 W.Va. 646, 165 S.E.2d 813 (1969) recognizes that incarceration is improper following expiration of a probationary period. *Louk v. Hayes*, 159 W.Va. 482, 223 S.E.2d 780 (1976) also requires procedural steps in revocation of probation. Relator relied on *Yates v. Buchanan*, 170 So.2d 72 (Fla. 1965), which allowed the defendant to avoid incarceration after remaining free for the maximum possible probationary period.

Here, the Court found that relator was not actually on probation. The crime of unlawful wounding excludes the possibility of probation when committed with a handgun. *W.Va. Code*, 62-12-2(b). Writ dismissed.

### **Recidivism**

#### **Double jeopardy**

*Gibson v. Legursky*, 415 S.E.2d 457 (1992) (Miller, J.)

See DOUBLE JEOPARDY Recidivism, (p. 176) for discussion of topic.

### **Release from regional/county jail**

#### **Parole**

*State ex rel. Smith v. Skaff*, 420 S.E.2d 922 (1992) (Workman, J.)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 437) for discussion of topic.

*State ex rel. Smith v. Skaff*, 428 S.E.2d 54 (1993) (Per Curiam)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 438) for discussion of topic.

### **Right to**

*State ex rel. Riggall v. Duncil*, No. 21138 (7/26/92) (Per Curiam)

See HABEAS CORPUS Parole, (p. 270) for discussion of topic.

## **HABEAS CORPUS**

### **Right to appeal**

#### **Waiver of**

*State ex rel. Adkins v. Trent*, No. 21441 (2/10/92) (Per Curiam)

See APPEAL Waiver of right to, (p. 32) for discussion of topic.

### **Right to counsel**

#### **Scope of**

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See also, *Frank Billotti v. A.V. Dodrill*, 183 W.Va. 48, 394 S.E.2d 32 (1990), Volume IV of the Criminal Law Digest, (p. 260) for discussion of topic.

### **Right to ruling on**

*State ex rel. Smith v. Hatcher*, No. 21640 (6/10/93) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 343) for discussion of topic.

*Warth v. Ferguson*, No. 19824 (12/13/90) (Per Curiam)

Petitioner sought a writ of mandamus to compel Judge Ferguson to rule in a pending *habeas corpus* proceeding. This request follows a writ of mandamus on July 11, 1990 requiring a decision in thirty days. No response has been filed.

The original *habeas corpus* petition was filed on July 23, 1982 and an evidentiary hearing held February 7, 1984. *W.Va. Code*, 53-4 A-(a) requires the court to “promptly hold a hearing. ... (and) pass upon all issues of fact without a jury. The Court has often held that § 17, Article III of the *West Virginia Constitution* requires a decision within a reasonable time. *State ex rel. Patterson v. Aldredge*, 173 W.Va. 446, 317 S.E.2d 805 (1984); *State ex rel. Cackowska v. Knapp*, 147 W.Va. 699, 130 S.E.2d 204 (1963).

Writ granted. Respondent ordered to issue a decision within thirty days or appear to show cause why he should not be held in contempt.

## **HARMLESS ERROR**

### **Constitutional**

#### **Ineffective assistance**

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 306) for discussion of topic.

#### **Right to be present**

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 496) for discussion of topic.

#### **Right to be present at all stages**

*State v. Hamilton*, 403 S.E.2d 739 (1991) (Per Curiam)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 496) for discussion of topic.

#### **Right to testify or remain silent**

*State v. Gibson*, 413 S.E.2d 120 (1991) (Per Curiam)

See DUE PROCESS Defendant's right to testify, Waiver of, (p. 186) for discussion of topic.

### **Critical stages**

#### **Defendant not present**

*State ex rel. Redman v. Hedrick*, 408 S.E.2d 659 (1991) (McHugh, J.)

See RIGHT TO CONFRONT Critical stages, (p. 500) for discussion of topic.

## HARMLESS ERROR

### Non-constitutional

#### Test for

*In the Matter of W.Va. State Police Crime Lab.*, 438 S.E.2d 501 (1993) (Miller, J.)

See NEW TRIAL Newly discovered evidence, (p. 402) for discussion of topic.

*State v. Moore*, 427 S.E.2d 450 (1992) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 218) for discussion of topic.

**Spontaneous declaration/excited utterance**

*State v. Farmer*, 406 S.E.2d 458 (1991) (Per Curiam)

Appellant was convicted of malicious wounding. She had been visiting an elderly man and used his handgun to fire three shots, one of which struck him in the forehead. The man called his neighbor, who, along with another neighbor found the victim sitting in the house near “a pool of blood” and appellant in the backyard, barefooted, in an hysterical state.

The victim made statements to both his neighbor and to a state trooper, which statements were admitted into evidence on direct testimony from the neighbor and the trooper. On appeal appellant claimed that the statements were inadmissible because they were not excited utterances. Further, appellant challenged the reliability of the victim’s statements since at trial the victim could not remember why appellant shot him.

Syl. pt. 1 - “An alleged spontaneous declaration must be evaluated in light of the following factors: (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation; and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.” Syl. pt. 2, *State v. Young*, 166 W.Va. 309, 273 S.E.2d 592 (1980).

Syl. pt. 2 - “Rule 803(2) of the West Virginia Rules of Evidence correctly contains the heart of the hearsay exception that was formally called a spontaneous declaration and which is now termed the excited utterance exception to the hearsay rule. The more detailed treatment of this exception contained in Syllabus Point 2 of *State v. Young*, 166 W.Va. 309, 273 S.E.2d 592 (1980), is helpful to further refine the contours of the rule.” Syl. pt. 1, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987).

Here, the statements were made while the victim was still in an agitated state.

The victim spoke to his neighbor minutes after the shooting and to the police officer within forty-five minutes of the shooting. No showing of premeditation or reflection was made. No error.

## HEARING

### Witness unavailable

#### Prosecution's burden

*State v. Phillips*, 417 S.E.2d 124 (1992) (Per Curiam)

Appellant was found guilty of transporting liquor to a jail while on work release. During discovery appellant found that a Terry Crago would testify as to the purchase of the liquor and its disappearance from a work site. At trial, the prosecution stated that Crago could not be located and that he would be treated as unavailable for purposes of Rule 804(a)(5) of the West Virginia Rules of Evidence. The prosecution had issued a subpoena for Crago but had not attempted to locate him in a city wherein the prosecution knew he might be. A police officer presented Crago's testimony at trial.

Syl. pt. 1 - Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules." Syl. Pt. 1, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990).

Syl. pt. 2 - "In order to satisfy its burden of showing that the witness is unavailable, the State must prove that it has made a good-faith effort to obtain the witness's attendance at trial. This showing necessarily requires substantial diligence." Syl. Pt. 3, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

Syl. pt. 3 - "Where there is a lack of evidence in the record demonstrating the State's good-faith efforts to secure the witness for trial, the prosecution has failed to carry its burden of proving unavailability." *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

The Court found the statement to have been introduced to prove the truth of the matter asserted and that the prosecution failed to exercise "due diligence" in locating the witness. *State v. Jacobs*, 171 W.Va. 300, 298 S.E.2d 836 (1982). Reversed and remanded.

## HEARSAY

### Admissibility of extrajudicial statements

*State v. Phillips*, 417 S.E.2d 124 (1992) (Per Curiam)

See HEARING Witness unavailable, Prosecution's burden, (p. 278) for discussion of topic.

### Defined

*State v. Delaney*, 417 S.E.2d 903 (1992) (Brotherton, J.)

See DISCOVERY Psychological tests, Judge's discretion, (p. 164) for discussion of topic.

### Prompt complaint/excited utterance

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prompt complaint, (p. 220) for discussion of topic.

## HOMICIDE

### Attempted murder

*State v. Burd*, 419 S.E.2d 676 (1991) (Workman, J.)

Appellant was convicted of attempted murder and conspiracy to commit murder as to two different persons. Appellant was involved in an affair with a married man. The man testified that on at least a dozen occasions appellant said his wife could be killed so he and appellant could be together.

The person appellant contacted went to the police and agreed to wear a monitoring device. During subsequent recorded conversations appellant described the victims' home, the victims and gave him a map of the interior of the home. She offered to pay \$500 as a down payment and \$150 to buy a gun. Plans were discussed to give the would be killer access to the home.

Syl. pt. 1 - "In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime." Syl. pt. 2, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - Where formation of criminal intent is accompanied by preparation to commit the crime of murder and a direct overt and substantial act toward its perpetration, it constitutes the offense of attempted murder.

The Court held the conversations and giving of funds to be sufficient to constitute an overt act toward commission of the crime. Affirmed.

*State v. Burd*, 419 S.E.2d 676 (1991) (Workman, J.)

Appellant was convicted of attempted murder and conspiracy to commit murder as to two different persons. Appellant was involved in an affair with a married man. The man testified that on at least a dozen occasions appellant said his wife could be killed so he and appellant could be together.

Appellant contacted a would-be killer and gave him money to buy a gun. The person appellant contacted went to the police and agreed to wear a monitoring device. During subsequent recorded conversations appellant described the victims' home, the victims and gave him a map of the interior of the home. She offered to pay \$500 as a down payment.

Syl. pt. 3 - "In order for the State to prove a conspiracy under *W.Va. Code*, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy to effect the object of that conspiracy." Syl. Pt. 4, *State v. Less*, 170 W.Va. 259, 294 S.E.2d 62 (1981).

## **HOMICIDE**

### **Attempted murder (continued)**

*State v. Burd*, (continued)

The Court rejected appellant's argument that the hired killer never intended to commit the act; the overt acts here were sufficient to convict. The killer's cooperation with police occurred after he discussed the project with appellant and received money to perform the act. Affirmed.

### **Attempted murder and malicious assault**

#### **Not double jeopardy**

*State v. George*, 408 S.E.2d 291 (1991) (Workman, J.)

See DOUBLE JEOPARDY Multiple offenses, Attempted murder and malicious assault, (p. 172) for discussion of topic.

### **Conspiracy to commit**

*State v. Burd*, 419 S.E.2d 676 (1991) (Workman, J.)

See HOMICIDE Attempted murder, (p. 280) for discussion of topic.

### **Evidence**

#### **Surviving spouse's testimony**

*State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

See EVIDENCE Surviving spouse, (p. 247) for discussion of topic.

### **Felony-murder**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

## **HOMICIDE**

### **Felony-murder (continued)**

#### **Double jeopardy**

*State v. Elliott*, 412 S.E.2d 762 (1991) (Workman, J.)

See DOUBLE JEOPARDY Felony-murder, (p. 169) for discussion of topic.

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See DOUBLE JEOPARDY Felony-murder, (p. 170) for discussion of topic.

#### **Election to proceed on**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

#### **Elements of**

*State ex rel. Painter v. Zakaib*, 411 S.E.2d 25 (1991) (Brotherton, J.)

See FELONY Murder, Suicide, (p. 256) for discussion of topic.

### **First-degree murder**

#### **Instructions to distinguish type**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

#### **Instructions**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

# HOMICIDE

## Instructions (continued)

### Premeditation

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See RIGHT TO APPEAL Constitutional right, Right to counsel, (p. 493) for discussion of topic.

### Malice

#### Inferred from deadly weapon

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See HOMICIDE Malice, Inferred from deadly weapon, (p. 283) for discussion of topic.

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

Appellant was convicted of first-degree murder. As a joke, the victim had moved appellant's car during a night of driving around to obtain alcohol (the evidence showed appellant was not drunk or on drugs). An argument ensued and the victim told appellant to pull off the road. Although the only witness was unable to see clearly, appellant and the victim went to the rear of the vehicle and the victim was fatally stabbed.

Appellant's original statement to police indicated that another person had done the killing. He later admitted that the first statement was untrue and admitted having a knife but claimed that the victim accidentally fell on the knife. The medical examiner testified that a "very forceful thrust" was necessary; falling on the knife could not have caused the wound. Appellant claimed that the evidence was insufficient to show malice or premeditation.

Syl. pt. 1 - "To warrant interference with a verdict on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. Pt. 1, in part, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "Malice may be inferred from the intentional use of a deadly weapon; however, where the State's own evidence demonstrates circumstances affirmatively showing an absence of malice which would make an inference of malice from the use of a deadly weapon alone improper, a conviction for second-degree murder cannot be upheld." Syl. Pt. 2, *State v. Brant*, 162 W.Va. 762, 252 S.E.2d 901 (1979).

## **HOMICIDE**

### **Malice (continued)**

#### **Inferred from deadly weapon (continued)**

##### *State v. Triplett*, (continued)

Syl. pt. 3 - ““This Court will not consider an error which is not preserved in the record nor apparent on the face of the record.’ Syl. Pt. 6, *State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726 (1976).” Syl. Pt. 8, *State v. Dietz*, 182 W.Va. 544, 390 S.E.2d 15 (1990).

The Court distinguished Brant in that appellant was sober and was not good friends with the victim; Brant had showed substantial remorse, he was close friends and future business partners with the victim and both Brant and the victim were drunk.

Appellant’s motions for new trial and acquittal properly denied. No error.

### **Recommendation of mercy**

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See SENTENCING Recommendation of mercy, (p. 561) for discussion of topic.

### **Second-degree murder**

#### **Malice inferred from deadly weapon**

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See HOMICIDE Malice, Inferred from deadly weapon, (p. 283) for discussion of topic.

### **Self-defense**

#### **Duty to retreat**

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See SELF-DEFENSE Duty to retreat, (p. 532) for discussion of topic.

# HOMICIDE

## Sentencing

### Recommendation of mercy

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See SENTENCING Recommendation of mercy, (p. 561) for discussion of topic.

### Sufficiency of evidence

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

Appellant was convicted of felony-murder and arson. While his arson conviction was improper (see INSTRUCTIONS First-degree murder, to include felony-murder and premeditated;), appellant's main objection was that the evidence was insufficient to withstand a directed verdict or required judgment *non obstante verdicto*.

Syl. pt. 4 - "If, on a trial for murder, the evidence is wholly circumstantial, but as to time, place, motive, means and conduct, it concurs in pointing to the accused as the perpetrator of the crime, he may properly be convicted." Syl. pt. 3, *State v. Gum*, 172 W.Va. 534, 309 S.E.2d 32 (1983).

Syl. pt. 5 - "Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syl. pt. 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

Syl. pt. 6 - "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such proof of motive, opportunity, intent preparation, plan, knowledge, identity, or absence of mistake or accident. *W.Va.R.Evid.* 404(b)." Syl. pt. 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syl. pt. 7 - "Under the requirements of the Confrontation Clause contained in the Sixth Amendment to the *United States Constitution*, evidence offered under the residual hearsay exceptions contained in Rule 803(24) and Rule 804(5) of the West Virginia Rules of Evidence is presumptively unreliable because it does not fall within any firmly rooted hearsay exception, and, therefore, such evidence is not admissible. If, however, the State can make a specific showing of particularized guarantees of trustworthiness, the statements may be admissible. In this regard, corroborating evidence may not be considered, and it must be found that the declarant's truthfulness is so clear that cross-examination would be of marginal utility." Syl. pt. 6, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

## HOMICIDE

### Sufficiency of evidence (continued)

#### *State v. Walker*, (continued)

No error in denying either a directed verdict or judgment n.o.v. The circumstantial evidence here may be sufficient to convict.

However, because the case was based on circumstantial evidence, the cumulative effect of improperly admitted evidence, even if otherwise harmless, becomes critical. *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979), *cert. denied* 445 U.S. 904, 100 S.Ct. 1081 (1980). Evidence of appellant's ownership of firearms and ammunition was admitted even though none of appellant's ammunition was the type of bullet found in the deceased. Testimony was allowed concerning unexplained events occurring just after appellant was in the area, including a fire with which appellant was not connected. Testimony of appellant's generalized threat to "burn... down" anyone who angered him was admitted, even though made four to five months prior to the acts here. Hearsay evidence was admitted that the victim told others of a visit from a man looking for a dog, along with evidence tending to show appellant used this ploy when snooping.

Here, the cumulative effect of improperly admitted evidence, along with the denial of appellant's right to confront the victim's alleged statements, require a new trial. Reversed and remanded.

## IDENTIFICATION

### In court

#### Admissibility

*State v. Dorisio*, 434 S.E.2d 707 (1993) (Per Curiam)

Appellant was convicted of aggravated robbery of a convenience store. A composite picture of appellant was developed by a police investigator, using two eyewitnesses' descriptions. On appeal, he claimed that the composite drawing was "overly suggestive" so as to taint out of court identifications.

One of the witnesses testified at an *in camera* hearing after having made an out of court identification. Appellant claimed on appeal that the purpose of the hearing was to discuss a collateral crime issue (see EVIDENCE Admissibility, Collateral crimes, (p. 205)).

Syl. pt. 3 - "A defendant must be allowed an *in camera* hearing on the admissibility of a pending in-court identification when he challenges it because the witness was a party to pretrial identification procedures that were allegedly constitutionally infirm." Syllabus point 6, *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978).

The Court noted appellant never asked for an *in camera* identification hearing, instead conducting an informal correspondence with the circuit court in violation of Rule 47 of the Rules of Criminal Procedure. Although the hearing at issue was for the purpose of discussing the collateral crime issue, appellant waived his opportunity to examine the witness, who was present.

More importantly, appellant did not challenge either the photo array from which he was identified or the manner in which it was presented, prerequisites for an *in camera* hearing on identification. No error.

### Out-of-court

#### Admissibility

*State v. Dorisio*, 434 S.E.2d 707 (1993) (Per Curiam)

See IDENTIFICATION In court, Admissibility, (p. 287) for discussion of topic.

## IDENTIFICATION

### Out-of-court (continued)

#### Admissibility (continued)

*State v. James*, 411 S.E.2d 692 (1991) (Neely, J.)

Appellant was convicted of kidnapping, first-degree sexual abuse and first-degree sexual assault. During a suppression hearing the victim identified appellant from a group of six or seven photographs. Appellant claimed that the victim had been shown his picture alone prior to that identification. At a preliminary hearing the victim said she could identify appellant because she remembered him from “the photo.” At trial she claimed to have gotten a good look at appellant during the assault, identified him later that day and picked him from the group of photographs; she denied ever having been shown a single photograph of appellant.

Syl. pt. 3 - “A pretrial identification by photograph will be set aside if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” Syl. Pt. 4, *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981).

No evidence was adduced showing that the victim saw appellant’s photograph by itself. Affirmed.

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

Appellant was convicted of first-degree sexual abuse. After the alleged attack occurred, the police were interviewing the victim when appellant drove past the police car. Upon being apprehended, the victim identified appellant as the assailant.

Appellant claimed the out of court identification was so tainted by the police officer’s presence as to be inadmissible.

Syl. pt. 7 - ““In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification [or testimony as to the out-of-court identification itself] a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.’ Syllabus Point 3, as amended, *State v. Casdorff*, 159 W.Va. 909, 230 S.E.2d 476 (1976).” Syllabus Point 3, *State v. Spence*, 182 W.Va. 472, 388 S.E.2d 498 (1989).

## IDENTIFICATION

### Out-of-court (continued)

#### Admissibility (continued)

##### *State v. Rummer*, (continued)

The Court found the victim's identification, although subject to suggestive influences, was sufficiently reliable to be admissible. No error.

##### *State v. Tharp*, 400 S.E.2d 300 (1990) (Per Curiam)

Appellant was convicted of grand larceny and burglary. The victim was also beaten severely. Her description of the perpetrator did not match appellant's appearance. Appellant claimed that her identification was based on the suggestion of a police officer.

Syl. pt. 1 - "In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification [or testimony as to the out-of-court identification itself] a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.' Syllabus Point 3, as amended, *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476 (1976)." Syl. pt. 3, *State v. Spence*, 182 W.Va. 472, 388 S.E.2d 498 (1989).

The victim had an opportunity to view appellant during the crimes. Despite inconsistencies, several major characteristics she described matched appellant. Further, appellant admitted being at the victim's home and stealing a rifle. No error.

#### Suggestive identification

##### *State v. James*, 411 S.E.2d 692 (1991) (Neely, J.)

See IDENTIFICATION Out-of-court, Admissibility, (p. 288) for discussion of topic.

## IMMUNITY

### Grant by police officer

*State v. Sharpless*, 429 S.E.2d 56 (1993) (Per Curiam)

See POLICE OFFICER Authority to bargain for information, (p. 423) for discussion of topic.

### Grant by prosecuting attorney

*State ex rel. Friend v. Hamilton*, No. 21449 (12/16/92) (Per Curiam)

See IMMUNITY Grant by prosecuting attorney, (p. 290) for discussion of topic.

*State ex rel. Friend v. Hamilton*, No. 21449 (12/16/92) (Per Curiam)

Petitioner was indicted for aggravated robbery and conspiracy. Respondent judge twice denied the Hardy County prosecuting attorney's motion to dismiss. In return for a confession relating to other crimes and other persons the prosecuting attorney of Braxton County agreed to reduce the instant charges to a misdemeanor and not to charge for other crimes admitted.

The confession related to crimes in Hardy county implicating other persons. Upon transfer of the information, Hardy county's prosecuting attorney agreed to give petitioner immunity if he would testify against the other defendants. Although the others were convicted based on his information petitioner was not called upon to testify.

The Hardy County prosecuting attorney believed dismissal appropriate because all of the evidence against petitioner was based on his confession elicited in reliance on the promise of immunity in Braxton County and is therefore inadmissible. Further, the prosecutor believed the interest of justice to be served because petitioner refused to testify in Braxton County unless the Hardy County charges were dismissed. The circuit court believed petitioner simply took a bad risk since court approval was not given to the immunity and that a longer investigation would have uncovered the necessary evidence.

*Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984) required court consent to dismissal of charges. See Syllabus Points 4 through 9 and 12. Further, a prosecuting attorney has no authority to grant immunity. Syl. pt. 16, *Myers, supra*. Absent an abuse of discretion, the circuit court may refuse a plea bargain. See Syl. pt. 5, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984); also, *W.Va.R.Crim.P.* Rule 48(a). No abuse here. Writ denied.

## IMMUNITY

### Police officer

#### Hot pursuit without warrant

*Goines v. James*, 433 S.E.2d 572 (1993) (Workman, C.J.)

See SEARCH AND SEIZURE Civil liability, Hot pursuit without warrant, (p. 520) for discussion of topic.

#### Search and seizure violation

*Goines v. James*, 433 S.E.2d 572 (1993) (Workman, C.J.)

See SEARCH AND SEIZURE Civil liability, Hot pursuit without warrant, (p. 520) for discussion of topic.

### Subsequent prosecution

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

See DOUBLE JEOPARDY Sexual assault, Abuse (by a parent or guardian), (p. 177) for discussion of topic.

# IMPEACHMENT

## Prior inconsistent statement

*State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

See WITNESSES Cross-examination, Prejudice or bias, (p. 622) for discussion of topic.

*State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Failure to disclose, Exculpatory evidence, (p. 476) for discussion of topic.

## Statements made for probation consideration

### Use at trial

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

Appellant was convicted of possession of marijuana with intent to deliver. While negotiating for probation with respect to a guilty plea, appellant told a probation officer that he had put marijuana in his girlfriend's purse immediately before his arrest.

After plea negotiations broke down, appellant was impeached during his testimony by reference to his statement to the probation officer. The trial court did direct the prosecution not to refer to the previous guilty plea, nor to the fact the statement was made to a probation officer.

Syl. pt. 2 - “[S]tatements made by a defendant during a guilty plea proceeding cannot be used . . . to impeach the defendant if he testifies at trial.” *State v. Bennett*, 179 W.Va. 464, 370 S.E.2d 120 (1988).

The Court quoted *Bennett, supra*, that frank plea discussions would be impaired if statements made therein were introduced into evidence, even for impeachment purposes. Reversed.

# INDICTMENT

## Dismissal of

### Effect of on new indictment

*State v. Seibert*, 429 S.E.2d 243 (1992) (Brotherton, J.)

The prosecution appealed following dismissal of appellee's indictment for sexual assault. A grand jury indictment was returned April 17, 1990; on April 20, 1990 the circuit judge ruled that an indictment was not returned and by order entered May 17, 1990 directed the indictment be removed from the record.

Appellee was reindicted September 19, 1990. Appellee's motion to dismiss was delayed pending a ruling on the state's motion to recuse the judge. On January 15, 1991 appellee was once more indicted, despite the fact the September indictment was still pending. On February 19, 1991 the motion to recuse was granted and the September indictment was dismissed. The special judge also dismissed the January, 1991 indictment, based on *W.Va. Code*, 52-2-9.

Syl. pt. 1 - Ordinarily, the dismissal of an indictment on motion of the defendant does not foreclose the prosecutor from procuring a new indictment.

Syl. pt. 2 - The dismissal of an indictment by a trial court does not result in the charge being classified a not true bill.

Syl. pt. 3 - West Virginia Code § 52-2-9 (1981) has no applicability unless a grand jury returns a not true bill.

See also, *State v. Childers*, 187 W.Va. 54, 415 S.E.2d 460 (1992). Dismissal of an indictment on motion of the defendant does not ordinarily prevent a reindictment; double jeopardy principles do not apply. Reversed.

### Generally

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

Appellant was convicted of conspiracy to commit malicious wounding and voluntary manslaughter. A special prosecutor was engaged by the victim's family. Appellant claimed that the indictment against him was improper and the indictment was dismissed without prejudice. A second indictment was later issued on the basis of police testimony and the testimony of the actual killer. Appellant claimed that the testimony was false and presentation to the grand jury constituted prosecutorial misconduct.

# INDICTMENT

## Dismissal of (continued)

### Generally (continued)

#### *State v. Bonham*, (continued)

Syl. pt. 1 - “[D]ismissal of [an] indictment is appropriate only “if it is established that the violation substantially influenced the grand jury’s decision to indict” or if there is “grave doubt” that the decision to indict was free from substantial influence of such violations.’ *Bank of Nova Scotia v. United States*, 487 U.S. 250, 251, 108 S.Ct. 2369, 2372, 101 L.Ed.2d 228, 238 (1986) (O’Connor, J., concurring).” Syllabus point 6, *State ex rel. Pinson v. Maynard*, 181 W.Va. 662, 383 S.E.2d 844 (1989).

The Court found the police officer’s testimony improper but found substantial evidence upon which an indictment could issue. No error.

### Magistrate court

*State ex rel. Johnson v. Zakaib*, 400 S.E.2d 590 (1990) (Miller, J.)

See RIGHT TO SPEEDY TRIAL Generally, (p. 509) for discussion of topic.

### Prosecuting attorney disqualified

*State ex rel. Knotts v. Watt*, 413 S.E.2d 173 (1991) (Miller, C.J.)

Relators sought a writ of prohibition to force dismissal of an indictment because of the prosecuting attorney’s prior representation of the defendant. Before the indictment issued, the prosecutor discussed with the defendant some of the circumstances undergirding the indictment. The prosecuting attorney disqualified himself from prosecuting the case prior to this proceeding; he also instructed police officers not to discuss the case with him and assigned the case to an assistant. Ultimately, a special prosecutor was assigned.

Syl. pt. 1 - There is a class of cases in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case, because of the errors are deemed fundamental. These cases are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice.

# INDICTMENT

## Dismissal of (continued)

### Prosecuting attorney disqualified (continued)

#### *State ex rel. Knotts v. Watt*, (continued)

Syl. pt. 2 - In cases not involving such fundamental errors, the rule is that dismissal of an indictment is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was free from the substantial influence of such violations.

Syl. pt. 3 - An indictment should not be dismissed merely because an assistant prosecuting attorney was disqualified from participating in the case, when the disqualified attorney did not participate in the investigation of the case or its presentation to the grand jury, and there is no evidence that he influenced the procurement of the indictment.

Here, the prosecutor did not actually present the case to the grand jury. See *Farber v. Douglas*, 178 W.Va. 491, 361 S.E.2d 456 (1985). The Court also distinguished *Moore v. Starcher*, 167 W.Va. 848, 280 S.E.2d 693 (1981), where disqualification occurred at trial. No evidence was adduced to show any improprieties before the grand jury. See *State ex rel. Starr v. Halbritter*, 183 W.Va. 350, 395 S.E.2d 773 (1990). No error; writ denied.

## Undue delay

#### *State ex rel. Henderson v. Hey*, 424 S.E.2d 741 (1992) (Per Curiam)

Appellant was arrested 24 May 1990 and charged with DUI, causing bodily injury. He was scheduled for trial in magistrate court 13 September 1990. Because the state did not appear, the charges were dismissed. He was then indicted 8 April 1992 for malicious wounding. His motion to dismiss was denied. He then brought this writ of prohibition, alleging that the twenty-three month delay between arrest and indictment violated due process.

Syl. pt. 1 - "The effects of less gross delays upon a defendant's due process rights must be determined by a trial court by weighing the reasons for delay against the impact of the delay upon the defendant's ability to defend himself." Syllabus Point 2, *State ex rel. Leonard v. Hey*, W.Va., 269 S.E.2d 394 (1980).

Syl. pt. 2 - "The general rule is that where there is a delay between the commission of the crime and the return of the indictment or the arrest of the defendant, the burden rests initially upon the defendant to demonstrate how such delay has prejudiced his case if such delay is not *prima facie* excessive." Syllabus Point 1, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982).

## INDICTMENT

### Dismissal of (continued)

#### Undue delay (continued)

##### *State ex rel. Henderson v. Hey*, (continued)

The Court found twenty-three months was not presumptively prejudicial. See *State ex rel. Bess v. Hey*, 171 W.Va. 624, 301 S.E.2d 580 (1983) (twenty months insufficient); *State v. Simmons*, 171 W.Va. 722, 301 S.E.2d 812 (1983) (seventeen months insufficient); *State v. Bennett*, 172 W.Va. 123, 304 S.E.2d 28 (1983) (seven months); *State v. Allman*, 177 W.Va. 365, 352 S.E.2d 116 (1986); (eleven months insufficient). Cf. *State v. Petrice*, 183 W.Va. 695, 398 S.E.2d 521 (1990) (two and one-half years *prima facie* excessive but delay still not sufficient to dismiss). See also, *Hundley v. Ashworth*, 181 W.Va. 379, 382 S.E.2d 573 (1989); dismissal appropriate when defendant can show delay was deliberate device to gain advantage and prejudice resulted. Writ denied.

##### *State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

Appellant was convicted of grand larceny in the cutting of timber on property adjacent to which he was hired to cut timber (See GRAND LARCENY Sufficiency of evidence, (p. 264)). He claimed prejudice in that two and one-half years elapsed between the act and the bringing of the indictment. He also claimed that the criminal action was brought in aid of enforcement of a debt, namely, the price of the cut timber.

Syl. pt. 5 - “The Due Process Clause of the Fifth Amendment to the *United States Constitution* and Article III, Section 10 of the *West Virginia Constitution* require the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the State’s delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.” Syl. pt. 2, *Hundley v. Ashworth*, 181 W.Va. 379, 382 S.E.2d 573 (1989).

Syl. pt. 6 - “Generally, abuse of process consists of the willful or malicious misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process.’ *Preiser v. MacQueen*, 177 W.Va. 273, 352 S.E.2d 22, 28 (1985).” Syl. pt. 2, *Wayne County Bank v. Hodges*, 175 W.Va. 723, 338 S.E.2d 202 (1985).

The Court noted that no actual prejudice was alleged as a result of the delay and that no abuse of process occurred. No error.

## INDICTMENT

### Enhancement of sentence

#### Use of firearm

*State v. Johnson and State v. Barber*, 419 S.E.2d 300 (1992) (Miller, J.)

See SENTENCING Enhancement, Notice of, (p. 551) for discussion of topic.

### Joinder of

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See EVIDENCE Admissibility, Discretion of judge, (p. 209) for discussion of topic.

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See JOINDER Discretion of judge, (p. 327) for discussion of topic.

### Larceny

#### Sufficiency of

*State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

See GRAND LARCENY Sufficiency of evidence, (p. 264) for discussion of topic.

#### Sufficiency of

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

Appellant was convicted of aggravated robbery. He claimed the indictment returned against him was founded solely on hearsay testimony of an incompetent witness.

Syl. pt. 6 - "Except for willful, intentional fraud the law of this State does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency." Syllabus, *Barker v. Fox*, 160 W.Va. 749, 238 S.E.2d 235 (1977).

The Court noted the validity of an indictment is not determined by the character of evidence brought before the grand jury. *State v. Bonham*, 184 W.Va. 55, 401 S.E.2d 901 (1990).

# INDICTMENT

## Sufficiency of (continued)

### Corporate officer

*State v. Childers*, 415 S.E.2d 460 (1992) (Miller, J.)

Appellant, the president of a corporation, was told by the Commissioner of Labor that a wage bond was required for his operations. When the bond was not posted, a cease and desist order was issued pursuant to *W.Va. Code*, 21-5-15(c)(1). After this order was violated, a felony warrant was obtained for appellant.

The subsequent indictment stated that appellant “committed the offense of ‘Failure to Provide a Bond’ by unlawfully, feloniously, knowingly, willfully and with intent to deprive employees of their wages and fringe benefits. ... failing to provide and maintain a bond as required by Chapter 21, Article 5, § 14 of the *W.Va. Code*.” Appellant was convicted and sentenced to one to three, with a \$25,000 fine.

On appeal, he alleged that the indictment was fatally defective because it failed to allege the necessary elements of the offense and did not contain the essential language of *W.Va. Code*, 21-5-15; in addition, he objected to the cease and desist order being issued against the corporation but the indictment against him personally.

Syl. pt. 1 - “[Under Article III, Section 14 of the *West Virginia Constitution*,] [a]n indictment is sufficient when it clearly states the nature and cause of the accusation against a defendant, enabling him to prepare his defense and plead his conviction as a bar to later prosecution for the same offense.” Syllabus Point 1, *State v. Furner*, 161 W.Va. 680, 245 S.E.2d 618 (1978).

Syl. pt. 2 - “An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.” Syllabus Point 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).

Syl. pt. 3 - Upon the reversal of a criminal case on appeal, the State is generally not precluded by double jeopardy principles from procuring a new indictment and retrying the defendant, except when a criminal conviction is set aside because of insufficient evidence.

Syl. pt. 4 - In an indictment charging a corporate officer, it is not essential that the corporate name be mentioned, so long as the officer is identified and the requisite criminal elements are outlined.

# INDICTMENT

## Sufficiency of (continued)

### Corporate officer (continued)

#### *State v. Childers*, (continued)

Syl. pt. 5 - Officers, agents, and directors of a corporation may be criminally liable if they cause the corporation to violate the criminal law while conducting corporate business.

Here, the indictment referred to the wrong statute; *W.Va. Code*, 21-5-15 (c)(1) is the proper reference. Although the indictment is void on its face, a new indictment may be brought; and it is permissible to name a corporate officer for the misdeed of the corporation. Reversed and remanded.

### Generally

#### *State v. Childers*, 415 S.E.2d 460 (1992) (Miller, J.)

See INDICTMENT Sufficiency of, Corporate officer, (p. 298) for discussion of topic.

#### *State v. Donald S.B.*, 399 S.E.2d 898 (1990) (Per Curiam)

See PLEA BARGAINS Setting aside, Necessity for record, (p. 419) for discussion of topic.

### Larceny

#### *State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

See GRAND LARCENY Sufficiency of evidence, (p. 264) for discussion of topic.

### Sexual abuse

#### *State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

Appellant was convicted of incest, sexual assault and sexual abuse by a guardian or custodian. One count of the indictment, relating to sexual assault in the second-degree, referred to “sexual contact.” Sexual contact refers to sexual abuse in the first-degree, which carries a much lower penalty.

# INDICTMENT

## Sufficiency of (continued)

### Sexual abuse (continued)

#### *State v. George W.H.*, (continued)

Syl. pt. 8 - “[Under Article III, Section 14 of the *West Virginia Constitution*,] [a]n indictment is sufficient when it clearly states the nature and cause of the accusation against a defendant, enabling him to prepare his defense and plead his conviction as a bar to later prosecution for the same offense.’ Syllabus Point 1, *State v. Furner*, 161 W.Va. 680, 245 S.E.2d 618 (1978.” Syllabus Point 1, *State v. Childers*, 187 W.Va. 54, 415 S.E.2d 460 (1992).

Syl. pt. 9 - “‘An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.’ Syllabus Point 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).”

The Court noted that appellant knew he was charged with sexual assault and not sexual abuse. Although the terms are different, it was clear from the surrounding language the charge was sexual assault. No error.

### Specific acts alleged

#### *State v. Scarberry*, 418 S.E.2d 361 (1992) (Per Curiam)

Appellant was convicted of daytime burglary and petit larceny. On appeal he claimed that he was improperly convicted of burglary because the structure he entered was technically not a dwelling house; and that the evidence failed to establish that the property taken belonged to the alleged victim.

The structure in question was a mobile home which had been abandoned by its owners. Although the alleged victim was in the process of buying the mobile home (and did own the real property on which it was located) the purchase agreement was signed some time after the break-in.

Syl. pt. 1 - “In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.” Syllabus point, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

## INDICTMENT

### Sufficiency of (continued)

#### Specific acts alleged (continued)

##### *State v. Scarberry*, (continued)

Syl. pt. 2 - “If an indictment alleges that an offense was done in a particular way, the proof must support such charge or there will be a fatal variance. However, if such averment can be omitted without affecting the charge in the indictment against the accused, such allegation may be considered and rejected as surplusage if not material.” Syllabus point 8, *State v. Crowder*, 146 W.Va. 810, 123 S.E.2d 42 (1961).

Here, *W.Va. Code*, 61-3-11 defines “dwelling house” as a structure “used as a dwelling regularly or only from time to time.” Although a structure remains a dwelling if temporarily unoccupied (see *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981), *State v. Bair*, 112 W.Va. 655, 166 S.E.2d 369 (1932) the owner must intend to return. Here, the property was clearly abandoned. Further, the property taken was not shown to belong to the alleged victim. Reversed and remanded.

## INDIGENTS

### **Right to appeal compromised by**

*State ex rel. Phillips v. Boggess*, 416 S.E.2d 270 (1992) (McHugh, C.J.)

See PLEA BARGAINS Setting aside, Right to transcript unaffected, (p. 420) for discussion of topic.

## INEFFECTIVE ASSISTANCE

### Confessions

#### Involuntary

*State v. Smith*, 410 S.E.2d 269 (1991) (Neely, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 307) for discussion of topic.

### Consent to search

#### Involuntary

*State v. Smith*, 410 S.E.2d 269 (1991) (Neely, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 307) for discussion of topic.

### Defendant represents himself

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

See RIGHT TO COUNSEL Self-representation, (p. 504) for discussion of topic.

### Inadequate record

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

Appellant was convicted of arson, attempted murder, felony-murder and malicious assault. He claimed that his trial counsel was ineffective in that he failed to request separate trials on each offense, failed to employ an expert, failed to conduct an effective *voir dire* and was generally inexperienced in felony cases.

Syl. pt. 7 - "Where the record on appeal is inadequate to resolve the merits of a claim of ineffective assistance of counsel, we will decline to reach the claim so as to permit the defendant to develop an adequate record in *habeas corpus*." Syllabus Point 11, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

The record here was inadequate. No error found.

## INEFFECTIVE ASSISTANCE

### **Inadequate record** (continued)

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 308) for discussion of topic.

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

Appellant was convicted of breaking and entering. On appeal he claimed ineffective assistance of counsel.

Syl. pt. 7 - "Where the record on appeal is inadequate to resolve the merits of a claim of ineffective assistance of counsel, we will decline to reach the claim so as to permit the defendant to develop an adequate record in *habeas corpus*." Syllabus Point 11, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

The Court found the record here inadequate. No error.

*State v. Wickline*, 399 S.E.2d 42 (1990) (Miller, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 309) for discussion of topic.

### **Presumption of**

#### **Appointment one day prior to trial**

*State v. Jones*, 420 S.E.2d 736 (1992) (Miller, J.)

Appellant was convicted of threat to kidnap and demand ransom. He was sentenced to life imprisonment as a recidivist pursuant to the habitual offenders act, *W.Va. Code*, 61-11-18. On appeal he claimed that he was given ineffective assistance of counsel on prior charges because, in part, his attorney was not prepared.

Syl. pt. 6 - "An interval of one day or less between the appointment of counsel and trial or the entry of a guilty plea raises a rebuttable presumption that the defendant was denied effective assistance of counsel and shifts the burden of persuasion of the state." Syllabus Point 1, *Housden v. Leverette*, 161 W.Va. 324, 241 S.E.2d 810 (1978).

## INEFFECTIVE ASSISTANCE

### **Presumption of** (continued)

#### **Appointment one day prior to trial** (continued)

##### *State v. Jones*, (continued)

Counsel was appointed 20 July 1977; on 3 August 1977 appellant was represented at a preliminary hearing by a privately-paid attorney; appellant pled not guilty and asked for a bench trial, at which he was zealously represented. No error.

### **Standard of proof**

##### *Dietz v. Legursky*, 425 S.E.2d 202 (1992) (McHugh, C.J.)

See EVIDENCE Character of victim, (p. 227) for discussion of topic.

##### *State ex rel. Redman v. Hedrick*, 408 S.E.2d 659 (1991) (McHugh, J.)

After being transferred from juvenile to adult jurisdiction, appellant pled to first-degree murder and was sentenced to life without mercy. He claimed ineffective assistance of counsel for failure to negotiate a plea; pursue suppression of a confession; raise a defense of insanity; ask for removal of the judge; and raise intoxication as preventing formation of intent.

Syl. pt. 4 - “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 attorney would have so acted in the defense of an accused.” Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 5 - Where a prosecutor in a criminal case becomes the presiding judge over the grand jury that ultimately indicts the defendant in such case, the record of the grand jury proceeding must be made a part of the record before this Court will determine whether prejudice has resulted therefrom.

The Court found the absence of a psychological report made the record inadequate for determining effectiveness; the Court also held essential the report of the grand jury because the presiding judge had served as an assistant prosecuting attorney in the case. (The Court did not discuss what actions the judge had taken while a prosecuting attorney.) Remanded.

## INEFFECTIVE ASSISTANCE

### Standard of proof (continued)

*State v. Delaney*, 417 S.E.2d 903 (1992) (Brotherton, J.)

See DISCOVERY Psychological tests, Judge's discretion, (p. 164) for discussion of topic.

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

Appellant was convicted of murder. He came to the police station voluntarily, was read his rights and attempted to contact his lawyer. After being unable to do so, appellant confessed. The next day he signed a handwritten agreement, drafted by his lawyer, signifying that he wanted to employ the attorney but that the attorney would not represent appellant if he were to seek or agree to a plea bargain.

Appellant claimed on appeal that the agreement impeded the attorney-client relationship in that appellant should have been allowed to decide whether a plea was appropriate. Appellant also claimed a conflict of interest in that the attorney also conferred with the victim's husband, who was seeking representation.

Syl. pt. 11 - "In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the *West Virginia Constitution*, and the Sixth Amendment to the *United States Constitution*, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless." Syl. Pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 12 - "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 attorney would have so acted in the defense of an accused." Syl. Pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 13 - "It is 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. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a *habeas corpus* proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim." Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992).

## INEFFECTIVE ASSISTANCE

### Standard of proof (continued)

#### *State v. Kilmer*, (continued)

The Court noted the agreement seemed to subordinate the client's interests to that of his lawyer or perhaps a third party, the victim's husband. However, since no plea agreement was ever offered, the Court suggested a *habeas corpus* action to develop the issue more fully. Affirmed.

#### *State v. Smith*, 410 S.E.2d 269 (1991) (Neely, J.)

Appellant was convicted of second-degree murder. Following an earlier appeal, the Court remanded for an evidentiary hearing to make a sufficient record. Appellant claimed ineffective assistance of counsel in the present appeal.

During the original investigation, the police officer questioned appellant and asked for his blood-spattered clothing. Appellant refused, whereupon the officer waited for appellant to come out of his house and arrested him for public intoxication.

Following a seven hour "processing" at the police station, appellant was taken to a hospital where he complained that he had been assaulted by police officers. Appellant had a raised bruise on his chest and a ruptured left eardrum. During the "processing" appellant gave two statements to police, in one of which he admitted to being an accomplice to the murder; he claimed that he gave the statements to stop the beating. Following release from the hospital a police officer returned appellant to his home and seized the clothing without a warrant.

Syl. pt. 1 - "In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the *West Virginia Constitution* and the Sixth Amendment to the *United States Constitution*, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error." Syllabus Point 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 2 - Confessions may be involuntary in law or involuntary in fact. Confessions that are involuntary in law are not admissible as part of the State's case-in-chief, but may be used to impeach the defendant's testimony.

Syl. pt. 3 - A confession that is involuntary in fact is inherently unreliable. A confession under torture is worthless for all purposes.

## INEFFECTIVE ASSISTANCE

### Standard of proof (continued)

#### *State v. Smith*, (continued)

Syl. pt. 4 - “A confession that has been found to be involuntary in the sense that it was not the product of the freewill of the defendant cannot be used by the State for any purpose at trial.” Syllabus Point 2, *State v. Goff*, 169 W.Va. 778, 289 S.E.2d 473 (1982).

Syl. pt. 5 - Consent to a search or seizure, not given as a product of the defendant’s free will, is not a valid exception to the prohibition in *U.S. Const.* amend. IV against unreasonable searches and seizures.

The Court found egregious trial counsel’s failure to move to suppress the blood-stained clothing and failure to move to suppress a coerced confession. Reversed and remanded.

**NOTE:** The Court also noted that prompt presentment would have prevented most of the underlying problems here.

#### *State v. Stewart*, 419 S.E.2d 683 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Duty, Generally, (p. 473) for discussion of topic.

#### *State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

Appellant was convicted of first-degree murder. On appeal he claimed that trial counsel failed to raise the issue of self-defense or to use appellant’s mental condition; that counsel allowed the prosecution to lead the witnesses; that counsel did not request production of documents; that counsel failed to develop evidence relevant to a recommendation of mercy; that counsel failed to request an instruction concerning armed guards in the courtroom (there at appellant’s request); and that counsel requested only twenty-five minutes for closing argument, while the prosecution requested fifty.

Syl. pt. 8 - “In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the *West Virginia Constitution* and the Sixth Amendment of the *United States Constitution*, courts should measure and compare the questioned counsel’s performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error. Syl. Pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

## INEFFECTIVE ASSISTANCE

### Standard of proof (continued)

#### *State v. Triplett*, (continued)

Syl. pt. 9 - “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 attorney would have so acted in defense of the accused.” Syl. Pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 10 - It is 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. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a *habeas corpus* proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.

The Court noted that the finding here is without prejudice to development of a full record on petition for *habeas corpus*. No ineffective assistance here; no error.

#### *State v. Wickline*, 399 S.E.2d 42 (1990) (Miller, J.)

Appellant was convicted of first-degree murder, without mercy. She claimed that her counsel was ineffective because he failed to properly investigate evidence in support of diminished capacity; failed to investigate the defense of “battered wife syndrome;” and failed to present any evidence.

Syl. pt. 7 - “In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the *West Virginia Constitution* and the Sixth Amendment to the *United States Constitution*, courts should measure and compare the questioned counsel’s performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error.” Syllabus Point 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 8 - “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 attorney would have so acted in the defense of an accused.” Syllabus Point 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

## INEFFECTIVE ASSISTANCE

### Standard of proof (continued)

#### *State v. Wickline*, (continued)

Syl. pt. 9 - “Where the record on appeal is inadequate to resolve the merits of a claim of ineffective assistance of counsel, we will decline to reach the claim so as to permit the defendant to develop an adequate record in *habeas corpus*.” Syllabus Point 11, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

The Court noted that neither witnesses nor documentary evidence were offered for the defense, despite a court-ordered psychiatric evaluation showing appellant to be borderline mentally retarded and a request for a second evaluation to determine if appellant suffered from “battered wife syndrome.” The second evaluation was apparently never done and no continuance was requested.

The record disclosed that trial counsel was aware that appellant suffered from a neurological disability which hindered her ability to assimilate data and knew of the availability of experts to testify as to this disability but did not call the witnesses. Further, evidence of appellant’s battering was never introduced, nor were appellant’s contentions that her confessions were not voluntary. Appellant stated that trial counsel refused to allow her to testify at either the suppression hearing or the trial.

Finally, the Court noted that trial counsel apparently did not appreciate the prosecution’s theory that appellant aided and abetted the actual killer. No instructions were submitted allowing the jury to find appellant’s involvement as minimal.

Nonetheless, the Court concluded that the record was insufficient to determine as a matter of law that trial counsel was ineffective. No error.

#### *Wickline v. House*, 424 S.E.2d 579 (1992) (Per Curiam)

Appellant was convicted of first-degree murder of her husband. On appeal she alleged that her trial counsel was ineffective. In *State v. Wickline*, 184 W.Va. 12, 399 S.E.2d 42 (1990), the Court found the record inadequate to determine effectiveness. The trial court did not find ineffective assistance at the subsequent *habeas corpus* hearing.

Appellant was given an inadequate *Miranda* warning when arrested so her initial confession was suppressed. After being detained for several hours, appellant gave another statement alleging physical and verbal abuse by her husband and admitting that she had conspired with her neighbors to have her husband killed. She admitted giving the final order to cut her husband’s throat.

## INEFFECTIVE ASSISTANCE

### Standard of proof (continued)

#### *Wickline v. House*, (continued)

Trial counsel Thomas Butcher obtained a twenty-day in-patient psychiatric evaluation of appellant, later amended to a two-day outpatient evaluation. The one-page evaluation found appellant competent to stand trial but with “borderline mental retardation.”

Mr. Butcher abandoned his considered defenses of “battered wife syndrome” and “diminished capacity” in favor of a “firebreak” theory as a result of the finding in a codefendant’s trial that he actually killed appellant’s husband. Butcher acknowledged that these theories were not inconsistent, and in fact asked the trial court to take judicial notice of appellant’s lack of capacity, but did not present any evidence.

At trial Butcher attempted to suppress appellant’s confession based on lack of capacity to waive her rights against self-incrimination and right to counsel. Again, Butcher presented no evidence and the confession was admitted. The prosecution relied heavily on the confession for its case.

At the *habeas* proceeding appellant’s mother testified that appellant had suffered from longstanding neurological problems and that Mr. Butcher was aware of those problems. A psychologist who participated in appellant’s competency evaluation testified that appellant may have lacked the capacity to waive her rights.

Syl. pt. 1 - “In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the *West Virginia Constitution* and the Sixth Amendment to the *United States Constitution*, courts should measure and compare the questioned counsel’s performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error.” Syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 2 - “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 attorney would have so acted in the defense of an accused.” Syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The Court found ineffective assistance. Reversed and remanded.

## INEFFECTIVE ASSISTANCE

### Standby or hybrid counsel

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

See RIGHT TO COUNSEL Self-representation, (p. 504) for discussion of topic.

## INFORMATION

### Sufficiency of

*State v. Donald S.B.*, 399 S.E.2d 898 (1990) (Per Curiam)

See PLEA BARGAINS Setting aside, Necessity for record, (p. 419) for discussion of topic.

# INSANITY

## Burden of proof

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See INSANITY Presumptions, (p. 314) for discussion of topic.

## Presumptions

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

Appellant was convicted of sexual assault of her sixth grade pupil. She claimed insanity and on appeal said the prosecution failed to show she was sane.

Syl. pt. - 6 “‘There exists in the trial of an accused the presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.’ Syl. pt. 2, *State v. Daggett*, 167 W.Va. 411, 280 S.E.2d 545 (1981).” Syllabus point 4, *State v. Parsons*, 181 W.Va. 131, 381 S.E.2d 246 (1989).

Syl. pt. 7 - “‘When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law...’ Syl. pt. 2, in part, *State v. Myers*, 159 W.Va. 353, 222 S.E.2d 300 (1976).” Syllabus point 3, *State v. Parsons*, 181 W.Va. 131, 381 S.E.2d 246 (1989).

The Court noted no general rule exists to determine the exact type and quantity of evidence necessary to establish sanity. Each case must stand on its own. Both expert testimony and circumstantial evidence is appropriate. The Court found sufficient evidence. No error.

## Test for

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See INSANITY Presumptions, (p. 314) for discussion of topic.

## INSTRUCTIONS

### Accidental death

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See INSTRUCTIONS Right to, (p. 319) for discussion of topic.

### Confessions

#### Voluntariness

*State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 540) for discussion of topic.

### Confusing

*State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

Appellant was convicted of second-degree murder. He claimed error in the trial court's refusal of his self-defense instructions. The trial court gave its own instruction. The proposed instruction would have required the jury to find appellant's action reasonable "if the circumstances then appearing to the defendant ... were such that another person with the defendant's same knowledge, intelligence and ability to perceive and understand would have also held a similar belief under such similar circumstances."

Syl. pt. 3 - "'Instructions in a criminal case which are confusing, misleading or incorrectly state the law should not be given.' Syllabus Point 3, *State v. Bolling*, 162 W.Va. 103, 246 S.E.2d 631 (1978)." Syl. Pt. 4, *State v. Neary*, 179 W.Va. 115, 365 S.E.2d 395 (1987).

The Court found the instruction given to be an accurate statement of the law; it even allowed appellant the opportunity to argue his particular circumstances. *State v. W.J.B.*, 166 W.Va. 602, 276 S.E.2d 550 (1981); *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978); *State v. Green*, 157 W.Va. 1031, 206 S.E.2d 923 (1974). No error.

### Elements of offense

*State v. Gibson*, 413 S.E.2d 120 (1991) (Per Curiam)

See JUDGES Duties, To instruct on elements of crime, (p. 342) for discussion of topic.

## INSTRUCTIONS

### Elements of offense (continued)

*State v. Miller*, 400 S.E.2d 611 (1990) (McHugh, J.)

See JUDGES Duties, To instruct on elements of crime, (p. 343) for discussion of topic.

### Failure to give

*State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

Appellant was convicted of first-degree murder. He complained that the trial court did not give several self-defense instructions defining his right to “repel force by force.”

Syl. pt. 3 - “It is not reversible error to refuse to give instructions offered by a party that are adequately covered by other instructions given by the court.” Syllabus point 20, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966).

The Court found the issue of self-defense adequately covered in other instructions given, including the trial court’s charge to the jury. No error.

*State v. Miller*, 400 S.E.2d 611 (1990) (McHugh, J.)

See JUDGES Duties, To instruct on elements of crime, (p. 343) for discussion of topic.

### Failure to object at trial

*State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

See APPEAL Failure to preserve, Failure to object, (p. 20) for discussion of topic.

### First-degree murder

#### To include felony-murder and premeditated

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

Appellant was convicted of felony murder and arson. Although the prosecution asserted a theory of premeditated murder, only a felony-murder instruction was offered. Although appellant was not sentenced on the arson conviction, it was still entered.

## INSTRUCTIONS

### First-degree murder (continued)

#### To include felony-murder and premeditated (continued)

##### *State v. Walker*, (continued)

Appellant claimed he was prejudiced in that the shift from a theory of premeditated murder to felony-murder allowed evidence to be introduced that was irrelevant; it kept the jury from being instructed on lesser-included offenses; and it kept appellant from raising possible defenses.

Syl. pt. 1 - “In a prosecution for first-degree murder, the State must submit jury instructions which distinguish between the two categories of first-degree murder-- willful, deliberate, and premediated murder and felony-murder-- if, under the facts of the particular case, the jury can find the defendant guilty of either category of first-degree murder. When the State also proceeds against the defendant on the underlying felony, the verdict forms provided to the jury should also reflect the foregoing distinction so that, if a guilty verdict is returned, the theory of the case upon which the jury relied will be apparent.” Syl. pt. 9, *State v. Giles*, 183 W.Va. 237, 395 S.E.2d 481 (1990).

Syl. pt. 2 - The State need not elect whether it will proceed on premeditated murder or felony murder until the close of all evidence; however, a defendant may make a motion to force an earlier election if he can make a strong, particularized showing that he will be prejudiced by further delay in electing.

Syl. pt. 3 - The granting of a motion to force the State to elect rests within the discretion of the trial court, and such a decision will not be reversed unless there is a clear abuse of discretion.

Presenting to the jury both felony-murder and premeditated murder theories is permissible so long as the defendant has proper notice and the opportunity to defend.

Here, appellant was not deprived of the opportunity to defend on either theory. The lack of an instruction on lesser included offenses of premeditated murder was not reversible error.

(Reversed on cumulative error; see elsewhere, this Digest.)

### Homicide

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See RIGHT TO APPEAL Constitutional right, Right to counsel, (p. 493) for discussion of topic.

## INSTRUCTIONS

### **Homicide** (continued)

#### **First-degree murder**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

### **Incomplete**

*State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

See INSTRUCTIONS Confusing, (p. 315) for discussion of topic.

### **Incorrect**

*State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

See INSTRUCTIONS Confusing, (p. 315) for discussion of topic.

### **Inferences from use of deadly weapon**

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See INSTRUCTIONS Right to, (p. 319) for discussion of topic.

### **Intoxication**

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See INSTRUCTIONS Right to, (p. 319) for discussion of topic.

### **Lesser included offenses**

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See LESSER INCLUDED OFFENSES Generally, (p. 376) for discussion of topic.

## INSTRUCTIONS

### Malice

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See INSTRUCTIONS Right to, (p. 319) for discussion of topic.

### Murder

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See RIGHT TO APPEAL Constitutional right, Right to counsel, (p. 493) for discussion of topic.

### Premeditation

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See RIGHT TO APPEAL Constitutional right, Right to counsel, (p. 493) for discussion of topic.

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See INSTRUCTIONS Right to, (p. 319) for discussion of topic.

### Refusal to give

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See INSTRUCTIONS Right to, (p. 319) for discussion of topic.

*State v. Miller*, 400 S.E.2d 611 (1990) (McHugh, J.)

See JUDGES Duties, To instruct on elements of crime, (p.343 ) for discussion of topic.

### Right to

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

Appellant was convicted of first-degree murder. On appeal he claimed as error the giving of instructions regarding his intoxication defense; the defense of accidental death; permissible inferences from use of a deadly weapon; and

self-defense. He also claimed as error the refusal of his instruction on premeditation and malice.

## INSTRUCTIONS

### Right to (continued)

#### *State v. Miller*, (continued)

Syl. pt. 3 - ““In this jurisdiction where there is competent evidence tending to support a pertinent theory of a case, it is error for the trial court to refuse a proper instruction, presenting such theory, when so requested.’ Syllabus, Point 4, *State v. Hayes*, 136 W.Va. 199, 67 S.E.2d 9 [1951].” *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

The Court found no error but cautioned the trial court to carefully limit instructions which are not well-suited to the facts at hand. (See case for specific discussion of each instruction and citations of authority.) No error; remanded for development of other issues.

#### *State v. Miller*, 400 S.E.2d 611 (1990) (McHugh, J.)

See JUDGES Duties, To instruct on elements of crime, (p. 343) for discussion of topic.

### Self-defense

#### *State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

See SELF-DEFENSE Force permissible, (p. 532) for discussion of topic.

#### *State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See INSTRUCTIONS Right to, (p. 319) for discussion of topic.

### Voluntariness of confessions

#### *State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 540) for discussion of topic.

## INTENT

### Embezzlement

#### Public official

*State v. Brown*, 422 S.E.2d 489 (1992) (Workman, J.)

See EMBEZZLEMENT Intent, Public official, (p. 191) for discussion of topic.

#### Evidence of

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See EVIDENCE Admissibility, Other crimes, (p. 214) for discussion of topic.

#### Transferred intent

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

Appellant was convicted of attempted murder, felony-murder, malicious assault and arson in the burning of an apartment building. The malicious assault charge was for the injuries to Joseph Vance. Appellant claimed that he could not have had the requisite intent to injure Vance because he did not know Vance was in the apartment building.

Syl. pt. 6 - The doctrine of transferred intent provides that where a person intends to kill or injure someone, but in the course of attempting to commit the crime accidentally injures or kills a third party, the defendant's criminal intent will be transferred to the third party.

See *State v. Daniel*, 182 W.Va. 643, 391 S.E.2d 90 (1990); *State v. Hall*, 174 W.Va. 599, 328 S.E.2d 206 (1985); and other cases cited in the opinion. No error.

## INTERROGATION

### Prior inconsistent statements to police

*State v. Moore*, 427 S.E.2d 450 (1992) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 218) for discussion of topic.

### Recording of

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See EVIDENCE Admissibility, Confessions, (p. 203) for discussion of topic.

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See DUE PROCESS Police interrogation, Recording of, (p. 188) for discussion of topic.

### Waiver of right to counsel

#### Juveniles

*Comer v. Tom A.M.*, 403 S.E.2d 182 (1991) (Per Curiam)

See JUVENILES Self-incrimination, Waiver of right to counsel, (p. 368) for discussion of topic.

## INTOXICATION

### **Instruction on for self-defense**

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See INSTRUCTIONS Right to, (p. 319) for discussion of topic.

## INVESTIGATORS

### Non-residents employed as

*Johnson v. Tsapis*, 413 S.E.2d 699 (1991) (Miller, C.J.)

Petitioners sought writ of prohibition to prevent further prosecution. Judge Tsapis denied petitioner's motion to suppress evidence because it was gathered by a non-resident private investigator employed by Weirton Steel to assist in a criminal investigation directed against some Weirton Steel employees. The investigators reported to and were under the control of the Weirton Police Department. Petitioners claimed *W.Va. Code*, 61-6-11 forbade the practice.

Syl. pt. - *W.Va. Code*, 61-6-11 (1923), violates the Privileges and Immunities Clause of Article IV, Section 2 of the *United States Constitution* insofar as it prohibits non-resident private investigators from being employed by a corporation to investigate drug trafficking or other criminal activity on the corporation's West Virginia premises.

The Court noted that the State's interest is primarily to insure competency in private investigators; this interest could be accomplished in a less restrictive manner than outright prohibitions against non-residents (i.e., licensure, as required by *W.Va. Code*, 30-18-1). Writ denied.

## JAILS AND PRISONS

### Conditions of

*Kincaid v. Mangum*, 432 S.E.2d 74 (1993) (McHugh, J.)

See PRISON/JAIL CONDITIONS Overcrowding and rules for exercise, Promulgation of rules regarding, (p. 435) for discussion of topic.

## JOINDER

### Discretion of judge

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

Appellant was convicted of three counts of obtaining a controlled substance. Two indictments were issued, the first alleging two counts of obtaining by prescriptions dated July 6 and July 20, 1990. The second alleged one count of obtaining by a prescription dated June 6, 1990.

Appellant was alleged to have altered the prescription by writing in the word “Plus” after the drug name; this alteration resulted in his receiving a drug 50% stronger than the one the doctor prescribed. Both the trial court and the Supreme Court found appellant did alter the prescription, in violation of *W.Va. Code*, 60A-4-403. *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

On appeal, appellant argued that joinder of the two indictments was prejudicial. Appellant’s first trial on only the first indictment ended in a mistrial; after the second indictment was returned and the two indictments joined for retrial, appellant was convicted.

Syl. pt. 1 - “A trial court may in its discretion order two or more indictments, or informations, or both, to be tried together if the offenses could have been joined in a single indictment or information, that is, the offenses are of the same or similar character or are based on the same act or transaction, or on two or more acts or transactions connected together or constituting a common scheme or plan.” Syl. pt. 5, *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 (1981).

Although the evidence was confusing regarding the prescription dates joinder was proper because the State clearly alleged the same offense occurred repeatedly over a period of time. No error.

*State v. Drennen*, 408 S.E.2d 24 (1991) (Per Curiam)

Appellant was convicted of three counts of delivery of marijuana to persons under the age of eighteen. The counts arose out of a single transaction in which appellant obtained a single bag of marijuana and returned to a vehicle in which the three juveniles were sitting.

Syl. pt. 2 - “The joinder of related offenses to meet possible variance in the evidence is not ordinarily subject to a severance motion. In those other situations where there has been either a joinder of separate offenses in the same indictment or the consolidation of separate indictments for the purpose of holding a single trial, the question of whether to grant a motion for severance rests in the sound discretion of the trial court.” Syllabus point 6, *State v. Mitter*, 168 W.Va. 531, 285 S.E.2d 376 (1981).

## JOINDER

### Discretion of judge (continued)

#### *State v. Drennen*, (continued)

The Court noted that joinder was proper under *State ex rel. Johnson v. Hamilton*, 164 W.Va. 682, 266 S.E.2d 125 (1980); *State ex rel. Watson v. Ferguson*, 166 W.Va. 337, 274 S.E.2d 440 (1980); and *Gilkerson v. Lilly*, 169 W.Va. 412, 288 S.E.2d 164 (1982). (See also, DOUBLE JEOPARDY Multiple offenses, Separate punishments, (p. 173)).

## JUDGES

### Abuse of discretion

#### Accepting plea bargain

*State ex rel. Friend v. Hamilton*, No. 21449 (12/16/92) (Per Curiam)

See IMMUNITY Grant by prosecuting attorney, (p. 290) for discussion of topic.

#### Grant of immunity

*State ex rel. Friend v. Hamilton*, No. 21449 (12/16/92) (Per Curiam)

See IMMUNITY Grant by prosecuting attorney, (p. 290) for discussion of topic.

#### Newly discovered evidence

*State ex rel. Spaulding v. Watt*, 422 S.E.2d 818 (1992) (Per Curiam)

See NEW TRIAL Newly discovered evidence, (p. 403) for discussion of topic.

### Admonishment

*In the Matter of Damron*, No. 21499 (10/18/93) (Per Curiam)

See JUDGES Discipline, Election improprieties, (p. 332) for discussion of topic.

*In the Matter of Kaufman*, 416 S.E.2d 480 (1992) (Brotherton, J.)

See JUDGES *Ex parte* communications, (p. 347) for discussion of topic.

### Certified question

#### Use in criminal cases

*State v. Lewis*, 422 S.E.2d 807 (1992) (Miller, J.)

See PROSECUTING ATTORNEY Appeal by, Prohibition, (p. 461) for discussion of topic.

## JUDGES

### Contempt

*State v. Smarr*, 418 S.E.2d 592 (1992) (Per Curiam)

See CONTEMPT Misrepresentation by attorney, (p. 136) for discussion of topic.

### Discharging jury

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See DOUBLE JEOPARDY Mistrial, Manifest necessity, (p. 171) for discussion of topic.

### Discipline

*In the Matter of Bivens*, No. 19378 (11/9/90) (Per Curiam)

Respondent was charged with violating Canons 1 and 2 of the Judicial Code of Ethics. He was arrested for driving under the influence of alcohol. Although his blood alcohol level was measured at .33 by weight, criminal charges were dismissed.

The Court held that the Judicial Investigation Commission met its burden of proving the offense by clear and convincing evidence. *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990); *In re Harshbarger*, 173 W.Va. 206, 314 S.E.2d 79 (1984); *In re Osborne*, 173 W.Va. 381, 315 S.E.2d 640 (1984); *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983). Respondent's no longer being a judge did not preclude sanctions. *West Virginia Judicial Hearing Board v. Romanello*, 175 W.Va. 577, 336 S.E.2d 540 (1985). Public censure, \$1,000 fine and costs of the proceedings.

*In the Matter of Boese*, 410 S.E.2d 282 (1991) (Per Curiam)

See MAGISTRATE COURT Judicial ethics, (p. 387) for discussion of topic.

*In the Matter of Eplin*, 410 S.E.2d 273 (1991) (Per Curiam)

See DISCIPLINE Signing, Forms in blank, (p. 158) for discussion of topic.

*In the Matter of Wilson*, 411 S.E.2d 847 (1991) (Per Curiam)

See DISCIPLINE Sexual impropriety, (p. 158) for discussion of topic.

# JUDGES

## Discipline (continued)

### Conviction of crimes

*Committee on Legal Ethics v. Grubb*, 420 S.E.2d 744 (1992) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 61) for discussion of topic.

### Election endorsements

*In the Matter of Hill*, 437 S.E.2d 738 (1993) (Brotherton, J.)

During a reelection campaign, Judge Hill appeared in an advertisement with another candidate, implying that Judge Hill and the other candidate were a team and that “Judge Hill Needs a FRIEND in the Courtroom.” (The other candidate’s name was Friend.)

The Judicial Investigation Commission alleged that this advertisement was endorsement of a political candidate in violation of Canon 2 and Canon 7B(1) and (2).

Syl. pt. 1 - “ ‘ “The Supreme Court of appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.” Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).’ Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 (1985).” Syllabus point 1, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

Syl. pt. 2 - “ ‘A specific section of a statute controls over a general section of the statute.’ Syllabus Point 2, *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (1970).” Syllabus point 2, *In the Matter of Vandelinde*, 179 W.Va. 183, 366 S.E.2d 631 (1988).

Syl. pt. 3 - Canon 5A(1)(b) of the Code of Judicial Conduct, effective January 1, 1993, clearly states that a judge or a candidate for election or appointment to judicial office shall not “publicly endorse or publicly oppose another candidate for public office.”

The Court noted that Canon 7A(1)(b) did not prohibit the conduct at issue but noted that the Canon appeared to be poorly drafted in that it applies to a judge *who* is not a candidate, while omitting a judge who is a candidate. The Court found Canon 2 and Canon 7B(1) and (2) too general and applied 7A(1)(b).

While this resulted in dismissal, the Court also noted that the new Code of Judicial Conduct, Canon 5A(1)(b), clearly prohibits the activity here.

## JUDGES

### Discipline (continued)

#### Election improprieties

*In the Matter of Codispoti*, 438 S.E.2d 549 (1993) (Per Curiam)

See MAGISTRATE COURT Election improprieties, (p. 381) for discussion of topic.

*In the Matter of Damron*, No. 21499 (10/18/93) (Per Curiam)

While a candidate for judge, respondent failed to form a campaign committee for acceptance and solicitation of campaign funds, in violation of Canon 7B(2) of the *Judicial Code of Ethics*. The Court found no deceit but found a violation. See *In the Matter of Karr*, 182 W.Va. 221, 387 S.E.2d 126 (1989).

Public admonishment. See *In the Matter of Suder*, 183 W.Va. 680, 398 S.E.2d 162 (1990).

#### Generally

*In the Matter of Atkinson*, 423 S.E.2d 902 (1992) (Per Curiam)

See MAGISTRATE COURT Discipline, Generally, (p. 382) for discussion of topic.

*In the Matter of Hill*, 437 S.E.2d 738 (1993) (Brotherton, J.)

See JUDGES Discipline, Election endorsements, (p. 331) for discussion of topic.

*In the Matter of Shaver*, No. 19689 (10/26/90) (Per Curiam)

See DISCIPLINE Bias, (p. 156) for discussion of topic.

*In the Matter of Suder*, 398 S.E.2d 162 (1990) (Per Curiam)

See DISCIPLINE Campaign funds, (p. 156) for discussion of topic.

*In the Matter of Twyman*, 437 S.E.2d 764 (1993) (Per Curiam)

See MAGISTRATE COURT Discipline, (p. 380) for discussion of topic.

## JUDGES

### Discipline (continued)

#### Standard of proof

*In the Matter of Egnor*, 412 S.E.2d 485 (1991) (Workman, J.)

See JUDGES Ethical misconduct, (p. 345) for discussion of topic.

*In the Matter of Gainer*, 404 S.E.2d 251 (1991) (Per Curiam)

Magistrate Gainer was found by the investigative panel to be guilty of sexually molesting a fifteen-year old summer employee. He was also indicted by a grand jury for the same actions. Magistrate Gainer retired from office following filing of the charges. The investigating police officer testified that Magistrate Gainer first denied the allegations and then asked to meet with him the next day; he then admitted all of the alleged acts except the actual sexual touching.

Syl. pt. 1 - “Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding “must be proved by clear and convincing evidence.” Syllabus Point 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).” Syl. pt. 3, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

Syl. pt. 2 - “ ‘ “The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.” Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).’ Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 (1985).” Syl. pt. 1, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

The Court found the allegations to have been proven by clear and convincing evidence. In light of Magistrate Gainer’s retirement, the Court imposed only a public reprimand.

*In the Matter of Hey*, 425 S.E.2d 221 (1992) (McHugh, C.J.)

See JUDGES Discipline, Statements regarding a case, (p. 334) for discussion of topic.

## Discipline (continued)

### Statements regarding a case

*In the Matter of Hey*, 425 S.E.2d 221 (1992) (McHugh, C.J.)

The Judicial Hearing Board found respondent John Hey violated Canon 3A(6) of the Judicial Code of Ethics and recommended public censure and imposition of costs. Judge Hey appeared on a national television program entitled “Crossfire” and discussed specific facts and issues of a case he had heard which was pending before the Supreme Court (see *Judith R. v. Hey*, 185 W.Va. 117, 405 S.E.2d 447 (1990) involving child custody. Judge Hey made negative comments regarding the mother’s fitness and the welfare of the child. No evidence was before Judge Hey on any of the matters he discussed publicly.

Syl. pt. 1 - “Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding ‘must be proved by clear and convincing evidence.’ Syllabus Point 4, *In re Pauley*, 172 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 2 - Under Canon 3A(6) of the *Judicial Code of Ethics* [1976] judges’ public statements shall be considered to be in the “course of their official duties” when the statement is part of any official duty, or related to an official duty, or is sought from or given by the judge because of his or her official position.

Syl. pt. 3 - Under Rule III(C)(13) [1992] of the *West Virginia Rules of Procedure* for the Handling of Complaints Against Justices, Judges, Magistrates and Family Law Masters, the Judicial Hearing Board is limited to making a “written recommendation, which shall contain findings of fact, conclusions of law and proposed disposition.” Because of the Board’s limited judicial capacity, the Board is without authority to make a legal decision that is entitled to preclusive or *res judicata* effect.

Syl. pt. 4 - ““The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial (Hearing) Board in disciplinary proceedings.’ Syllabus point 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980)”. Syllabus Point 1, *In the Matter of Kaufman*, 187 W.Va. 166, 416 S.E.2d 480 (1992).

## Discipline (continued)

### Statements regarding a case (continued)

#### *In the Matter of Hey*, (continued)

The Court noted that a judge's general public comment "as to a legal issue does not automatically require his later disqualification when the issue is presented to him in a specific case." *Judicial Inquiry Com'n of W.Va. v. McGraw*, 171 W.Va. 441, at 444, 299 S.E.2d 872, at 875 (1983). However, the Court found Judge Hey did comment on the specifics of a case which would normally have been remanded to him (the case was assigned to another judge upon remand). The Court ordered public censure but declined to impose costs.

### Suspension pending hearing

#### *In the Matter of Grubb*, 417 S.E.2d 919 (1992) (McHugh, C.J.)

Respondent was indicted by a federal grand jury for bribery, mail fraud, conspiracy, witness tampering and obstruction of justice and later convicted of most of the charges. The Administrative Director of the Court filed a complaint with the Judicial Investigation Commission relating the charges. Following an investigation, the Commission petitioned the Court.

A rule to show cause was issued directing respondent to show why he should not be suspended, either with or without pay. Respondent requested a continuance until after the federal charges were resolved, which request was denied. The Commission asserted that the Court could suspend respondent without pay.

Syl. pt. - Under the authority of article VIII, sections 3 and 8 of the *West Virginia Constitution* and Rule II(J)(2) of the *Rules of Procedure for the Handling of Complaints Against Justices, Judges, Magistrates and Family Law Masters*, the Supreme Court of Appeals of West Virginia may suspend a judge, who has been indicted for or convicted of serious crimes, without pay, pending the final disposition of the criminal charges against the particular judge or until the underlying disciplinary proceeding before the Judicial Investigation Commission has been completed.

Here, the public had knowledge of the criminal convictions, calling into question respondent's effectiveness as a judge. Suspension without pay pending final disposition of the convictions.

## JUDGES

### Discretion

#### Admissibility of evidence

*State v. Bass*, 432 S.E.2d 86 (1993) (Per Curiam)

See EVIDENCE Admissibility, Prejudice versus probative value, (p. 216) for discussion of topic.

*State v. Bunda and Devault*, 419 S.E.2d 457 (1992) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 205) for discussion of topic.

*State v. Bunda and Devault*, 419 S.E.2d 457 (1992) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 535) for discussion of topic.

*State v. Harding*, 422 S.E.2d 619 (1992) (Per Curiam)

See BAIL Revocation of, Hearing required, (p. 111) for discussion of topic.

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See EVIDENCE Admissibility, Generally, (p. 211) for discussion of topic.

*State v. Perolis*, 398 S.E.2d 512 (1990) (Neely, C.J.)

See EVIDENCE Witnesses, Hostile, (p. 250) for discussion of topic.

*State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Statement written by police officer, (p. 547) for discussion of topic.

*State v. Slaman*, 431 S.E.2d 91 (1993) (Per Curiam)

See SEARCH AND SEIZURE Plain view exception, (p. 523) for discussion of topic.

## JUDGES

### Discretion (continued)

#### Admissibility of evidence (continued)

*State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

See EVIDENCE Admissibility, Photographs, (p. 215) for discussion of topic.

#### Contempt

*State v. Smarr*, 418 S.E.2d 592 (1992) (Per Curiam)

See CONTEMPT Misrepresentation by attorney, (p. 136) for discussion of topic.

#### Continuance

*Lewis v. Henry*, 400 S.E.2d 567 (1990) (Per Curiam)

See CONTINUANCE Discretion in granting, (p. 137) for discussion of topic.

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 405) for discussion of topic.

#### Expert witnesses

*State v. Hose*, 419 S.E.2d 690 (1992) (Per Curiam)

See EVIDENCE Expert witnesses, Admissibility of opinions, (p. 235) for discussion of topic.

#### Immunity

*State ex rel. Friend v. Hamilton*, No. 21449 (12/16/92) (Per Curiam)

See IMMUNITY Grant by prosecuting attorney, (p. 290) for discussion of topic.

## JUDGES

### Discretion (continued)

#### Jury instructions

*State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

See INSTRUCTIONS Failure to give, (p. 316) for discussion of topic.

#### Jury selection

*State v. Gray*, 418 S.E.2d 597 (1992) (Neely, J.)

See JURY Qualifications, Generally, (p. 360) for discussion of topic.

#### Mercy in first-degree murder sentence

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See SENTENCING Recommendation of mercy, (p. 561) for discussion of topic.

#### Mistrial

*State v. Strauss*, 415 S.E.2d 888 (1992) (Per Curiam)

See JURY Bias, Juror talking with witnesses, (p. 355) for discussion of topic.

#### New trial based on new evidence

*State ex rel. Spaulding v. Watt*, 422 S.E.2d 818 (1992) (Per Curiam)

See NEW TRIAL Newly discovered evidence, (p. 403) for discussion of topic.

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 405) for discussion of topic.

## JUDGES

### Discretion (continued)

#### Notes by jury

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See JURY Note-taking, Use of notes, (p. 359) for discussion of topic.

#### Plea bargain

*State ex rel. Friend v. Hamilton*, No. 21449 (12/16/92) (Per Curiam)

See IMMUNITY Grant by prosecuting attorney, (p. 290) for discussion of topic.

#### Pre-trial discovery

*State v. Delaney*, 417 S.E.2d 903 (1992) (Brotherton, J.)

See DISCOVERY Psychological tests, Judge's discretion, (p. 164) for discussion of topic.

#### Probation

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

See PROBATION Denial of, (p. 444) for discussion of topic.

#### Scope of cross-examination

*State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

See CROSS-EXAMINATION Scope of, (p. 147) for discussion of topic.

*State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

See CROSS-EXAMINATION Scope of, (p. 148) for discussion of topic.

## JUDGES

### Discretion (continued)

#### Sentencing

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See SENTENCING Recommendation of mercy, (p. 561) for discussion of topic.

#### Voluntariness of confession

*State v. Gray*, 418 S.E.2d 597 (1992) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 536) for discussion of topic.

### Disqualification

*In the Interest of Betty L. Taylor*, No. 21302 (4/23/93) (Per Curiam)

See MAGISTRATE COURT Discipline, Ruling on son-in-law's case, (p. 383) for discussion of topic.

### Duties

#### Before accepting guilty plea

*State v. Hatfield*, 413 S.E.2d 162 (1991) (McHugh, J.)

See COMPETENCY Suicide attempt, Effect of, (p. 122) for discussion of topic.

#### Explanation of appointed counsel fee reductions

*Judy v. White*, 425 S.E.2d 588 (1992) (McHugh, C.J.)

See ATTORNEYS Compensation, Appointed criminal cases, (p. 42) for discussion of topic.

#### Jury bias

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See JURY Bias, Judge's duty to examine for, (p. 354) for discussion of topic.

## JUDGES

### Duties (continued)

#### Psychiatric evaluation for competency

*State v. Hatfield*, 413 S.E.2d 162 (1991) (McHugh, J.)

See COMPETENCY Suicide attempt, Effect of, (p. 122) for discussion of topic.

#### To ascertain competency

*State v. Hatfield*, 413 S.E.2d 162 (1991) (McHugh, J.)

See COMPETENCY Suicide attempt, Effect of, (p. 122) for discussion of topic.

#### To declare mistrial

*Dietz v. Legursky*, 425 S.E.2d 202 (1992) (McHugh, C.J.)

Appellant was convicted of first-degree murder; his conviction was affirmed (*State v. Dietz*, 182 W.Va. 544, 390 S.E.2d 15 (1990)). In this *habeas corpus* petition appellant objected to the trial court stating during *voir dire* that appellant would “state that the decedent did threaten to attack and attacked him in such a way as to require him to defend himself...” Appellant claimed that his right to remain silent was infringed; upon objection the trial judge responded that if appellant did not testify then “I will declare a mistrial.” Although appellant did not testify no mistrial was declared.

Syl. pt. 1 - Because the right of a defendant in a criminal case [not] to testify on his or her own behalf is fundamental, then, in a case where a trial court represents that a mistrial will be declared if the defendant does not so testify, in the event that the defendant does not in fact testify and can demonstrate that he or she decided not to testify in reliance on the trial court’s representation, it is reversible error for that trial court not to declare a mistrial.

Appellant claimed in the earlier appeal that his decision not to testify was motivated by the trial court’s threat of a mistrial. Although the earlier record did not support the contention, the record here did. Reversed and remanded.

#### To inform of sentence enhancement

*State v. Johnson and State v. Barber*, 419 S.E.2d 300 (1992) (Miller, J.)

See SENTENCING Enhancement, Notice of, (p. 551) for discussion of topic.

## JUDGES

### Duties (continued)

#### To inquire into racial discrimination

*State v. Bass*, 432 S.E.2d 86 (1993) (Per Curiam)

See DISCRIMINATION Racial, Jury selection, (p. 166) for discussion of topic.

*State v. Harris*, 432 S.E.2d 93 (1993) (Neely, J.)

See DISCRIMINATION Racial, Jury selection, (p. 167) for discussion of topic.

#### To instruct on elements of crime

*State v. Gibson*, 413 S.E.2d 120 (1991) (Per Curiam)

Appellant was convicted of first-degree murder. On appeal, he claimed that the trial judge instructed the jury that it could find him guilty despite the absence of any evidence of premeditation and deliberation; he also claimed that the judge failed to instruct the jury on all elements of murder in the first-degree.

Syl. pt. 4 - “The trial court must instruct the jury on all essential elements of the offense charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error.” Syllabus, *State v. Miller*, 184 W.Va. 367, 400 S.E.2d 611 (1990).

Syl. pt. 5 - “ “It is not error to refuse to give an instruction to the jury, though it states a correct and applicable principle of law, if the principle stated in the instruction refused is adequately covered by another instruction or other instruction given.” Syl. pt. 2, *Jennings v. Smith*, 165 W.Va. 791, 272 S.E.2d 229 (1980), quoting, Syl. Pt. 3, *Morgan v. Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966). Syl. pt. 2, *McAllister v. Weirton Hospital Co.*, 173 W.Va. 75, 312 S.E.2d 738 (1983).’ Syllabus Point 4, *Jenrett v. Smith*, 173 W.Va. 325, 315 S.E.2d 583 (1983).” Syl. Pt. 9, *State v. Deskins*, 181 W.Va. 112, 380 S.E.2d 676 (1989).

The trial judge properly instructed the jury that it could return verdicts of guilty of first-degree murder, second-degree murder, voluntary manslaughter, involuntary manslaughter or not guilty; it further defined first-degree murder as “when one person kills another unlawfully, maliciously, deliberately and premeditatedly.” No error.

## JUDGES

### Duties (continued)

#### To instruct on elements of crime (continued)

*State v. Miller*, 400 S.E.2d 611 (1990) (McHugh, J.)

Appellant was convicted of grand larceny, forgery and uttering. The prosecution failed to offer any instructions and the trial court failed to instruct the jury on all the essential elements of the crimes charged. The prosecution claimed that appellant's trial counsel deliberately failed to offer instructions of his own in order to invite error.

Syl. pt. - The trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error.

(See opinion for extensive citations). Reversed.

#### To render decisions

*State ex rel. Cooper v. Schlaegel*, No. 21481 (2/16/93) (Per Curiam)

Petitioner sought a writ of mandamus to compel a decision in petitioner's case involving compelling the County Commission of Lincoln County to provide suitable quarters for processing of prisoners and secure housing for sheriff's records pursuant to *W.Va. Code*, 7-3-2.

Following close of testimony on 6 February 1992 respondent requested written arguments. Parties promptly submitted arguments but respondent has not ruled. Citing Section 17, Art. III of the *West Virginia Constitution* and Canon 3A(5) of the *West Virginia Judicial Code of Ethics* the Court granted the writ of mandamus and ordered the respondent to render a decision within thirty days of the order (16 February 1993). See also, *State ex rel. Patterson v. Aldredge*, 176 W.Va. 446, 317 S.E.2d 805 (1984).

#### To rule in timely manner

*State ex rel. Smith v. Hatcher*, No. 21640 (6/10/93) (Per Curiam)

Relator claimed that the circuit court unreasonably delayed ruling on his writ of *habeas corpus*, filed with the court 23 May 1990. Respondent judge pointed out that he was not then judge of the court; his review of the file revealed that an attorney was appointed to pursue a writ of *habeas corpus* but no petition was in the file.

## JUDGES

### Duties (continued)

#### To rule in timely manner (continued)

*State ex rel. Smith v. Hatcher*, (continued)

The Court assumed that a petition was filed and set forth the basis for a writ of mandamus: that a clear legal right resided with the petitioner to the relief sought; that the respondent had a legal duty to perform the act petitioner sought; and that petitioner did not have another adequate remedy. *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

In light of the apparently lost earlier petition, the Court remanded the case to the circuit court with directions to afford petitioner a hearing as soon as possible.

#### When informant not disclosed

*State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

See DISCOVERY Failure to disclose, Informants, (p. 160) for discussion of topic.

### Elections

#### Endorsements by incumbents

*In the Matter of Hill*, 437 S.E.2d 738 (1993) (Brotherton, J.)

See JUDGES Discipline, Election endorsements, (p. 331) for discussion of topic.

#### Election improprieties

*In the Matter of Damron*, No. 21499 (10/18/93) (Per Curiam)

See JUDGES Discipline, Election improprieties, (p. 332) for discussion of topic.

#### Ethical misconduct

*In the Matter of Bivens*, No. 19378 (11/9/90) (Per Curiam)

See JUDGES Discipline, (p. 330) for discussion of topic.

## JUDGES

### **Ethical misconduct** (continued)

*In the Matter of Boese*, 410 S.E.2d 282 (1991) (Per Curiam)

See MAGISTRATE COURT Judicial ethics, (p. 387) for discussion of topic.

*In the Matter of Egnor*, 412 S.E.2d 485 (1991) (Workman, J.)

This matter was precipitated by a grand jury investigation of sexual abuse allegations at a Cabell County juvenile detention facility. Respondent Judge received a copy of the grand jury report, finding that supervisory personnel failed to safeguard residents from known sexual abuse by an employee.

Respondent contacted the executive director and recommended that the employee be terminated; the director demurred, saying the information was insufficient. Respondent thereupon appeared before the Cabell County Commission, which owned the property upon which the center was located and which had supervisory authority. The Commission entered an order requesting the judge to appoint a special master.

Respondent appointed a special master to run the center for a period not to exceed sixty days and, upon the master's motion, suspended the employee. The employee apparently received no notice of the motion, nor an opportunity for a hearing. The husband of one of the Board of Supervisors and the employee filed complaints resulting in charges of violation of Canon 1, Canon 2 and Canon 3(A)(1) and (4).

Syl. pt. 1 - "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] ... Board in disciplinary proceedings." Syl. Pt. 1, in part, *West Virginia Judicial Inquiry Comm'n v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

Syl. pt. 2 - "Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges[,] ... Magistrates, [and Family Law Masters], the allegations of a complaint in a judicial disciplinary proceeding 'must be proven by clear and convincing evidence.'" Syl. Pt. 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 3 - Custodians of juveniles detained by court order must be held to a high standard of responsibility to protect those in their care, and the court by whose hand such juveniles are detained has an inherent right to assure their safety and well-being.

The Court agreed with the Hearing Board that the judge's reaction to a very serious allegation was both necessary and justifiable. The Court applauded Judge Egnor's prompt and responsible action in protecting the juvenile residents. Complaint dismissed.

## JUDGES

### **Ethical misconduct** (continued)

*In the Matter of Eplin*, 410 S.E.2d 273 (1991) (Per Curiam)

See DISCIPLINE Signing, Forms in blank, (p. 158) for discussion of topic.

*In the Matter of Shaver*, No. 19689 (10/26/90) (Per Curiam)

See DISCIPLINE Bias, (p. 156) for discussion of topic.

*In the Matter of Suder*, 398 S.E.2d 162 (1990) (Per Curiam)

See DISCIPLINE Campaign funds, (p. 156) for discussion of topic.

*In the Matter of Wilson*, 411 S.E.2d 847 (1991) (Per Curiam)

See DISCIPLINE Sexual impropriety, (p. 158) for discussion of topic.

### **Ethics**

*In the Interest of Betty L. Taylor*, No. 21302 (4/23/93) (Per Curiam)

See MAGISTRATE COURT Discipline, Ruling on son-in-law's case, (p. 383) for discussion of topic.

*In the Matter of Atkinson*, 423 S.E.2d 902 (1992) (Per Curiam)

See MAGISTRATE COURT Discipline, Generally, (p. 382) for discussion of topic.

*In the Matter of Bivens*, No. 19378 (11/9/90) (Per Curiam)

See JUDGES Discipline, (p. 330) for discussion of topic.

*In the Matter of Egnor*, 412 S.E.2d 485 (1991) (Workman, J.)

See JUDGES Ethical misconduct, (p. 345) for discussion of topic.

## JUDGES

### Ethics (continued)

*In the Matter of Hey*, 425 S.E.2d 221 (1992) (McHugh, C.J.)

See JUDGES Discipline, Statements regarding a case, (p. 334) for discussion of topic.

*In the Matter of Hill*, 437 S.E.2d 738 (1993) (Brotherton, J.)

See JUDGES Discipline, Election endorsements, (p. 331) for discussion of topic.

### *Ex parte* communications

*In the Matter of Kaufman*, 416 S.E.2d 480 (1992) (Brotherton, J.)

Respondent judge made a telephone call to the President of Charleston Area Medical Center with respect to a case involving payment to an automobile accident victim who apparently owed CAMC money for services. The court allowed CAMC to intervene. Counsel for CAMC failed to arrive on time for a 7:30 a.m. hearing, prompting Judge Kaufman to call the President of CAMC to confirm that the President would be able to attend a scheduled hearing.

The President, in a memo to CAMC's chief counsel, indicated that the judge made it clear that he wanted CAMC to stop trying to collect on the hospital bill. The President perceived the call as a clear message that the judge was unhappy with CAMC's actions.

After the call, the judge issued a memo to all parties stating that CAMC had filed ten of default judgment actions and that the court had "bent over backwards to be accessible to CAMC as it has to all litigants this term. However, CAMC is not entitled and will not be given preferential treatment in this case and should be on notice that if they miss another hearing on January 8, 1991 then they may well dismissed from this present suit."

Syl. pt. 1 - "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial (Hearing) Board in disciplinary proceedings." Syllabus point 1, *West Virginia Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

Syl. pt. 2 - The initiation of *ex parte* communications by a judge is strictly prohibited by Canon 3A(4) of the Judicial Code of Ethics, "except as authorized by law."

Syl. pt. 3 - A judge should not initiate a telephone conversation with a party to a pending or impending proceeding who is represented by counsel.

## JUDGES

### *Ex parte communications* (continued)

#### *In the Matter of Kaufman*, (continued)

The Court found the communication to be improper and admonished Judge Kaufman.

### Examining witnesses

#### *State v. Ferrell*, 412 S.E.2d 501 (1991) (Per Curiam)

Appellant was convicted by a jury of DUI. At trial the judge refused to allow defense counsel to object to the judge's questioning a witness to determine if he had been given immunity from prosecution in exchange for testimony. The questioning occurred in the presence of the jury.

The judge then asked the witness if he understood that his testimony constituted an admission to obstructing an officer (*W.Va. Code*, 61-5-17). Again in the presence of the jury the judge arrested the witness and instructed the prosecution to prepare an information charging the witness with obstructing.

Syl. pt. - "A trial judge in a criminal case has a right to control the orderly process of a trial and may intervene into the trial process for such purpose, so long as such intervention does not operate to prejudice the defendant's case. With regard to evidence bearing on any material issue, including the credibility of witnesses, the trial judge should not intimate any opinion, as these matters are within the exclusive province of the jury." Syllabus Point 4, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979)." Syllabus point 8, *State v. Massey*, 178 W.Va. 427, 359 S.E.2d 865 (1987).

Here, there was contradictory evidence before the jury concerning the matters about which the witness was testifying. The witness' credibility was a crucial factor. The Court found substantial prejudicial effect in the judge's conduct. Reversed and remanded.

### Former prosecuting attorney

#### Grand jury record required

#### *State ex rel. Redman v. Hedrick*, 408 S.E.2d 659 (1991) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 305) for discussion of topic.

## **JUDGES**

### **Immunity**

#### **Sole judge of**

*State ex rel. Friend v. Hamilton*, No. 21449 (12/16/92) (Per Curiam)

See IMMUNITY Grant by prosecuting attorney, (p. 290) for discussion of topic.

### **Judicial notice**

#### **Blood tests**

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

See SCIENTIFIC TESTS Evidence destroyed, Duty to make record, (p. 518) for discussion of topic.

### **Juvenile matters**

*In the Matter of Egnor*, 412 S.E.2d 485 (1991) (Workman, J.)

See JUDGES Ethical misconduct, (p. 345) for discussion of topic.

### **Magistrates**

#### **Concurrent jurisdiction with circuit court**

*State ex rel. Johnson v. Zakaib*, 400 S.E.2d 590 (1990) (Miller,)

See MAGISTRATE COURT Concurrent jurisdiction with circuit court, (p. 379) for discussion of topic.

### **Public censure**

*In the Matter of Hey*, 425 S.E.2d 221 (1992) (McHugh, C.J.)

See JUDGES Discipline, Statements regarding a case, (p. 334) for discussion of topic.

## JUDGES

### Suspensions

*In the Matter of Grubb*, 417 S.E.2d 919 (1992) (McHugh, C.J.)

See JUDGES Discipline, Suspension pending hearing, (p. 335) for discussion of topic.

## JUDICIAL NOTICE

### Blood tests

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

See SCIENTIFIC TESTS Evidence destroyed, Duty to make record, (p. 518) for discussion of topic.

## **JURISDICTION**

### **Appeal by prosecution**

*State v. Lewis*, 422 S.E.2d 807 (1992) (Miller, J.)

See PROSECUTING ATTORNEY Appeal by, Prohibition, (p. 461) for discussion of topic.

### **Magistrate court**

#### **Concurrent jurisdiction with circuit court**

*State ex rel. Johnson v. Zakaib*, 400 S.E.2d 590 (1990) (Miller,)

See MAGISTRATE COURT Concurrent jurisdiction with circuit court, (p. 379) for discussion of topic.

## **JUROR**

### **Bias**

#### **Generally**

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See JURY Qualifications, Generally, (p. 361) for discussion of topic.

# JURY

## Bias

### Generally

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See JURY Disqualification, Delay between impaneling and trial, (p. 356) for discussion of topic.

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See JURY Disqualification, Relationship to law enforcement officer, (p. 357) for discussion of topic.

### Judge's duty to examine for

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

Appellant was convicted of first-degree murder. During *voir dire*, one juror admitted to hearing and reading newspaper accounts of the killing; and added that she may have difficulty in ignoring the information. The trial court made further inquiry and determined that the juror could be unbiased. Appellant's trial counsel did not object.

Appellant challenged for cause one other juror because counsel had a pending claim against the insurance company the juror represented. Following individual *voir dire*, the court found this juror acceptable. Appellant challenged another juror for cause because she was a neighbor of the county Sheriff and knew the county Medical Examiner, an investigating deputy and the victim's father. After further inquiry, the trial court also found this juror acceptable.

Syl. pt. 4 - "When a trial court determines that prospective jurors have been exposed to information which may be prejudicial, the trial court, upon its own motion or motion of counsel, shall question or permit the questioning of the prospective jurors individually, out of the presence of the other prospective jurors, to ascertain whether the prospective jurors remain free of bias or prejudice." Syl. Pt. 1, *State v. Finley*, 177 W.Va. 554, 355 S.E.2d 47 (1987).

The Court found no abuse of discretion. No error.

## Bias (continued)

### Juror talking with witnesses

*State v. Strauss*, 415 S.E.2d 888 (1992) (Per Curiam)

Appellant was convicted of burglary and grand larceny. After trial, a prosecution witness told appellant that he saw another prosecution witness talking with a juror. Appellant filed a motion for new trial, which motion was denied.

During a recess in jury deliberations, the juror told other jurors that he had known the witness for years and that the witness would not do anything wrong. At least one juror reported that this statement influenced her decision.

Syl. pt. - “A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of. 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.” Syllabus point 7, *State v. Johnson*, 111 W.Va. 653, 164 S.E. 31 (1932).” Syllabus Point 1, *State v. Daniel*, 182 W.Va. 643, 391 S.E.2d 90 (1990).

The Court found clear prejudice here. Reversed and remanded.

### Victim weeping in court

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

Appellant was convicted of first-degree sexual assault. The victim, a ten-year old girl, sat in the front row during closing argument and wept. Appellant claimed prejudice. The trial court refused to grant a mistrial, ruling that no disruption occurred and that the right to a public trial was balanced against any potential prejudice.

Where the motives and interests of spectators were not clear and known to the jury, the Court will apparently find no prejudice; the conduct of the trial is within the trial judge’s discretion. See *State v. Franklin*, 174 W.Va. 469, 327 S.E.2d 449 (1985); presence of organization against drunk drivers reversible error when 14 of 20 of jury venire knew of organization. But, see also, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982); presence of high school students at trial of fellow student not error. No error here; judge did not abuse his discretion.

# JURY

## Challenges

### Generally

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See JURY Disqualification, Delay between impaneling and trial, (p. 356) for discussion of topic.

### Pending lawsuit against spouse

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See JURY Disqualification, Relationship to law enforcement officer, (p. 357) for discussion of topic.

### Discharge without verdict

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See DOUBLE JEOPARDY Mistrial, Manifest necessity, (p. 171) for discussion of topic.

### Disqualification

#### Delay between impaneling and trial

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

Appellant was convicted of first-degree sexual assault. The jury was impaneled three weeks prior to trial. Appellant claims that this delay caused an opportunity for bias and prejudice.

Syl. pt. 1 - “The object of the law is, in all cases in which juries are impaneled to try the issue, to secure men for that responsible duty whose minds are wholly free from bias or prejudice either for or against the accused ... .” Syl. pt. 1, in part, *State v. Hatfield*, 48 W.Va. 561, 37 S.E. 626 (1900).” Syllabus point 3, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987).

The Court noted the great latitude allowed for *voir dire* questions. *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981). The question of whether a jury is free of bias is within the trial judge’s discretion and, absent actual prejudice, the trial court’s ruling will not be disturbed on appeal. *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987). *State v. Carduff*, 142 W.Va. 18, 93 S.E.2d 502 (1956). No abuse here.

## JURY

### Disqualification (continued)

#### Generally

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See JURY Qualifications, Generally, (p. 361) for discussion of topic.

#### Pending lawsuit against spouse

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See JURY Disqualification, Relationship to law enforcement officer, (p. 357) for discussion of topic.

#### Peremptory strike requires explanation

*State v. Bass*, 432 S.E.2d 86 (1993) (Per Curiam)

See DISCRIMINATION Racial, Jury selection, (p. 166) for discussion of topic.

*State v. Harris*, 432 S.E.2d 93 (1993) (Neely, J.)

See DISCRIMINATION Racial, Jury selection, (p. 167) for discussion of topic.

#### Relationship to law enforcement officer

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

Appellant was convicted of first-degree sexual assault. One of the jurors was married to a chief of police. She was also suing the police department for police brutality. In addition, defense counsel was suing the juror's husband in an effort to garnishee his wages.

Syl. pt. 2 - "A prospective juror's consanguineal, martial or social relationship with an employee of a law enforcement agency does not operate as a per se disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a party has a right to obtain individual *voir dire* of the challenged juror to determine possible prejudice or bias arising from the relationship." Syllabus point 6, of *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983).

## JURY

### Disqualification (continued)

#### Relationship to law enforcement officer (continued)

##### *State v. McClure*, (continued)

The Court noted that actual prejudice is the test here. *State v. Archer*, 169 W.Va. 564, 289 S.E.2d 178 (1982). During *voir dire* the juror repeatedly stated that she could decide the case regardless of her relationships. Similarly, the juror stated that she could render a just verdict in spite of the pending action against her husband. *State v. Deaner*, 175 W.Va. 489, 334 S.E.2d 627 (1985); *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974). No error.

### Exhibits

#### Use during deliberation

##### *State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See JURY Note-taking, Use of notes, (p. 359) for discussion of topic.

### Instructions on elements of offense

##### *State v. Gibson*, 413 S.E.2d 120 (1991) (Per Curiam)

See JUDGES Duties, To instruct on elements of crime, (p. 342) for discussion of topic.

### Misconduct

##### *State v. Strauss*, 415 S.E.2d 888 (1992) (Per Curiam)

See JURY Bias, Juror talking with witnesses, (p. 355) for discussion of topic.

## JURY

### Note-taking

#### Use of notes

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

Appellant was convicted of first-degree murder. The jury was permitted to take notes during trial. The judge instructed the jury carefully to use only their own notes, not to rely exclusively on the notes and to take notes only on the evidence, not on opening and closing statements; and instructed the bailiff to collect the notes during recesses.

Appellant claimed that note-taking distorts the evidence and allows undue influence over jurors unable to read or write. The trial court allowed counsel to ask if anyone lacked that ability and also offered to allow individual *voir dire*, which offer was refused.

Syl. pt. 4 - “The court may permit the jury to take to their room, when they retire to consider of their verdict, any paper read in evidence before them; and, at the request of the jury or any one of them, it may allow a paper to be read to them a second time, and any juror has the right to make notes therefrom when it is so read.” Syl. Pt. 5, *Koontz, Phillips & Stamm v. Mylius*, 77 W.Va. 499, 87 S.E. 851 (1916).

Syl. pt. 5 - It is a permissible practice to allow jurors to take notes on the evidence during trial as long as proper *voir dire* is permitted concerning the jurors’ capacity to take notes, and a cautionary instruction is given concerning the proper and improper uses of note-taking. The ultimate decision on whether to allow note-taking by the jury lies within the sound discretion of the trial court.

The Court found the trial court’s instructions proper; no abuse of discretion. No error.

### Poll

*State v. Vandevender*, 438 S.E.2d 24 (1993) (Per Curiam)

See JURY Unanimity required for verdict, (p. 362) for discussion of topic.

## JURY

### Prejudicing

#### Juror talking with witness

*State v. Strauss*, 415 S.E.2d 888 (1992) (Per Curiam)

See JURY Bias, Juror talking with witnesses, (p. 355) for discussion of topic.

#### Prosecutor's inflammatory statements

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 464) for discussion of topic.

#### Victim weeping in court

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See JURY Bias, Victim weeping in court, (p. 355) for discussion of topic.

### Qualifications

#### Generally

*State v. Gray*, 418 S.E.2d 597 (1992) (Neely, J.)

Appellant was convicted of first-degree murder. The killing took place as appellant was interrupted by an off-duty policeman hired as an investigator while appellant was attempting to burn a house pursuant to a scheme by the owner to collect insurance proceeds. Appellant claimed that the jury was improperly impaneled because the pretrial publicity was prejudicial and several jurors were originally impaneled to hear the arson charges brought against the house's owner.

Syl. pt. 3 - Unless it clearly appears that a qualified jury cannot be obtained from the county in which an offense has been committed, the circuit court does not abuse his discretion under *W.Va. Code*, 52-1-14 [1986] in deciding not to summon jurors from another county.

Syl. pt. 4 - When the circuit court determines that a juror can act fairly and impartially and render a just verdict at trial, that juror is not disqualified to serve solely because he was impaneled to serve as a juror at the trial of a different defendant charged with crimes arising out of the same set of circumstances.

## JURY

### Qualifications (continued)

#### Generally (continued)

##### *State v. Gray*, (continued)

Syl. pt. 5 - “Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.’ Syllabus point 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).” Syllabus point 5, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

The Court noted that the jurors impaneled for the related case never heard evidence in that case; further, the trial judge allowed extensive *voir dire*. No error.

##### *State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See JURY Disqualification, Delay between impaneling and trial, (p. 356) for discussion of topic.

##### *State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See JURY Disqualification, Relationship to law enforcement officer, (p. 357) for discussion of topic.

##### *State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

Appellant was convicted of possession of marijuana with intent to deliver. During the first day of trial, one of the jurors advised the court that she had been a secretary for a law firm which had successfully defended appellant’s girlfriend. The juror did not work on any aspect of the case; at most she may have heard casual conversation relating to the case.

Upon questioning by the trial court the juror vowed she could afford appellant the presumption of innocence, that she was in no way prejudiced against appellant, and that she could make her decision solely on the basis of evidence presented. Both the defense and the prosecution were allowed to question the juror.

Syl. pt. 6 - “The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court.” Syllabus point 1, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

No error.

## JURY

### Qualifications (continued)

#### Jury impaneled for related trial

*State v. Gray*, 418 S.E.2d 597 (1992) (Neely, J.)

See JURY Qualifications, Generally, (p. 360) for discussion of topic.

#### Right to be present at jury selection

*State v. Hamilton*, 403 S.E.2d 739 (1991) (Per Curiam)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 496) for discussion of topic.

### Selection

#### Racial discrimination in

*State v. Bass*, 432 S.E.2d 86 (1993) (Per Curiam)

See DISCRIMINATION Racial, Jury selection, (p. 166) for discussion of topic.

*State v. Harris*, 432 S.E.2d 93 (1993) (Neely, J.)

See DISCRIMINATION Racial, Jury selection, (p. 167) for discussion of topic.

#### Unanimity required for verdict

*State v. Vandevender*, 438 S.E.2d 24 (1993) (Per Curiam)

Appellant was convicted of several misdemeanors and sentenced to one year, suspended to ninety days. After deliberating for three and one-half hours the jury first arrived at a not guilty verdict. The prosecution thereupon requested a poll, during which one juror said the verdict was not unanimous.

After being advised by the judge that a unanimous verdict was required, the jury reconvened and returned a guilty verdict. All jurors nodded when asked if the verdict was unanimous.

Appellant objected that a compromised verdict was reached because the trial court did not instruct the jury of the alternative for a “hung jury.” Appellant further objected that the evidence was insufficient to support the verdict.

## JURY

### Unanimity required for verdict (continued)

#### *State v. Vandevender*, (continued)

Syl. pt. 1 - “Rule 31 of the West Virginia Rules of Criminal Procedure, which is modeled after Rule 31 of the Federal Rules of Criminal Procedure, mandates that the verdict in a criminal case be unanimous and provides a procedure for ensuring that the verdict is unanimous, i.e., the jury poll.” Syl. pt. 1, *State v. Tennant*, 173 W.Va. 627, 319 S.E.2d 395 (1984).

Syl. pt. 2 - “Federal cases have held that the language of Rule 31(d) of the Federal Rules of Criminal Procedure requires that when a juror indicates in a poll that he either disagrees with the verdict or expresses reservations about it, the trial court must either direct the jury to retire for further deliberations or discharge the jury. Although the rule does not explicitly so state, courts have also recognized that appropriate neutral questions may be asked of the juror to clarify any apparent confusion, provided the questions are not coercive. We adopt this procedure for Rule 31(d) of the West Virginia Rules of Criminal Procedure.” Syl. pt. 2, *State v. Tennant*, 173 W.Va. 627, 319 S.E.2d 395 (1984).

Syl. pt. 3 - “In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.” Syl. pt. 1 *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The Court found the trial court’s questioning to be acceptable (the judge instructed the jury to deliberate “until you are all in agreement.”) Similarly, the Court dismissed appellant’s claim of insufficient evidence to support the verdict.

#### *Voir dire*

#### *State v. Ward*, 424 S.E.2d 725 (1991) (Workman, J.)

Appellant was convicted of aggravated robbery and first-degree murder. On appeal he claimed that the *voir dire* conducted by the trial court was deficient in that several jury members exhibited bias and prejudice (appellant is black).

## JURY

### *Voir dire* (continued)

#### *State v. Ward*, (continued)

Syl. pt. 5 - ““In a criminal case, the inquiry made of a jury on its *voir dire* is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused.’ Syl. pt. 2, *State v. Beacraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944).” Syl. Pt. 2, *State v. Mayle*, 178 W.Va. 26, 357 S.E.2d 219 (1987).

Here, each juror who indicated possible prejudice was subjected to individual *voir dire*. *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983). No law requires *voir dire* regarding racial prejudice, absent showing of extreme impact on defendant; the Court noted defense counsel’s failure to submit questions on racial prejudice. See *Ristaino v. Ross*, 424 U.S. 589 (1976); *Turner v. Murray*, 476 U.S. 28, 33, 106 S.Ct. 1683, 1686, 90 L.Ed.2d 27 (1986). No error.

## JUVENILES

### Detention

#### Alternative placement

*Facilities Review Panel v. Coe*, 420 S.E.2d 532 (1992) (Brotherton, J.)

See JUVENILES Detention centers, Standards for, (p. 366) for discussion of topic.

#### Condition of centers

*Facilities Review Panel v. Miller*, No. 19849 (3/14/91) (Per Curiam)

Petitioners sought a writ of mandamus to compel respondent to submit a plan setting forth how and when certain deficiencies at the Eastern Regional Juvenile Detention Center were to be corrected. A previous order required respondent to (1) bring the Center into conformity with certain standards by 1 September 1990; (2) accept no more than two juveniles at the Center until improvements were made; (3) inform petitioners of the progress made on renovations, repairs, staffing and programs. See *Facilities Review Panel et al. v. Miller*, No. 19690 (W.Va., filed July 11, 1990).

This petition alleged that deficiencies still exist. The Court noted that respondent's answers do not indicate expected completion dates for the various improvements. Writ granted. Respondent to submit to the Court by 5 April 1991 a plan, with specific dates, showing how the remaining deficiencies are to be corrected.

#### Judge's responsibility

*Facilities Review Panel v. Coe*, 420 S.E.2d 532 (1992) (Brotherton, J.)

See JUVENILES Detention centers, Standards for, (p. 366) for discussion of topic.

*In the Matter of Egnor*, 412 S.E.2d 485 (1991) (Workman, J.)

See JUDGES Ethical misconduct, (p. 345) for discussion of topic.

## JUVENILES

### Detention centers

#### Dispositional hearing

*Facilities Review Panel v. Coe*, 420 S.E.2d 532 (1992) (Brotherton, J.)

See JUVENILES Detention centers, Standards for, (p. 366) for discussion of topic.

#### Maximum length of stay

*Facilities Review Panel v. Coe*, 420 S.E.2d 532 (1992) (Brotherton, J.)

See JUVENILES Detention centers, Standards for, (p. 366) for discussion of topic.

#### Standards for

*Facilities Review Panel v. Coe*, 420 S.E.2d 532 (1992) (Brotherton, J.)

Petitioners sought a writ of mandamus to compel the respondent circuit clerk to rotate juvenile cases among the three judges in the circuit and to require the respondent judge to cooperate in establishing in-home detention guidelines, use electronic monitoring for juveniles committed to in-home detention, and to refrain from committing more than ten juveniles to the local detention center. Petitioners also requested that this Court adopt the American Bar Association juvenile justice standards.

This case originated in 1989 with a petition for writ of mandamus brought by the Facilities Review Panel asking adoption of certain standards for preadjudication detention of juveniles. This opinion is pursuant to a petition for rehearing.

Syl. pt. 1 - “Young children should not be placed in secure detention except in the most extraordinary cases.” Syllabus point 5, *State ex rel. M.C.H. v. Kinder*, 173 W.Va. 387, 317 S.E.2d 150 (1984).

Syl. pt. 2 - The juvenile detention standards adopted by this Court are in accord with our State law as set forth in *W.Va. Code*, § 49-1-1 *et seq.*, (1990) and *State ex rel. M.C.H. v. Kinder*, 173 W.Va. 387, 317 S.E.2d 150 (1984), and to be implemented within sixty days from the date of this opinion.

Syl. pt. 3 - Before any juvenile can be sent to a detention facility, the arresting officer or the detention hearing officer must telephone the detention facility to determine whether there is a vacancy before the juvenile can be transported to the juvenile facility.

## JUVENILES

### Detention centers (continued)

#### Standards for (continued)

##### *Facilities Review Panel v. Coe*, (continued)

Syl. pt. 4 - No facility can accept any juvenile beyond their licensed capacity and must immediately report any attempt to force them to do so to the Department of Human Services and the Juvenile Justice Committee.

Syl. pt. 5 - A juvenile must remain in detention no longer than thirty days awaiting a dispositional hearing.

Syl. pt. 6 - Following the dispositional hearing, a juvenile shall not remain in detention longer than fourteen days before moving the juvenile into an appropriate placement. Thus, the circuit courts must move swiftly and efficiently to avoid overcrowding.

Syl. pt. 7 - In the event overcrowding occurs, the circuit courts must develop alternative methods of detention, such as in-home detention, electronic monitoring, and emergency shelters.

Syl. pt. 8 - Within ten days after the end of each month, each detention facility must file a report with the Department of Human Services and the Juvenile Justice Committee which lists each new child detained, the reasons and charge, and the date the child enters and leaves the facility, including explanations of any interim absences. Also required is a listing of the number of children detained on each day of the month. The report form is to be prepared by the Department of Human Services.

Writ granted. (See detention standards adopted in opinion, as well as standards set forth in appendices to the opinion.)

### Guardians *ad litem*

#### Duty of counsel

*In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 593) for discussion of topic.

## JUVENILES

### Right to counsel

#### Abuse and neglect

*In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 593) for discussion of topic.

### Self-incrimination

#### Waiver of right to counsel

*Comer v. Tom A.M.*, 403 S.E.2d 182 (1991) (Per Curiam)

Tom A.M., a juvenile, was accused of sexually molesting his minor sister. After an investigation, Trooper Coe interviewed Tom A.M. in the presence of his mother and a probation officer. Tom A.M. denied the allegations but later said he had lied and admitted to engaging in part of the alleged activities; with his mother and the probation officer again present he signed a waiver of rights form. He was transferred to adult jurisdiction. He complained on appeal that his rights were not adequately protected and the statement he gave should have been suppressed.

*W.Va. Code*, 49-5-1(d) requires that a minor's extrajudicial statements other than *res gestae* are not admissible unless made with counsel present or with the child's parent's or guardian's consent, the parent or guardian having been first fully informed of the child's rights to a prompt hearing, to counsel and his privilege against self-incrimination. Syllabus Point 2 of *In the Matter of Mark E.P.*, 175 W.Va. 83, 331 S.E.2d 813 (1985) held that a minor above the age of tender years may execute a valid waiver of rights.

Here, Tom A.M. claimed that his mother's presence did not protect his interests because of her conflict of interest with regard to the charges. He further cites his age and lack of reading ability as support for his need for counsel during the waiver process.

No evidence here to demonstrate that the statements were made involuntarily. Under the totality of the circumstances, no error. (See *State v. Laws*, 162 W.Va. 359, 251 S.E.2d 769 (1978); *In the Interest of Moss*, 170 W.Va. 543, 295 S.E.2d 33 (1982).

## JUVENILES

### Self-incrimination (continued)

#### Warrantless search at school

*State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41 (1993) (Brotherton, J.)

See SEARCH AND SEIZURE Warrantless search, Juvenile at school, (p. 529) for discussion of topic.

### Transfer to adult jurisdiction

#### Admissibility of statements to police

*Comer v. Tom A.M.*, 403 S.E.2d 182 (1991) (Per Curiam)

See JUVENILES Self-incrimination, Waiver of right to counsel, (p. 368) for discussion of topic.

#### Factors to consider

*State v. Gary F.*, 432 S.E.2d 793 (1993) (Workman, C.J.)

See JUVENILES Transfer to adult jurisdiction, Right to confront, (p. 372) for discussion of topic.

*State v. Michael S.*, 423 S.E.2d 632 (1992) (Per Curiam)

Appellant Michael S. objected to the circuit court's transfer of this juvenile matter to adult jurisdiction, arguing that appellant's potential for rehabilitation was ignored. The original petition alleged appellant had committed malicious assault and possessed a deadly weapon.

A "social history information" report submitted by the juvenile probation officer noted appellant had "no major discipline problems" at home but three incidents of "misbehavior" had been reported at school over the preceding three years. The probation officer recommended psychological evaluation and placement out of the home, as well as alternative schooling.

The probation officer testified at the transfer hearing that she had only a forty-five minute conversation with appellant. School psychologist's reports showed appellant was learning disabled and was frequently late for class.

## JUVENILES

### Transfer to adult jurisdiction (continued)

#### Factors to consider (continued)

##### *State v. Michael S.*, (continued)

Syl. pt. - “ “Before transfer of a juvenile to criminal court, a juvenile court judge must make a careful, detailed analysis into the child’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and other similar personal factors.” *W.Va. Code*, 49-5-10(d). Syl. Pt. 4, *State v. C.J.S.*, 164 W.Va. 473, 263 S.E.2d 899 (1980), *overruled in part on others grounds State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980) and *State ex rel. Cook v. Helms*, 170 W.Va. 200, 292 S.E.2d 610 (1981).” Syl. pt. 2, *State v. Sonja B.*, 183 W.Va. 380, 395 S.E.2d 803 (1990).

The trial court failed to carefully consider the factors set forth in *W.Va. Code*, 49-5-10. Reversed and remanded.

#### Generally

*State v. Michael S.*, 423 S.E.2d 632 (1992) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Factors to consider, (p. 369) for discussion of topic.

#### Probable cause

*Comer v. Tom A.M.*, 403 S.E.2d 182 (1991) (Per Curiam)

Appellant, a fifteen-year old juvenile, was charged with first-degree sexual assault of his nine-year old sister. K.M. Comer, state police investigating officer, filed a juvenile petition.

Testimony was introduced at the transfer hearing establishing that the victim had told a school counselor about the assaults. The counselor then contacted a the Department of Human Services protective services worker and Trooper Comer. After interviewing the victim and taking her to a hospital to confirm the sexual assault, Tom A.M. was advised of his rights and signed a waiver. He first denied assaulting the victim but shortly thereafter retracted his statement. A psychological evaluation noted that Tom A.M. denied the assault but stated that he was “in desperate need of rehabilitation” to reverse “acting out and anti-social behavior.”

## Transfer to adult jurisdiction (continued)

### Probable cause (continued)

#### *Comer v. Tom A.M.*, (continued)

Syl. pt. 1 - “When a court finds that there is probable cause to believe that a juvenile has committed one of the crimes specified in *W.Va. Code*, 49-5-10(d)(1) (treason, murder, robbery involving the use of or presenting of deadly weapons, kidnapping, first-degree arson, and first-degree sexual assault), the court may transfer the juvenile to the court’s criminal jurisdiction without further inquiry. To the extent this holding is inconsistent with *State v. R.H.*, 166 W.Va. 280, 273 S.E.2d 578 (1980) and *State v. C.J.S.*, 164 W.Va. 473, 263 S.E.2d 899 (1980), those cases are overruled.” Syllabus Point 2, *State ex rel. Cook v. Helms*, 170 W.Va. 200, 292 S.E.2d 610 (1981).

Syl. pt. 2 - “Probable cause for the purpose of transfer of a juvenile to adult jurisdiction is more than mere suspicion and less than clear and convincing proof. Probable cause exists when the facts and circumstances as established by probative evidence are sufficient to warrant a prudent person in the belief that an offense has been committed and that the accused committed it.” Syllabus Point 1, *In the Interest of Moss*, 170 W.Va. 543, 295 S.E.2d 33 (1982).

Syl. pt. 3 - “The probable cause determination at a juvenile transfer hearing may not be based entirely on hearsay evidence.” Syllabus Point 3, *In the Interest of Moss*, 170 W.Va. 543, 295 S.E.2d 33 (1982).

Syl. pt. 4 - “Where the findings of fact and conclusions of law justifying an order transferring a juvenile proceeding to the criminal jurisdiction of the circuit court are clearly wrong or against the plain preponderance of the evidence, such findings of fact and conclusions of law must be reversed. *W.Va. Code*, § 49-5-10(a) [1977].” Syllabus Point 1, *State v. Bannister*, 162 W.Va. 447, 250 S.E.2d 53 (1978).

The Court rejected appellant’s contention that failure to make a finding of “personal factors” as required by *W.Va. Code*, 49-5-10 (d) requires reversal. *W.Va. Code*, 49-5-19(d)(1) precludes any “further inquiry” once probable cause is found. Here, the Court even ordered a psychological examination though not required to do so. No error.

#### *In the Interest of David Zane B.*, 403 S.E.2d 10 (1991) (Per Curiam)

Appellant was charged with committing robbery by use of a firearm and transferred to adult jurisdiction. At the transfer hearing the investigating officer gave a substantial amount of hearsay testimony. Appellant’s co- defendant also testified as to the events of the robbery.

**Transfer to adult jurisdiction** (continued)

**Probable cause** (continued)

*In the Interest of David Zane B.*, (continued)

Syl. pt. - “Probable cause for the purpose of transfer of a juvenile to adult jurisdiction is more than mere suspicion and less than clear and convincing proof. Probable cause exists when the facts and circumstances as established by probative evidence are sufficient to warrant a prudent person in the belief that an offense has been committed and that the accused committed it.” Syllabus point 1, *In Interest of Moss*, 170 W.Va. 543, 295 S.E.2d 33 (1982).

The Court noted that probable cause could not be based solely on hearsay evidence. See *In the Interest of S.M.P.*, 168 W.Va. 626, 285 S.E.2d 408 (1981). Here, appellant’s co-defendant’s testimony was sufficient to meet the *Moss* test.

**Right to confront**

*State v. Gary F.*, 432 S.E.2d 793 (1993) (Workman, C.J.)

Appellant, a juvenile, was transferred to adult criminal jurisdiction pursuant to *W.Va. Code*, 49-5-10(d)(4). After providing a list of witnesses to appellant, the prosecution added the testimony of a co-defendant but did not supplement its witness list. A copy of the witness’ statement was provided to appellant at the beginning of the transfer hearing. Because he was incarcerated, the witness was allowed to testify by telephone.

Appellant claimed the failure to supplement the witness list violated the continuing duty to disclose required by Rule 16(c) of the *Rules of Criminal Procedure*. The prosecution claimed that Rule 54 makes Rule 16 inapplicable to juvenile proceedings in that Rule 16(a)(1)(E) is inconsistent with *W.Va. Code*, 49-5-1, *et seq.* because the Rule refers to the “case in chief;” the prosecution argued that a transfer hearing is not a “case in chief.”

Finally, appellant objected to the Court’s failure to discuss each witness testifying favorably as to appellant’s general maturity. Only a psychiatrist’s testimony was mentioned.

Syl. pt. 1 - The continuing disclosure requirement imposed by Rule 16 of the West Virginia Rules of Criminal Procedure applies to juvenile transfer proceedings in the same manner as it applies to criminal proceedings.

**Transfer to adult jurisdiction** (continued)

**Right to confront** (continued)

*State v. Gary F.*, (continued)

Syl. pt. 2 - “Our traditional appellate standard for determining whether the failure to comply with court[-]ordered pretrial discovery is prejudicial is contained in Syllabus Point 2 of *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980), and is applicable to discovery under Rule 16 of the Rules of Criminal Procedure. It is summarized: The nondisclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant’s case.” Syl. Pt. 1, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).

Syl. pt. 3 - A juvenile is denied his constitutional right to confront his accusers when a critical witness, who has not been demonstrated as unavailable pursuant to the rules of evidence, is permitted to testify by telephone during a transfer hearing.

Syl. pt. 4 - “ ‘ “Before transfer of a juvenile to criminal court, a juvenile court judge must make a careful, detailed analysis into the child’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and other similar personal factors.” *W.Va. Code*, 49-5-10(d).’ Syl. Pt. 4, *State v. C.J.S.*, 164 W.Va. 473, 263 S.E.2d 899 (1980), *Overruled in part on other grounds* [in] *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980) and *State ex rel. Cook v. Helms*, 170 W.Va. 200, 292 S.E.2d 610 (1981).” Syl. Pt. 2, *State v. Sonja B.*, 183 W.Va. 380, 395 S.E.2d 803 (1990).

The Court found unpersuasive the reasons given by the prosecution for omitting the witness from the witness list. Similarly, the Court found the lack of notice prejudicial in that the witness was crucial to the prosecution. However, because appellant did not object timely at the hearing the Court was not convinced that allowing the witness to testify was prejudicial. No error.

However, counsel did object to the mode of testimony (by telephone). The Court found the right to confront seriously abridged by this method. Failure to discuss all testimony as to appellant’s maturity was not error. Reversed and remanded.

## JUVENILES

### Warrantless search at school

*State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41 (1993) (Brotherton, J.)

See SEARCH AND SEIZURE Warrantless search, Juvenile at school, (p. 529) for discussion of topic.

## LARCENY

### Sufficiency of evidence

*State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

See GRAND LARCENY Sufficiency of evidence, (p. 264) for discussion of topic.

*State v. Scarberry*, 418 S.E.2d 361 (1992) (Per Curiam)

See INDICTMENT Sufficiency of, Specific acts alleged, (p. 300) for discussion of topic.

## LESSER INCLUDED OFFENSES

### Generally

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

Appellant was convicted of first-degree sexual assault. The trial court refused his instruction on third-degree sexual abuse. Appellant contended that abuse is a lesser included offense so the refusal was error.

Syl. pt. 4 - “The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.’ Syllabus point 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981).” Syllabus point 1, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Syl. pt. 5 - “Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction.” Syllabus point 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

The Court noted that proof of first-degree sexual assault requires three elements distinct from proof of sexual abuse. In light of no evidentiary disputes, the Court found no error.

### Worthless checks

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

See LESSER INCLUDED OFFENSES Worthless checks, (p. 376) for discussion of topic.

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

Appellant was convicted of obtaining “property or a thing of value” worth \$200.00 or more in return for a worthless check, in violation of *W.Va. Code*, 61-3-39. On appeal he claimed that the trial court had a duty to provide a lesser included offense instruction allowing appellant to be found guilty of violating *W.Va. Code*, 61-3-39a, a misdemeanor.

## LESSER INCLUDED OFFENSES

### Worthless checks (continued)

#### *State v. Hays*, (continued)

Syl. pt. 3 - “The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.” Syl. pt. 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981).

Syl. pt. 4 - “Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction.” Syl. pt. 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

Syl. pt. 5 - A violation of *W.Va. Code*, 61-3-39a [1977] is not a lesser included offense of *W.Va. Code*, 61-3-39 [1977]. Consequently, a defendant who is accused of violating *W.Va. Code*, 61-3-39 [1977] is not entitled to a “lesser included offense” instruction reflecting the elements of *W.Va. Code*, 61-3-39a [1977].

*W.Va. Code*, 61-3-39 requires exchange of “property or a thing of value” for the worthless check; *W.Va. Code*, 61-3-39a requires that the worthless check be given for a preexisting debt. Appellant clearly received a commercial lease in exchange for his check; the lease was not a preexisting debt pursuant to *W.Va. Code*, 61-3-39a. Finding no evidentiary dispute regarding distinguishing elements of the two crimes, the Court found no error.

## MAGISTRATE COURT

### Admonishment

*In the Matter of Phillips*, No. 21473 (10/14/93) (Per Curiam)

See MAGISTRATE COURT Discipline, Election finance, (p. 380) for discussion of topic.

### Advice by magistrate or clerk

*State v. Walters*, 411 S.E.2d 688 (1991) (McHugh, J.)

See MAGISTRATE COURT Appeal from, (p. 378) for discussion of topic.

### Appeal from

*State v. Walters*, 411 S.E.2d 688 (1991) (McHugh, J.)

The prosecution appealed from an order of the circuit court dismissing two criminal complaints in magistrate court against Melissa Walters. After several *ex parte* contacts with the complainants, the magistrate allowed her clerk to type the complaints; the complainants then reviewed and signed them, resulting in the issuance of an arrest warrant.

Ms. Walters then waived her right to trial in magistrate court and the case was transferred to circuit court, with the magistrate court's consent. Ms. Walters then moved to dismiss on the ground the magistrate was not neutral. The motion was granted without prejudice.

*W.Va. Code*, 58-5-30 [1931] does not authorize an appeal to this Court by the State from a final order of a circuit court dismissing a criminal complaint filed initially in magistrate court.

The Court noted that the state is allowed to appeal only where revenue matters are at issue or when an indictment is "bad or insufficient." Also, *W.Va. Code*, 58-18-10, upon which the prosecution relied, was repealed and *W.Va. Code*, 50-5-13 took its place. Although the previous statute allowed for trial in circuit court "as upon indictment," the statute currently in effect does not equate a criminal complaint and an arrest warrant with an indictment for purposes of trial in circuit court on appeal from magistrate court; it simply says trial *de novo* is available. Further, the case here was transferred, not appealed and a procedural violation occurred, not an insufficient indictment.

## MAGISTRATE COURT

### Appeal from (continued)

#### *State v. Walters*, (continued)

The difficulty here was not merely the drafting of the complaint by the clerk but the appearance of agency and lack of impartiality. See *W.Va. Code*, 50-1-12 and Canon 3(C)(1)(b) of the *Judicial Code of Ethics*. While a magistrate or magistrate clerk may furnish information, they should not give advice. Although the mere act of reducing a complaint to writing is acceptable, it seems better if a complainant did his or her own writing. Dismissed.

### Bail bondsman

#### Preference for

#### *In the Matter of Eplin*, 411 S.E.2d 862 (1991) (Per Curiam)

See MAGISTRATE COURT Discipline, Standard of proof, (p. 384) for discussion of topic.

### Concurrent jurisdiction with circuit court

#### *State ex rel. Johnson v. Zakaib*, 400 S.E.2d 590 (1990) (Miller,)

Petitioner was arrested for aiding and abetting credit card fraud. *W.Va. Code*, 61-3-24a. On the day of her appearance in magistrate court neither the prosecution nor its witnesses appeared. The charges were dismissed without prejudice and petitioner was indicted by the grand jury on the charges. On appeal she asked for writ of prohibition, contending that circuit court proceedings are barred because the original proceedings were in magistrate court.

Syl. pt. 1 - "*W.Va. Code*, 50-5-7 (1976), requires that if a defendant is charged by warrant in the magistrate court with an offense over which that court has jurisdiction, he is entitled to a trial on the merits in the magistrate court." Syllabus Point 2, *State ex rel. Burdette v. Scott*, 163 W.Va. 705, 259 S.E.2d 626 (1979).

Syl. pt. 2 - "Even though *W.Va. Code*, 50-5-7 (1976), gives exclusive jurisdiction to a magistrate court once the defendant is charged by warrant in that court with an offense within its jurisdiction, this does not mean that the circuit court has no initial jurisdiction over misdemeanor offenses. Concurrent jurisdiction still exists under Article VIII, Section 6 of the *West Virginia Constitution*, and *W.Va. Code*, 51-2-2 (1978)." Syllabus Point 3, *State ex rel. Burdette v. Scott*, 163 W.Va. 705, 259 S.E.2d 626 (1979).

## MAGISTRATE COURT

### Concurrent jurisdiction with circuit court (continued)

*State ex rel. Johnson v. Zakaib*, (continued)

(Writ granted but on other grounds: See RIGHT TO SPEEDY TRIAL Generally, (p. 509)).

### Discipline

*In the Matter of Twyman*, 437 S.E.2d 764 (1993) (Per Curiam)

A case before Magistrate Twyman was delayed beyond the normal 120-day time limit for hearing a case following issuance of a warrant. Magistrate Twyman dismissed the case. The prosecuting attorney did not object. The person who swore the original warrant filed this complaint.

Syl. pt. 1 - “Under Rule III(C)(2) [1992 Supp.] of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding ‘must be proved by clear and convincing evidence.’” Syl. pt. 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 2 - “The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.” Syl. pt. 1, *West Virginia Judicial Inquiry Com’n v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

The Court found Magistrate Twyman’s defense persuasive: the magistrate court was faced with an unusually heavy caseload during the period in question and was operating with three magistrates instead of the usual four. The Court noted that although the 120-day rule was violated, the hearing which resulted in dismissal was heard within the one-year outside limit set by *State ex rel. Stiltner v. Harshbarger*, 178 W.Va. 739, 296 S.E.2d 861 (1982).

### Election finance

*In the Matter of Phillips*, No. 21473 (10/14/93) (Per Curiam)

Magistrate Phillips failed to establish a committee to secure and manage campaign funds during his campaign. He accepted unsolicited funds from realties and friends and signed a campaign financial statement.

The Court found Magistrate Phillips violated Canon 7B of the *Judicial Code of Ethics* but that he merely misinterpreted the Canon. No deceit was found. Public Admonishment.

**Discipline** (continued)

**Election improprieties**

*In the Matter of Codispoti*, 438 S.E.2d 549 (1993) (Per Curiam)

Magistrate Codispoti, while running for reelection, approached a lawyer in another county and the editor of a local newspaper regarding information about a murder case handled by a prosecuting attorney who was running for circuit judge against the magistrate's wife. He later contacted a granddaughter of the one of the murder victims, eventually writing a statement for her and obtaining her signature. This statement, in its essentials, was run as an advertisement, along with another advertisement critical of the prosecuting attorney. Although one of the advertisements said the granddaughter paid for it to run, she denied having done so. Magistrate Codispoti also asked the granddaughter to appear on a radio show shortly before the election (she refused).

Mrs. Codispoti's campaign financial statement listed an "in-kind contribution" of \$300 from the magistrate's sister for an advertisement and a \$900 donation from the magistrate's brother-in-law for the same purpose.

Syl. pt. 1 - "Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'" Syllabus Point 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 2 - "'The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.' Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980)." Syllabus Point 1, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 3 - "When the language of a canon under the *Judicial Code of Ethics* is clear and unambiguous, the plain meaning of the canon is to be accepted and followed without resorting to interpretation or construction." Syllabus Point 1, *In the Matter of Karr*, 182 W.Va. 221, 387 S.E.2d 126 (1989).

The Court found Magistrate Codispoti violated Canons 2 and 7B(1), regarding the appearance of impropriety and refraining from participating in campaign activities. Public censure and costs.

# MAGISTRATE COURT

## Discipline (continued)

### Generally

*In the Matter of Atkinson*, 423 S.E.2d 902 (1992) (Per Curiam)

Magistrate Atkinson was accused of violating Canons 1, 2, 3A(1), 3A(4) and 3C(a) by giving special treatment to a criminal defendant, allowing him to plead to a lesser offense. The defendant was charged with DUI, first offense. The day before trial, the arresting officer produced a record of a prior DUI offense and sought from a different magistrate a warrant to “enhance” the original charge. Although he was told the proper procedure would be to dismiss the old warrant and obtain a new one, he choose not to do so. Before the old warrant could be dismissed the defendant appeared before Magistrate Atkinson one day before the scheduled hearing and pled to DUI first offense.

Magistrate Atkinson was not originally assigned to hear the matter but obtained permission from the assigned magistrate to enter the plea. He then sentenced the defendant the minimum allowed. The arresting officer contended that he telephoned Magistrate Atkinson to inform him of the “enhanced” warrant and that Atkinson told him the plea would not be accepted. Magistrate Atkinson denies having that conversation.

Although some allegation was made of prejudice in favor of the defendant the hearing Board found the prior acquaintance between the Magistrate and the defendant did not of itself prejudice the proceeding. The Board recommended dismissal.

Syl. pt. 1 - “Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding ‘must be proved by clear and convincing evidence.’ Syl. pt. 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 2 - “ ‘ “The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.” Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).’ Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 (1985).” Syl. pt. 1, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

See also, *In the Matter of Eplin*, 187 W.Va. 131, 416 S.E.2d 248 (1992).

Complaint dismissed.

## MAGISTRATE COURT

### Discipline (continued)

#### Generally (continued)

*In the Matter of Codispoti*, 438 S.E.2d 549 (1993) (Per Curiam)

See MAGISTRATE COURT Election improprieties, (p. 381) for discussion of topic.

#### Public censure

*In the Matter of Codispoti*, 438 S.E.2d 549 (1993) (Per Curiam)

See MAGISTRATE COURT Election improprieties, (p. 381) for discussion of topic.

#### Ruling on son-in-law's case

*In the Interest of Betty L. Taylor*, No. 21302 (4/23/93) (Per Curiam)

Former Magistrate Taylor was one of only two magistrates in Clay County. The other was on sick leave at the time of this incident. Magistrate Taylor accepted her son-in-law's plea to possession of marijuana. She ordered a fine of \$100.00 and court costs of \$56.00.

The prosecuting attorney complained that he was not advised. Subsequent to the taking of the plea he discovered a previous felony conviction of possession of marijuana with intent to deliver. The Judicial Hearing Board found that Magistrate Taylor believed she was required to accept the plea due to the unavailability of the other magistrate, that she had not informed the prosecuting attorney and that she sentenced her son-in-law consistent with sentences given to others for the same or similar offense.

The Court found Magistrate Taylor violated Canon 1, Canon 2A, Canon 2B, Canon 3A(1) and (4) and Canon 3C by sentencing her son-in-law. Canon 3C specifically requires disqualification in this circumstance. However, the unusual circumstances warrant only an admonishment.

#### Standard of proof

*In the Matter of Codispoti*, 414 S.E.2d 628 (1992) (Per Curiam)

Respondent was scheduled for an evening shift but asked another magistrate to cover his hours because of illness. Neither respondent nor his replacement sought approval from a circuit judge as required by a local circuit court rule.

# MAGISTRATE COURT

## Discipline (continued)

### Standard of proof (continued)

#### *In the Matter of Codispoti*, (continued)

Repeated unsuccessful efforts were made to reach respondent while he was on call at home the same evening. Respondent's explanation was that he had taken a prescription medication that made him drowsy and that his telephone was malfunctioning.

The Judicial Investigation Commission charged respondent's actions violated Canon 2A, 3A(5) and 3B(1) but the Board dismissed the charges.

Syl. pt. 1 - "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.' Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980). Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 (1985)." Syllabus Point 1, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

Syl. pt. 2 - "Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding "must be proved by clear and convincing evidence.' Syllabus Point 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983)." Syllabus Point 3, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

The Court agreed with the Board. Charges dismissed.

#### *In the Matter of Eplin*, 411 S.E.2d 862 (1991) (Per Curiam)

Respondent allegedly failed to release a defendant to a bail bondsman and showed favoritism toward another bonding company. Aside from the allegations in the complaint, no evidence was adduced to show favoritism. Respondent refused to recognize the bondsman's photocopied court order authorizing him to act as a bail bondsman (see *W.Va. Code*, 51-10-8).

After the bail bondsman obtained an attorney who secured a certified copy of the order, respondent agreed to allow the bondsman to sign the bond in question. The bondsman chose not to do so, but rather waited seven hours to get another magistrate before whom to sign the bond. Respondent testified that he did not allow the bail bondsman to sign because the bondsman was not on a list of persons approved by the Circuit Court. (Respondent had an out-of-date list; the current list did have the bondsman included.)

## MAGISTRATE COURT

### Discipline (continued)

#### Standard of proof (continued)

##### *In the Matter of Eplin*, (continued)

Syl. pt. 1 - “The Supreme Court of appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] ... Board in disciplinary proceedings.” Syl. Pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

Syl. pt. 2 - “Under Rule III(C)(2) (1983 Supp.) of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding ‘must be proved by clear and convincing evidence.’” Syl. Pt. 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

The Court held respondent’s failure to have an accurate list of approved bondsmen was insufficient for discipline in light of the testimony of another magistrate who claimed not to have been given a current list. Complaint dismissed.

##### *In the Matter of Eplin*, 416 S.E.2d 248 (1992) (Per Curiam)

See DISCIPLINE Dismissal of, Charges improper, (p. 157) for discussion of topic.

##### *In the Matter of Gainer*, 404 S.E.2d 251 (1991) (Per Curiam)

See JUDGES Discipline, Standard of proof, (p. 333) for discussion of topic.

### Ethics

##### *In the Interest of Betty L. Taylor*, No. 21302 (4/23/93) (Per Curiam)

See MAGISTRATE COURT Discipline, Ruling on son-in-law’s case, (p. 383) for discussion of topic.

##### *In the Matter of Boese*, 410 S.E.2d 282 (1991) (Per Curiam)

See MAGISTRATE COURT Judicial ethics, (p. 387) for discussion of topic.

## MAGISTRATE COURT

### **Ethics** (continued)

*In the Matter of Codispoti*, 414 S.E.2d 628 (1992) (Per Curiam)

See MAGISTRATE COURT Discipline, Standard of proof, (p. 383) for discussion of topic.

*In the Matter of Eplin*, 416 S.E.2d 248 (1992) (Per Curiam)

See DISCIPLINE Dismissal of, Charges improper, (p. 157) for discussion of topic.

*In the Matter of Eplin*, 410 S.E.2d 273 (1991) (Per Curiam)

See DISCIPLINE Signing, Forms in blank, (p. 158) for discussion of topic.

*In the Matter of Eplin*, 411 S.E.2d 862 (1991) (Per Curiam)

See MAGISTRATE COURT Discipline, Standard of proof, (p. 384) for discussion of topic.

*In the Matter of Suder*, 398 S.E.2d 162 (1990) (Per Curiam)

See DISCIPLINE Campaign funds, (p. 156) for discussion of topic.

*In the Matter of Wilson*, 411 S.E.2d 847 (1991) (Per Curiam)

See DISCIPLINE Sexual impropriety, (p. 158) for discussion of topic.

### **Bias**

*In the Matter of Shaver*, No. 19689 (10/26/90) (Per Curiam)

See DISCIPLINE Bias, (p. 156) for discussion of topic.

## MAGISTRATE COURT

### Incapacity

#### Retirement

*In the Matter of Baughman*, No. 20686 (10/23/92) (Per Curiam)

See MAGISTRATE COURT Retirement for physical incapacity, (p. 389) for discussion of topic.

### Judicial ethics

*In the Interest of Betty L. Taylor*, No. 21302 (4/23/93) (Per Curiam)

See MAGISTRATE COURT Discipline, Ruling on son-in-law's case, (p. 383) for discussion of topic.

*In the Matter of Boese*, 410 S.E.2d 282 (1991) (Per Curiam)

Respondent and her ex-husband exchanged a series of harassing telephone calls, including some made by respondent while at work using obscene and abusive language. Further, respondent left a threatening message on her ex-husband's answering machine. Respondent's former employee testified that respondent's fighting with her ex-husband interfered with her work. The Judicial Hearing Board found respondent in violation of Canons 1, 2A and 2B of the Judicial Code of Ethics.

Syl. pt. 1 - "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of Judicial [Hearing] Board in disciplinary proceedings.' Syl. pt. 1, *West Virginia Judicial Inquiry Comm'n v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980)." Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697, *modified on other grounds*, 176 W.Va. 16, 339 S.E.2d 702 (1985).

Syl. pt. 2 - "Under Rule III(C)(2) ... of the West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges, and Magistrates, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.'" Syllabus Point 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Noting that foul language alone does not justify discipline, the Court found the threats unacceptable. Public reprimand.

## MAGISTRATE COURT

### Judicial ethics (continued)

*In the Matter of Codispoti*, 414 S.E.2d 628 (1992) (Per Curiam)

See MAGISTRATE COURT Discipline, Standard of proof, (p. 383) for discussion of topic.

*In the Matter of Eplin*, 416 S.E.2d 248 (1992) (Per Curiam)

See DISCIPLINE Dismissal of, Charges improper, (p. 157) for discussion of topic.

*In the Matter of Eplin*, 410 S.E.2d 273 (1991) (Per Curiam)

See DISCIPLINE Signing, Forms in blank, (p. 158) for discussion of topic.

*In the Matter of Suder*, 398 S.E.2d 162 (1990) (Per Curiam)

See DISCIPLINE Campaign funds, (p. 156) for discussion of topic.

*In the Matter of Wilson*, 411 S.E.2d 847 (1991) (Per Curiam)

See DISCIPLINE Sexual impropriety, (p. 158) for discussion of topic.

### Bias

*In the Matter of Shaver*, No. 19689 (10/26/90) (Per Curiam)

See DISCIPLINE Bias, (p. 156) for discussion of topic.

### Probable cause

#### Standard for

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 527) for discussion of topic.

## MAGISTRATE COURT

### **Retirement for physical incapacity**

*In the Matter of Baughman*, No. 20686 (10/23/92) (Per Curiam)

Following a hearing on 28 May 1992 the Judicial Hearing Board recommended to the Court that Magistrate Baughman be relieved of his duties based on a serious physical condition which necessitated a liver transplant. Magistrate Baughman had not been able to work since February, 1991 and had been extensively absent prior to that time.

Based on Rule II(B) and Rule III(C)(13)(b) of the Rules of Procedure for Handling of Complaints Against Justices, Judges, Magistrates and Family Law Masters, the Court concluded that Magistrate Baughman should be retired due to physical incapacity.

### **Right to speedy trial in**

*State ex rel. Johnson v. Zakaib*, 400 S.E.2d 590 (1990) (Miller.)

See RIGHT TO SPEEDY TRIAL Generally, (p. 509) for discussion of topic.

### **Right to trial in**

*State ex rel. Johnson v. Zakaib*, 400 S.E.2d 590 (1990) (Miller.)

See MAGISTRATE COURT Concurrent jurisdiction with circuit court, (p. 379) for discussion of topic.

## **Warrants**

### **Standard for appellate review**

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 526) for discussion of topic.

## **MALICE**

### **Deadly weapon**

#### **Inference from**

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See HOMICIDE Malice, Inferred from deadly weapon, (p. 283) for discussion of topic.

#### **Instruction on**

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See INSTRUCTIONS Right to, (p. 319) for discussion of topic.

## MALICIOUS ASSAULT

### Transferred intent

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See INTENT Transferred intent, (p. 322) for discussion of topic.

## MANDAMUS

### Abuse and neglect

#### Guidelines

*Jennifer A. v. Burgess*, No. 21009 (7/16/93) (Per Curiam)

See ABUSE AND NEGLECT Duty of DHS, Guidelines, (p. 2) for discussion of topic.

### Appointed counsel relieved

#### Conflict of interest

*Cooper v. Murensky*, No. 21438 (12/18/92) (Per Curiam)

See ATTORNEYS Conflict of interest, Court-appointed counsel, (p. 44) for discussion of topic.

### Bail bond

*State ex rel. Woods v. Wolverton*, No. 20165 (7/11/91) (Per Curiam)

See ABUSE OF DISCRETION Bail, (p. 12) for discussion of topic.

### Conflict of interest

#### Relieving appointed counsel

*Cooper v. Murensky*, No. 21438 (12/18/92) (Per Curiam)

See ATTORNEYS Conflict of interest, Court-appointed counsel, (p. 44) for discussion of topic.

### Habeas corpus

#### Compel ruling

*State ex rel. Smith v. Hatcher*, No. 21640 (6/10/93) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 343) for discussion of topic.

## MANDAMUS

### *Habeas corpus* (continued)

#### **Compel ruling** (continued)

*Warth v. Ferguson*, No. 19824 (12/13/90) (Per Curiam)

See *HABEAS CORPUS* Right to ruling on, (p. 274) for discussion of topic.

#### **Police brutality**

*State ex rel. Billy Ray C. v. Skaff*, 438 S.E.2d 847 (1993) (Miller, J.)

See *POLICE OFFICER* Police brutality, Procedure for complaining, (p. 424) for discussion of topic.

#### **Revised sentence**

*Brumfield v. Legursky*, No. 19932 (3/14/91) (Per Curiam)

Relator sought a writ of mandamus directing the Warden of the penitentiary to remove three kidnapping convictions from his commitment orders pursuant to the Court's reversal of those convictions in *State v. Brumfield*, 178 W.Va. 240, 358 S.E.2d 801 (1987). The Warden had not received a revised order from the Circuit Court of Cabell County.

Writ granted; Circuit Court directed to issue a revised order deleting the convictions and respondent directed to enter the revised order.

#### **Ruling by court**

##### **To compel**

*State ex rel. Cooper v. Schlaegel*, No. 21481 (2/16/93) (Per Curiam)

See *JUDGES* Duties, To render decisions, (p. 343) for discussion of topic.

#### **Sexual abuse**

*Jennifer A. v. Burgess*, No. 21009 (7/16/93) (Per Curiam)

See *SEXUAL ATTACKS* Child assault or abuse, (p. 564) for discussion of topic.

# MANDAMUS

## Transcripts

### Court reporter to produce

*Philyaw v. Bogovich*, No. 21541 (4/28/93) (Per Curiam)

and

*State ex rel. Scott v. Bogovich*, No. 21480 (2/10/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 599) for discussion of topic.

*State ex rel. Baker v. Bogovich*, No. 21450 (12/11/92) (Per Curiam)

See TRANSCRIPTS Right to transcript, Failure to provide, (p. 599) for discussion of topic.

*State ex rel. Hodge v. Reid-Williams*, No. 21621 (4/28/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 600) for discussion of topic.

*State ex rel. Jenkins v. Marchbank*, No. 21428 (2/10/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 601) for discussion of topic.

*State ex rel. Philyaw v. Williams*, 438 S.E.2d 64 (1993) (Per Curiam)

See COURT REPORTER Transcript, Failure to provide, (p. 142) for discussion of topic.

*State ex rel. Rouse v. Bogovich*, No. 21464 (12/14/92) (Per Curiam)

See TRANSCRIPTS Right to transcript, Failure to provide, (p. 601) for discussion of topic.

*State ex rel. Stephens v. Bratton*, No. 21619 (4/28/93) (Per Curiam)

and

*State ex rel. Hall v. Bratton*, No. 21618 (4/28/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 601) for discussion of topic.

## MANDAMUS

### Transcripts (continued)

#### Court reporter to produce (continued)

*State ex rel. Stine v. Gagich*, No. 21962 (12/1/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 602) for discussion of topic.

*State ex rel. Walker v. Miller*, No. 21496 (2/10/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 602) for discussion of topic.

*Thomas v. Janco-Parsons*, No. 19976 (3/29/91) (Per Curiam)

See TRANSCRIPTS Right to transcript, Failure to provide, (p. 602) for discussion of topic.

## **MIRANDA WARNINGS**

### **As showing prior crimes**

*State v. Farmer*, 406 S.E.2d 458 (1991) (Per Curiam)

See EVIDENCE Prior offenses, Reading of rights, (p. 243) for discussion of topic.

## **MISTRIAL**

### **Judge's promise to declare**

#### **Effect of**

*Dietz v. Legursky*, 425 S.E.2d 202 (1992) (McHugh, C.J.)

See JUDGES Duties, To declare mistrial, (p. 341) for discussion of topic.

### **Jury misconduct**

*State v. Strauss*, 415 S.E.2d 888 (1992) (Per Curiam)

See JURY Bias, Juror talking with witnesses, (p. 355) for discussion of topic.

### **Manifest necessity**

#### **Not double jeopardy**

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See DOUBLE JEOPARDY Mistrial, Manifest necessity, (p. 171) for discussion of topic.

## **MOTIVE**

### **Evidence of other crimes**

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See EVIDENCE Admissibility, Other crimes, (p. 214) for discussion of topic.

## **MULTIPLE OFFENSES**

### **Multiple acts**

#### **Sexual intercourse**

*State v. Lola Mae C.*, 408 S.E.2d 31 (1991) (Workman, J.)

See SEXUAL ATTACKS Multiple acts of intercourse, (p. 568) for discussion of topic.

### **Separate punishments**

*State v. Drennen*, 408 S.E.2d 24 (1991) (Per Curiam)

See DOUBLE JEOPARDY Multiple offenses, Separate punishments, (p. 173) for discussion of topic.

## **MURDER**

### **Attempt**

*State v. Burd*, 419 S.E.2d 676 (1991) (Workman, J.)

See HOMICIDE Attempted murder, (p. 280) for discussion of topic.

### **Felony-murder**

#### **Instructions on**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

### **Felony-murder and premeditated**

#### **Election to proceed on**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

### **First-degree**

#### **Instructions on**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

### **Instructions**

#### **To distinguish felony-murder and premeditated**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See INSTRUCTIONS First-degree murder, To include felony-murder and premeditated, (p. 316) for discussion of topic.

## **MURDER**

### **Malice**

#### **Inferred from deadly weapon**

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See HOMICIDE Malice, Inferred from deadly weapon, (p. 283) for discussion of topic.

### **Sentencing**

#### **Recommendation of mercy**

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See SENTENCING Recommendation of mercy, (p. 561) for discussion of topic.

### **Sufficiency of evidence**

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See HOMICIDE Sufficiency of evidence, (p. 285) for discussion of topic.

## NEW TRIAL

### Newly discovered evidence

*In the Matter of W.Va. State Police Crime Lab.*, 438 S.E.2d 501 (1993) (Miller, J.)

The prosecuting attorney of Kanawha County filed a petition requesting appointment of a special judge to investigate alleged improprieties at the State Police lab, relating to convictions based upon the testimony of former serologist Fred S. Zain. Judge James O. Holliday was appointed and returned a report following a five-month investigation assisted by Alexander Ross, Special Prosecuting Attorney, and George Castelle, Chief Public Defender of Kanawha County.

The report contained an analysis by two noted practitioners of policies, procedures and practices of the serology lab. Severe deficiencies were found. Some suggestion was also found that Trooper Zain's supervisors may have ignored or concealed complaints of his misconduct. With the concurrence of both Ross and Castelle, the report concluded that "any testimonial or documentary evidence offered by Zain at any time in any criminal prosecution should be deemed invalid, unreliable and inadmissible...."

Syl. pt. 1 - " "A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that [defendant] was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would have not secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." Syllabus, *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979), quoting, Syl. pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894).' Syl. pt. 1, *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984)." Syllabus Point 1, *State v. O'Donnell*, 189 W.Va. 628, 433 S.E.2d 566 (1993).

Syl. pt. 2 - Although it is a violation of due process for the State to convict a defendant based on false evidence, such conviction will not be set aside unless it is shown that the false evidence had a material effect on the jury verdict.

Newly discovered evidence (continued)

*In the Matter of W.Va. State Police Crime Lab.*, (continued)

Syl. pt. 3 - “Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State’s case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant’s guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.” Syllabus Point 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1081, 63 L.Ed.2d 320 (1980).

Syl. pt. 4 - “‘Where the guilty plea is sought to be withdrawn by the defendant after sentence is imposed, the withdrawal should be granted only to avoid manifest injustice.’ Syl. pt. 2, *State v. Olish*, 164 W.Va. 712, 266 S.E.2d 134 (1980).” Syllabus Point 2, *State v. Pettigrew*, 168 W.Va. 299, 284 S.E.2d 370 (1981).

The Court directed any court hearing *habeas* petitions to determine whether sufficient evidence remained for a conviction, absent Zain’s testimony. With respect to plea agreements, courts were directed to consider whether the plea was voluntary; whether defendant understood his rights and the nature of the charges; and whether a factual basis existed for accepting the plea. Where defendant knew nothing of Zain’s evidence, the issue here was deemed irrelevant.

The Court further ordered the entire investigative file unsealed and copies be made available to correctional institutions. Finally, the Kanawha County prosecuting attorney was directed to pursue appropriate criminal action against Zain.

*State ex rel. Spaulding v. Watt*, 422 S.E.2d 818 (1992) (Per Curiam)

Relator asked the Court to prohibit respondent Judge Watt from granting a new trial. The defendant was charged with 22 counts of sexual abuse of his stepdaughter and stepson. In response to discovery motions relator furnished defendant with investigative reports, including a videotaped statement by the victims.

Newly discovered evidence (continued)

*State ex rel. Spaulding v. Watt*, (continued)

At neither the investigative interviews nor at trial were the victims able to recall specific dates of the incidents. To establish the dates, the victims' father testified that he reviewed his work records to determine when the children visited the defendant. Defense counsel did not request the dates during discovery but protested that the prosecution had failed to provide them and moved for a mistrial based on newly discovered evidence (not withholding of evidence by the prosecution).

The trial court granted the motion, finding that the prosecution had failed to give the precise dates even though it had them months before trial.

Syl. pt. 1 - "A new trial will not be granted on the ground of newly- discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would have not secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side." Syllabus, *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979).

Syl. pt. 2 - "The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented." Syllabus point 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992).

The Court found the newly discovered evidence here to be insufficient to produce a different result at trial. The trial court should not have granted a new trial. Writ granted.

## NEW TRIAL

### Newly discovered evidence (continued)

#### Sufficient for new trial

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

Appellant was convicted of conspiracy to commit malicious wounding and voluntary manslaughter. His trial was severed from that of his co-conspirator and he was tried first. He claimed prejudice in that information adduced at the second trial tended to show that the victim was a drug dealer.

Syl. pt. 3 - “A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion.” Syllabus point 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

Syl. pt. 4 - ““A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.’ Syllabus, *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979, quoting, Syl. pt. 1, *Halstead v. Horton*, 38 W.Va 727, 18 S.E. 953 (1894).” Syllabus point 2, *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984).

The Court found that appellant’s real complaint was that he was forced to go to trial first, his motion for continuance being refused. No error in the refusal.

As to the necessity for new trial, the evidence at the second trial was not sufficient so as to produce a different result here. No error.

*State v. O’Donnell*, 433 S.E.2d 566 (1993) (Workman, C.J.)

Appellant was convicted of sexual assault and aiding and abetting sexual assault of his wife. Testimony at trial indicated that sexual activity did take place, the only issue being whether the victim consented or was forced.

## NEW TRIAL

### Newly discovered evidence (continued)

#### Sufficient for new trial (continued)

##### *State v. O'Donnell*, (continued)

Appellant claimed that various letters and photos describing “kinky” sex were to be found at the marital residence. Neither the police nor the defense investigator could find any such material. Several days after appellant’s wife visited the residence, the police found it ransacked.

Appellant received a letter following his conviction, purporting to be from his wife, saying “we had fun that night” and that she would “sleep” where she wanted, “maybe one, maybe two, you will never know,” and saying appellant would never see his children again; and that “it was the only way I would get away from and West Virginia.” Appellant filed a motion for new trial based on the letter. The trial court found a strong probability that the letter was from appellant’s wife but denied the motion, finding the letter was merely cumulative evidence on the issue of consent.

Syl. pt. 1 - “A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.’ Syllabus, *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979), quoting, Syl. pt. 1, *Halstead v. Horton*, 38 W.Va 727, 18 S.E. 953 (1894).” Syl. Pt. 1, *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984).

Syl. pt. 2 - To be cumulative, newly-discovered evidence must not only tend to prove facts which were in evidence at the trial, but must be of the same kind of evidence as that produced at the trial to prove these facts. If it is of a difference kind, though upon the same issue, or of the same kind on a difference issue, the new evidence is not cumulative.

The Court found the letter to be a different kind of evidence, therefore not cumulative. Reversed and remanded.

## NEW TRIAL

### Sufficiency of evidence

*State v. Ross*, 402 S.E.2d 248 (1990) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Conflicting oral testimony, (p. 581) for discussion of topic.

# OBSCENITY

## County commissions

### Authority to enact ordinances

*State v. Ross*, 402 S.E.2d 248 (1990) (Per Curiam)

By petition for declaratory judgment, writ of prohibition and writ of mandamus appellants challenged the constitutionality of an anti-pornography ordinance adopted by the Nicholas County Commission pursuant to *W.Va. Code*, 7-1-4. Although appellants' videotapes were seized, no arrests were made, nor indictments or informations filed.

Appellants argued that the definition of obscenity in *W.Va. Code*, 7-1-4 is vague and that the statute allows for each county commission to enact whatever parts of the statute it deems fit and that the Legislature unconstitutionally delegated its power.

Syl. pt. 1 - West Virginia Code, § 7-1-4 (1990) is constitutional because it embodies not only the general obscenity test authorized in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), but also incorporates in paragraphs (A) and (B) of subsection (b)(4), the specific "plain examples" of obscenity set out by the Supreme Court in *Miller*.

Syl. pt. 2 - The limited power given county commissions to adopt the obscenity ordinance in *W.Va. Code*, § 7-1-4(b) and to delete some of the language in paragraph (A) of subsection (b)(4) does not render *W.Va. Code*, § 7-1-4 (1990) unconstitutional.

Syl. pt. 3 - "The county court [commission] is a corporation created by statute, and can only do such things as are authorized by law, and in the mode prescribed." Syllabus point 5, *Goshorn's Ex'rs v. County Court of Kanawha County*, 42 W.Va. 735, 26 S.E. 452 (1896).

Syl. pt. 4 - "The constitutional prerequisite to a valid statute is that the law shall be complete when enacted." Syllabus point 4, *State v. Grinstead*, 157 W.Va. 1001, 206 S.E.2d 912 (1974).

Syl. pt. 5 - West Virginia Code, § 7-1-4 (1990), which authorizes county commissions to enact the obscenity ordinance contained therein, is not an unconstitutional delegation of legislative power.

The Court noted that county commissions could not make the ordinance more restrictive; the statute merely allowed for a choice of what acts were obscene. The Court rejected appellants' argument that notice must be given before passage of an obscenity ordinance; no notice is required by statute and the Code puts one on general notice (the Court skirted the issue of whether this ordinance was passed with the usual notice given other ordinances).

## OBSCENITY

### County commissions (continued)

#### Authority to enact ordinances (continued)

##### *State v. Ross*, (continued)

The Court also rejected appellants' argument that magistrate courts were unconstitutionally deprived of jurisdiction (i.e., that the statute regulated the practice of law in violation of Art. 6, Section 39 of the *West Virginia Constitution*). No error.

## ORDINANCES

### Obscenity

*State v. Ross*, 402 S.E.2d 248 (1990) (Per Curiam)

See OBSCENITY County commissions, Authority to enact ordinances, (p. 408) for discussion of topic.

## **PAROLE**

### **County/regional jails**

#### **Inmates sentenced to penitentiary**

*State ex rel. Smith v. Skaff*, 420 S.E.2d 922 (1992) (Workman, J.)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 437) for discussion of topic.

*State ex rel. Smith v. Skaff*, 428 S.E.2d 54 (1993) (Per Curiam)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 438) for discussion of topic.

### **Duty of parole board**

*State ex rel. Smith v. Skaff*, 420 S.E.2d 922 (1992) (Workman, J.)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 437) for discussion of topic.

### **Generally**

*State ex rel. Smith v. Skaff*, 420 S.E.2d 922 (1992) (Workman, J.)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 437) for discussion of topic.

### **Inmates held in county or regional jails**

*State ex rel. Smith v. Skaff*, 420 S.E.2d 922 (1992) (Workman, J.)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 437) for discussion of topic.

## PATERNITY

### Best interests of the child

*Cleo A.E. v. Rickie Gene E.*, 438 S.E.2d 886 (1993) (Workman, C.J.)

See GUARDIAN AD LITEM Paternity, (p. 265) for discussion of topic.

### Determination of

*Cleo A.E. v. Rickie Gene E.*, 438 S.E.2d 886 (1993) (Workman, C.J.)

See GUARDIAN AD LITEM Paternity, (p. 265) for discussion of topic.

### When prior determination is *res judicata*

*State ex rel. Stump v. Cline*, 406 S.E.2d 749 (1991) (Per Curiam)

Oliver Stump was born on 27 February 1981. Since that time, the mother has received Aid to Families with Dependent Children which required her to subrogate her claims to child support to the Department of Health and Human Resources. In 1982 the circuit court issued an order compelling the parties to submit to blood tests pursuant to a paternity action. By trial in 1983, however, no blood tests had been conducted and determination of paternity was made without them.

In 1986 the Child Advocate Office brought an income withholding action seeking to collect past due child support. In 1987 judgement was rendered granting the withholding. In 1989 the Child Advocate office brought a petition to modify the support order to increase the amount. Respondent moved for a DNA test to determine the issue of paternity. The circuit court granted the motion. The Department of Health and Human Resources sought writ of prohibition to prevent enforcement.

Syl. pt. 1 - “An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*.” Point 1, Syllabus, *Sayre’s Adm’r v. Harpold*, 33 W.Va. 583, 11 S.E. 16 [1890].” Syl. Pt. 1, *In re McIntosh’s Estate*, 144 W.Va. 583, 109 S.E.2d 153 (1959).

## PATERNITY

### When prior determination is *res judicata* (continued)

#### *State ex rel. Stump v. Cline*, (continued)

Syl. pt. 2 - “An adjudication of paternity, which is expressed in a divorce order, is *res judicata* as to the husband and wife in any subsequent proceeding.” Syl. Pt. 1, in part, *Nancy Darlene M. v. James Lee M. Jr.*, 184 W.Va. 447, 400 S.E.2d 882 (1990).

Although the parties here were never married, the father waived his right to contest his paternity by a proper blood test at the 1983 determination. This type of challenge cannot be raised again “if there has been more than a relatively brief passage of time.” *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 387 S.E.2d 866, at 872 (1989).

**Civil distinguished from criminal**

*State ex rel. Palumbo v. Graley's*, 425 S.E.2d 177 (1992) (McHugh, C.J.)

Attorney General Mario Palumbo sought review of an order dismissing his complaint alleging the defendants' violation of the West Virginia Antitrust Act, *W.Va. Code*, 47-18-1, *et seq.*, for fixing prices. The trial court found the Antitrust Act quasi-criminal in nature.

Syl. pt. 1 - The question of whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction, and requires the application of a two-level inquiry adopted by the United States Supreme Court in *United States v. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). First, courts must determine whether the legislature indicated either expressly or impliedly, a preference for labeling the statute civil or criminal. Second, if the legislature indicates an intention to establish a civil remedy, courts must consider whether the legislature, irrespective of its intent to create a civil remedy, provided for sanctions so punitive as to transform the civil remedy into a criminal penalty. As part of the second level of the inquiry, courts should be guided by the following factors identified by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-68, 9 L.Ed.2d 644, 661 (1963): "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment---retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]"

Syl. pt. 2 - The proceedings conducted and the monetary penalties imposed under the West Virginia Antitrust Act, *W.Va. Code*, 47-18-1 to 47-18-23, as amended, are civil, and not quasi-criminal in nature, and therefore, suspected violators of the Antitrust Act do not have the right to be informed that they are targets of an investigation nor do they have the right to be informed that they may have counsel present at oral deposition. In subpoenas issued pursuant to an investigation under the Antitrust Act, the Attorney General should adequately inform suspected violators of the conduct constitution a violation of the Antitrust Act.

The Court noted that the same actions at issue under the state Antitrust Act might become criminal under the Federal Antitrust Act. Defendants had no right to counsel, or right to be informed that they could have counsel even though counsel may be present when testimony is taken. Reversed and remanded.

## PERJURY

### Prior inconsistent statements to police

*State v. Moore*, 427 S.E.2d 450 (1992) (Per Curiam)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 218) for discussion of topic.

## PLAIN ERROR

### Generally

*State v. Harris*, 432 S.E.2d 93 (1993) (Neely, J.)

See DISCRIMINATION Racial, Jury selection, (p. 167) for discussion of topic.

*State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 540) for discussion of topic.

### Prosecuting attorney's comments

*State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments during closing argument, (p. 465) for discussion of topic.

## **PLEA**

### **Waiver of rights**

*State v. Hatfield*, 413 S.E.2d 162 (1991) (McHugh, J.)

See COMPETENCY Suicide attempt, Effect of, (p. 122) for discussion of topic.

### **Withdrawal of**

*In the Matter of W.Va. State Police Crime Lab.*, 438 S.E.2d 501 (1993) (Miller, J.)

See NEW TRIAL Newly discovered evidence, (p. 402) for discussion of topic.

*State v. Cook*, 403 S.E.2d 27 (1991) (Per Curiam)

See PLEA BARGAINS Withdrawal of, (p. 422) for discussion of topic.

## PLEA BARGAINS

### Acceptance of

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

Appellant was convicted of obtaining “property or a thing of value” in exchange for a worthless check, a violation of *W.Va. Code*, 61-3-39, and a felony. Appellant was offered a plea agreement which would have resulted in a guilty plea to *W.Va. Code*, 61-3-39a, a misdemeanor, and dismissal of the felony charge. Appellant claimed that the trial court rejected the plea agreement solely because the maximum incarceration penalty would be ten days’ imprisonment.

Syl. pt. 6 - “A primary test to determine whether a plea bargain should be accepted or rejected is in light of the entire criminal event and given the defendant’s prior criminal record whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant.” Syl. pt. 6 *Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984).

The Court found that the trial court also considered appellant’s past record of issuing worthless checks. No error.

### Right to appeal

#### Wavier of

*State ex rel. Phillips v. Boggess*, 416 S.E.2d 270 (1992) (McHugh, C.J.)

See PLEA BARGAINS Setting aside, Right to transcript unaffected, (p. 420) for discussion of topic.

### Sentencing

*State ex rel. Forbes v. Kaufman*, 404 S.E.2d 763 (1991) (McHugh, J.)

Petitioner sought a writ of prohibition to prevent imposition of sentence contrary to a plea agreement. He claimed that under Rule 11(e)(3) of the West Virginia Rules of Criminal Procedure respondent was required to either reject or accept the agreement, not accept the guilty plea and change the sentence.

Syl. pt. 1 - Where the state agrees to make a sentencing recommendation and enters into a plea agreement with the defendant pursuant to Rule 11(e)(1)(B) of the *West Virginia Rules of Criminal Procedure*, the trial court is not bound to impose the sentence recommended by the state if it accepts the plea agreement.

## PLEA BARGAINS

### Sentencing (continued)

#### *State ex rel. Forbes v. Kaufman*, (continued)

Syl. pt. 2 - Where the state agrees that a specific sentence is a suitable disposition of a criminal case and enters into a plea agreement with the defendant pursuant to Rule 11(e)(1)(C) of the *West Virginia Rules of Criminal Procedure*, the trial court may either accept or reject the entire agreement, but it may not accept the guilty plea and impose a different sentence.

Syl. pt. 3 - If a plea is taken pursuant to a plea agreement and the state has agreed to a specific sentence in that agreement, yet it is not clear whether the plea was taken under Rule 11(e)(1)(B) or 11(e)(1)(C) of the *West Virginia Rules of Criminal Procedure*, the trial judge may sentence the defendant without being bound by the sentencing provision in the plea agreement.

The prosecution bears a significant responsibility to ensure that the plea agreement is unambiguous and precise. In the case of any uncertainty, the Court will construe the agreement in favor of the defendant. Both the terms and the manner in which this plea agreement was presented were unclear. Writ denied.

### Setting aside

#### Necessity for record

#### *State v. Donald S.B.*, 399 S.E.2d 898 (1990) (Per Curiam)

Appellee entered into a plea agreement by which he pled guilty to first-degree sexual abuse. Pursuant to writ of *habeas corpus* his plea was set aside; the prosecution claimed on appeal that the circuit court erred in allowing withdrawal of his guilty plea after imposition of sentence.

Appellee entered into the plea agreement in return for the prosecution's silence at sentencing. Appellee was sentenced to one to five. After obtaining a new attorney, appellee moved to withdraw his plea and vacate the sentence; the circuit court agreed to treat the motion as a petition for writ of *habeas corpus*. Before ruling on that writ, the court granted appellee probation in response to a motion for reconsideration of sentence.

Appellee sent a letter requesting that the court rule on his *habeas* petition. A stipulation, signed by both counsel, and filed with the court, stated that the reconsideration motion made the *habeas* petition moot. However, one month later, the court granted appellee's writ and allowed withdrawal of the guilty plea.

## PLEA BARGAINS

### Setting aside (continued)

#### Necessity for record (continued)

##### *State v. Donald S.B.*, (continued)

Syl. pt. 1 - “Where there is a plea bargain by which the defendant pleads guilty in consideration for some benefit conferred by the State, the trial court should spread the terms of the bargain upon the record and interrogate the defendant concerning whether he understands the rights he is waiving by pleading guilty and whether there is any pressure upon him to plead guilty other than the consideration admitted on the record.” Syl. pt. 4, *Call v. McKenzie*, 159 W.Va. 191, 220 S.E.2d 665 (1975).

Syl. pt. 2 - “Where the guilty plea is sought to be withdrawn by the defendant after sentence is imposed, the withdrawal should be granted only to avoid manifest injustice.” Syl. pt. 2, *State v. Olish*, 164 W.Va. 712, 266 S.E.2d 134 (1980).

Syl. pt. 3 - ““An indictment [or information] for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.’ Syl. pt. 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).” Syl. pt. 3, *State v. Wade*, 174 W.Va. 381, 327 S.E.2d 142 (1985).

The Court found that the notice requirement of Rule 7(c)(1) of the West Virginia Rules of Criminal Procedure was satisfied; appellee was sufficiently informed of the charges against him. No manifest injustice was done sufficient to require withdrawal of the plea. Reversed; writ set aside. Plea stands.

#### Right to transcript unaffected

##### *State ex rel. Phillips v. Boggess*, 416 S.E.2d 270 (1992) (McHugh, C.J.)

Petitioner brought an original proceeding in mandamus to compel respondent court reporter to produce a transcript of his trial. Petitioner was convicted of second-degree murder and malicious wounding. Pursuant to a recidivist information, the court appointed separate attorneys to pursue an appeal and to contest the recidivist charge. Neither counsel represented petitioner at trial. Petitioner, his recidivist counsel and his appellate counsel all requested a transcript.

## PLEA BARGAINS

### Setting aside (continued)

#### Right to transcript unaffected (continued)

##### *State ex rel. Phillips v. Boggess*, (continued)

After three separate requests for transcript, petitioner entered into a plea agreement in which the prosecution agreed to drop the recidivist information in exchange for petitioner's withdrawing his appeal. Petitioner also agreed to testify against his co-defendants and the prosecution agreed to concurrent sentences with respect to the current charge and other previous convictions, for which petitioner was already in jail.

##### *State ex rel. Phillips v. Boggess*, 416 S.E.2d 270 (1992) (McHugh, C.J.)

The prosecution informed petitioner that a request for a trial transcript was tantamount to withdrawing from the plea agreement, exposing petitioner to recidivist charges. The trial court agreed that the agreement must be set aside before petitioner was entitled to a transcript.

Syl. pt. 1 - "Where a defendant enters a plea bargain arrangement whereby he agrees not to appeal a conviction on a previous charge to which he has never admitted guilt, but has been convicted by jury verdict, the defendant should not be deemed to have irrevocably waived his right to appeal. However, if the defendant chooses to disregard the agreement and file a timely appeal, the State should not be held to the bargain and, at its option, may seek resentencing on all other convictions involved in the agreement or reinstitute any charges dismissed pursuant to the plea bargain and proceed to trial thereon." Syl. pt. 2, *Blackburn v. State*, 170 W.Va. 96, 290 S.E.2d 22 (1982).

Syl. pt. 2 - "The right to the equal protection of the laws guaranteed by our federal and state constitutions blocks unequal treatment of criminal defendants based on indigency." Syl. pt. 1, *Robertson v. Goldman*, 179 W.Va. 453, 369 S.E.2d 888 (1988).

Syl. pt. 3 - A request for a transcript by a criminal defendant is not tantamount to an appeal. Therefore, an indigent defendant is entitled to a transcript of his trial without endangering a prior plea agreement wherein he agrees not to seek an appeal in exchange for the agreement of the State to forego initiation of a recidivist proceeding. If the defendant subsequently files a timely appeal, the State should not be held to the plea agreement.

The Court agreed that indigent defendants would be treated unequally if the plea agreement could be broached by merely requesting a transcript; a client who could afford a transcript would not have to make the request to obtain one. A criminal defendant cannot be made to waive his right to appeal a conviction in which he has not admitted guilt. Writ granted.

## PLEA BARGAINS

### Standard for acceptance

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

See PLEA BARGAINS Acceptance of, (p. 418) for discussion of topic.

### Statements made during

#### Use at trial

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See IMPEACHMENT Statements made for probation consideration, Use at trial, (p. 292) for discussion of topic.

### Withdrawal of

*State v. Cook*, 403 S.E.2d 27 (1991) (Per Curiam)

Appellant was indicted on grand larceny; he subsequently agreed to plead to a reduced charge of petit larceny. The prosecution agreed to recommend that appellant be fined rather than imprisoned, or at least placed on probation. The Circuit Court accepted the plea but the chief judge of the Circuit, during sentencing hearings regarding appellant's co-defendants directed that the case be sent to him for sentencing based on comments made by the prosecution.

Following representations by both sides that the prosecution violated the plea agreement, the case was returned to the first judge who denied the motion to withdraw the plea and sentenced appellant to one year in jail.

Syl. pt. - "Rule 32(d) of the West Virginia Rules of Criminal Procedure as it relates to the right to withdraw a guilty or *nolo contendere* plea prior to sentence permits the withdrawal of a plea for 'any fair and just reason.'" Syl. pt. 1, *State v. Harlow*, 176 W.Va. 559, 346 S.E.2d 350 (1986).

The Court noted that a prosecuting attorney is bound by a plea agreement. *State ex rel. Gray v. McClure*, 161 W.Va. 488, 242 S.E.2d 704 (1978). The comments made clearly violated the agreement. Reversed.

*State v. Donald S.B.*, 399 S.E.2d 898 (1990) (Per Curiam)

See PLEA BARGAINS Setting aside, Necessity for record, (p. 419) for discussion of topic.

## **POLICE OFFICER**

### **Agreement not to prosecute**

*State v. Sharpless*, 429 S.E.2d 56 (1993) (Per Curiam)

See POLICE OFFICER Authority to bargain for information, (p. 423) for discussion of topic.

### **Authority to bargain for information**

*State v. Sharpless*, 429 S.E.2d 56 (1993) (Per Curiam)

Appellant was convicted of receiving stolen property. He claimed the prosecuting attorney reneged on an agreement not to charge him. More specifically, appellant claimed the investigating officer promised to drop charges if appellant provided evidence of other crimes.

Appellant did cooperate; he quit only after his parole officer intervened with the investigating officer. Appellant noted the officer did not immediately process the charges; he claimed the delay, coupled with his cooperation constitute “substantial evidence” of the alleged breached agreement. *State v. Wayne*, 162 W.Va. 41, 42, 245 S.E.2d 838, 840 (1978); *overruled on other grounds*, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983).

Syl. pt. 1 - “Law enforcement officers do not have authority to promise that in exchange for information a person accused will not be prosecuted for the commission of a crime, and such a promise is generally unenforceable.” Syllabus, *State v. Cox*, 162 W.Va. 915, 253 S.E.2d 517 (1979).

The Court found appellant’s evidence insubstantial. Because appellant did not testify and there was no written agreement, the only evidence was the officer’s testimony. Even if the officer had entered into an agreement it would not have been enforceable, even under a theory of detrimental reliance. No error.

## **Civil liability**

### **Hot pursuit without warrant**

*Goines v. James*, 433 S.E.2d 572 (1993) (Workman, C.J.)

See SEARCH AND SEIZURE Civil liability, Hot pursuit without warrant, (p. 520) for discussion of topic.

## **POLICE OFFICER**

### **Complaint procedure**

*State ex rel. Billy Ray C. v. Skaff*, 438 S.E.2d 847 (1993) (Miller, J.)

See POLICE OFFICER Police brutality, Procedure for complaining, (p. 424) for discussion of topic.

### **Entrapment**

*State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

See ENTRAPMENT Grounds for, (p. 192) for discussion of topic.

### **Interrogation by**

#### **Recording of**

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See EVIDENCE Admissibility, Confessions, (p. 203) for discussion of topic.

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See DUE PROCESS Police interrogation, Recording of, (p. 188) for discussion of topic.

### **Non-resident investigator employed by**

*Johnson v. Tsapis*, 413 S.E.2d 699 (1991) (Miller, C.J.)

See INVESTIGATORS Non-residents employed as, (p. 325) for discussion of topic.

### **Police brutality**

#### **Procedure for complaining**

*State ex rel. Billy Ray C. v. Skaff*, 438 S.E.2d 847 (1993) (Miller, J.)

Relator claimed abuse by a state police officer and sought writ of mandamus to compel creation of an investigative procedure for these kinds of allegations of abuse.

## POLICE OFFICER

### Police brutality (continued)

#### Procedure for complaining (continued)

##### *State ex rel. Billy Ray C. v. Skaff*, (continued)

Syl. pt. 1 - “A writ of mandamus will not issue unless three elements coexist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.’ Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).” Syllabus Point 1, *Smith v. West Virginia State Board of Education*, 170 W.Va. 593, 295 S.E.2d 680 (1982).

Syl. pt. 2 - “It is well established that the word ‘shall,’ in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.” Syllabus Point 1, *Nelson v. West Virginia Public Employees Insurance Board*, 171 W.Va. 445, 300 S.E.2d 86 (1982).

Syl. pt. 3 - Under *W.Va. Code*, 15-2-21 (1977), a person who has been subjected to the use of excessive physical force by a State Police officer has the right to file a complaint with the Superintendent of the West Virginia Division of Public Safety. Under this same section, the Superintendent is required to investigate the complaint.

Syl. pt. 4 - Implicit within the Superintendent of the West Virginia Division of Public Safety’s mandatory duty to investigate allegations of misconduct under *W.Va. Code*, 15-2-21 (1977), there is a duty to promulgate formal, written investigation procedures. These procedures should outline (1) how a citizen may notify the Superintendent of alleged misconduct by a State Police officer, and (2) the specific procedure to be followed to ensure that a thorough investigation is conducted by an impartial and neutral party. These procedures also should require that a report of the investigation be given to the Superintendent on which to base his decision.

Syl. pt. 5 - Under *W.Va. Code*, 29-12-5 (1986), which delegates to the West Virginia State Board of Risk and Insurance Management the authority to investigate and settle claims under the State’s liability insurance, the Board of Risk is required to promulgate rules or regulations for State agencies covered by the State’s liability insurance policy that will enable the Board to promptly identify potential liability claims against the State.

The Court did not discuss the issue of individual liability for state police officers. Writ granted.

## **POLICE OFFICER**

### **Reports**

#### **Disclosure of**

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See EVIDENCE Police reports, (p. 241) for discussion of topic.

#### **Writing confession for accused**

*State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Statement written by police officer, (p. 547) for discussion of topic.

## PRELIMINARY HEARING

### Purpose of

*Peyatt v. Kopp*, 428 S.E.2d 535 (1993) (McHugh, J.)

See EVIDENCE Admissibility, Hearsay, (p. 211) for discussion of topic.

## **PREMEDITATION**

### **Instruction on**

*State v. Miller*, 401 S.E.2d 237 (1990) (Per Curiam)

See INSTRUCTIONS Right to, (p. 319) for discussion of topic.

## PRESENTENCE REPORT

### Defendant's right to inspect

*State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

See SENTENCING Presentence report, Defendant's right to inspect, (p. 557) for discussion of topic.

## **PRIOR OFFENSES**

### **Introduction at trial**

#### **Previous reading of rights**

*State v. Farmer*, 406 S.E.2d 458 (1991) (Per Curiam)

See EVIDENCE Prior offenses, Reading of rights, (p. 243) for discussion of topic.

#### **Use of in DUI prosecution**

*State ex rel. Kutsch v. Wilson*, 427 S.E.2d 481 (1993) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Prior offenses in another state, (p. 183) for discussion of topic.

## PRISON/JAIL CONDITIONS

### Detention centers

#### Standards for

*Facilities Review Panel v. Coe*, 420 S.E.2d 532 (1992) (Brotherton, J.)

See JUVENILES Detention centers, Standards for, (p. 366) for discussion of topic.

### Double celling

*Wagner v. Burke*, 420 S.E.2d 298 (1992) (Per Curiam)

See PRISON/JAIL CONDITIONS Exercise room in regional jail, (p. 431) for discussion of topic.

### Exercise room in regional jail

*Wagner v. Burke*, 420 S.E.2d 298 (1992) (Per Curiam)

By writ of mandamus the Facility Review Panel invoked the Court's original jurisdiction to compel the Regional Jail and Correctional Facility Authority to revise plans for the South Central Regional Jail so as to provide for an exercise yard of sixty feet by eighty feet and to eliminate double celling.

Syl. pt. - "A writ of mandamus will not issue unless three elements co-exist--(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

Respondents claimed exercise areas were already included in the plans. Brackets allowing double celling were to be installed but the Court held this step prudent in case of a change in regulations which might allow double celling in the future.

The Court ordered respondents to allow petitioner's counsel to review plans but denied the writ.

## PRISON/JAIL CONDITIONS

### Generally

*Crain v. Bordenkircher*, 408 S.E.2d 355 (1991) (Per Curiam)

This proceeding was the latest in a long series of opinions and orders (See *Crain v. Bordenkircher*, 182 W.Va. 787, 392 S.E.2d 227 (1990) relating to conditions at the West Virginia Penitentiary. On 8 January 1991 a status report showed completion of a master plan for the required new facility.

Syl. pt. - “This Court has a duty to take such actions as are necessary to protect and guard the Constitution of the United States and the Constitution of the State of West Virginia.” Syllabus point 2, *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988).

Upon objections being raised to some architectural plans, the Special Master reviewed the plans and reported on 16 April 1991 that they were acceptable. The Court directed respondents to follow modifications recommended to cut costs.

The Court also directed respondents to submit to the Special Master by 7 December 1991 plans to regarding programs and staffing; and to provide another status report on 4 February 1992, the date of the next hearing.

*Crain v. Bordenkircher*, 420 S.E.2d 732 (1992) (Neely, J.)

This is the latest in a long line of hearings regarding the conditions of the West Virginia Penitentiary at Moundsville. On 4 February 1992 the parties appeared for further hearing and submitted a status report and draft of policies.

Respondents informed the Court that certain preliminary work was completed but bids for the construction phase came in over budget by \$7,000,000. Based on respondents’ representations the Court was satisfied that all reasonable steps were being taken to comply with the original order. Case continued until 5 May 1992.

*Crain v. Bordenkircher*, 420 S.E.2d 732 (1992) (Neely, J.)

For the seventh time the Court once again reviewed the progress of compliance with its original order in this case requiring a new penitentiary. (See cases cited in opinion.)

Syl. pt. - “This Court has a duty to take such actions as are necessary to protect and guard the Constitution of the United States and the Constitution of the State of West Virginia.” Syllabus Point 2, *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988).

## PRISON/JAIL CONDITIONS

### Generally (continued)

#### *Crain v. Bordenkircher*, (continued)

The Court recited the difficulties with cost overruns and the use of interest accumulated from bonds previously sold to finance several projects involving the penitentiary and several regional jails. Noting these difficulties, the Court ordered its original closure date for the old penitentiary at Moundsville extended from 1 July 1992 to 1 July 1994.

The Court reiterated its direction to submit plans, procedures and staffing arrangements to the special master. Plans submitted 31 January 1992 were deemed inadequate. New plans were ordered by 1 October 1992. Citing *Crain I*, 176 W.Va. 338, 342 S.E.2d 422 (1986) and *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981), the Court reminded respondents of their obligation to provide for rehabilitation and health care in the new plans.

The Court did not find it appropriate for the Division of Corrections to reimburse county jail expenses using funds from bonds. At the time of the hearing 354 inmates committed to the state penitentiary were housed in county jails. The Court requested further information on this issue and set a hearing date of 4 November 1992. Writ granted.

#### *Crain v. Bordenkircher*, 424 S.E.2d 751 (1992) (Per Curiam)

For the eighth time, the Court heard progress reports on construction of a new state penitentiary. See *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988). Petitioners objected to an operational plan as incomplete and contrary to law or previous court orders. The Court-appointed Special Master found the parts of the plan completed acceptable and that respondents are making “a sound and serious effort” to comply with the Court’s orders.

The Special Master recommended informal resolution of petitioner’s objections and further found the budget adequate to fund operation of the new facility.

Syl. pt. - “This Court has a duty to take such actions as are necessary to protect and guard the Constitution of the United States and the Constitution of the State of West Virginia.” Syllabus Point 2, *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988).

The Court found respondent’s plan acceptable. The full plan is to be finished in January, 1993. The Court ordered submission of the full plan to the Special Master and petitioners’ counsel by 1 March 1993 and set a further hearing for 4 May 1993.

## PRISON/JAIL CONDITIONS

### Generally (continued)

*Crain v. Bordenkircher*, 433 S.E.2d 526 (1993) (Per Curiam)

The Court reviewed the completed operational procedures plan for the new state penitentiary. See *Crain v. Bordenkircher*, 188 W.Va. 406, 424 S.E.2d 751 (1992) (Crain IX). The Court granted respondents' motion to allow the parties to submit to the Special Master remaining disputes as to the plan and set a further hearing for 11 January 1994.

Syl. pt. - 'This Court has a duty to take such actions as are necessary to protect and guard the Constitution of the United States and the Constitution of the State of West Virginia.' Syllabus Point 2, *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988).

### Juveniles detention centers

*Facilities Review Panel v. Miller*, No. 19849 (3/14/91) (Per Curiam)

See JUVENILES Detention, Condition of centers, (p. 365) for discussion of topic.

### Overcrowding

*State ex rel. Smith v. Skaff*, 428 S.E.2d 54 (1993) (Per Curiam)

See PRISON/JAIL CONDITIONS State's duty to incarcerate, (p. 438) for discussion of topic.

### Rules for

*Kincaid v. Mangum*, 432 S.E.2d 74 (1993) (McHugh, J.)

See PRISON/JAIL CONDITIONS Overcrowding and rules for exercise, Promulgation of rules regarding, (p. 435) for discussion of topic.

## PRISON/JAIL CONDITIONS

### Overcrowding and rules for exercise

#### Promulgation of rules regarding

*Kincaid v. Mangum*, 432 S.E.2d 74 (1993) (McHugh, J.)

Plaintiffs were inmates of the Raleigh County Jail. They brought a civil rights action in U.S. District Court alleging their conditions of confinement were inadequate according to the West Virginia Jail and Prison Standards Commission Rule 95 *W.Va. Code of State Rules* 1-1.1. Specifically, they alleged overcrowding and inadequate exercise facilities.

Defendants alleged the rules upon which plaintiffs relied were promulgated unconstitutionally. The District Court certified the following question to this Court:

Does the West Virginia Legislature's authorization of the "West Virginia Minimum Standard for Construction, Operation and Maintenance of Jails" through the use of an omnibus bill, which authorized numerous legislative rules unrelated to one another, contravene:

(a) Article VI, Section 30 of the *West Virginia Constitution* (providing that no act may embrace more than one object);

(b) Article VII, Section 14 of the *West Virginia Constitution* (providing the Governor's veto power); or

(c) Article 3, Chapter 29A of the West Virginia Code (the State Administrative Procedures Act)?

Syl. pt. 1 - "While the Legislature has the power to void or to amend administrative rules and regulations, when it exercises that power it must act as a legislature, within the confines of the enactment procedures mandated by our constitution. It cannot invest itself with the power to act as an administrative agency in order to avoid those requirements." Syl. pt. 2, *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981).

Syl. pt. 2 - If there is a reasonable basis for the grouping of various matters in a legislative bill, and if the grouping will not lead to logrolling or other deceiving tactics, then the one-object rule in *W.Va. Const.* art. VI, § 30 is not violated; however, the use of an omnibus bill to authorize legislative rules violates the one-object rule found in *W.Va. Const.* art. VI § 30 because the use of the omnibus bill to authorize legislative rules can lead to logrolling or other deceiving tactics.

## PRISON/JAIL CONDITIONS

### Overcrowding and rules for exercise (continued)

#### Promulgation of rules regarding (continued)

##### *Kincaid v. Mangum*, (continued)

Syl. pt. 3 - When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W.Va. Code*, 51-1A-1, *et seq.* and *W.Va. Code*, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court.

Syl. pt. 4 - “In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of law in their overruling decisions.” Syl. pt. 5, *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979).

Syl. pt. 5 - When this Court issues an interpretation of the *W.Va. Const.* which was clearly not foreshadowed, and when retroactive application of the new interpretation would excessively burden the government’s ability to carry out its functions, then the new constitutional interpretation will apply prospectively.

The Court noted the reason for the one-object rule was to prevent passage of unrelated legislation if the Legislature disagreed with only a few objects of a group. The Court rejected the vague test of whether the provisions of a bill are “germane” to one object. Each bill must be judged on its own peculiar facts.

Here, the purpose of the one-object rule was violated. The Court expanded the scope of the certified question and required each agencies’ set of rules and regulations to be in one separate bill in the future. The Court declined to address the second and third parts of the certified question.

## PRISON/JAIL CONDITIONS

### Processing of prisoners at county jail

*State ex rel. Cooper v. Schlaegel*, No. 21481 (2/16/93) (Per Curiam)

See JUDGES Duties, To render decisions, (p. 343) for discussion of topic.

### State's duty to incarcerate

*State ex rel. Smith v. Skaff*, 420 S.E.2d 922 (1992) (Workman, J.)

Petitioner brought this petition of *habeas* corpus for release from the Eastern Regional Jail, claiming that he was illegally confined; that he was denied educational and other opportunities; and that he was effectively denied parole. Petitioner pled guilty to one count of uttering and was sentenced to a term of one to ten years in the West Virginia Penitentiary.

Due to overcrowding, petitioner was held in the Eastern Regional Jail for thirteen months prior to transfer to Huttonsville Correctional Center. Petitioner became eligible for parole while at the jail but was not considered because he was not in the custody of the Division of Corrections. Petitioner claimed that at the time of the Parole Board so informed him, there was a two-year waiting list for transfer.

Syl. pt. 1 - The statutory scheme of this state places a non-discretionary duty upon the Division of Corrections to incarcerate those inmates who are sentenced to the penitentiary in a state penal facility operated by the Division of Corrections. Hence, the Division of Corrections is prohibited from lodging inmates in a county or regional jail facility absent the availability of space in these facilities once the inmates have been sentenced to a Division of Corrections facility.

Syl. pt. 2 - "Our parole statute, *W.Va. Code*, 62-12-13 (1979), creates a reasonable expectation interest in parole to those prisoners meeting its objective criteria." Syl. Pt. 1, *Tasker v. Mohn*, 165 W.Va. 55, 267 S.E.2d 183 (1980).

Syl. pt. 3 - The Parole Board has a mandatory duty not only to consider an inmate for parole once the inmate becomes eligible, but also to conduct a parole hearing, if necessary, at any facility where the inmate is being lodged, be it a facility within the Division of Corrections or a county or regional jail.

Syl. pt. 4 - It is a violation of West Virginia Code § 62-12-13 (1989) for the Parole Board to refuse to consider an inmate for parole until after his transfer into a Division of Corrections facility when he is otherwise eligible for such consideration.

## PRISON/JAIL CONDITIONS

### State's duty to incarcerate (continued)

#### *State ex rel. Smith v. Skaff*, (continued)

Syl. pt. 5 - Until construction of the new penitentiary is completed, the Parole Board has the latitude to give parole consideration to those inmates being detained in county or regional jails who have been convicted of non-violent crimes upon review of their records. When the Parole Board determines that an inmate has sufficiently met the requirements of West Virginia Code § 62-12-13 (1989), then it may grant parole without actually holding a hearing at the facility where the inmate is housed.

The Court rejected respondents' argument that the regional jail is actually a state facility. *State ex rel. Dodrill v. Scott*, 177 W.Va. 452, 352 S.E.2d 741 (1986) is not being followed insofar as state prisoners are being held in local facilities. See *County Commission of Mercer County v. Dodrill*, 182 W.Va. 10, 385 S.E.2d 248 (1989).

The Court noted the various decisions in *Crain v. Bordenkircher*, 187 W.Va. 596, 420 S.E.2d 732 (1992) requiring a new state penitentiary and ordered the Department of Corrections to develop a plan to remove all state prisoners from local facilities.

As to parole, the Court ordered the Parole Board to conduct the appropriate hearings for inmates incarcerated in county and regional jails. Writ granted.

#### *State ex rel. Smith v. Skaff*, 428 S.E.2d 54 (1993) (Per Curiam)

The Court issued a previous ruling in this case requiring the Board of Probation and Parole to hold eligibility hearings. *State ex rel. Smith v. Skaff*, 187 W.Va. 651, 420 S.E.2d 922 (1992). The previous ruling recognized the overcrowding in state facilities and the upcoming new state penitentiary. See *Crain v. Bordenkircher*, 187 W.Va. 596, 420 S.E.2d 732 (1992).

On 28 December 1992 the Division of Corrections filed a plan with the court relating to overcrowding. The Court's Special Master generally approved the plan.

Syl. - "Moot 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." Pt. 1, syllabus, *State ex rel. Lilly v. Carter*, 63 W.Va. 684, 60 S.E. 873 (1908)." Syl. Pt. 1, *State ex rel. West Virginia Secondary School Activities Commission v. Oakley*, 152 W.Va. 533, 164 S.E.2d 775 (1968).

The Court found petitioner's initial complaints to be moot. Writ denied.

## PRIVATE PROSECUTING ATTORNEYS

### Appointment of when conflict arises

*State ex rel. Bailey v. Facemire*, 413 S.E.2d 183 (1991) (Workman, J.)

and

*Justice v. Thompson*, 413 S.E.2d 183 (1991) (Workman, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 468) for discussion of topic.

### Dismissal of indictment

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See INDICTMENT Dismissal of, Generally, (p. 293) for discussion of topic.

## PRIVILEGES AND IMMUNITIES CLAUSE

### Non-resident investigators

*Johnson v. Tsapis*, 413 S.E.2d 699 (1991) (Miller, C.J.)

See INVESTIGATORS Non-residents employed as, (p. 325) for discussion of topic.

## PROBABLE CAUSE

### Felony arrest

*State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

See ARREST Warrantless, Felony, (p. 34) for discussion of topic.

### Gesture when stopped

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

Appellant was convicted of possession of marijuana with intent to deliver. Police officers came upon appellant's legally parked vehicle in an area known for drug trafficking. As they approached appellant's vehicle, one from each side, one officer observed appellant drop something into a paper bag, place it in a purse and hand it to the passenger in the front seat. Upon closer inspection, the officers noted marijuana smoke. They directed the passengers to exit the vehicle and, obtaining the purse, discovered several baggies of marijuana, totaling 499.5 grams.

Appellant's pretrial motions for suppression of evidence were denied and the marijuana was admitted to evidence. Appellant claimed no probable cause for a warrantless search.

Syl. pt. 1 - "A furtive gesture on the part of the occupant of a vehicle is ordinarily insufficient to constitute probable cause to search a vehicle if it is not coupled with other reliable causative facts to connect the gesture to the probable presence of contraband or incriminating evidence." Syllabus point 5, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980).

The Court noted that a warrantless search is generally unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). One exception is for automobiles. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.543 (1925). Probable cause can be found when a probability exists that contraband can be found. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States v. Colyer*, 878 F.2d 469 (D.C. Cir. 1989). Some decisions have held that police officers' experience can give rise to reasonable expectation of criminal activity, leading to probable cause. *United States v. Stanley*, 915 F.2d 54 (1st Cir. 1990); *United States v. Watson*, 953 F.2d 895 (1992).

The Court found "other reliable causative facts" in this case sufficient to justify the warrantless search. The area was known for drug trafficking and the officers noticed the smell of marijuana. No error.

## PROBABLE CAUSE

### Juveniles

#### Transfer to adult jurisdiction

*Comer v. Tom A.M.*, 403 S.E.2d 182 (1991) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Probable cause, (p. 370) for discussion of topic.

#### Required for warrant

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 526) for discussion of topic.

#### Standard for

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 527) for discussion of topic.

#### Transfer to adult jurisdiction

*In the Interest of David Zane B.*, 403 S.E.2d 10 (1991) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Probable cause, (p. 371) for discussion of topic.

#### Warrantless arrest

*State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

See ARREST Warrantless, Felony, (p. 34) for discussion of topic.

#### Worthless checks

*State ex rel. Walls v. Noland*, 433 S.E.2d 541 (1993) (Brotherton, J.)

See STATUTES Worthless checks, (p. 577) for discussion of topic.

# PROBATION

## Conditions of

### Confinement

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See SENTENCING Burglary, (p. 548) for discussion of topic.

### Failure to report to probation officer

*State v. Harding*, 422 S.E.2d 619 (1992) (Per Curiam)

See BAIL Revocation of, Hearing required, (p. 111) for discussion of topic.

### Special prosecutor fees

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

Appellant was convicted of grand larceny. As part of appellant's probation, payment of court costs was imposed, including costs of two special prosecutors (a cost of \$40,842.90).

Syl. pt. 1 - "A probation condition requiring repayment of costs and attorney fees is constitutionally acceptable if it is tuned to the probationer's ability to pay without undue hardship and is subject to modification if his indigency persist or reoccurs. *W.Va. Code*, 62-12-9." Syl. pt. 1, *Armstead v. Dale*, 170 W.Va. 319, 294 S.E.2d 122 (1982).

Syl. pt. 2 - "Allowance and recovery of costs was unknown at common law, and therefore only costs specifically allowed by statute may be recovered." *State v. St. Clair*, 177 W.Va. 629, 631, 355 S.E.2d 418, 420 (1987).

Syl. pt. 3 - *W.Va. Code*, 62-12-9 [1992] does not authorize a circuit court to impose, as a condition of probation, that a convicted criminal defendant pay the fees of a special prosecutor as costs of the prosecution.

The Court noted *W.Va. Code*, 62-12-9 allows imposition of costs as a condition of probation. Here, however, unlike *Armstead*, the costs are related to the prosecution; in *Armstead*, the costs of the defense were at issue. Absent a specific statute authorizing payment of these costs, no such payment can be required. Reversed and remanded.

## PROBATION

### Confinement as condition of

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See SENTENCING Burglary, (p. 548) for discussion of topic.

### Constructive probation

*Davis v. Duncil*, No. 19652 (11/9/90) (Per Curiam)

See HABEAS CORPUS Probation, (p. 272) for discussion of topic.

### Denial of

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

Appellant was convicted of feloniously obtaining controlled substances. He claimed the trial court failed to make appropriate findings regarding his eligibility for probation because he was employed as a school bus driver.

Syl. pt. 4 - “The decision of a trial court to deny probation will be overturned only when, on the facts of the case, that decision constituted a palpable abuse of discretion.” Syl. pt. 2, *State v. Shafer*, 168 W.Va. 474, 284 S.E.2d 916 (1981).

The Court noted appellant cited *State v. Nicastro*, 181 W.Va. 556, 383 S.E.2d 521 (1989) but that case applied only to delivery of less than fifteen grams of marijuana. No error.

## DUI

### Eligibility with revoked operator’s license

*State v. Morris*, 421 S.E.2d 488 (1992) (McHugh, C.J.)

See DRIVING UNDER THE INFLUENCE Sentencing, Alternative sentencing, (p. 184) for discussion of topic.

## **PROBATION**

### **Eligibility**

#### **Unlawful wounding**

*Davis v. Duncil*, No. 19652 (11/9/90) (Per Curiam)

See *HABEAS CORPUS* Probation, (p. 272) for discussion of topic.

### **Firearm**

#### **Use of prohibits**

*State v. Johnson and State v. Barber*, 419 S.E.2d 300 (1992) (Miller, J.)

See *SENTENCING* Enhancement, Notice of, (p. 551) for discussion of topic.

### **Home confinement**

*State v. Caskey*, 406 S.E.2d 717 (1991) (Brotherton, J.)

See *PROBATION* Right to, (p. 447) for discussion of topic.

### **Incarceration as condition of**

*State v. White*, 425 S.E.2d 210 (1992) (Workman, J.)

See *SENTENCING* Probation, Incarceration as condition of, (p. 558) for discussion of topic.

### **Modification hearing**

#### **Notice of to prosecuting attorney**

*State ex rel. Reed v. Douglass*, 427 S.E.2d 751 (1993) (Miller, J.)

See *PROBATION* Notice of modification hearing, Prosecuting attorney entitled to, (p. 446) for discussion of topic.

## PROBATION

### Notice of modification hearing

#### Prosecuting attorney entitled to

*State ex rel. Reed v. Douglass*, 427 S.E.2d 751 (1993) (Miller, J.)

The prosecuting attorney sought a writ of prohibition to prevent the circuit court from premature termination of Dean Ray Buckley's probation without a hearing. Mr. Buckley's sentence for sexual assault was reduced to five years probation, terms to include six months of incarceration and six months work release, among other conditions.

He sought early release by motion which was served on the prosecuting attorney. Prior to the hearing the circuit court, apparently without further notice to the prosecuting attorney, released Buckley.

Syl. pt. 1 - When a defendant moves to obtain a favorable modification of the terms of probation under Rule 32.1(b) of the West Virginia Rules of Criminal Procedure, the prosecuting attorney is entitled to reasonable notice of the motion for modification and an opportunity to be heard.

Syl. pt. 2 - "A writ of prohibition will lie where the trial court does not have jurisdiction or, having jurisdiction, exceeds its legitimate powers.' Syllabus Point 3, *State ex rel. McCartney v. Nuzum*, 161 W.Va. 740, 248 S.E.2d 318 (1978)." Syllabus Point 4, *Pries v. Watt*, 186 W.Va. 49, 410 S.E.2d 285 (1991).

The Court also cited Rule 49(a) of the *West Virginia Rules of Criminal Procedure*, which requires written motions to be served on opposing counsel. The Court noted that closing procedural gaps by court rule is common practice. *State v. Caskey*, 185 W.Va. 286, 406 S.E.2d 717 (1991); *Burns v. United States*, 501 U.S. \_\_\_, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991). Writ granted.

### Revocation

#### Hearing procedure

*State v. Harding*, 422 S.E.2d 619 (1992) (Per Curiam)

See BAIL Revocation of, Hearing required, (p. 111) for discussion of topic.

## PROBATION

### Right to

*State v. Caskey*, 406 S.E.2d 717 (1991) (Brotherton, J.)

Appellants pled to four counts of misdemeanor child neglect and was sentenced in magistrate court to four concurrent one-year terms in the county jail. They filed motion for probation in circuit court.

Syl. pt. 1 - West Virginia Code § 62-12-2(a) (1989) permits eligibility for probation where the defendant is found guilty or pleads to any misdemeanor. Moreover, West Virginia Code § 62-12-4 authorized the filing of a written petition for probation from the magistrate court “with the court of record to which an appeal would lie.”

Syl. pt. 2 - “A circuit court has the authority under *W.Va. Code*, 62-12-4 [1943] to apply to work release provisions of *W.Va. Code*, 62-11A-1 [1988] in lieu of a sentence of ordinary confinement imposed by a magistrate court in a misdemeanor case.” Syllabus Point 2, *State v. Kearns*, 183 W.Va. 130, 394 S.E.2d 532 (1990).

Syl. pt. 3 - “A circuit court has the authority under *W.Va. Code*, 62-12-4 [1943] to order electronically monitored home confinement, in a county having the equipment therefor, in lieu of incarceration imposed by a magistrate court in a misdemeanor case.” Syllabus Point 4, *State v. Kearns*, 183 W.Va. 130, 394 S.E.2d 532 (1990).

Syl. pt. 4 - A defendant who is convicted or pleads guilty in a magistrate court may request probation by filing a written petition in the circuit court. The State shall be served with a copy of the petition and shall have the right to file a response. The circuit court may grant or deny probation based on the matters contained in the petition and response or may refer the matter for a presentencing investigation in which event the applicable provisions of Rule 32(c) of the West Virginia Rules of Criminal Procedure shall apply.

The Court noted that petition may be taken from magistrate court to circuit court for any type of sentencing, including alternative sentencing and home confinement, as well as probation. Obtaining a presentence report is discretionary with the trial court. No error.

### Right to probation officer’s presentence report

*State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

See SENTENCING Presentence report, Defendant’s right to inspect, (p. 557) for discussion of topic.

## **PROBATION**

### **Statements made during discussions**

#### **Impeachment**

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See IMPEACHMENT Statements made for probation consideration, Use at trial, (p. 292) for discussion of topic.

#### **Use at trial**

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See IMPEACHMENT Statements made for probation consideration, Use at trial, (p. 292) for discussion of topic.

### **Work release**

#### **In misdemeanor**

*State v. Caskey*, 406 S.E.2d 717 (1991) (Brotherton, J.)

See PROBATION Right to, (p. 447) for discussion of topic.

## PROFESSIONAL RESPONSIBILITY

### Attorney-client relationship

*Committee on Legal Ethics v. Cometti*, 430 S.E.2d 320 (1993) (Miller, J.)

See ATTORNEYS Discipline, Attorney-client relationship, (p. 48) for discussion of topic.

## PROHIBITION

### Bail

#### Right to in sexual assault of children

*State ex rel. Spaulding v. Watt*, 423 S.E.2d 217 (1992) (Miller,)

See SEXUAL ATTACKS Bail, Right to in sexual assault, (p. 564) for discussion of topic.

### Criminal cases generally

*State ex rel. Spaulding v. Watt*, 422 S.E.2d 818 (1992) (Per Curiam)

See NEW TRIAL Newly discovered evidence, (p. 403) for discussion of topic.

### Delay of indictment

*State ex rel. Henderson v. Hey*, 424 S.E.2d 741 (1992) (Per Curiam)

See INDICTMENT Dismissal of, Undue delay, (p. 295) for discussion of topic.

### Denial of change of venue

*Lewis v. Henry*, No. 20194 (7/11/91) (Per Curiam)

See ABUSE OF DISCRETION Denial of change of venue, (p. 13) for discussion of topic.

*State ex rel. Walker v. Schlaegel*, No. 20033 (4/11/91) (Per Curiam)

See VENUE Change of venue, Abuse of discretion in not granting, (p. 609) for discussion of topic.

### Deposition

#### Compelling of

*State ex rel. Spaulding v. Watt*, 411 S.E.2d 450 (1991) (Miller, C.J.)

See DEPOSITION Basis for compelling, (p. 152) for discussion of topic.

## PROHIBITION

### Disqualification of prosecuting attorney

*Kutsch v. Broadwater*, 404 S.E.2d 249 (1991) (Per Curiam)

See PROSECUTING ATTORNEY Disqualification, (p. 471) for discussion of topic.

*State ex rel. McClanahan v. Hamilton*, 430 S.E.2d 569 (1993) (Miller, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 469) for discussion of topic.

## DUI

### Dismissal of

*State ex rel. Spaulding v. Watt*, No. 21502 (4/23/93) (Per Curiam)

See PROMPT PRESENTMENT DUI, (p. 453) for discussion of topic.

### DUI convictions

*State ex rel. Kutsch v. Wilson*, 427 S.E.2d 481 (1993) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Prior offenses in another state, (p. 183) for discussion of topic.

### Immunity promised by prosecuting attorney

*State ex rel. Friend v. Hamilton*, No. 21449 (12/16/92) (Per Curiam)

See IMMUNITY Grant by prosecuting attorney, (p. 290) for discussion of topic.

## Indictment

### Delay in bringing

*State ex rel. Henderson v. Hey*, 424 S.E.2d 741 (1992) (Per Curiam)

See INDICTMENT Dismissal of, Undue delay, (p. 295) for discussion of topic.

## PROHIBITION

### Probation

#### Notice of modification hearing required

*State ex rel. Reed v. Douglass*, 427 S.E.2d 751 (1993) (Miller, J.)

See PROBATION Notice of modification hearing, Prosecuting attorney entitled to, (p. 446) for discussion of topic.

### Prosecuting attorney

#### Presenting evidence to grand jury

*Peyatt v. Kopp*, 428 S.E.2d 535 (1993) (McHugh, J.)

See PROSECUTING ATTORNEY Prohibition, Not appropriate in grand jury proceedings, (p. 479) for discussion of topic.

### Prosecuting attorney may use

*State ex rel. Kutsch v. Wilson*, 427 S.E.2d 481 (1993) (Neely, J.)

See DRIVING UNDER THE INFLUENCE Prior offenses in another state, (p. 183) for discussion of topic.

*State ex rel. Reed v. Douglass*, 427 S.E.2d 751 (1993) (Miller, J.)

See PROBATION Notice of modification hearing, Prosecuting attorney entitled to, (p. 446) for discussion of topic.

*State ex rel. Spaulding v. Watt*, No. 21502 (4/23/93) (Per Curiam)

See PROMPT PRESENTMENT DUI, (p. 453) for discussion of topic.

*State v. Hott*, 421 S.E.2d 500 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Appeal by, Prohibition, (p. 461) for discussion of topic.

*State v. Lewis*, 422 S.E.2d 807 (1992) (Miller, J.)

See PROSECUTING ATTORNEY Appeal by, Prohibition, (p. 461) for discussion of topic.

## PROMPT PRESENTMENT

### Delay in taking before magistrate

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See RIGHT TO COUNSEL Recanting request for, (p. 502) for discussion of topic.

## DUI

*State ex rel. Spaulding v. Watt*, No. 21502 (4/23/93) (Per Curiam)

The prosecuting attorney of Putnam County sought to prohibit Judge Watt from dismissing a warrant in a criminal action. Respondent/defendant was arrested and charged with DUI. An “on call” magistrate had called just before his incarceration. Since the magistrate called prior to his incarceration, pursuant to Rule 1 of the Administrative Rules for the Magistrate Courts, a hearing was scheduled for the next day.

Appellant filed a motion to suppress the breath test and claimed he was denied a right to blood test as provided by *W.Va. Code*, 17C-5-9. Although not ruling on that issue, the circuit court dismissed the warrant on appeal, finding appellant was not promptly presented before a magistrate following arrest.

Citing *W.Va. Code*, 62-1-5, Rule 5 of the Rules of Criminal Procedure and *State v. Wickline*, 184 W.Va. 12, 399 S.E.2d 42 (1990), the Court found respondent judge acted in excess of his authority; violation of the prompt presentment rule is not cause for dismissal of charges. Writ granted.

## Generally

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 538) for discussion of topic.

## Statements made to police

### Use of for impeachment

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 217) for discussion of topic.

## PROMPT PRESENTMENT

### Statements made to police (continued)

#### Use of for impeachment (continued)

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 220) for discussion of topic.

# PROPORTIONALITY

## Appropriateness of sentence

### Recidivism

*State v. Barker*, 410 S.E.2d 712 (1991) (Per Curiam)

Appellant was sentenced to life imprisonment as an habitual criminal pursuant to *W.Va. Code*, 61-11-18. Appellant was convicted of forging and cashing a check in the amount of \$40.48. He had one previous conviction for uttering, and two separate convictions for forging and uttering. He claimed the life sentence violated proportionality principles under Article 3, § 5 of the *West Virginia Constitution*.

Syl. pt. - “The appropriateness of life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute.” Syl. pt. 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

Noting that none of the felonies were violent crimes, and that forging and uttering carries a penalty of one to ten years, the Court remanded for resentencing.

*State v. Davis*, 427 S.E.2d 754 (1993) (Per Curiam)

See PROPORTIONALITY Recidivism, (p. 460) for discussion of topic.

*State v. Housden*, 399 S.E.2d 882 (1990) (Workman, J.)

Appellant was convicted of burglary and grand larceny. His sentence was enhanced to life imprisonment based on recidivism, with a consecutive one to ten year sentence for grand larceny (see *W.Va. Code*, 61-11-18). The circuit court used a 1968 breaking and entering conviction, a 1982 grand larceny conviction and the burglary conviction for the recidivism sentence.

Defense counsel argued that the third felony was non-violent; the prosecution argued that all of the underlying felonies exhibited a potential for violence. Defense counsel also objected to the consecutive sentence for grand larceny.

## PROPORTIONALITY

### Appropriateness of sentence (continued)

#### Recidivism (continued)

##### *State v. Housden*, (continued)

Syl. pt. 1 - “Article III, Section 5 of the *West Virginia Constitution*, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the *United States Constitution*, has an express statement of the proportionality principle: ‘Penalties shall be proportioned to the character and degree of the offense.’” Syl. Pt. 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

Syl. pt. 2 - “The appropriateness of life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute.” Syl. Pt. 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

Syl. pt. 3 - A trial judge may impose sentences which run consecutively for multiple convictions rendered on the same day in which one of the convictions is subject to enhancement pursuant to *W.Va. Code*, § 61-11-19 (1943).

The Court found burglary to be a potentially violent crime. Further, grand larceny and breaking and entering are sufficient underlying offenses to justify imposition of a life sentence. *State v. Oxier*, 179 W.Va. 431, 369 S.E.2d 866 (1988); see also, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 at 428 (1980).

The Court dismissed appellant’s claim that the current convictions were not “finalized” and therefore could not be used for recidivism purposes. Only prior convictions need be finalized, not the current one. *Moore v. Coiner*, 303 F. Supp. 185 (N.D. W.Va. 1969); *State ex rel. Yokum v. Adams*, 145 W.Va. 450, 452, 114 S.E.2d 892, 895 (1960); Syl. Pt. 3, *State ex rel. Medley v. Skeen*, 138 W.Va. 409, 76 S.E.2d 146 (1953).

*Hutchinson v. Dietrich*, 183 W.Va. 25, 393 S.E.2d 663 (1990) held that only one of two simultaneous convictions could be enhanced. Reasoning that *W.Va. Code*, 61-11-21 presumes that all sentences run consecutively unless the sentence specifies otherwise, the Court found no reason to disturb the consecutive sentence here. No error.

## PROPORTIONALITY

### Appropriateness of sentence (continued)

#### Recidivism (continued)

*State v. Jones*, 420 S.E.2d 736 (1992) (Miller, J.)

Appellant was sentenced to life imprisonment pursuant to the habitual criminal statute (*W.Va. Code*, 61-11-18) following a conviction for threats to kidnap and demand ransom. Appellant's prior convictions were in 1974, 1977, 1980 and 1981. He objected to use of the 1977 conviction as too remote in time.

Syl. pt. 1 - "Habitual criminal proceedings providing for enhanced or additional punishment on proof of one or more prior convictions are wholly statutory. In such proceedings, a court has no inherent or common law power or jurisdiction. Being in derogation of the common law, such statutes are generally held to require a strict construction in favor of the prisoner.' *State ex rel. Ringer v. Boles*, 151 W.Va. 864, 871, 157 S.E.2d 554, 558 (1967)." Syllabus Point 2, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Syl. pt. 2 - In the absence of any provision in the habitual criminal or recidivist statutes, *W.Va. Code*, 61-11-18 (1943), and *W.Va. Code*, 61-11-19 (1943), the remoteness of the prior convictions sought to be used in a recidivist trial need not be considered.

Syl. pt. 3 - The primary purpose of our recidivist statutes, *W.Va. Code*, 61-11-18, and *W.Va. Code*, 61-11-19 (1943), is to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses. The statute is directed at persons who persist in criminality after having been convicted and sentenced once or twice, as the case may be, on a penitentiary offense.

Syl. pt. 4 - In the absence of a statute to the contrary, a life recidivist proceeding is not conditioned upon the State's prior utilization of the five-year recidivist enhancement provision in *W.Va. Code*, 61-11-18 (1943).

Syl. pt. 5 - "The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5 [of the *West Virginia Constitution*], will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute." Syl. Pt. 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981)." Syllabus Point 2, *State v. Housden*, 184 W.Va. 171, 399 S.E.2d 882 (1990).

## PROPORTIONALITY

### Appropriateness of sentence (continued)

#### Recidivism (continued)

##### *State v. Jones*, (continued)

Syl. pt. 7 - Where more than the statutory number of prior convictions have been proved at the recidivist trial, the excess proof is surplusage and does not affect the validity of the life recidivist conviction.

The Court noted that the crime here involved a threat of violence, even though no one was injured. Appellant had two firearms in his possession. The Court rejected appellant's objections to introduction of three prior convictions when only two were required. Identity was proven. No error.

##### *State v. Miller*, 400 S.E.2d 897 (1990) (Per Curiam)

Appellant was convicted of unlawful assault. The prosecution filed a recidivist information pursuant to *W.Va. Code*, 61-11-18 and 61-11-19 and appellant was sentenced to life. The prior felonies were a 1961 breaking and entering (appellant was a juvenile), a 1972 conviction for forgery and uttering and a 1975 conviction for false pretenses in obtaining money.

Appellant claimed on appeal that his juvenile conviction is invalid and cannot be used for enhancement purposes because the circuit court lacked jurisdiction over him.

Syl. pt. - "The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute." Syllabus Point 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

The Court found that the circuit court had jurisdiction because under the law at the time, appellant was under either juvenile jurisdiction or adult jurisdiction. However, the Court noted that none of the underlying felonies exhibited violence, and the crimes spanned twenty-five years. Even though the latest felony is scrutinized more closely, under *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981), life imprisonment is not appropriate here. Reversed.

# PROPORTIONALITY

## Generally

*State v. Housden*, 399 S.E.2d 882 (1990) (Workman, J.)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 455) for discussion of topic.

*State v. Ross*, 402 S.E.2d 248 (1990) (Per Curiam)

Appellant was convicted of attempted aggravated robbery, burglary and first-degree sexual assault and sentenced to one hundred year, one to fifteen years and one to five years, respectively, the sentences to run consecutively. He claimed on appeal that the one hundred year sentence was disproportionate pursuant to Article III, Section 5 of the *West Virginia Constitution*.

Syl. pt. 2 - "Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating *West Virginia Constitution*, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense." Syllabus point 5 of *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983).

The Court noted that the first test for a disproportionate sentence is whether it shocks the Court's conscience and that of society. If it does not, then the nature of the offense, the defendant's past history and propensity for violence must be considered.

Here, a knife was used in threatening the victim; further, aggravated robbery is a crime with a high potential for violence. Defendant himself was found to be antisocial and a substance abuser with a long history of ignoring the personal and property rights of others. No error.

## Recidivism

*State v. Barker*, 410 S.E.2d 712 (1991) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 455) for discussion of topic.

## PROPORTIONALITY

### Recidivism (continued)

*State v. Davis*, 427 S.E.2d 754 (1993) (Per Curiam)

Appellant was convicted of breaking and entering and sentenced to life in the penitentiary as a recidivist. No one was in the building at the time of the entry, there was no violence against any person and only \$10.00 was taken. On appeal he claimed the sentence is disproportionate to the crime in violation of the proportionality principle of the Eighth Amendment. Appellant's prior felonies were for receiving stolen property and a prior breaking and entering.

Syl. pt. 1 - "Article III, Section 5 of the *West Virginia Constitution*, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the *United States Constitution*, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offense.'" Syllabus point 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

Syl. pt. 2 - "The appropriateness of a life recidivist sentence under our constitution proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute." Syllabus point 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

The defendant's general propensity for violence is also an important factor to be considered. *State v. Miller*, 184 W.Va. 462, 400 S.E.2d 897 (1990). Previous cases have held that where all the felonies were non-violent crimes life sentences were inappropriate. *State ex rel. Boso v. Hedrick*, 182 W.Va. 701, 391 S.E.2d 614 (1990); *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981). Here, also the Court felt the life sentence was disproportionate; sentence set aside, case remanded for resentencing.

*State v. Housden*, 399 S.E.2d 882 (1990) (Workman, J.)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 455) for discussion of topic.

## PROSECUTING ATTORNEY

### Appeal by

#### Prohibition

*State ex rel. Spaulding v. Watt*, 422 S.E.2d 818 (1992) (Per Curiam)

See NEW TRIAL Newly discovered evidence, (p. 403) for discussion of topic.

*State v. Hott*, 421 S.E.2d 500 (1992) (Per Curiam)

Relator sought a writ of prohibition to prevent a new trial in the case of Dennis Berger. Mr. Berger was convicted of four counts of sexual assault. After the verdict, a juror admitted telling the jury panel that she knew Berger had either been convicted or accused of wife beating and child molestation; other jurors apparently said they had also heard the same matters.

The trial court scheduled a hearing and polled all jurors; although they all claimed that the statements did not influence their verdict, the judge stated he would set aside the verdict but invited the prosecution to seek a writ of prohibition.

Syl. pt. “The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court’s action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant’s right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.” Syllabus Point 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992).

Here, the Court refused to grant the writ because the trial court did not determine whether the jurors’ remarks were harmless error. The Court did not have a trial transcript on which to rule. Writ denied; trial court asked to reconsider motion for new trial.

*State v. Lewis*, 422 S.E.2d 807 (1992) (Miller, J.)

This matter involved a certification of two questions in a first-degree murder case, pursuant to *W. Va. Code*, 58-5-2 and Rule 13 of the Rules of Appellate Procedure. The trial resulted in a hung jury. The first question was whether an alleged co-defendant’s confession was properly admitted (the trial court admitted the confession); the second, assuming the confession was inadmissible, whether double jeopardy prevented a retrial.

## PROSECUTING ATTORNEY

### Appeal by (continued)

#### Prohibition (continued)

##### *State v. Lewis*, (continued)

Syl. pt. 1 - This Court will make an independent determination of whether the matters brought before it lie within its jurisdiction.

Syl. pt. 2 - “The question of certifiability of decisions of a lower court to this Court is one which goes to the jurisdiction of this Court.” Syllabus Point 2, *State v. Brown*, 159 W.Va. 438, 223 S.E.2d 193 (1976).

Syl. pt. 3 - “Our law is in accord with the general rule that the State has no right of appeal in a criminal case, except as may be conferred by the Constitution or a statute.” Syllabus Point 1, *State v. Jones*, 178 W.Va. 627, 363 S.E.2d 513 (1987).

Syl. pt. 4 - *W.Va. Code*, 58-5-2 (1967), is designed for certifying questions in civil cases. The State’s right to an appeal in a criminal case is contained in *W.Va. Code*, 58-5-30 (1923), and is confined to those cases where an indictment is held bad or insufficient by the judgment or order of the circuit court.

Syl. pt. 5 - The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court’s action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant’s right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.

The Court noted that *W.Va. Code*, 58-5-30 is the appropriate appellate route where sufficiency of an indictment is at issue; prohibition should be used only where no other adequate remedy exists and even then, may not be used where an issue of the judge’s discretion arises. Here, the record was inadequate to determine if prohibition would lie. Dismissed.

#### Right to bail in sexual assault of children

*State ex rel. Spaulding v. Watt*, 423 S.E.2d 217 (1992) (Miller,)

See SEXUAL ATTACKS Bail, Right to in sexual assault, (p. 564) for discussion of topic.

## PROSECUTING ATTORNEY

### Conduct at trial

#### Comments during closing argument

*State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

Appellant was convicted of unlawful assault. During closing argument, after stating that the victim was “certainly drunk” the prosecuting attorney said “No, he is here telling you the truth, that he didn’t know what he got hit with, but it was something more than fists.” He also said that appellant’s wife, who testified in his behalf that she hit the victim with a board, was lying (“I submit to you that [her testimony] is a fabrication.”)

Syl. pt. 4 - “It is improper for a prosecutor in this State to ‘[a]ssert his personal opinion as to the justness of a cause, as to the credibility of a witness ... or as to the guilt or innocence of the accused ...’ ABA Code DR7-106(c)(4) *in part*.” Syllabus Point 3, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).

The Court held the comments here to be reasonable inferences from the facts and not comments on the witness’ credibility. Cf. *Critzer, supra*.

*State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

See CROSS-EXAMINATION Scope of, (p. 147) for discussion of topic.

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

Appellant was convicted of acquiring a controlled substance by felonious means. At trial he testified that he was taking pain medication while employed as a school bus driver. The prosecuting attorney, during closing argument, alleged that the State of West Virginia was victimized because of appellant’s responsibility for transporting school children.

Appellant claimed the trial court erred in not granting a mistrial because of the prejudicial effect.

Syl. pt. 3 - “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.” Syl. pt. 5 *State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982).

No error.

## PROSECUTING ATTORNEY

### Conduct at trial (continued)

#### Comments during closing argument (continued)

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

Appellant was convicted of issuing a worthless check in exchange for “property or a thing of value.” During closing argument the prosecution referred to appellant’s knowing the law regarding worthless checks. Appellant claimed that this reference was clearly to prior acts, placing appellant’s character at issue in violation of Rule 404(a)(1) of the *West Virginia Rules of Evidence*.

Syl. pt. 7 - “Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury.” Syl. pt. 2, *State v. Kennedy*, 162 W.Va. 244, 249 S.E.2d 188 (1978).

Syl. pt. 8 - “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.” Syl. pt. 5, *State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982).

The remarks here referred to a civil suit brought against appellant for non-payment. No error.

*State v. Leadingham*, 438 S.E.2d 825 (1993) (McHugh, J.)

Appellant was convicted of intimidation of judicial officers and witnesses, obstruction of justice, conspiracy to obstruct justice, conspiracy to commit first-degree murder, reckless driving and threatening phone calls. During closing argument the prosecuting attorney said:

The proof in this case leaves no doubt that this defendant has engaged in a course and conduct that destroys the system. No one’s dead, but you can kill it. And you can kill it by a verdict of not guilty or you can save it. And you can tell Mrs. Leadingham and every other victim in this case they were right when we asked them to trust us and we would protect them; or you can let everyone know they were wrong to trust us and we can’t protect them.

## PROSECUTING ATTORNEY

### Conduct at trial (continued)

#### Comments during closing argument (continued)

##### *State v. Leadingham*, (continued)

Syl. pt. 1 - “A defendant cannot waive his state and federal constitutional privileges against self-incrimination and rights to assistance of counsel at court-appointed pre-trial psychiatric examinations except upon advice of counsel.” Syl. pt. 3, *State v. Jackson*, 171 W.Va. 329, 298 S.E.2d 866 (1982).

Syl. pt. 2 - Under the Fourteenth Amendment of the *United States Constitution* and article III, § 10 of the *West Virginia Constitution*, due process and fundamental fairness dictate that the police and the prosecuting attorney be precluded from using an undercover informant to penetrate the clinical environment of a psychiatric institution in order to elicit incriminating statements from a defendant who is undergoing a court-ordered psychiatric evaluation. Any incriminating statements elicited from a defendant under these circumstances, upon proper motion by the defendant, shall be suppressed in the trial on the criminal charges to which the incriminating statements relate.

Syl. pt. 3 - “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.” Syl. pt. 5, *State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982).” Syl. pt. 8, *State v. Hays*, 185 W.Va. 664, 408 S.E.2d 614 (1991).

In light of a curative instruction telling the jury they alone were to decide the case, the Court did not find error. (The Court did caution that the prosecuting attorney is a quasi-judicial officer and must “set a tone of fairness and impartiality.” Syl. pt. 1, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).

##### *State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

Appellant was convicted of grand larceny (See GRAND LARCENY Sufficiency of evidence, (p. 264)). He complained on appeal that the prosecuting attorney improperly commented on appellant’s pretrial silence and misstated the evidence.

Syl. pt. 7 - “It is improper for a prosecutor in this State to ‘[a]ssert his personal opinion as to the justness of a cause, as to the credibility of a witness ... or as to the guilt or innocence of the accused ....’ ABA Code DR7-106(C)(4) *in part*.” Syl. pt. 3, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).

## PROSECUTING ATTORNEY

### Conduct at trial (continued)

#### Comments during closing argument (continued)

##### *State v. Petrice*, (continued)

The prosecuting attorney remarked on statements made by appellant to a police officer after receiving his *Miranda* warnings. No misstatements of evidence were quoted. In closing argument the prosecutor did say “I’m telling you the defendant wasn’t truthful to you.” Although recognizing the impropriety of the comment, the Court affirmed.

##### *State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

Appellant was convicted of possession of marijuana with intent to deliver. After appellant’s arrest, a friend wrote to the judge saying the marijuana belonged to him, not to appellant. During closing argument the prosecuting attorney commented that appellant would tell a subsequent jury at his friend’s trial that the marijuana belonged to appellant.

Syl. pt. 3 - “A prosecutor may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inference it may draw.” Syllabus point 7, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

Noting the prosecuting attorney has a duty to be fair and impartial, the Court found the prosecuting attorney improperly inserted his personal opinion into his argument. See *England, supra*, at 351.

##### *State v. Stewart*, 419 S.E.2d 683 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Duty, Generally, (p. 473) for discussion of topic.

### Questioning witnesses

##### *State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

See EVIDENCE Surviving spouse, (p. 247) for discussion of topic.

## PROSECUTING ATTORNEY

### Confessing error

#### Effect of

*State v. Walter*, 423 S.E.2d 222 (1992) (Per Curiam)

See CONFESSION OF ERROR Effect of, (p. 127) for discussion of topic.

### Conflict of interest

*Bayles v. Hedrick*, 422 S.E.2d 524 (1992) (Per Curiam)

This *habeas corpus* petition presented two certified questions: whether the prosecuting attorney's entire office was disqualified because both he and one of his assistants were formerly employed by the firm representing petitioner; and whether petitioner's appointed counsel is disqualified because of her former employment in the prosecuting attorney's office.

Syl. pt. - "Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question." Syllabus Point 1, *Nicholas v. Sammons*, 178 W.Va. 631, 363 S.E.2d 516 (1987).

Quoting Syllabus Point 5 of *State v. Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974), the Court noted a prosecuting attorney has a duty to recuse himself if he gains some "unfair advantage," even if the advantage is gained gratuitously or in good faith. (See also, *State ex rel. Moran v. Ziegler*, 161 W.Va. 609, 244 S.E.2d 550 (1978); attorney initially contacted by defendant he ultimately prosecuted as private prosecutor; appearance of conflict demanded disqualification.)

Here, the timing of employment was such that neither the prosecuting attorney or his assistant were employed at the time the firm represented petitioner. Although both examined petitioner's files while working on other cases, these files were a matter of public record. Petitioner's current counsel, although employed at one time in the prosecuting attorney's office, never even looked at petitioner's file. No conflict.

## PROSECUTING ATTORNEY

### Conflict of interest (continued)

*State ex rel. Bailey v. Facemire*, 413 S.E.2d 183 (1991) (Workman, J.)  
and  
*Justice v. Thompson*, 413 S.E.2d 183 (1991) (Workman, J.)

Petitioners sought writs of mandamus, claiming that part-time prosecuting attorneys should be prohibited from representing persons in divorce or child custody cases where charges may be brought relating to domestic violence, child support or similar matters. The cases consolidated herein related to domestic violence petitions filed by the woman and divorce petitions wherein the prosecuting attorney represented the man.

Syl. pt. 1 - A prosecuting attorney is required to withdraw from representing a private client in a domestic proceeding in the event the attorney identifies a potential or actual conflict of interest between his/her duties owed to the state and the interests of the private client.

Syl. pt. 2 - A prosecuting attorney is required to use reasonable efforts to investigate whether conflicts of interest either are present or have the potential of arising prior to undertaking representation of private clients in domestic proceedings. "Reasonable effort" entails a review of pertinent records in the prosecuting attorney's office and other court records to ascertain whether a party to the subject or prospective litigation has filed a petition pursuant to the Prevention of Domestic Violence Act, *W.Va. Code*, §§ 48-2A-1 to -11 (Supp. 1991), a petition alleging failure to pay child support, or has initiated any other civil or criminal proceeding which has the potential of involving the prosecutor's office for enforcement purposes.

Syl. pt. 3 - In the event a prosecuting attorney agrees to represent a private client in a domestic proceeding and no conflict of interest is apparent but subsequently arises, the prosecuting attorney must seek appointment of a special prosecuting attorney and remove himself from the case in all respects.

The Court noted that violation of a protective order pursuant to *W.Va. Code*, 48-2A-11 can result in criminal penalties. The conflicts here are inevitable. Writs granted.

*State ex rel. McClanahan v. Hamilton*, 430 S.E.2d 569 (1993) (Miller, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 469) for discussion of topic.

## PROSECUTING ATTORNEY

### Conflict of interest (continued)

*State ex rel. McClanahan v. Hamilton*, 430 S.E.2d 569 (1993) (Miller, J.)

Relator sought to prohibit respondent judge from proceeding in an action for malicious assault of her husband until the prosecuting attorney was disqualified. He previously represented relator in a divorce, during which relator claimed she divulged confidential information regarding her husband's abusive conduct. The couple reconciled and the action was dismissed.

Syl. pt. 1 - "Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question." Syllabus Point 1, *Nicholas v. Sammons*, 178 W.Va. 631, 363 S.E.2d 516 (1987).

Syl. pt. 2 - Rule 1.9(a) of the Rules of Professional Conduct, precludes an attorney who has formerly represented a client in a matter from representing another person in the same or a substantially related matter that is materially adverse to the interests of the former client unless the former client consents after consultation.

Syl. pt. 3 - Under Rule 1.9(a) of the Rules of Professional Conduct, determining whether an attorney's current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations.

Syl. pt. 4 - Once a former client establishes that the attorney is representing another party in a substantially related matter, the former client need not demonstrate that he divulged confidential information to the attorney as this will be presumed.

Syl. pt. 5 - Rule 1.9(a) of the Rules of Professional Conduct recognizes that even though an attorney may have a conflict of interest with regard to a former client, the attorney may continue the representation if the former client, after consultation, consents to the representation. During this consultation, the attorney must make a full disclosure to the former client so that an intelligent decision may be made on the consent.

## PROSECUTING ATTORNEY

### Conflict of interest (continued)

#### *State ex rel. McClanahan v. Hamilton*, (continued)

Syl. pt. 6 - “In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, the Court will look to the adequacy of other available remedies such as appeal and to the overall economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clearcut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” Syllabus Point 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

Relator’s defense of battered wife syndrome was directly related to the confidential information disclosed in her prior divorce action. Because the prosecutor would now be forced to discredit that claim his current interest is clearly adverse. Writ granted.

#### *State v. James R.*, 422 S.E.2d 521 (1992) (Brotherton, J.)

The trial court disqualified the prosecuting attorney’s office from pursuing criminal sexual abuse charges against the same defendant against whom it had brought civil abuse and neglect charges for abuse to the same minors, defendant’s children. The prosecution appealed.

Syl. pt. 1 - “Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant’s interest in regard to the pending criminal charges. A second category is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question.” Syllabus point 1, *Nicholas v. Sammons*, 178 W.Va. 631, 363 S.E.2d 516 (1987).

Syl. pt. 2 - “As the primary responsibility of a prosecuting attorney is to seek justice, his affirmative duty to an accused is fairness.” Syllabus point 2, *State v. Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974).

Syl. pt. 3 - No evidence that is acquire from a parent or any other person having custody of a child, as a result of medical or mental examinations performed in the course of civil abuse and neglect proceedings, may be used in any subsequent criminal proceedings against such person. *W.Va. Code*, § 49-6-4(a) (1992).

## PROSECUTING ATTORNEY

### Conflict of interest (continued)

#### *State v. James R.*, (continued)

The Court recognized that the prosecution's duty to ensure the children's safety (*i.e.*, pursue the civil charges) did not conflict with its duty to pursue criminal charges. The prosecutor here had neither a personal interest nor an attorney-client relationship with any of the parties. No conflict. Reversed and remanded.

### Disqualification

#### *Kutsch v. Broadwater*, 404 S.E.2d 249 (1991) (Per Curiam)

Relator, prosecuting attorney of Ohio County, sought a writ of prohibition to prevent recusal of the prosecutor's office and appointment of a special prosecutor in a criminal action. The defendant, Melvin Green, was indicted for malicious assault at a Convenient Food Mart. The prosecuting attorney moved to dismiss and Mr. Green was later reindicted.

Just prior to the reindictment Anthony I. Werner became a part-time assistant prosecuting attorney. Although, Mr. Werner did not participate in the criminal case, he was attorney of record in a civil suit against Convenient Food Mart for injuries arising out of the same incident which resulted in the malicious assault charges. Mr. Green, the defendant, was later joined in a third-party complaint filed by another law firm. No one in the second law firm worked as an assistant prosecuting attorney.

Prior to further action in the criminal case, Mr. Werner resigned from the prosecuting attorney's office.

Syl. pt. - "Under circumstances where it can reasonably be inferred that the prosecuting attorney has an interest in the outcome of a criminal prosecution beyond ordinary dedication to his duty to see that justice is done, the prosecuting attorney should be disqualified from prosecuting the case ... ." Syl. pt. 4, in part, *State v. Knight*, 168 W.Va. 615, 285 S.E.2d 401 (1981)", Syllabus Point 4, *State v. Pennington*, 179 W.Va. 139, 365 S.E.2d 803 (1987).

The Court found no conflict here because of Mr. Werner's resignation. Writ granted.

## PROSECUTING ATTORNEY

### Disqualification (continued)

#### Conflict of interest

*Bayles v. Hedrick*, 422 S.E.2d 524 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Conflict of interest, (p. 467) for discussion of topic.

*State ex rel. McClanahan v. Hamilton*, 430 S.E.2d 569 (1993) (Miller, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 469) for discussion of topic.

*State v. James R.*, 422 S.E.2d 521 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 470) for discussion of topic.

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See PROSECUTING ATTORNEY Disqualification, Reasons to appear on record, (p. 472) for discussion of topic.

#### Effect on indictment

*State ex rel. Knotts v. Watt*, 413 S.E.2d 173 (1991) (Miller, C.J.)

See INDICTMENT Dismissal of, Prosecuting attorney disqualified, (p. 294) for discussion of topic.

#### Reasons to appear on record

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

Appellant was convicted of grand larceny. A special prosecutor was appointed when it was discovered that an assistant prosecutor represented appellant's business partner. The private prosecutor appointed appeared before the grand jury. Although that indictment was dismissed *Kerns v. Wolverson*, 181 W.Va. 143, 381 S.E.2d 258 (1989), the same private prosecutor pursued the subsequent reenlistment.

## PROSECUTING ATTORNEY

### Disqualification (continued)

#### Reasons to appear on record (continued)

##### *State v. Kerns*, (continued)

Syl. pt. 7 - “Before a prosecuting attorney may be disqualified from acting in a particular case and relieved of the duties imposed upon him by the Constitution and by statute, the reasons for his disqualification must appear on the record, and where there is any factual question as to the propriety of the prosecutor acting in the matter, he must be afforded notice and an opportunity to be heard.” Syl. pt. 3, *State ex rel. Preissler v. Dostert*, 163 W.Va. 719, 260 S.E.2d 279 (1979).

Syl. pt. 8 - Where a special prosecutor is appointed to try a criminal case due to a conflict, and the case is dismissed without prejudice, but the defendant is reindicted on the same charges, it is not error for a trial court to deny a motion to remove the special prosecutor if it is shown that the conflict which led to the original removal of the regular prosecutor still exists.

The impediment still existed here according to testimony on the record. No error.

### Duty

#### Generally

##### *State v. Stewart*, 419 S.E.2d 683 (1992) (Per Curiam)

Appellant was convicted of first-degree murder. He claimed that remarks made by the prosecution were improper. Primarily, he objected to the prosecution’s calling an witness unfavorable to the defense the “most qualified person” in the state without specific qualifications; to the prosecution’s description of the grand jury process; to the closing argument statement that “he is guilty beyond a reasonable doubt of murder in the first-degree, you have to decide whether to give him mercy;” and to the closing statement, “please do not ask (appellant’s stepdaughter, whom he shot at) to live the rest of her life at the discretion of the parole board, worrying that he may get out someday.”

Syl. pt. 1 - “The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor’s duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State’s case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.” Syllabus point 3, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

## PROSECUTING ATTORNEY

### Duty (continued)

#### Generally (continued)

##### *State v. Stewart*, (continued)

Syl. pt. 2 - “Error in the admission of testimony to which no objection was made will not be considered by this Court on appeal or writ of error, but will be treated as waived.” Syl. Pt. 4, *State v. Michael*, 141 W.Va. 1, 87 S.E.2d 595 (1955).” Syllabus point 7, *State v. Davis*, 176 W.Va. 454, 345 S.E.2d 549 (1986).

Syl. pt. 3 - “In the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the *West Virginia Constitution* and the Sixth Amendment to the *United States Constitution*, courts should measure and compare the questioned counsel’s performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case, will be regarded as harmless error.” Syllabus point 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 4 - “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 attorney would have so acted in the defense of an accused.” Syllabus point 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The Court found the prosecution’s comments acceptable in light of the evidence, especially in light of trial counsel’s failure to object to the comments. That failure to object was held not to be tantamount to ineffective assistance of counsel. No error.

#### To be fair

*State v. James R.*, 422 S.E.2d 521 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 470) for discussion of topic.

#### To document test wherein evidence destroyed

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

See SCIENTIFIC TESTS Evidence destroyed, Duty to make record, (p. 518) for discussion of topic.

## PROSECUTING ATTORNEY

### Exculpatory evidence

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

See SCIENTIFIC TESTS Evidence destroyed, Duty to make record, (p. 518) for discussion of topic.

### Failure to disclose

*State v. Ward*, 424 S.E.2d 725 (1991) (Workman, J.)

See EVIDENCE Exculpatory, Failure to disclose, (p. 234) for discussion of topic.

### Failure to disclose

#### Demonstrative evidence

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See EVIDENCE Admissibility, Generally, (p. 211) for discussion of topic.

### Evidence available to prosecutor

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

Appellant was convicted of grand larceny. At trial the state's primary witness disclosed that a private investigator was hired by the victim; and that the witness had signed a written statement made by the investigator. Appellant's motion to produce the statement pursuant to *W.Va.R.Crim.P.* 26.2 was denied, the state claiming that it never had the statement and was thus not required to produce it.

Appellant claimed that the investigator worked for the prosecution.

Syl. pt. 4 - "Under the 'in possession of' language of Rule 26.2(f) of the West Virginia Rules of Criminal Procedure, a prosecutor is required to disclose statements to which he has access even though he does not have the present physical possession of the statements." Syl. pt. 5, *State v. Watson*, 173 W.Va. 553, 318 S.E.2d 603 (1984).

Here, the statement was clearly taken during a private investigation, prior to criminal charges. Although the investigator was eventually hired by the special prosecutor, the testimony and statement here related only to the private work; the state did not have access to the statement at the time of trial. No error.

## PROSECUTING ATTORNEY

### Failure to disclose (continued)

#### Exculpatory evidence

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See DISCOVERY Failure to disclose, Exculpatory evidence, (p. 160) for discussion of topic.

*State v. Ward*, 424 S.E.2d 725 (1991) (Workman, J.)

See EVIDENCE Exculpatory, Failure to disclose, (p. 234) for discussion of topic.

*State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

Appellant was convicted of malicious wounding, attempted murder and first-degree murder. On appeal he claimed that the prosecution withheld witness statements containing exculpatory evidence until after the witnesses testified on direct examination. The trial court refused defense counsel's motion for discovery of all witness statements. The prosecution said that under Rule 26.2 of the *Rules of Criminal Procedure* the statements are not required until after direct examination.

Syl. pt. 1 - "After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the State or the defendant and his attorney, as the case may be, to produce for the examination and use of the moving party any statement of the witness that is in their possession that relates to the subject matter concerning which the witness has testified." Rule 26.2, West Virginia Rules of Criminal Procedure." Syllabus point 1, *State v. Tanner*, 175 W.Va. 264, 332 S.E.2d 277 (1985).

Syl. pt. 2 - "A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the *West Virginia Constitution*." Syllabus point 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

Syl. pt. 3 - "When a trial court grants a pretrial discovery motion requiring the prosecution to disclose evidence in its possession, non-disclosure by the prosecution is fatal to its case where such non-disclosure is prejudicial. The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syllabus point 2, *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980).

## PROSECUTING ATTORNEY

### Failure to disclose (continued)

#### Exculpatory evidence (continued)

##### *State v. Wheeler*, (continued)

The Court agreed that Rule 26.2 does not require pre-trial disclosure of witness' statements. Further, the Court found the evidence in the statements not exculpatory, nor the timing of the disclosure of the statements prejudicial. No error.

#### Inducements to witness

##### *State v. James*, 411 S.E.2d 692 (1991) (Neely, J.)

See EVIDENCE Exculpatory, Duty to disclose, (p. 232) for discussion of topic.

#### Informant

##### *State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

See DISCOVERY Failure to disclose, Informants, (p. 160) for discussion of topic.

#### Tape recording

##### *State v. Miller*, 400 S.E.2d 897 (1990) (Per Curiam)

See EVIDENCE Exculpatory, Duty to disclose, (p. 233) for discussion of topic.

#### When prejudicial

##### *State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

See DISCOVERY Failure to disclose, Late-discovered evidence, (p. 161) for discussion of topic.

#### Fairness to accused

##### *State v. James R.*, 422 S.E.2d 521 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 470) for discussion of topic.

## PROSECUTING ATTORNEY

### Grand jury

#### Evidence presented to

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See INDICTMENT Dismissal of, Generally, (p. 293) for discussion of topic.

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

Appellant was convicted of first-degree murder. On appeal he claimed that the prosecuting attorney impermissibly instructed the grand jury by explaining the difference between premeditation and deliberation.

Syl. pt. 5 - “A prosecuting attorney can only appear before the grand jury to present by sworn witnesses evidence of alleged criminal offenses, and to render court supervised instructions, *W.Va. Code*, § 7-4-1 (1976 Replacement Vol.); he is not permitted to influence the grand jury in reaching a decision, nor can he provide unsworn testimonial evidence.” Syl. Pt. 2, *State ex rel. Miller v. Smith*, 168 W.Va. 745, 285 S.E.2d 500 (1981).

Syl. pt. 6 - “A prosecuting attorney who attempts to influence a grand jury by means other than the presentation of evidence or the giving of court supervised instructions, exceeds his lawful jurisdiction and usurps the judicial power of the circuit court and of the grand jury. . . .” Syl. Pt. 3, in part, *State ex rel. Miller v. Smith*, 168 W.Va. 745, 285 S.E.2d 500 (1981).

The prosecuting attorney was merely repeating the trial court’s instructions. No error.

#### Influencing

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See PROSECUTING ATTORNEY Grand jury, Evidence presented to, (p. 478) for discussion of topic.

### Immunity

#### Promised by prosecuting attorney

*State ex rel. Friend v. Hamilton*, No. 21449 (12/16/92) (Per Curiam)

See IMMUNITY Grant by prosecuting attorney, (p. 290) for discussion of topic.

## PROSECUTING ATTORNEY

### Judges

#### Record required when attorney becomes judge

*State ex rel. Redman v. Hedrick*, 408 S.E.2d 659 (1991) (McHugh, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 305) for discussion of topic.

### Misstating evidence

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments made during closing argument, (p. 466) for discussion of topic.

### Personal opinion

#### Forbidden during argument

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See PROSECUTING ATTORNEY Conduct at trial, Comments made during closing argument, (p. 466) for discussion of topic.

### Prohibition

#### DUI

*State ex rel. Spaulding v. Watt*, No. 21502 (4/23/93) (Per Curiam)

See PROMPT PRESENTMENT DUI, (p. 453) for discussion of topic.

#### Not appropriate in grand jury proceedings

*Peyatt v. Kopp*, 428 S.E.2d 535 (1993) (McHugh, J.)

Appellant was charged with sexual abuse. The court granted defense counsel's petition for writ of prohibition to prevent the case from going to the grand jury until counsel could obtain a second preliminary hearing. The prosecution argued that he performs an executive function in appearing before the grand jury and is thus not subject to writ of prohibition.

## PROSECUTING ATTORNEY

### Prohibition (continued)

#### Not appropriate in grand jury proceedings (continued)

##### *Peyatt v. Kopp*, (continued)

Syl. pt. 2 - Prohibition does not lie against a prosecuting attorney to restrain him from presenting a case to a grand jury where the prosecuting attorney, in performing his statutory duties, has probable cause to believe that a criminal offense has been committed and that the defendant committed the offense.

The Court noted that the prosecuting attorney is subject to the writ when he is usurping judicial power. However, the prosecuting attorney has a duty to bring an action when he has probable cause to believe a crime is created. See *State ex rel. Ginsberg v. Naum*, 173 W.Va. 510, 318 S.E.2d 454 (1984); *State ex rel. Hamstead v. Dostert*, 173 W.Va. 133, 313 S.E.2d 409 (1984); and *State ex rel. Skinner v. Dostert*, 166 W.Va. 743, 278 S.E.2d 624 (1981). Because this duty is not quasi-judicial in nature, it is improper to allow writ of prohibition. Reversed and remanded.

#### When prosecutor may seek

*State ex rel. Spaulding v. Watt*, 422 S.E.2d 818 (1992) (Per Curiam)

See NEW TRIAL Newly discovered evidence, (p. 403) for discussion of topic.

*State v. Hott*, 421 S.E.2d 500 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Appeal by, Prohibition, (p. 461) for discussion of topic.

#### Quasi-judicial role

*State v. Stewart*, 419 S.E.2d 683 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Duty, Generally, (p. 473) for discussion of topic.

## **PROSECUTING ATTORNEY**

### **Special prosecutor**

#### **Fees for**

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See PROBATION Conditions of, Special prosecutor fees, (p. 443) for discussion of topic.

### **Witness for defense**

*State ex rel. Karr v. McCarty*, 417 S.E.2d 120 (1992) (Per Curiam)

See ATTORNEYS Discipline, Lawyer as witness, (p. 79) for discussion of topic.

### Right to

*State v. Hatfield*, 413 S.E.2d 162 (1991) (McHugh, J.)

See COMPETENCY Suicide attempt, Effect of, (p. 122) for discussion of topic.

### Self-Incrimination

#### Waiver during examination

*State v. Leadingham*, 438 S.E.2d 825 (1993) (McHugh, J.)

Appellant was convicted of intimidation of judicial officers and witnesses, obstruction of justice, conspiracy to obstruct justice, conspiracy to commit first-degree murder, reckless driving and threatening phone calls. While confined, he met another inmate, Walter Farris, and allegedly told Farris he wanted his wife killed.

Farris ultimately agreed to wear a recording device while visiting appellant at Weston State hospital, where he was confined for evaluation. Although the recording device was confiscated by hospital officials, Farris testified at trial that appellant told him he wanted him to kill his wife's attorney.

Syl. pt. 1 - "A defendant cannot waive his state and federal constitutional privileges against self-incrimination and rights to assistance of counsel at court-appointed Pre-trial psychiatric examinations except upon advice of counsel." Syl. pt. 3, *State v. Jackson*, 171 W.Va. 329, 298 S.E.2d 866 (1982).

Syl. pt. 2 - Under the Fourteenth Amendment of the *United States Constitution* and article III, § 10 of the *West Virginia Constitution*, due process and fundamental fairness dictate that the police and the prosecuting attorney be precluded from using an undercover informant to penetrate the clinical environment of a psychiatric institution in order to elicit incriminating statements from a defendant who is undergoing a court-ordered psychiatric evaluation. Any incriminating statements elicited from a defendant under these circumstances, upon proper motion by the defendant, shall be suppressed in the trial on the criminal charges to which the incriminating statements relate.

In deciding whether to admit statements elicited by an undercover agent, the Court directed consideration of (1) whether the police have intentionally created a situation to induce an incriminating statement made without assistance of counsel; (2) whether the statements relate to an offense for which the right to counsel attaches; (3) whether police or prosecutors have knowingly elicited incriminating statements without counsel; and (4) whether police or undercover agents have solicited incriminating statements.

## PSYCHOLOGICAL/PSYCHIATRIC EVALUATION

### **Self-Incrimination** (continued)

#### **Waiver during examination** (continued)

##### *State v. Leadingham*, (continued)

The Court noted that pre-trial evaluations are a “critical stage” of prosecution, requiring all constitutional protections. Reversed and remanded.

## PUBLIC EMPLOYMENT

### Defined

*State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

See ENTRAPMENT Grounds for, (p. 192) for discussion of topic.

## **PUBLIC OFFICER**

### **Defined**

*State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

See ENTRAPMENT Grounds for, (p. 192) for discussion of topic.

## **PUBLIC RECORDS**

### **Officer in charge of defined**

*State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

See ENTRAPMENT Grounds for, (p. 192) for discussion of topic.

## RECIDIVISM

### Sentencing

*Gibson v. Legursky*, 415 S.E.2d 457 (1992) (Miller, J.)

See DOUBLE JEOPARDY Recidivism, (p. 176) for discussion of topic.

*State v. Davis*, 427 S.E.2d 754 (1993) (Per Curiam)

See PROPORTIONALITY Recidivism, (p. 460) for discussion of topic.

*State v. Housden*, 399 S.E.2d 882 (1990) (Workman, J.)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 455) for discussion of topic.

*State v. Jones*, 420 S.E.2d 736 (1992) (Miller, J.)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 457) for discussion of topic.

## RECORDS

### Officer in charge

#### Define

*State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

See ENTRAPMENT Grounds for, (p. 192) for discussion of topic.

## REGIONAL JAIL AUTHORITY

### Rules governing jails

*Kincaid v. Mangum*, 432 S.E.2d 74 (1993) (McHugh, J.)

See PRISON/JAIL CONDITIONS Overcrowding and rules for exercise, Promulgation of rules regarding, (p. 435) for discussion of topic.

## ***RES JUDICATA***

### **Paternity determination**

*State ex rel. Stump v. Cline*, 406 S.E.2d 749 (1991) (Per Curiam)

See PATERNITY When prior determination is *res judicata*, (p. 412) for discussion of topic.

## RESTRAINTS

### Right to be free of at trial

*State v. Holliday*, 424 S.E.2d 248 (1992) (Per Curiam)

Appellant was convicted of aggravated robbery. The trial court forced her to wear shackles and refused to grant an evidentiary hearing on whether the shackles were necessary. Apparently appellant had been involved in an altercation at the jail; the prosecution was indifferent as to whether shackles were used.

The trial judge did conduct a “hearing” consisting of a discussion between the judge, counsel and the court bailiff. Although the judge noted that the shackles would not be visible to the jury, the shackles were brought to the jury’s attention.

Syl. pt. - “A criminal defendant has the right, absent some necessity relating to courtroom security or order, to be tried free of physical restraints.” Syllabus point 3, *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979).

The Court noted that a true hearing was not conducted on whether it was necessary for appellant to be shackled. Remanded with directions to hold an evidentiary hearing for that purpose; new trial denied unless the trial court finds that shackles should not have been used.

## RIGHT TO APPEAL

### Constitutional right

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See also, *Frank Billotti v. A.V. Dodrill*, 183 W.Va. 48, 394 S.E.2d 32 (1990), Volume IV of the Criminal Law Digest, (p. 487) for discussion of topic.

### Generally

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

Appellant was convicted of drug violations. The circuit court denied appellant's motion for resentencing and enlargement of time so as to file an appeal. Her attorney failed to file a petition for writ of certiorari after filing notice of intent to appeal. Appellant asserts that failure constitutes good cause for enlargement of time pursuant to *W.Va. Code*, 58-5-4 and Rules 3 and 16 of the Rules of Appellate Procedure.

Appellee argued appellant waived her right to appeal by absconding from the state. Appellee claimed the reason the appeal was not taken was appellant's escape from custody.

Syl. pt. 1 - "Through the interpretation of Article III, § 10 and Article III, § 17 of the *Constitution of West Virginia*, this Court has recognized a constitutional right to petition for appeal in criminal cases and has also 'constitutionalized' the criminal defendant's right to receive a free transcript, appointed counsel, and the effective assistance of counsel in appellate proceedings." Syl. Pt. 3, *Billotti v. Dodrill*, 183 W.Va. 48, 394 S.E.2d 32 (1990).

Syl. pt. 2 - "West Virginia does not grant a criminal defendant a first appeal of right, either statutorily or constitutionally." Syl. Pt. 4, in part, *Billotti v. Dodrill*, 183 W.Va. 48, 394 S.E.2d 32 (1990).

Syl. pt. 3 - "A prisoner convicted of felony obtains a writ of error, and he then escapes from jail and is still at large. In such case the appellate court will order, that the writ of error be dismissed by a certain day, unless it shall be made to appear to the court before that day, that the plaintiff in error is in custody of the proper officer of the law." Syllabus, *State v. Conners*, 20 W.Va. 1 (1882).

Syl. pt. 4 - A criminal defendant does not present good cause for granting a motion for resentencing and an enlargement of time for filing an appeal where the reason for the defendant's failure to prosecute the original appeal was that the defendant voluntarily absconded from the State's custody and remained at large throughout the duration of the statutorily prescribed appeal period.

## RIGHT TO APPEAL

### Constitutional right (continued)

#### Generally (continued)

##### *State v. Rogers*, (continued)

Despite the “constitutionalizing” of the right to petition for appeal, the Court noted that it does not acquire jurisdiction unless a petition is timely filed (within four months of conviction). *State v. Legg*, 151 W.Va. 401, 151 S.E.2d 215 (1966). More importantly, the Court refused to consider an appeal when a defendant is a fugitive. No error.

#### Right to counsel

##### *Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

Petitioner was found guilty of first-degree murder and sentenced to life without mercy. After attempting suicide, he confessed to both his cousin and to medical personnel that he had killed his wife and two daughters. At trial, three psychiatrists testified that appellant did not appreciate the wrongfulness of his acts at the time of the killings. Petitioner testified he had taken amphetamines and smoked marijuana daily; and described his paranoid behavior the day of the killings.

Petitioner applied unsuccessfully for writ of *habeas corpus* in 1985 and 1986 and was refused an appeal in federal district court. In 1987 petitioner again filed for writ of *habeas corpus* and an omnibus hearing was held; that petition was dismissed in 1988. This petition was from the 1988 dismissal, again asking for *habeas corpus* relief. The issue was whether petitioner is entitled by due process to an automatic right to appeal a conviction of first-degree murder and sentence of life without mercy.

Syl. pt. 1 - “One convicted of a crime is entitled to the right to appeal that conviction and where he is denied his right to appeal such denial constitutes a violation of due process clauses of the state and federal constitutions and renders any sentence imposed by reason of the conviction void and unenforceable.” Syllabus, *State ex rel. Bratcher v. Cooke*, 155 W.Va. 850, 188 S.E.2d 769 (1972).

Syl. pt. 2 - “In the enactment of a statute, the Legislature is presumed not to enact a statute which is violative of any of the provisions of the *Constitution of the United States* or the *Constitution of West Virginia*.” Syllabus point 2, *Linger v. Jennings*, 143 W.Va. 57, 99 S.E.2d 740 (1957).

## RIGHT TO APPEAL

### Constitutional right (continued)

#### Right to counsel (continued)

##### *Billotti v. Dodrill*, (continued)

Syl. pt. 3 - Through the interpretation of Article III, § 10 and Article III, § 17 of the *Constitution of West Virginia* this Court has recognized a constitutional right to petition for appeal in criminal cases and has also “constitutionalized” the criminal defendant’s right to receive a free transcript, appointed counsel, and the effective assistance of counsel in appellate proceedings.

Syl. pt. 4 - West Virginia does not grant a criminal defendant a first appeal of right, either statutorily or constitutionally. However, our discretionary procedure of either granting or denying a final full appellate review of a conviction does not violate a criminal defendant’s guarantee of due process and equal protection of the law.

Syl. pt. 5 - “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.” Syllabus point 4, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979).

The Court noted that the right to a transcript had already been established. *State ex rel. Johnson v. McKenzie*, 159 W.Va. 795, 226 S.E.2d 721 (1976); and that the right to an appeal cannot be affected by counsel’s or defendant’s delay or inaction. *Rhodes v. Leverette*, 160 W.Va. 781, 239 S.E.2d 136 (1977).

The Court distinguished between a right to petition for appeal and a right to full review, holding that West Virginia has the former but not the latter. No constitutional provision requires a right to full appellate review. No error.

The Court rejected petitioner’s argument that his sentence was unconstitutional without appellate review; and also rejected petitioner’s objection to the instruction given on intent (see *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982)).

#### Waiver in plea bargain

*State ex rel. Phillips v. Boggess*, 416 S.E.2d 270 (1992) (McHugh, C.J.)

See PLEA BARGAINS Setting aside, Right to transcript unaffected, (p. 420) for discussion of topic.

## RIGHT TO APPEAL

### Waiver of

*State ex rel. Adkins v. Trent*, No. 21441 (12/10/92) (Per Curiam)

See APPEAL Waiver of right to, (p. 32) for discussion of topic.

## RIGHT TO BE PRESENT

### All stages of proceedings

*State v. Hamilton*, 403 S.E.2d 739 (1991) (Per Curiam)

Appellant was found guilty of aggravated robbery. He was not present during jury selection, nor did he waive his right to be present; he claimed that he was not informed of his right to be present.

Syl. pt. 1 - “In a felony case the accused must be present in person from the inception of the trial on the indictment to the final judgment, when anything is done affecting him; and the record must show his presence.’ Syllabus, *State v. Martin*, 120 W.Va. 229, 197 S.E. 727 (1938).” Syl. Pt. 8, *State v. Vance*, 146 W.Va. 925, 124 S.E.2d 252 (1962).

Syl. pt. 2 - “*W.Va. Code*, 1931, 62-3-2 requires that one accused of a felony shall be present at every stage of the trial during which his interest may be affected; and if anything is done at trial in the accused’s absence which may have affected him by possibly prejudicing him, reversible error occurs.” Syl. Pt. 3, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

Syl. pt. 3 - “The defendant has a right under Article III, Section 14 of the *West Virginia Constitution* to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless.” Syl. Pt. 6, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Syl. pt. 4 - “Insofar as the decisions in *State ex rel. Boner v. Boles*, 148 W.Va. 802, 137 S.E.2d 418 (1964), ... held that the common-law/ statutory right of presence is inalienable and cannot be waived, such decisions are disapproved; an accused, by declaration and conduct, may waive a fundamental right protected by the Constitution if it is demonstrated that such waiver was made knowingly and intelligently.” Syl. Pt. 7, in part, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

Here, there was no showing of a knowing and intelligent waiver; further, no other person may waive this right on appellant’s behalf and failure to object at the trial level does not render the error waived. (Cf. *State v. Tiller*, 168 W.Va. 522, 285 S.E.2d 371 (1981)) Reversed and remanded.

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

Appellant was convicted of daytime burglary by breaking without entering. He claimed on appeal that his absence on three separate occasions during trial-related proceedings constituted plain error. The first occasion was an *in camera* meeting regarding individual *voir dire* of a juror. A mistrial was declared.

## RIGHT TO BE PRESENT

### All stages of proceedings (continued)

#### *State v. Ward*, (continued)

At the second trial, appellant was absent from chambers when the prosecuting attorney and his counsel had an undisclosed discussion with the judge. The discussion ensued after defense counsel objected to the scope of the prosecution's redirect. The third instance occurred when a hearing was held on the prosecuting attorney's motion to withdraw from the case.

*State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330, 338 (1975) held that an accused has a right to be present at any "critical stage in the criminal proceeding." See also, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710, 719 (1977), holding that "a critical stage is one where the defendant's right to a fair trial will be affected."

The first instance was made moot by the mistrial; the second instance was, at best harmless error, and the third instance was not a critical stage. No error.

### Critical stage defined

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

See RIGHT TO BE PRESENT Waiver of, (p. 497) for discussion of topic.

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 496) for discussion of topic.

### Waiver of

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

Appellant was convicted of aggravated robbery. At trial both defense counsel and appellant participated in appellant's defense. During a discussion at the bench regarding when to break for lunch, counsel said some defense witnesses had not yet appeared, even though they were subpoenaed. The next available witness was appellant, who did not want to testify until all the other witnesses had testified.

## RIGHT TO BE PRESENT

### Waiver of (continued)

#### *State v. Layton*, (continued)

Appellant left the bench conference when he realized he might have to testify prior to the break. Defense counsel thereupon sought to be relieved of questioning appellant about anything when appellant went on the stand. Counsel believed appellant would commit perjury. Appellant was present for the duration of the trial.

Syl. pt. 5 - “Where a defendant in a noncapital case is free on bail and is initially present at trial, and thereafter voluntarily absents himself after the trial has commenced, and where he has been informed of his obligation to remain during all stages of the trial, then such voluntary absence will be deemed a waiver of his right to be present.” Syllabus point 3, *State v. Tiller*, 168 W.Va. 522, 285 S.E.2d 371 (1981).

The Court found appellant voluntarily left the bench conference, apparently in a fit of anger; no reversible error, especially in light of the subject of the conference (appellant’s potential perjury) which had been previously discussed. The trial court did not alter its ruling as a result of the conference.

The Court did admit that some impropriety occurred but found any error to be harmless.

## RIGHT TO CONFRONT

### Admissibility of extrajudicial statements

*State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

Appellant was convicted of incest. He claimed that hearsay was admitted to evidence. Prior to trial the prosecution filed a motion for a Department of Human Services social worker to testify about out of court statements made by S.S., the victim's sister, to the social worker. The trial court initially ruled that S.S. would testify in her own behalf but reversed itself when S.S. allegedly ran away prior to trial. Appellant claimed that the testimony violated his right to confront his accuser.

Syl. pt. 1 - The Confrontation Clause contained in the Sixth Amendment to the *United States Constitution* provides: "In all criminal prosecutions, the accused shall ... be confronted with the witnesses against him." This clause was made applicable to the states through the Fourteenth Amendment to the *United States Constitution*.

Syl. pt. 2 - The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the *United States Constitution* are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement.

Syl. pt. 3 - In order to satisfy its burden of showing that the witness is unavailable, the State must prove that it has made a good-faith effort to obtain the witness's attendance at trial. This showing necessarily requires substantial diligence.

Syl. pt. 4 - Where there is a lack of evidence in the record demonstrating the State's good-faith efforts to secure the witness for trial, the prosecution has failed to carry its burden of proving unavailability.

Syl. pt. 5 - Even though the unavailability requirement has been met, the Confrontation Clause contained in the Sixth Amendment to the *United States Constitution* mandates the exclusion of evidence that does not bear adequate indicia of reliability. Reliability can usually be inferred where the evidence falls within a firmly rooted hearsay exception.

Syl. pt. 6 - Under the requirements of the Confrontation Clause contained in the Sixth Amendment to the *United States Constitution*, evidence offered under the residual hearsay exceptions contained in Rule 803(24) and Rule 804(b)(5) of the West Virginia Rules of Evidence is presumptively unreliable because it does not fall within any firmly rooted hearsay exception, and, therefore, such evidence is not admissible. If, however, a specific showing is made of particularized guarantees of trustworthiness, the statements may be admissible. In this regard, corroborating evidence may not be considered, it must be found that the declarant's truthfulness is so clear that cross-examination would be of marginal utility.

## RIGHT TO CONFRONT

### Admissibility of extrajudicial statements (continued)

#### *State v. James Edward S.*, (continued)

Syl. pt. 7 - In assessing whether a statement is reliable, a trial court must make a record to support its decision on admissibility. Where no such record is made, the reliability test has not been satisfied.

The Court found no record as to either the unavailability of the witness or the reliability of her statements. Reversed.

### Critical stages

#### *State ex rel. Redman v. Hedrick*, 408 S.E.2d 659 (1991) (McHugh, J.)

Appellant was transferred from juvenile to adult status and convicted of first-degree murder. Appellant's attorney moved for a continuance following indictment so that a psychiatric examination could be performed. Appellant was not present.

At the continued hearing, the circuit court noted that the transfer to adult jurisdiction was on appeal and still pending. On motion of defense counsel, appellant was moved to a juvenile detention center in the circuit. Again, appellant was not present. Ultimately, appellant pled to the murder charge.

Syl. pt. 1 - "The defendant has a right under Article III, Section 14 of the *West Virginia Constitution* to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless." Syl. pt. 6, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Syl. pt. 2 - "If an accused demonstrates that his right to confront his accusers was abridged by the State or that he was absent during a critical stage of the trial proceeding, his conviction of a felony will be reversed where a possibility of prejudice appears from the abrogation of the constitutional or statutory right." Syl. pt. 8, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

Syl. pt. 3 - In a criminal proceeding, the defendant's absence at a critical stage of such proceeding is not reversible error where no possibility of prejudice to the defendant occurs.

The Court found no prejudice in appellant's absence; no error. Whether the stage is critical is not dispositive. The Court also noted that both motions were granted. (Query: would a different result have been reached if the motions were denied? What if the result was not clearly prejudicial?)

## **RIGHT TO CONFRONT**

### **Juvenile transfer hearing**

*State v. Gary F.*, 432 S.E.2d 793 (1993) (Workman, C.J.)

See JUVENILES Transfer to adult jurisdiction, Right to confront, (p. 372) for discussion of topic.

### **Right to be present at all stages**

*State v. Hamilton*, 403 S.E.2d 739 (1991) (Per Curiam)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 496) for discussion of topic.

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 496) for discussion of topic.

## **RIGHT TO COUNSEL**

### **Abuse and neglect**

#### **Children's right to counsel**

*In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 593) for discussion of topic.

### **Children's right**

#### **Abuse and neglect cases**

*In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 593) for discussion of topic.

### **Denial of**

#### **Ineffective assistance of counsel**

*Wickline v. House*, 424 S.E.2d 579 (1992) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 310) for discussion of topic.

### **Generally**

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

### **Recanting request for counsel**

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

Appellant was convicted of murder. During the initial investigation, appellant admitted to being at the victim's home the day of the murder to repair a light fixture. After hearing that police wanted to collect a hair sample, appellant volunteered to appear at the police department the next day.

## RIGHT TO COUNSEL

### Recanting request for counsel (continued)

#### *State v. Kilmer*, (continued)

That evening, appellant's friend told police that appellant committed the murder. With the friend's help, police retrieved bloody clothing belonging to appellant. An arrest warrant was obtained and appellant was read his rights when he appeared at the police station the following morning.

The police told appellant his friend had been arrested, that they had appellant's clothing and that they suspected him of the murder. Appellant told them he wanted an attorney. After attempting to contact a particular attorney and failing, appellant said to the police sergeant "let's do it." He then gave a description of what happened.

During the statement, the sergeant told appellant he could not write fast enough and offered to let him write the statement. Appellant chose to have one of the officers write. The sergeant again advised appellant of his rights but appellant did not sign a waiver of rights form until after he completed his statement.

Appellant claimed at the suppression hearing that he never said "let's do it," and that he felt pressure to make a statement. He did, however, admit that the police did not threaten or intimidate him. He acknowledged the second *Miranda* warnings, that he signed the waiver and that he did not renew his request for an attorney.

In addition to claiming that police violated his right to counsel and intimidated him into making a statement, appellant also claimed he could not have waived his right to counsel because police violated the prompt presentment statute (*W.Va. Code*, 62-1-5) in not taking him before a magistrate without unnecessary delay.

Syl. pt. 1 - "Once an accused asks for counsel during custodial interrogation, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations." Syl. Pt. 2, *State v. Bowyer*, 181 W.Va. 26, 380 S.E.2d 193 (1989).

Syl. pt. 2 - "For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel." Syl. Pt. 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987).

Syl. pt. 3 - "The delay in taking the defendant to a magistrate may be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant." Syl. Pt. 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982).

## RIGHT TO COUNSEL

### Recanting request for counsel (continued)

*State v. Kilmer*, (continued)

Syl. pt. 4 - “The delay occasioned by reducing an oral confession to writing ordinarily does not count on the unreasonableness of the delay where a prompt presentment issue is involved.” Syl. Pt. 3, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

The Court noted appellant was in police custody for only two hours prior to giving his statement. Although he clearly requested an attorney, the Court held appellant was in no way interrogated or otherwise pressured into making the statement. Further, appellant initiated the conversation.

The Court held the sole purpose for the delay in taking before a magistrate was not to obtain the confession but rather to reduce to writing appellant’s eight and one-half page statement. Affirmed.

### Waiver of

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 539) for discussion of topic.

### Seizure of evidence pursuant to lawful arrest

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See SEARCH AND SEIZURE Plain view exception, (p. 522) for discussion of topic.

### Self-representation

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

Appellant was convicted of aggravated robbery. At trial appellant moved to allow his counsel to withdraw and that he be allowed to represent himself. While allowing appellant to defend himself the circuit court required appointed counsel to remain in the case as “standby counsel.”

## RIGHT TO COUNSEL

### Self-representation (continued)

#### *State v. Layton*, (continued)

Appellant claimed on appeal that the trial court erred in allowing him to proceed *pro se* and that his right to testify in his behalf and the right to effective counsel were denied. Specifically, he says no *in camera* hearing was held to determine if he made a knowing and voluntary waiver of his right to counsel. *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983). The trial court ruled that counsel could not assist appellant in his testimony because it was feared appellant would commit perjury.

Syl. pt. 1 - “The right of self-representation is a correlative of the right to assistance of counsel guaranteed by article III, section 14 of the *West Virginia Constitution*.” Syllabus point 7, *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983).

Syl. pt. 2 - “A defendant in a criminal proceeding who is mentally competent and *sui juris*, has a constitutional right to appear and defend in person and without assistance of counsel, provided that (1) he voices his desire to represent himself in a timely and unequivocal manner; (2) he elects to do so with full knowledge and understanding of his rights and of the risks involved in self-representation; and (3) he exercises the right in a manner which does not disrupt or create undue delay at trial.” Syllabus point 8, *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983).

Syl. pt. 3 - Where a defendant ostensibly represents himself in a criminal trial, but where standby counsel actually is consistently available and actually plays the dominant role in the defense, it is not reversible error for a trial court to fail to engage in the full litany in *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173 (1983).

Syl. pt. 4 - When a criminal defendant, who has elected to take the stand and testify in his own behalf, indicates to his attorney, or to the court, that he is contemplating committing perjury during his testimony, it is not error, or a denial of the criminal defendant’s constitutional right to the assistance of counsel, for the trial court to direct the defendant’s attorney to refrain from participating in the examination of the defendant on the stand and to rule that if the defendant wishes to testify, he must testify in a narrative fashion.

See *State v. Barker*, 35 Wash. App. 388, 667 P.2d 108 (1983). Here, although appellant said he wished to proceed without counsel, his “standby counsel” actually played a dominant role. Further, the trial court took proper steps to protect appellant’s right to testify while not forcing counsel to participate in perjury. No error.

## **RIGHT TO COUNSEL**

### **Waiver of**

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See RIGHT TO COUNSEL Recanting request for, (p. 502) for discussion of topic.

*State v. Leadingham*, 438 S.E.2d 825 (1993) (McHugh, J.)

See PSYCHOLOGICAL/PSYCHIATRIC EVALUATION Self-Incrimination, Waiver during examination, (p. 482) for discussion of topic

*State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 539) for discussion of topic.

### **Withdrawal of counsel**

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

See RIGHT TO COUNSEL Self-representation, (p. 504) for discussion of topic.

## **RIGHT TO FAIR TRIAL**

### **Right to instructions on elements of crime**

*State v. Miller*, 400 S.E.2d 611 (1990) (McHugh, J.)

See JUDGES Duties, To instruct on elements of crime, (p. 343) for discussion of topic.

## **RIGHT TO REMAIN SILENT**

### **Incarceration for invoking**

*Kelly v. Allen*, No. 20663 (12/19/91) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Right to invoke, (p. 543) for discussion of topic.

### **Waiver of**

*State v. Leadingham*, 438 S.E.2d 825 (1993) (McHugh, J.)

See PSYCHOLOGICAL/PSYCHIATRIC EVALUATION Self-Incrimination, Waiver during examination, (p. 482) for discussion of topic

## RIGHT TO SPEEDY TRIAL

### Generally

*State ex rel. Johnson v. Zakaib*, 400 S.E.2d 590 (1990) (Miller.)

Petitioner was arrested for aiding and abetting credit card fraud. *W.Va. Code*, 61-3-24a. On the day of her hearing neither the prosecution nor its witnesses appeared. The magistrate dismissed without prejudice. More than a year later petitioner was indicted by the grand jury. On appeal she claimed that the subsequent prosecution in circuit court should be barred because of the delay between the dismissal and indictment.

Syl. pt. 3 - “The speedy trial guarantee of *W.Va. Const.*, art. III, section 14 that provides for criminal trials ‘without unreasonable delay’ is applicable to magistrate courts.” Syllabus Point 1, *State ex rel. Stiltner v. Harshbarger*, 178 W.Va. 739, 296 S.E.2d 861 (1982).

Syl. pt. 4 - “Ordinarily, unless good cause for delay exists, criminal trials in magistrate court should be commenced within one hundred and twenty days of the [execution] of a warrant; however, good cause for delaying a trial beyond one hundred and twenty days must be judged by the standards applicable under *W.Va. Code*, 62-3-1 [1975] to postponements in circuit court beyond one term of court and, consistent with our rules for circuit courts, absence of good cause cannot be presumed from a silent record.” Syllabus Point 2, as modified, *State ex rel. Stiltner v. Harshbarger*, 178 W.Va. 739, 296 S.E.2d 861 (1982).

Syl. pt. 5 - “Unless one of the reasons specifically set forth in *W.Va. Code*, 62-3-21 [1959] for postponing criminal trials in circuit court beyond three terms of the circuit court exists, 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 as defined in *W.Va. Code*, 62-3-21 [1959] should be presumed from a silent record.” Syllabus Point 3, as modified, *State ex rel. Stiltner v. Harshbarger*, 178 W.Va. 739, 296 S.E.2d 861 (1982).

Syl. pt. 6 - Where a misdemeanor warrant in a magistrate court is dismissed, further prosecution for the same offense by a new warrant or by an indictment after one year from execution of the original warrant is barred unless the record shows that one or more of the exceptions contained in *W.Va. Code*, 61-3-21 (1959), applies.

*State ex rel. Webb v. Wilson*, 182 W.Va. 538, 390 S.E.2d 9 (1990) held that a subsequent indictment brought more than three terms of court after dismissal of the first indictment could not stand. In addition, *State ex rel. Forbes v. McGraw*, 183 W.Va. 144, 394 S.E.2d 743 (1990) acknowledged that *W.Va. Code*, 50-4-12 related to dismissals in both magistrate and circuit courts. Writ granted.

## RIGHT TO SPEEDY TRIAL

### Indictment delayed

*State ex rel. Henderson v. Hey*, 424 S.E.2d 741 (1992) (Per Curiam)

See INDICTMENT Dismissal of, Undue delay, (p. 295) for discussion of topic.

### Prohibition writ not to offend

*State ex rel. Spaulding v. Watt*, 422 S.E.2d 818 (1992) (Per Curiam)

See NEW TRIAL Newly discovered evidence, (p. 403) for discussion of topic.

*State v. Hott*, 421 S.E.2d 500 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Appeal by, Prohibition, (p. 461) for discussion of topic.

*State v. Lewis*, 422 S.E.2d 807 (1992) (Miller, J.)

See PROSECUTING ATTORNEY Appeal by, Prohibition, (p. 461) for discussion of topic.

### Standard for determining

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

Appellant was convicted of conspiracy to commit malicious wounding and voluntary manslaughter. He claimed that his right to a speedy trial was denied because the prosecution was allowed to proceed two years and eight months after the crime, the delay being attributable to prosecutorial misconduct.

Appellant was arrested March 21, 1986, tried on November 18, 1988. On December 12, 1986 he filed a petition for writ of prohibition and mandamus. No action was taken so he filed with the Supreme Court of Appeals on January 16, 1987. Following an evidentiary hearing by the circuit court on February 10 and 13, 1987, the court ruled the delay acceptable. The Supreme Court refused the appeal.

## RIGHT TO SPEEDY TRIAL

### Standard for determining (continued)

#### *State v. Bonham*, (continued)

Syl. pt. 5 - “A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant’s assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the defendant has been denied a speedy trial.’ Syllabus Point 2, *State v. Foddrell*, 171 W.Va. 54, 297 S.E.2d 829 (1982).” Syllabus point 4, *State v. Drachman*, 178 W.Va. 207, 358 S.E.2d 603 (1987).

The Court found the reasons for the delay related to the complexity of the issues involved and the dismissal, at appellant’s request, of the first indictment.

#### *State v. Carrico*, 427 S.E.2d 474 (1993) (Neely, J.)

Appellant was indicted on first-degree arson charges on 5 May 1988 for a fire in her home on 17 December 1985. Although the original trial date was 31 August 1988, three continuances were granted, two on motion of the prosecution, one by joint motion. Trial was rescheduled for 15 March 1989.

Because of lost evidence the charges were dismissed without prejudice and appellant was reindicted on 5 May 1989. In August, 1989 appellant was convicted.

Syl. pt. 1 - “It is the government’s duty to proceed with reasonable diligence in its investigation and preparation for arrest, indictment and trial. If it fails to do so after discovering sufficient facts to justify indictment and trial, it violates this due process right.” *State ex rel. Leonard v. Hey*, W.Va., 269 S.E.2d 394, 398 (1980).

Syl. pt. 2 - “It is the three-term rule, *W.Va. Code*, 62-3-21 [1959], which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the *West Virginia Constitution*.” Syl. pt. 1, *Good v. Handlan*, 176 W.Va. 145, 342 S.E.2d 111 (1986).

Syl. pt. 3 - If a conviction is validly obtained within the time set forth in the three-term rule, *W.Va. Code*, 62-3-21 [1959], then that conviction is presumptively constitutional under the speedy trial provisions of the *Constitution of the United States*, Amendment VI, and *W.Va. Constitution*, Art. III, § 14.

## RIGHT TO SPEEDY TRIAL

### Standard for determining (continued)

#### *State v. Carrico*, (continued)

Syl. pt. 4 - “The three regular terms of a court essential to the right of a defendant to be discharged from further prosecution, pursuant to provisions of the *W.Va. Code*, 62-3-21 [1959], as amended, are regular terms occurring [*sic*] subsequent to the ending of the term at which the indictment against him is found. The term at which the indictment is returned is not to be counted in favor of the discharge of a defendant.” Syl. pt. 1, *State ex rel. Smith v. DeBerry*, 146 W.Va. 534, 120 S.E.2d 504 (1961).

The Court noted the pre-indictment delay was entirely justifiable here and did not violate appellant’s due process rights; the indictment was obtained as soon as the relevant facts became known.

Although the prosecution may not use a *nolle prosequi* to evade the three-term rule, *State v. Crawford*, 84 W.Va. 556, 98 S.E. 615 (1919), reindictment is proper after a *nolle prosequi*. Appellant was tried within three terms of the term following the second indictment. No error.

### Three-term rule

*State v. Carrico*, 427 S.E.2d 474 (1993) (Neely, J.)

See RIGHT TO SPEEDY TRIAL Standard for determining, (p. 511) for discussion of topic.

## **RIGHT TO TESTIFY**

### **Defendant's right to testify**

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

See RIGHT TO COUNSEL Self-representation, (p. 504) for discussion of topic.

### **Waiver of**

*State v. Gibson*, 413 S.E.2d 120 (1991) (Per Curiam)

See DUE PROCESS Defendant's right to testify, Waiver of, (p. 186) for discussion of topic.

### **Mistrial if not exercised**

*Dietz v. Legursky*, 425 S.E.2d 202 (1992) (McHugh, C.J.)

See JUDGES Duties, To declare mistrial, (p. 341) for discussion of topic.

## RIGHT TO TRANSCRIPT

### Court reporter to produce

*State ex rel. Baker v. Bogovich*, No. 21450 (12/11/92) (Per Curiam)

See TRANSCRIPTS Right to transcript, Failure to provide, (p. 599) for discussion of topic.

*Philyaw v. Bogovich*, No. 21541 (4/28/93) (Per Curiam)

and

*State ex rel. Scott v. Bogovich*, No. 21480 (2/10/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 599) for discussion of topic.

*State ex rel. Hodge v. Reid-Williams*, No. 21621 (4/28/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 600) for discussion of topic.

*State ex rel. Jenkins v. Marchbank*, No. 21428 (2/10/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 601) for discussion of topic.

*State ex rel. Stephens v. Bratton*, No. 21619 (4/28/93) (Per Curiam)

and

*State ex rel. Hall v. Bratton*, No. 21618 (4/28/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 601) for discussion of topic.

*State ex rel. Stine v. Gagich*, No. 21962 (12/1/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 602) for discussion of topic.

*State ex rel. Walker v. Miller*, No. 21496 (2/10/93) (Per Curiam)

See TRANSCRIPTS Right to, Failure to provide, (p. 602) for discussion of topic.

## RIGHT TO TRANSCRIPT

### Generally

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

## **RIGHT TO TRIAL**

### **Charges in magistrate court**

*State ex rel. Johnson v. Zakaib*, 400 S.E.2d 590 (1990) (Miller,)

See MAGISTRATE COURT Concurrent jurisdiction with circuit court, (p. 379) for discussion of topic.

### **Speedy trial**

#### **Generally**

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See RIGHT TO SPEEDY TRIAL Standard for determining, (p. 510) for discussion of topic.

### **Speedy trial in magistrate court**

*State ex rel. Johnson v. Zakaib*, 400 S.E.2d 590 (1990) (Miller,)

See RIGHT TO SPEEDY TRIAL Generally, (p. 509) for discussion of topic.

## **ROBBERY**

### **Aggravated**

#### **Double jeopardy**

*State v. Elliott*, 412 S.E.2d 762 (1991) (Workman, J.)

See DOUBLE JEOPARDY Felony-murder, (p. 169) for discussion of topic.

#### **Sentence for**

*State v. Ross*, 402 S.E.2d 248 (1990) (Per Curiam)

See PROPORTIONALITY Generally, (p. 459) for discussion of topic.

## SCIENTIFIC TESTS

### Evidence destroyed

#### Duty to make record

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

Appellant was convicted of first-degree murder and abduction. On the night of the killing, the victim, Janet Miller, had gone to Parkersburg to visit her estranged boyfriend, Jeffrey Mosier. Appellant, Mosier and Ms. Miller were seen together at a bar. Mosier and Miller argued and appellant and Miller danced together. Miller left the club and appellant left a short time later. Mosier left some time after that; both Mosier and appellant claimed they went straight home.

After obtaining search warrants, police sent both appellant's and Mosier's cars to the F.B.I. crime lab. Following their investigation, Parkersburg city police again searched appellant's car, removing the back seat cover and a floor mat, and sending them back to the F.B.I. This time one bloodstain was found on the seat cover and a hair on the floor mat. Using an electrophoresis test, the F.B.I. concluded that the blood stain fell into a group comprising 1.3 percent of the white population and that the victim was in that group.

The blood sample was completely used up and appellant had no chance to have an independent expert test the stain. In addition, the F.B.I.'s slides and other raw material were not available; only oral testimony and lab notes were presented to the jury. Appellant alleged destruction of the blood test results was withholding of exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Syl. pt. 1 - "When senior appellate courts have concluded that a test is generally accepted by the scientific community, a trial court may take judicial notice of a test's reliability." Syl. Pt. 2, *State v. Woodall*, 182 W.Va. 15, 385 S.E.2d 253 (1989).

Syl. pt. 2 - There is nothing inherently unreliable in statistical evidence based on blood-typing and enzyme tests. First, blood tests themselves are reliable *when properly conducted*, and these tests are valuable only when their results are placed in the context of statistical probabilities.

Syl. pt. 3 - "A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III. Section 14 of the *West Virginia Constitution*." Syl. Pt. 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

## SCIENTIFIC TESTS

### Evidence destroyed (continued)

#### Duty to make record (continued)

##### *State v. Thomas*, (continued)

Syl. pt. 4 - When the government performs a complicated test on evidence that is important to the determination of guilt, and in so doing destroys the possibility of an independent replication of the test, the government must preserve as much documentation of the test as is reasonably possible to allow for a full and fair examination of the results by a defendant and his experts.

While the electrophoresis method of testing is generally accepted, thus eliminating the need for a Frye hearing on scientific reliability, the Court noted that specific errors in specific tests can alter the outcome. The F.B.I. expert here, however, defended his lab's policy of not even taking photographs (so that results could be challenged) as necessary to force defendants to perform their own independent tests. Here, however, the sample was used up; no retest was possible.

The Court likened this failure to a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), recognized in *Hatfield, supra*. The Court dismissed the state's argument that appellant did not show the evidence was exculpatory; without the evidence which was missing, this showing is impossible. Taking of photographs and preservation of lab procedures, reports and other records is necessary to insure some duplication of the test in question. The state must take reasonable steps to insure that appellant is in as nearly identical position as possible to having an independent test. Reversed and remanded.

#### Judicial notice

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

See SCIENTIFIC TESTS Evidence destroyed, Duty to make record, (p. 518) for discussion of topic.

## SEARCH AND SEIZURE

### Civil liability

#### Hot pursuit without warrant

*Goines v. James*, 433 S.E.2d 572 (1993) (Workman, C.J.)

Appellants filed suit 13 June 1988 pursuant to 42 U.S.C.A. 1983 on the grounds that excessive force and illegal entry were used in searching appellants' residence. Following directed verdicts on some counts, the jury returned a verdict for the defendants.

Officer James of the Parkersburg City Police responded to a complaint of disorderly conduct and observed a man in front of appellants' home holding an open beer bottle. The officer observed the man drink the contents of the bottle, then break it by throwing it onto the street.

When the officer requested the man's identification, he refused and moved into appellants' yard. Ms. Goines gave Officer James permission to enter the yard where the man was standing in the middle of an ongoing party. Upon being asked for identification, the man again refused and walked away. At Ms. Goines direction, he entered appellants' home.

Officer James followed and grabbed the man in appellants' doorway. The man broke free and a chase through the house ensued, resulting in the man's arrest. No search warrant or arrest warrant was issued.

Appellants claimed that the officer made an unprovoked assault upon Ms. Goines during entry into the house and, while arresting the man, engaged in a fight with Ms. Goines' son, who had demanded a warrant and that the officer leave the house. The son was also arrested. Mr. Goines claimed that he was struck in the head sometime during the disturbance by a person who appeared to be a uniformed officer. The issue was whether police officers are entitled to qualified immunity.

Syl. pt. 1 - "Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." Syllabus, *Bennett v. Coffman*, 178 W.Va. 500, 361 S.E.2d 465 (1987).

Syl. pt. 2 - Under the doctrine of qualified immunity, a police officer is absolved from civil liability for following a misdemeanor in hot pursuit into the residence of a third party, with neither a warrant nor the permission of the third party, in order to effect a warrantless arrest of the misdemeanor, so long as such entry violates no clearly established statutory or constitutional rights.

## SEARCH AND SEIZURE

### Civil liability (continued)

#### Hot pursuit without warrant (continued)

##### *Goines v. James*, (continued)

The Court held that no clearly established right was violated here. Immunity is available, at least under these facts. Affirmed.

### Curtilage

##### *State v. Townsend*, 412 S.E.2d 477 (1991) (Per Curiam)

See SEARCH AND SEIZURE Exclusionary rule, Items outside curtilage, (p. 521) for discussion of topic.

### Exclusionary rule

#### Items outside curtilage

##### *State v. Townsend*, 412 S.E.2d 477 (1991) (Per Curiam)

Appellant was convicted of possession of marijuana with intent to deliver. Following appellant's sale of marijuana to an undercover police officer, a search warrant was granted to search appellant's house. As part of the search of the "curtilage," marijuana was discovered in an outbuilding 200 feet from appellant's dwelling house. The building housed pigs, was not open to plain view and was in an untended wood.

Syl. pt. - "The general rule is that where there is an illegal seizure of property, such property cannot be introduced into evidence, and testimony may not be given in regard to the facts surrounding the seizure of the property." Syllabus point 1, *State v. Davis*, 170 W.Va. 376, 294 S.E.2d 179 (1982).

The Court found appellant had a reasonable expectation of privacy in the interior of the hog house. Whether the house was in or outside of the curtilage was irrelevant where the area was closed off to the public. However, if the house was within the curtilage the search warrant was arguably effective to allow seizure of the marijuana.

The relevant factors are: the proximity of the area searched to the dwelling house; whether the area is included as part of an enclosure around the dwelling house; how the area is used; and steps taken by the owner to prevent observation by the public. *State v. Forshey*, 182 W.Va. 87, 386 S.E.2d 15 (1989). The hog house was not within the search warrant area, nor was it within the "plain view" or "open field" exceptions to the requirement for a warrant. Reversed and remanded.

## SEARCH AND SEIZURE

### Expectation of privacy

*State v. Townsend*, 412 S.E.2d 477 (1991) (Per Curiam)

See SEARCH AND SEIZURE Exclusionary rule, Items outside curtilage, (p. 521) for discussion of topic.

### Plain view exception

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

Appellant was convicted of arson, attempted murder, felony-murder and malicious assault. The investigating officer went to appellant's trailer with a warrant for his arrest. In plain view of appellant was a camouflage jacket which appellant was seen wearing just before fire broke out in an apartment building occupied by a man with whom appellant had fought earlier the same night.

The officer seized the jacket and took appellant to city hall to await arraignment. Upon advice of an arson investigator police also seized all of appellant's clothing to check it for evidence of flammable liquids. Appellant objected to the seizures, claiming the jacket was improperly seized without a warrant; and that his other clothing was improperly seized because he was intoxicated and could not intelligently waive his Fifth Amendment rights against self-incrimination. Further, he claimed that his right to counsel was denied.

Syl. pt. 1 - "A warrantless search of the person and the immediate geographic area under his physical control is authorized as an incident to a valid arrest." Syllabus Point 6, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980).

Syl. pt. 2 - Searches and seizures that could be made at the time of arrest may legally be conducted later when the accused arrives at the place of detention.

Syl. pt. 3 - The essential predicates of a plain view warrantless seizure are (1) that the officer did not violate the Fourth Amendment in arriving at the place from which the incriminating evidence could be viewed; (2) that the item was in plain view and its incriminating character was also immediately apparent; and (3) that not only was the officer lawfully located in a place from which the object could be plainly seen, but the officer also had a lawful right of access to the object itself.

Syl. pt. 4 - The inadvertent discovery of an object is not the predicate requirement of a plain view seizure. To the extent that *State v. Stone*, 165 W.Va. 266, 268 S.E.2d 50 (1980), and *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980), and their progeny hold to the contrary, they are overruled.

## SEARCH AND SEIZURE

### Plain view exception (continued)

#### *State v. Julius*, (continued)

Syl. pt. 5 - Where physical evidence is lawfully seized from the person of the defendant who has been lawfully arrested, the defendant may not interpose a Sixth Amendment right to counsel to render the seizure invalid.

The Court found seizure of the appellant's clothes while at city hall to be incident to the lawful arrest made pursuant to an arrest warrant. Seizure of the camouflage jacket was permissible under the plain view doctrine (See U.S. Supreme Court opinions cited in opinion).

No violation of Fifth or Sixth Amendment rights here. *Schmerber v. California*, 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966); *Marano v. Holland*, 179 W.Va. 156, 366 S.E.2d 117 (1988); and *State v. Grubbs*, 178 W.Va. 811, 364 S.E.2d 824 (1987). Only testimonial evidence is protected by the right against self-incrimination, not physical evidence; further, once physical evidence is seized pursuant to a lawful arrest, no Sixth Amendment right to counsel attaches. (See "critical stage" analyses and discussion in opinion). No error.

#### *State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

See ENTRAPMENT Grounds for, (p. 192) for discussion of topic.

#### *State v. Slaman*, 431 S.E.2d 91 (1993) (Per Curiam)

Appellant was convicted of manufacturing a controlled substance. Officers went to appellant's mobile home to serve arrest warrants on appellant's significant other for unrelated charges. Upon being told by a neighbor that she was home, the officers discovered the door was unlocked and entered the mobile home.

After calling out, the officers went into a bedroom where they saw what appeared to be a "fish aquarium" with marijuana growing out of it. Another officer obtained a search warrant and seized the plants.

Later the same day appellant went to the Sheriff's office and was advised of his rights. According to the investigating officer, after signing a waiver, appellant claimed in an unrecorded discussion that the marijuana belonged to him. A second recorded statement was taken. The trial court refused appellant's motions to suppress any physical evidence and to dismiss based on the misclassification of the marijuana pursuant to *W.Va. Code*, 60A-4-401(a).

## SEARCH AND SEIZURE

### Plain view exception (continued)

#### *State v. Slaman*, (continued)

Syl. pt. 1 - “If officers are lawfully present and observe what is then and there immediately apparent, no search warrant is required in such instance, and the testimony by the officers with regard to the evidence which they observed is entirely proper.” Syl. pt. 3, *State v. Angel*, 154 W.Va. 615, 177 S.E.2d 562 (1970).

Syl. pt. 2 - “The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syl. pt. 5, *Casto v. Martin*, 159 W.Va. 761, 230 S.E.2d 722 (1976), *citing* syl. pt. 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955).

Here, the Court found the officers were reasonable in their belief that appellant’s girlfriend was in the mobile home; and that they could reasonably continue searching once they entered the premises. The Court stressed that actual seizure of the marijuana took place later pursuant to warrant. No error.

### Warrant

#### Area of curtilage

*State v. Townsend*, 412 S.E.2d 477 (1991) (Per Curiam)

See SEARCH AND SEIZURE Exclusionary rule, Items outside curtilage, (p. 521) for discussion of topic.

#### Probable cause for

*State v. Hlavacek*, 407 S.E.2d 375 (1991) (Brotherton, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 524) for discussion of topic.

*State v. Hlavacek*, 407 S.E.2d 375 (1991) (Brotherton, J.)

Appellant was stopped upon suspicion of making a drug delivery. Following the stop, appellant refused to a consensual search of his automobile. The officer then made a “protective search” of appellant’s person which yielded three marijuana cigarettes. Based on the fruits of this search and on information from an informant which led to the initial stop, a search warrant was issued for a search of appellant’s car. The car contained approximately one pound of marijuana.

## SEARCH AND SEIZURE

### Warrant (continued)

#### Probable cause for (continued)

##### *State v. Hlavacek*, (continued)

Appellant's motion to suppress was denied. The Court found the "protective search" to be in violation of the Fourth Amendment. Appellant argued that without the fruits of that search there was no probable cause for the search of the automobile.

Syl. pt. 2 - "Both the Fourth Amendment to the *United States Constitution* and Article III, Section 6 of the *West Virginia Constitution* provide that no warrant shall issue except upon probable cause supported by oath or affirmation. There is virtual unanimity that a warrant may not issue on unsworn testimony.' Syllabus Point 3, *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986)." Syllabus point 2, *State v. Thompson*, 178 W.Va. 254, 358 S.E.2d 815 (1987).

Syl. pt. 3 - "In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the United States Supreme Court held it constitutionally permissible under certain conditions to attack a search warrant affidavit. If such attack is successful, this will result in voiding the search warrant and rendering the property seized under such warrant inadmissible.' Syllabus Point 1, *State v. Walls*, 170 W.Va. 419, 294 S.E.2d 272 (1982)." Syllabus point 1, *State v. Thompson*, 178 W.Va. 254, 358 S.E.2d 815 (1987).

Syl. pt. 4 - "Under the Fourth Amendment to the *United States Constitution* and Article III, Section 6 of the *West Virginia Constitution*, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers." Syllabus point 4, *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986).

Syl. pt. 5 - "To constitute probable cause for the issuance of a search warrant, the affiant must set forth facts indicating the existence of criminal activities which would justify a search and further, if there is an unnamed informant, sufficient facts must be set forth demonstrating that the information obtained from the unnamed informant is reliable." Syllabus point 1, *State v. Stone*, 165 W.Va. 266, 268 S.E.2d 50 (1980).

Syl. pt. 6 - Generally, when information received from a confidential informant is relied upon in an affidavit for a search warrant, the affidavit must contain information which sufficiently establishes the informant's basis of knowledge and lends credibility to the informant's statements.

## SEARCH AND SEIZURE

### Warrant (continued)

#### Probable cause for (continued)

##### *State v. Hlavacek*, (continued)

Syl. pt. 7 - Independent police work may corroborate information contained in an affidavit for a search warrant. However, the details which are verified through further investigation must be both significant and specific in order to permit a judicial officer to impart some degree of reliability upon the confidential source of the information.

Here, the Court found the only independent corroboration of the informant's information was the mere observation that appellant was not at home. Further, no information was given which would bolster the credibility of the informant. The Court rejected the "good faith" exception in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Reversed.

##### *State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

Appellant was convicted of murder. A warrant issued for appellant's "head, facial and body hair." Appellant claimed that vital information was not included and therefore the warrant issued without probable cause.

Syl. pt. 5 - "Both the Fourth Amendment to the *United States Constitution* and Article III, Section 6, of the *West Virginia Constitution* provide that no warrant shall issue except upon probable cause supported by oath or affirmation." Syl. Pt. 3, in part, *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986).

Syl. pt. 6 - "To constitute probable cause for the issuance of a search warrant, the affiant must set forth facts indicating the existence of criminal activities which would justify a search . . . ." Syllabus point 1, in part, *State v. Stone*, 165 W.Va. 266, 268 S.E.2d 50 (1980)." Syl. Pt. 5, in part, *State v. Hlavacek*, 185 W.Va. 371, 407 S.E.2d 375 (1991).

Syl. pt. 7 - "Under the Fourth Amendment to the *United States Constitution* and Article III, Section 6 of the *West Virginia Constitution*, the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable. ..." Syl. Pt. 4, in part, *State v. Adkins*, 176 W.Va. 613, 346 S.E.2d 762 (1986).

Syl. pt. 8 - "Reviewing courts should grant magistrates deference when reviewing warrants for probable cause." Syl. pt. 5, in part, *State v. Thomas*, 187 W.Va. 686, 421 S.E.2d 227 (1992).

## SEARCH AND SEIZURE

### Warrant (continued)

#### Probable cause for (continued)

##### *State v. Kilmer*, (continued)

The Court found the affidavit on which the warrant was issued did tell the magistrate that appellant was a suspect. Despite extraneous information, the affidavit placed appellant at the crime scene near the time of the murder. Affirmed.

##### *State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

Appellant was convicted of first-degree murder and abduction. Police obtained search warrants for both appellant's car and the car of a Mr. Mosier. After an F.B.I. crime lab search, appellant's car was returned and searched again by Parkersburg city police. The police removed a back seat cover and a floor mat which resulted in the detection by the F.B.I. of a hair and a bloodstain. The stain fell into a blood grouping into which only 1.3 percent of the white population falls. The victim's blood fell within this grouping.

Appellant claimed the search warrant affidavits did not contain all information available to police; there was no probable cause because identical information given by two different police officers resulted in warrants to search two different cars belonging to two different suspects; and police intentionally lied on the affidavit.

Syl. pt. 5 - Reviewing courts should grant magistrates deference when reviewing warrants for probable cause. Such warrants should be judged by a "totality-of-the-circumstances" test.

Syl. pt. 6 - Because probable cause cannot be reduced to an exact numerical probability, it is possible that identical facts can lead to probable cause to search the premises of or possessions of more than one person.

Syl. pt. 7 - When false or unreliable information is present in an affidavit supporting a search warrant, the warrant is not invalid if, when the false or unreliable information is omitted, probable cause for granting the warrant still exists in the affidavit.

The Court noted that full information need not be given in a search warrant affidavit; only enough evidence need be given to convince the judicial officer that probable cause exists. However, omissions which diminish probable cause are forbidden.

## SEARCH AND SEIZURE

### Warrant (continued)

#### Probable cause for (continued)

##### *State v. Thomas*, (continued)

Here, the Court found that two different officers working together came to the conclusion that two different persons committed the murder. This is permissible under the “totality of the circumstances” test. In addition, although the affidavit contained false information, the truthful information was sufficient for probable cause.

However, the Court commented on the questionable police conduct regarding the appearance of the bloodstain and hair after the F.B.I. returned appellant’s car to Parkersburg. The Court noted that either the F.B.I. and the Parkersburg police were negligent or the evidence was planted. Reversed and remanded.

### Warrantless search

#### Gesture by vehicle occupants

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See PROBABLE CAUSE Gesture when stopped, (p. 441) for discussion of topic.

#### Incident to lawful arrest

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See SEARCH AND SEIZURE Plain view exception, (p. 522) for discussion of topic.

#### Incident to lawful investigative stop

*State v. Hlavacek*, 407 S.E.2d 375 (1991) (Brotherton, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause for, (p. 530) for discussion of topic.

## SEARCH AND SEIZURE

### Warrantless search (continued)

#### Juvenile at school

*State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41 (1993) (Brotherton, J.)

Appellant was a fourteen-year old eighth grade student. When a teacher reported cash missing from her purse, the school social worker called appellant to his office. Upon finding nothing, the social worker referred appellant to the principal, who found the money in appellant's underwear after asking him to strip. Appellant admitted taking the money.

The teacher initiated delinquent proceedings pursuant to *W.Va. Code*, 49-1-4(1). Appellant's motion to suppress the evidence was denied. Because of prior thefts, appellant was denied probation and sentenced to one year; the sentence was ultimately suspended and probation granted. On appeal he claimed the strip search was "excessively intrusive," in violation of the Fourth Amendment and Art. III, Sec. 6 of the *West Virginia Constitution*.

Syl. pt. 1 - "Public School students in West Virginia are entitled under *U.S. const.* amend. IV and *W.Va. Const.* art. III, § 6, to security against unreasonable searches and seizures conducted in the schools by school principals, teachers and other school authorities." Syllabus point 2, *State v. Joseph T.*, 175 W.Va. 598, 336 S.E.2d 728 (1985).

Syl. pt. 2 - "In determining whether a warrantless search concerning a public school student conducted by school authorities is reasonable under *U.S. Const.* amend. IV and *W.Va. Const.* art. III, § 6, in the context of delinquency or criminal proceedings instituted against the student, the search is to be assessed in view not only of the rights of the public school student but also in view of the need of this State's educational system to prevent disruptive or illegal conduct by public school students; in particular, the search must be reasonable in terms of (1) the initial justification for the search and (2) the extent of the search conducted; the initial justification for the search is determined by the 'reasonable suspicion standard' (a standard less exacting than 'probable cause') under which a search is justified where school authorities have reasonable grounds for suspecting that the search will reveal evidence that the student violated the rules of the school or the law; the extent of the search conducted is reasonable when reasonably related to the objective of the search and not excessively intrusive to the student." Syllabus point 3, *State v. Joseph T.*, 175 W.Va. 598, 336 S.E.2d 728 (1985).

Syl. pt. 3 - In the absence of exigent circumstances which necessitate an immediate search in order to ensure the safety of other students, the warrantless strip search of a student by a school official is presumed to be "excessively intrusive" and thus unreasonable in scope.

## SEARCH AND SEIZURE

### Warrantless search (continued)

#### Juvenile at school (continued)

*State ex rel. Galford v. Mark Anthony B.*, (continued)

The Court found reasonable cause for focusing on appellant; he had access to the empty classroom and was on probation for attempted burglary. However, the scope of the search was held excessive. Reversed.

#### Lawfully parked car

*State v. Smith*, 438 S.E.2d 554 (1993) (Per Curiam)

See PROBABLE CAUSE Gesture when stopped, (p. 441) for discussion of topic.

#### Plain view exception

*State v. Nelson*, 434 S.E.2d 697 (1993) (Workman, C.J.)

See ENTRAPMENT Grounds for, (p. 192) for discussion of topic.

#### Probable cause for

*State v. Hlavacek*, 407 S.E.2d 375 (1991) (Brotherton, J.)

Appellant was convicted of possession of marijuana. On appeal he challenged the validity of the search warrant used to obtain the marijuana.

The investigating officer, acting on an informant's tip that appellant was engaged in a drug delivery, followed appellant in his car until appellant turned into a gasoline station. The officer approached the car and asked appellant to consent to a search of the vehicle. Appellant refused. The officer told appellant he was free to leave but the car must stay in place while the officer obtained a search warrant. Appellant chose to stay with his car.

Before leaving the scene, the officer did a "protective search" of appellant's person, finding three marijuana cigarettes. Appellant was thereupon arrested and advised of his rights. Upon obtaining the search warrant, the officer discovered approximately one pound of marijuana in appellant's automobile.

## SEARCH AND SEIZURE

### Warrantless search (continued)

#### Probable cause for (continued)

##### *State v. Hlavacek*, (continued)

Syl. pt. 1 - “Where a police officer making a lawful investigatory stop has reason to believe that an individual is armed and dangerous, that officer, in order to protect himself and others, may conduct a search for concealed weapons, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be certain that the individual is armed; the inquiry is whether a reasonably prudent man would be warranted in the belief that his safety or that of others was endangered. *U.S. Const.* amend. IV. *W.Va. Const.* art. III, section 6.” Syllabus point 3, *State v. Choat*, 178 W.Va. 607, 363 S.E.2d 493 (1987).

Here, the Court found that concern for his partner’s safety did not justify the search. The Court noted that the initial investigatory stop was not challenged and cautioned that even sufficient suspicion to justify an investigative stop may not satisfy probable cause standards for a subsequent search.

Even if a “pat-down” search would have been permissible, the officer impermissibly asked appellant to empty his pockets. Reversed and remanded.

#### Right to counsel

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See SEARCH AND SEIZURE Plain view exception, (p. 522) for discussion of topic.

## SELF-DEFENSE

### Duty to retreat

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

Appellant was convicted of first-degree murder in the killing of appellant's former sister-in-law's boyfriend. According to her testimony appellant had warned her not to continue seeing the victim or "something would happen."

The victim was killed in a wooded area near a lightly traveled road. At trial appellant claimed self-defense. Through cross-examination of the state's witnesses appellant tried to establish that his wounds were neither self-inflicted nor superficial and that the victim was the aggressor. The trial court did not instruct the jury on self defense. Appellant argued on appeal that sufficient evidence was introduced to support an instruction.

Syl. pt. 1 - "[W]hen there is a quarrel between two or more persons and both or all are in fault, and a combat as a result of such quarrel takes place and death ensues as a result; in order to reduce the offense to killing in self-defense, two things must appear from the evidence and circumstances in the case: first, that before the mortal shot was fired the person firing the shot declined further combat, and retreated as far as he could with safety; second, that he necessarily killed the deceased in order to preserve his own life or to protect himself from great bodily harm. . . ." Syl. Pt. 6, *in part*, *State v. Foley*, 131 W.Va. 326, 47 S.E.2d 40 (1948).

Evidence here came from appellant's statement to an investigating officer that he stopped to offer the victim assistance and was attacked. Even if true, appellant also said that the victim retreated to his vehicle and then ran into the woods. When appellant followed the victim, appellant became the aggressor and lost any right to claim self-defense. No error in refusing the self-defense instruction.

### Force permissible

*State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

Appellant was found guilty of unlawful assault. The assault occurred when appellant's son identified the victim as the person with whom appellant's ex-wife was having an affair. Appellant approached the victim with closed fists and hit him several times; the victim throughout protested that he was "the wrong guy" and backed away while appellant hit him. The victim fell and appellant continued kicking him with steel toed shoes. The assault continued for some 15 or 20 minutes. Appellant later went to the victim's apartment and shouted that he had the victim's blood on him and wanted "to finish the job."

## **SELF-DEFENSE**

### **Force permissible (continued)**

#### *State v. Asbury*, (continued)

The trial court refused appellant's instruction on self-defense on the grounds there was no evidence showing the victim threatened appellant.

Syl. pt. 1 - "The amount of force that can be used in self-defense is that normally one can return deadly force only if he reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise, where he is threatened only with non-deadly force, he may use only non-deadly force in return.' Syllabus Point 1, *State v. Baker*, 177 W.Va. 769, 356 S.E.2d 862 (1987)." Syllabus Point 3, *State v. Bongalis*, 180 W.Va. 584, 378 S.E.2d 449 (1989).

The Court noted the aggressor cannot rely on self defense. *State v. Smith*, 170 W.Va. 654, 295 S.E.2d 820 (1982). Viewing the evidence in the light most favorable to the prosecution, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978), appellant was the aggressor. Even if appellant were not the aggressor, by his own testimony he did not feel threatened. No error in refusing the instruction.

#### *State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See SELF-DEFENSE Duty to retreat, (p. 532) for discussion of topic.

### **Instructions on**

#### *State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

See INSTRUCTIONS Confusing, (p. 315) for discussion of topic.

### **Victims's acts admissible**

#### *State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

See EVIDENCE Victim's acts of violence, (p. 248) for discussion of topic.

## **SELF-INCRIMINATION**

### **Clothing seized during arrest**

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See SEARCH AND SEIZURE Plain view exception, (p. 522) for discussion of topic.

### **During arrest**

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See SEARCH AND SEIZURE Plain view exception, (p. 522) for discussion of topic.

### **Consent to search**

#### **Involuntary**

*State v. Smith*, 410 S.E.2d 269 (1991) (Neely, J.)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 307) for discussion of topic.

### **Controlled substance prescription**

*State v. Bell*, 432 S.E.2d 532 (1993) (Per Curiam)

Appellant was convicted of altering a prescription to obtain a controlled substance. A police officer testified that he gave appellant the prescription while appellant was at the police station and never saw it again. Appellant claimed he gave the prescription back to the officer.

On appeal, appellant claimed his Fifth Amendment rights were violated when the prosecuting attorney questioned him at trial regarding the prescription. Appellant had asserted his right to see an attorney while at the police station.

The Court found no error. The exchange at the police station was not investigatory, and thus not protected.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Confessions

#### Admissibility

*State ex rel. Justice v. Allen*, 432 S.E.2d 199 (1993) (Per Curiam)

Appellant was convicted of delivering a controlled substance. He appealed from an order denying *habeas corpus* relief. He claimed he gave an involuntary confession because of a promise of leniency from the prosecuting attorney.

After appellant was indicted by a grand jury, the prosecuting attorney told him he was not the principal subject of a drug investigation and that he would not be prosecuted if he cooperated with police. He gave a statement which was used at trial to convict him.

Syl. pt. - “When the representations of one in authority are calculated to foment hope or despair in the mind of the accused to any material degree, and a confession ensues, it cannot be deemed voluntary.” Syllabus, *State v. Parsons*, 108 W.Va. 705, 152 S.E. 745 (1930).” Syllabus point 7, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982).

The Court recognized that *habeas corpus* may be used to challenge coerced confessions. Appellant brought three witnesses to testify to the coercion, including his attorney and an assistant prosecuting attorney. Reversed.

*State v. Bunda and Devault*, 419 S.E.2d 457 (1992) (Per Curiam)

Appellants were both convicted of arson after having been previously convicted in Pennsylvania of both arson and burglary. During the Pennsylvania investigation, it became clear that they were involved in arsons in West Virginia. Appellants confessed to the Pennsylvania crimes and pled guilty.

At trial the Pennsylvania police were allowed to testify concerning the confessions in Pennsylvania. Appellants claimed the confessions were coerced. During the suppression hearing the Pennsylvania police claimed independent sources for their probable cause to question appellants.

Syl. pt. 4 - “The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of part or all of an offense were voluntary before such may be admitted into the evidence of a criminal case.” Syllabus point 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975).” Syl. pt. 1, *State v. Woods*, 169 W.Va. 767, 289 S.E.2d 500 (1982).

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Confessions (continued)

#### Admissibility (continued)

##### *State v. Bunda and Devault*, (continued)

Syl. pt. 5 - “The trial court has wide discretion as to the admission of confessions and ordinarily this discretion will not be disturbed on review.’ Syllabus Point 2, *State v. Lamp*, 163 W.Va. 93, 254 S.E.2d 697 (1979).” Syl. pt. 2, *State v. Woods*, 169 W.Va. 767, 289 S.E.2d 500 (1982).

Syl. pt. 6 - “A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.’ Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).” Syl. pt. 1, *State v. Nicholson*, 174 W.Va. 573, 328 S.E.2d 180 (1985).

The Court found no evidence of coercion. No error.

##### *State v. George*, 408 S.E.2d 291 (1991) (Workman, J.)

Appellant was convicted of malicious assault and attempted murder of the same victim. At trial, appellant testified that he was stopped by two police officers who approached him with weapons drawn. He was searched and then held in a police car while his truck was searched, with his consent, and he was questioned. Appellant’s contemporaneous statements as to not hearing any gunshots, not having a gun, and his reasons for being in the area were admitted to evidence. On appeal, he objected, saying *Miranda* warnings should have been given.

Syl. pt. 3 - “A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.’ Syl. pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).” Syl. Pt. 4, *State v. Preece*, 181 W.Va. 633, 383 S.E.2d 815 (1989).

The Court found the questions here to be merely investigatory; appellant was not placed under arrest until three months after the questioning. No error.

##### *State v. Gray*, 418 S.E.2d 597 (1992) (Neely, J.)

Appellant was convicted of first-degree murder. On appeal he claimed that his confession was a result of police beatings; the police claimed appellant’s injuries were a result of his struggle with the murdered police officer.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Confessions (continued)

#### Admissibility (continued)

##### *State v. Gray*, (continued)

Syl. pt. 1 - “A confession that is involuntary in fact is inherently unreliable. A confession under torture is worthless for all purposes.” Syllabus Point 3, *State v. Smith*, 186 W.Va. 33, 410 S.E.2d 269 (1991).

Syl. pt. 2 - “A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.” Syllabus Point 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

The Court noted that only appellant’s own testimony supported his allegation of beatings. His minor injuries were consistent with his struggle with the dead officer and with his attempts to escape. No abuse of discretion in admitting the confession.

##### *State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See CONFESSIONS Admissibility, Warrantless arrest, (p. 128) for discussion of topic.

##### *State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

Appellant was convicted of eight counts of sexual assault, beginning when the victim was one of her sixth grade pupils. The sexual acts continued over a period of approximately one and one half years. When police officers confronted her, she read and signed a statement waiving her rights, whereupon she stated she was in love with the student and described their sexual encounters.

A suppression hearing was held regarding her confession. The trial court found appellant was informed of the nature of the charges against her, that she was told she was not under arrest and was free to leave at any time, and that she voluntarily agreed to make a statement. She read and understood the waiver and signed a written account of her statement acknowledging its accuracy, and read and signed a disclaimer stating the statement she gave was not obtained by threats, coercion or inducements of any kind.

Syl. pt. 1 - “It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review.” Syllabus point 2, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Confessions (continued)

#### Admissibility (continued)

##### *State v. Koon*, (continued)

Syl. pt. 2 - “‘The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of all or a part of an offense were voluntary before such may be admitted into the evidence of a criminal case.’ Syl. pt. 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975).” Syllabus point 1, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Syl. pt. 3 - “A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.” Syllabus point 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Syl. pt. 5 - “In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.” Syllabus point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

No abuse of discretion in admitting the confession to evidence. No error.

##### *State v. Slaman*, 431 S.E.2d 91 (1993) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 204) for discussion of topic.

##### *State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

Appellant was convicted of breaking and entering of a retail store. He claimed on appeal that incriminating admissions should have been suppressed because of the delay in presenting him before a magistrate. Appellant was arrested at work around 4:00 p.m. He was fingerprinted, photographed and given *Miranda* warnings. He agreed to accompany police to his room to locate the stolen goods.

After returning to the police station with the contraband appellant described hiding in the store loft and claimed he would have shot investigators if they had come closer. Appellant was taken before a magistrate at 9:00 p.m.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Confessions (continued)

#### Admissibility (continued)

##### *State v. Whitt*, (continued)

Syl. pt. 4 - ““The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.’ Syllabus Point 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), as amended.” Syllabus Point 1, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).

Syl. pt. 5 - “The delay between the time of the arrest or custodial interrogation and the giving of a confession is most critical for prompt presentment purposes because during this time period custodial confinement and interrogation can be used to attempt to produce a confession.” Syllabus Point 4, *State v. Wickline*, 184 W.Va. 12, 399 S.E.2d 42 (1990).

The Court found the delay here acceptable. No evidence was introduced to show that appellant was interrogated during the delay; the admission appears to have been voluntary. No error.

##### *State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 539) for discussion of topic.

##### *State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

Appellant was found guilty of breaking and entering and committed to the Anthony Center for youthful offenders. After appellant’s arrest on two charges, and while he was waiting for a magistrate, he was advised of his constitutional rights and signed a waiver of those rights. He then made a statement admitting to the breaking and entering. The statement was recorded in writing by a deputy sheriff. At the subsequent arraignment appellant said he would arrange for his own lawyer.

The next day further warrants were obtained charging appellant with two other breaking and entering incidents. In a tape-recorded statement, appellant denied any involvement. On the day following, appellant was again advised of his rights, signed a waiver and gave another statement, again reduced to writing, in which he admitted to three of the four break-ins attributed to him.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Confessions (continued)

#### Admissibility (continued)

##### *State v. Williams*, (continued)

At the suppression hearing regarding the last statement, appellant claimed he was coerced by the officer and that the officer threatened his mother and girlfriend. He further claimed that his statement to the arraigning magistrate regarding counsel was equivalent to a request for an attorney; therefore his subsequent interrogation without counsel was prohibited. The state claimed that appellant initiated the last conversation and that the statement was voluntary, based on a knowing waiver of his rights.

Syl. pt. 1 - "For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel." Syl. pt. 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987).

Syl. pt. 2 - "It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review." Syl. pt. 2, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1987).

Syl. pt. 3 - "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Syl. pt. 6 - "A confession or statement made by a suspect is admissible if it is freely and voluntarily made despite the fact that it is written by an arresting officer if the confession or statement is read, translated (if necessary), signed by the accused and admitted by him to be correct." Syl. pt. 2, *State v. Nicholson*, 174 W.Va. 573, 328 S.E.2d 180 (1985).

No abuse of discretion. No error.

##### *State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

Appellant was convicted of several counts of sexual assault, sexual abuse and sexual abuse by a parent or guardian. After a complaint from a neighbor, appellant was contacted by police and voluntarily submitted to questioning without an attorney present. He was advised of his rights and that he was not under arrest. He denied the allegations and asked for a polygraph test.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Confessions (continued)

#### Admissibility (continued)

##### *State v. Wilson*, (continued)

Still without an attorney, appellant was tested and failed. After the test he admitted to the testing officer that he had committed the abuse. Another officer was summoned, appellant waived his rights, and indicated he would make a statement. He again admitted to the charges.

At the suppression hearing appellant denied having been informed of his rights, denied reading the forms and claimed he was coerced and threatened by the polygraph administrator. Although acknowledging conflicts in the testimony, the trial court allowed the issue of Voluntariness to go to the jury.

At trial, appellant introduced his request for a polygraph examination to show he was wrongly treated after the test. The trial court, however, refused appellant's instruction saying the test itself was inadmissible. The test results were admitted into evidence through questioning of the administering officer.

Syl. pt. 1 - "The State must prove, at least by a preponderance of the evidence, that confessions or statements of an accused which amount to admissions of all or a part of an offense were voluntary before such may be admitted into the evidence of a criminal case." Syl. pt. 5, *State v. Starr*, 158 W.Va. 905, 216 S.E.2d 242 (1975)." Syl. Pt. 1, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Syl. pt. 2 - "It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review." Syl. Pt. 2, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Syl. pt. 3 - "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Syl. pt. 4 - "Polygraph test results are not admissible in evidence in a criminal trial in this State." Syl. Pt. 2, *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979).

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Confessions (continued)

#### Admissibility (continued)

##### *State v. Wilson*, (continued)

Syl. pt. 5 - “The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.’ Syllabus Point 4, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).” Syl. Pt. 6, *State v. Collins*, 186 W.Va. 1, 409 S.E.2d 181 (1990).

Syl. pt. 6 - “In all trials conducted hereafter where a confession or admission is objected to by the defendant at trial or prior to trial on the grounds of voluntariness, the trial court must instruct the jury on this issue if requested by the defendant.” Syl. Pt. 5, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

The Court found introduction of the test results plain error. The Court also found error in the prosecution’s refusal to allow appellant to copy the test results and in the trial court’s refusal to instruct the jury on the voluntariness of the confession. Reversed.

### Confessions to police

##### *State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 217) for discussion of topic.

##### *State v. Slaman*, 431 S.E.2d 91 (1993) (Per Curiam)

See EVIDENCE Admissibility, Confessions, (p. 204) for discussion of topic.

##### *State v. Wickline*, 399 S.E.2d 42 (1990) (Miller, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Delay in taking before magistrate, (p. 545) for discussion of topic.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Delay in taking before magistrate

*State v. Bess*, 406 S.E.2d 721 (1991) (Per Curiam)

See CONFESSIONS Voluntariness, (p. 130) for discussion of topic.

*State v. Wickline*, 399 S.E.2d 42 (1990) (Miller, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Delay in taking before magistrate, (p. 545) for discussion of topic.

### Prompt presentment

*State v. Bess*, 406 S.E.2d 721 (1991) (Per Curiam)

See CONFESSIONS Voluntariness, (p. 130) for discussion of topic.

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 220) for discussion of topic.

### Psychiatric examination

#### Waiver during

*State v. Leadingham*, 438 S.E.2d 825 (1993) (McHugh, J.)

See PSYCHOLOGICAL/PSYCHIATRIC EVALUATION Self-Incrimination, Waiver during examination, (p. 482) for discussion of topic

### Right to invoke

*Kelly v. Allen*, No. 20663 (12/19/91) (Per Curiam)

Petitioner sought writ of *habeas* corpus for release from the McDowell County jail. After the prosecuting attorney of Wyoming County sought writ of *habeas* corpus against petitioner to produce her father, petitioner invoked her Fifth Amendment right and refused to testify. The trial judge held petitioner guilty of “civil” contempt and ordered her confined for six months or until she provided the information sought.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Right to invoke (continued)

#### *Kelly v. Allen*, (continued)

The Court held the confinement to be criminal contempt because of the definite term of imprisonment. *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981). Because petitioner was being held for invoking her Fifth Amendment right against self-incrimination, the Court granted the writ. The Court distinguished cases wherein petitioner was granted immunity in return for testimony. *State ex rel. Brown v. MacQueen*, 169 W.Va. 56, 285 S.E.2d 486 (1981); *In re Yoho*, 171 W.Va. 625, 301 S.E.2d 581 (1983).

### Testimony by defendant

#### *State v. Gibson*, 413 S.E.2d 120 (1991) (Per Curiam)

See DUE PROCESS Defendant's right to testify, Waiver of, (p. 186) for discussion of topic.

### Threats against victim

#### *State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

Appellant was convicted of first-degree murder. The trial court admitted evidence that appellant had told the victim a month before the killing that "There'll be another day and another time and I will stick you." The victim was stabbed with appellant's knife during a fight outside a bar.

Appellant claimed that the remark was too remote in time to be considered as evidence of his state of mind at the time of the fight.

Syl. pt. 3 - "Evidence of a threat made by a defendant on trial for murder, against the life of the person alleged to have been murdered, coupled with a statement of the manner or means by which such threat was intended to be carried out, is admissible." Syl. pt. 3, *State v. Flint*, 142 W.Va. 509, 96 S.E.2d 677 (1957)." Syllabus point 5, *State v. Duell*, 175 W.Va. 233, 332 S.E.2d 246 (1985).

The Court noted that remoteness goes to the weight to be accorded the evidence rather than to admissibility. *State v. Gwinn*, 169 W.Va. 456, 288 S.E.2d 533 (1982). Generally, admission is within the trial court's discretion. *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945). No abuse of discretion here.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Voluntariness

*State v. Wilson*, 439 S.E.2d 448 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 540) for discussion of topic.

### Coercion

*State ex rel. Justice v. Allen*, 432 S.E.2d 199 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 535) for discussion of topic.

*State v. Bess*, 406 S.E.2d 721 (1991) (Per Curiam)

See CONFESSIONS Voluntariness, (p. 130) for discussion of topic.

### Delay in taking before magistrate

*State v. Wickline*, 399 S.E.2d 42 (1990) (Miller, J.)

Appellant was convicted of first-degree murder, without mercy. During the investigation of the killing, appellant confessed to a police officer. He read her *Miranda* rights to her. She executed a written statement. A second officer also talked to her, resulting in a second confession. Appellant asked to go elsewhere to talk. Police officers later testified that appellant was not under arrest at this point even though she was told to remain in the police car. The officers told her they had to complete their investigation before taking her anywhere.

Some four hours later appellant was placed under formal arrest and driven to a state police barracks. She began a second written statement an hour after arrest, in which she admitted that she planned to kill her husband because he abused her. On appeal she challenged the admission of the oral confession and the admission of the second written statement.

Syl. pt. 1 - “A spontaneous statement by a defendant made prior to any action by a police officer and before an accusation, arrest or any custodial interrogation is made or undertaken by the police may be admitted into evidence without the voluntariness thereof first having been determined in an *in camera* hearing.’ Syllabus Point 1, *State v. Johnson*, 159 W.Va. 682, 226 S.E.2d 442 (1976).” Syllabus Point 4, *Wilhelm v. Whyte*, 161 W.Va. 67, 239 S.E.2d 735 (1977).

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Voluntariness (continued)

#### Delay in taking before magistrate (continued)

##### *State v. Wickline*, (continued)

Syl. pt. 2 - ““The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.’ Syllabus Point 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), as amended.” Syllabus Point 1, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984).

Syl. pt. 3 - “Our prompt presentment rule contained in *W.Va. Code*, 62-1-5, and Rule 5(a) of the West Virginia Rules of Criminal Procedure, is triggered when an accused is placed under arrest. Furthermore, once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is also triggered.” Syllabus Point 2, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

Syl. pt. 4 - The delay between the time of the arrest or custodial interrogation and the giving of a confession is most critical for prompt presentment purposes because during this time period custodial confinement and interrogation can be used to attempt to produce a confession.

Syl. pt. 5 - “An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.” Syllabus Point 1, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

Syl. pt. 6 - “The delay occasioned by reducing an oral confession to writing ordinarily does not count on the unreasonableness of the delay where a prompt presentment issue is involved.” Syllabus Point 3, *State v. Humphrey*, 177 W.Va. 264, 351 S.E.2d 613 (1986).

The Court found that appellant was under arrest when told to stay in the police car. However, there was not an unreasonable delay in taking her before a magistrate because a confession had already been obtained prior to her being told to stay in the police car. The police did not continue to interrogate her but merely continued their investigation. See *State v. Worley*, 179 W.Va. 403, 369 S.E.2d 706 (1988), *cert. denied*, 488 U.S. 895, 102 L.Ed.2d 226, 109 S.Ct. 236 (1988); *State v. Hutcheson*, 177 W.Va. 391, 352 S.E.2d 143 (1986); and *State v. Humphrey*, *supra*. No error.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Voluntariness (continued)

#### Generally

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 537) for discussion of topic.

#### Statement written by police officer

*State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

Appellant was convicted of second-degree murder. He claimed that the trial court erroneously admitted his written confession. The statement was taken by a police officer shortly after arrest and the giving of *Miranda* warnings. Since appellant is illiterate, the statement was transcribed and read back to him; he made minor corrections and signed it.

Syl. pt. 1 - “A confession or statement made by a suspect is admissible if it is freely and voluntarily made despite the fact that it is written by an arresting officer if the confession or statement is read, translated (if necessary), signed by the accused and admitted by him to be correct.” Syl. Pt. 2, *State v. Nicholson*, 174 W.Va. 573, 328 S.E.2d 180 (1985).

Syl. pt. 2 - “It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review.’ Syl. Pt. 2, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).” Syl. Pt. 3, *State v. McDonough*, 178 W.Va. 1, 357 S.E.2d 34 (1987).

The Court approved of the procedure used in taking the confession. No error.

## SENTENCING

### Appropriateness

#### Generally

*State v. Housden*, 399 S.E.2d 882 (1990) (Workman, J.)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 455) for discussion of topic.

#### Recidivism

*State v. Barker*, 410 S.E.2d 712 (1991) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 455) for discussion of topic.

*State v. Miller*, 400 S.E.2d 897 (1990) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 458) for discussion of topic.

### Burglary

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See SENTENCING Delay in imposing, (p. 549) for discussion of topic.

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

Appellant was convicted of daytime burglary without breaking. He argued that his sentence of four months in the county jail is void because *W.Va. Code*, 61-3-11(b) says nothing about serving time in a county jail.

Syl. pt. 5 - West Virginia Code Section 61-3-11(b) (1989) provides that a person found guilty of daytime burglary “shall be confined in the penitentiary not less than one nor more than ten years.”

Syl. pt. 6 - As a condition of probation, a court may require a probationer “to serve a period of confinement in the county jail of the county in which he was convicted for a period not to exceed one third of the minimum sentence established by law or one third of the least possible period of confinement in an indeterminate sentence, but in no case shall such period of confinement exceed six consecutive months.” *W.Va. Code*, Section 62-12-9(4) (1989).

## SENTENCING

### Burglary (continued)

#### *State v. Ward*, (continued)

Here, appellant's sentence in the county jail was made a condition of the two years' probation he got when his sentence was suspended. Since the sentence was for the statutory period of one-third of the minimum sentence. No error.

### Consecutive sentences

#### Multiple convictions

#### *State v. Housden*, 399 S.E.2d 882 (1990) (Workman, J.)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 455) for discussion of topic.

### Court costs

#### Special prosecutor fees

#### *State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See PROBATION Conditions of, Special prosecutor fees, (p. 443) for discussion of topic.

### Delay in imposing

#### *State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

Appellant was convicted of daytime burglary by entering without breaking. He was convicted 12 December 1985 but was not sentenced until 28 April 1989. On appeal he claimed that this delay was in violation of Rule 32 of the *West Virginia Rules of Criminal Procedure*, which requires sentence to be imposed "without unreasonable delay."

Appellant's trial counsel withdrew from his case in April, 1986. On 29 April 1986 appellant asked that the judge recuse himself; a second presentence report which prepared as a result of the judge's recusing his probation officer son but no himself. On 7 July 1986 that report was filed. Sentencing was set for 26 January 1987 but a continuance was requested by defense counsel. On 11 November 1988 a new judge was appointed. Motion for new trial was made 1 December 1988 and sentencing occurred thereafter.

## SENTENCING

### Delay in imposing (continued)

#### *State v. Ward*, (continued)

Passage of time alone is not unreasonable delay in sentencing. *Ball v. Whyte*, 170 W.Va. 417, 294 S.E.2d 270 (1982). This delay was not unreasonable. No error.

### Disproportionate sentence

#### Recidivism

#### *State v. Miller*, 400 S.E.2d 897 (1990) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 458) for discussion of topic.

## DUI

### Alternative sentencing

#### *State v. Morris*, 421 S.E.2d 488 (1992) (McHugh, C.J.)

See DRIVING UNDER THE INFLUENCE Sentencing, Alternative sentencing, (p. 184) for discussion of topic.

### Probation

#### *State v. Morris*, 421 S.E.2d 488 (1992) (McHugh, C.J.)

See DRIVING UNDER THE INFLUENCE Sentencing, Alternative sentencing, (p. 184) for discussion of topic.

### Third offense

#### *State ex rel. Moomau v. Hamilton*, 400 S.E.2d 259 (1990) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Third offense DUI, Sentencing, (p. 185) for discussion of topic.

## SENTENCING

### DUI (continued)

#### Work release

*State ex rel. Moomau v. Hamilton*, 400 S.E.2d 259 (1990) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Third offense DUI, Sentencing, (p. 185) for discussion of topic.

### Enhancement

#### Duty to inform jury

*State v. Johnson and State v. Barber*, 419 S.E.2d 300 (1992) (Miller, J.)

See SENTENCING Enhancement, Notice of, (p. 551) for discussion of topic.

#### *Ex post facto* application

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

See *EX POST FACTO* Sentencing, (p. 252) for discussion of topic.

*State v. Hensler*, 415 S.E.2d 885 (1992) (Per Curiam)

See SENTENCING *Ex post facto* application, (p. 554) for discussion of topic.

### Multiple convictions

*State v. Housden*, 399 S.E.2d 882 (1990) (Workman, J.)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 455) for discussion of topic.

### Notice of

*State v. Johnson and State v. Barber*, 419 S.E.2d 300 (1992) (Miller, J.)

These cases were consolidated on appeal. Both involve the use of a firearm in a killing (Johnson was convicted of voluntary manslaughter, Barber of first-degree murder). The issues involved application of mandatory incarceration for use of firearms.

## SENTENCING

### Enhancement (continued)

#### Notice of (continued)

##### *State v. Johnson and State v. Barber*, (continued)

Syl. pt. 1 - *W.Va. Code*, 62-12-2 (1986), prohibits a grant of probation to any person convicted of committing a felony with the use, presentment, or brandishing of a firearm.

Syl. pt. 2 - Under *W.Va. Code*, 62-12-2 (1986), the State has two options by which it may notify the defendant of its intent to seek an enhanced penalty. Under *W.Va. Code*, 62-12-2(c)(1), it may set out the charge in the indictment, or, under *W.Va. Code*, 62-12-2(c) (2)(C), it may elect to give notice of the enhancement by a writing. In this latter event, the grounds must be set out as fully as such grounds are otherwise required to be stated in an indictment.

Syl. pt. 3 - In the absence of specific legislation, the trial court is not required to inform the jury as to the penalty enhancement imposed under *W.Va. Code*, 62-12-2 (1986), where the defendant is found to have used a firearm in the commission of or attempt to commit a felony.

The Court noted that the defendant should be given notice of enhancement sufficiently in advance to be able to choose between alternatives like plea bargaining or proceeding to trial. Failure to give notice makes the statutes inapplicable.

A specific finding must be made that a firearm was used; if the jury makes the finding it must be by special interrogatory. Once a jury verdict is returned the court cannot make its own finding. *State v. Pannell*, 175 W.Va. 35, 330 S.E.2d 844 (1985). The court should instruct the jury on the definition of a firearm and use of the firearm must be found beyond a reasonable doubt.

Here, both appellants were properly notified of the state's intention to seek enhancement. No objection was made as to the court's failure to instruct on the burden of proof and the court had no duty to inform the jury as to the consequences of its finding. The jury need not weigh sentencing or parole options; its job is to determine guilt or innocence. No error.

##### *State v. Richards*, 438 S.E.2d 331 (1993) (Brotherton, J.)

Appellant was convicted of malicious wounding of his brother and nephew and sentenced to two concurrent terms of two to ten years. Since appellant used a firearm, the sentence was enhanced. No notice of intent to seek enhancement was given by the prosecution. *W.Va. Code*, 62-12-2.

## SENTENCING

### Enhancement (continued)

#### Notice of (continued)

##### *State v. Richards*, (continued)

Syl. pt. 4 - The State may not seek a *W.Va. Code*, § 62-12-2, enhancement of a defendant's sentence for use of a firearm in the commission of the crime charged unless it has previously given the defendant notice of the intention to enhance in the manner outlined in syllabus point 2 of *State v. Johnson*, 187 W.Va. 360, 419 S.E.2d 300 (1992).

Syl. pt. 5 - "Under *W.Va. Code*, 62-12-1 (1986), the State has two options by which it may notify the defendant of its intent to seek an enhanced penalty. Under *W.Va. Code*, 62-12-2(c)(1), it may set out the charge in the indictment, or, under *W.Va. Code*, 62-12-2(c)(2)(C), it may elect to give notice of the enhancement by a writing. In this latter event, the grounds must be set out as fully as such grounds are otherwise required to be stated in an indictment." Syllabus point 2, *State v. Johnson*, 187 W.Va. 360, 419 S.E.2d 300 (1992).

Here, the prosecution did not give notice. Reversed and remanded.

#### Prior use of 5 year enhancement

##### *State v. Jones*, 420 S.E.2d 736 (1992) (Miller, J.)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 457) for discussion of topic.

#### Remoteness in time of prior offense

##### *State v. Jones*, 420 S.E.2d 736 (1992) (Miller, J.)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 457) for discussion of topic.

#### Use of firearm

##### *State v. Johnson and State v. Barber*, 419 S.E.2d 300 (1992) (Miller, J.)

See SENTENCING Enhancement, Notice of, (p. 551) for discussion of topic.

## SENTENCING

### *Ex post facto* application

*State v. Hensler*, 415 S.E.2d 885 (1992) (Per Curiam)

Appellant was sentenced to two concurrent terms for two convictions of first-degree sexual abuse and to two additional concurrent terms for two additional convictions of first-degree sexual abuse. On appeal he claimed that the trial court improperly allowed the jury to consider *W.Va. Code*, 61-8B-1(1)(c) (defining forcible compulsion) in determining if he violated *W.Va. Code*, 61-8B-7 (prohibiting sexual abuse). The definition statute was amended after the alleged acts to add fear by a child under 16 by another person four years older.

Although the trial court originally said the evidence did not support an instruction on forcible compulsion, the court later instructed the jury according to *W.Va. Code*, 61-8B-1(1)(c). Appellant claimed on appeal that this instruction constituted either an unconstitutional *ex post facto* law or an unconstitutional denial of due process.

Syl. pt. - “Under *ex post facto* principles of the *United States* and *West Virginia Constitutions*, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.” Syllabus point 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980).

Here, the previous definition of forcible compulsion did not include fear; therefore using the newer definition altered the necessary proof for conviction. Clearly an *ex post facto* application. See *State v. R.H.*, 166 W.Va. 280, 273 S.E.2d 578 (1980); *State v. Short*, 177 W.Va. 1, 350 S.E.2d 1 (1986). Reversed and remanded.

### Failure to sentence

#### Effect of

*Davis v. Duncil*, No. 19652 (11/9/90) (Per Curiam)

See *HABEAS CORPUS* Probation, (p. 272) for discussion of topic.

### Generally

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

Appellant was convicted of eight counts of sexual assault of her sixth-grade pupil. She claimed her sentence was unconstitutionally disproportionate (one to five years for four counts, separately, consecutive one to five years for the last four counts).

## SENTENCING

### Generally (continued)

#### *State v. Koon*, (continued)

Syl. pt. 9 - “Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.’ Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). “ Syllabus point 9, *State v. Hays*, 185 W.Va. 664, 408 S.E.2d 614 (1991).

The Court noted that the trial court afforded appellant an opportunity to read and correct the presentence report, testimony was allowed on the effect of incarceration on her family, and defense counsel addressed the court (appellant having declined). The court further stated that it had considered all of the above factors and further considered the effect on the community, the recommendations of the prosecuting attorney and the retributive, rehabilitative and deterrent effect. No error.

### Good time credit

#### *State ex rel. Roach v. Dietrick*, 404 S.E.2d 415 (1991) (Miller, C.J.)

Petitioner was indicted for attempted aggravated robbery. He pled guilty to second offense petit larceny, which carries a mandatory one year sentence in the penitentiary. *W.Va. Code*, 61-11-20. At sentencing he was given credit for pretrial detention and committed to the Regional Jail.

The Department of Corrections credited an additional one day of “good time” for each day of petitioner’s previous confinement and ordered his release. Without hearing, the Circuit Court ordered petitioner to remain confined until resolution of this petition for *habeas corpus*.

Syl. pt. 1 - “Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.’ Syllabus Point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).” Syllabus Point 2, *Stowers & Sons Trucking Co. v. Public Service Commission*, 182 W.Va. 374, 387 S.E.2d 841 (1989).

Syl. pt. 2 - “The Legislature, when it enacts legislation, is presumed to know its prior enactments.’ Syllabus Point 12, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953).” Syllabus Point 5, *Pullano v. City of Bluefield*, 176 W.Va. 198, 342 S.E.2d 164 (1986).

## SENTENCING

### Good time credit (continued)

*State ex rel. Roach v. Dietrick*, (continued)

Syl. pt. 3 - A person who has been incarcerated in jail awaiting sentence and is then sentenced to the custody of the Commissioner of the Department of Corrections and is credited with presentence jail time under *W.Va. Code*, 61-11-24, is also entitled to receive good time credit under *W.Va. Code*, 28-5-27(c) (1984), for the presentence jail time.

Syl. pt. 4 - “A writ of *habeas corpus ad subjiciendum* will lie to effect the release of one imprisoned in the State Penitentiary without authority of law.” Syllabus Point 1, *State ex rel. Vandal v. Adams*, 145 W.Va. 566, 115 S.E.2d 489 (1960).

The Court noted that *W.Va. Code*, 28-5-27(c) was amended in 1984 to allow inmates committed to the Department of Corrections to be given credit for “any and all days in jail awaiting sentence and which is credited by the sentencing court ... to (the) sentence pursuant to *W.Va. Code*, 61-11-24.” Since petitioner’s presentence detention was credited (six months elapsed time), the Department was correct in trying to release petitioner. Writ granted.

### Home confinement

*State v. Caskey*, 406 S.E.2d 717 (1991) (Brotherton, J.)

See PROBATION Right to, (p. 447) for discussion of topic.

### Incarceration preceding

*State ex rel. Roach v. Dietrick*, 404 S.E.2d 415 (1991) (Miller, C.J.)

See SENTENCING Good time credit, (p. 555) for discussion of topic.

### Multiple offenses

*State v. Gill*, 416 S.E.2d 253 (1992) (Miller, J.)

See DOUBLE JEOPARDY Sexual assault, Abuse (by a parent or guardian), (p. 178) for discussion of topic.

## SENTENCING

### Multiple offenses (continued)

#### Same transaction

*State v. Drennen*, 408 S.E.2d 24 (1991) (Per Curiam)

See DOUBLE JEOPARDY Multiple offenses, Separate punishments, (p. 173) for discussion of topic.

### Notice

#### For enhancement

*State v. Richards*, 438 S.E.2d 331 (1993) (Brotherton, J.)

See SENTENCING Enhancement of, Notice of, (p. 552) for discussion of topic.

### Plea bargaining

#### When judge bound by plea

*State ex rel. Forbes v. Kaufman*, 404 S.E.2d 763 (1991) (McHugh, J.)

See PLEA BARGAINS Sentencing, (p. 418) for discussion of topic.

### Presentence report

#### Defendant's right to inspect

*State v. Plumley*, 401 S.E.2d 469 (1990) (Per Curiam)

Appellant was convicted of second-degree murder. He claimed as error that the trial court failed to require a presentence report from a probation officer and also refused to allow appellant to inspect a report from the Department of Corrections. *W.Va. Code*, 62-12-7a requires a probation officer's report prior to a presentence evaluation by the Department. The trial court found information of a confidential nature and refused to disclose the report.

## SENTENCING

### Presentence report (continued)

#### Defendant's right to inspect (continued)

##### *State v. Plumley*, (continued)

Syl. pt. 4 - "Where a presentence report has been prepared and presented the court shall, upon request, permit the defendant, or his counsel if he is so represented, prior to imposition of sentence, to read the report exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons and the court shall afford the defendant or his counsel an opportunity to comment on the report, and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report." Syl. Pt. 1, *State v. Byrd*, 163 W.Va. 248, 256 S.E.2d 323 (1979)."

The Court affirmed here, but noted that a defendant generally has the right to review his presentence report; complete denials are clearly not favored when confidential material can be excised.

### Probation

#### Incarceration as condition of

##### *State v. White*, 425 S.E.2d 210 (1992) (Workman, J.)

Appellant was indicted for malicious wounding; he entered a plea agreement to plead guilty to battery. He was sentenced to one year, suspended; put on probation, and ordered to serve five months in the county jail and five years probation; along with restitution and community service work. He filed a motion for reconsideration of sentence pursuant to Rule 35(b) of the *Rules of Criminal Procedure*, on the grounds that the maximum allowable time served could only be four months (one-third of the minimum sentence allowed, when made a condition of probation; see *W.Va. Code*, 62-12-9(4)).

In denying the motion, the trial court noted that the five month jail term was not a "condition of probation" subject to *W.Va. Code*, 62-12-9(4). The trial court believed the probation would begin after the jail term. Appellant was released on personal recognizance bond pending this appeal.

## SENTENCING

### Probation (continued)

#### Incarceration as condition of (continued)

##### *State v. White*, (continued)

Syl. pt. 1 - “ “A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.” Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908).’ Syl. pt. 1, *State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 305 S.E.2d 268 (1983).” Syl. Pt. 3, *Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393 (1985).

Syl. pt. 2 - ““In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.” Syl. Pt. 2, *Smith v. State Workmen’s Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).” Syl. Pt. 3, *State ex rel. Fetters v. Hott*, 173 W.Va. 502, 318 S.E.2d 446 (1984).

Syl. pt. 3 - In sentencing an offender, a court may either sentence the individual to a period of incarceration or place the individual on probation. If the court wishes to probate with a period of incarceration as a condition of that probation, West Virginia Code § 62-12-9(4) (1991) must be followed.

The Court noted the Legislature intended to limit a sentencing court’s discretion. The period of incarceration here must be limited to four months. Reversed and remanded.

#### Use of firearm prohibits

*State v. Johnson and State v. Barber*, 419 S.E.2d 300 (1992) (Miller, J.)

See SENTENCING Enhancement, Notice of, (p. 551) for discussion of topic.

#### Proportionality

*State v. Ross*, 402 S.E.2d 248 (1990) (Per Curiam)

See PROPORTIONALITY Generally, (p. 459) for discussion of topic.

## SENTENCING

### Proportionality(continued)

#### Recidivism

*State v. Barker*, 410 S.E.2d 712 (1991) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 455) for discussion of topic.

*State v. Davis*, 427 S.E.2d 754 (1993) (Per Curiam)

See PROPORTIONALITY Recidivism, (p. 460) for discussion of topic.

#### Recidivism

*State v. Barker*, 410 S.E.2d 712 (1991) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 455) for discussion of topic.

*State v. Davis*, 427 S.E.2d 754 (1993) (Per Curiam)

See PROPORTIONALITY Recidivism, (p. 460) for discussion of topic.

*State v. Housden*, 399 S.E.2d 882 (1990) (Workman, J.)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 455) for discussion of topic.

*State v. Jones*, 420 S.E.2d 736 (1992) (Miller, J.)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 457) for discussion of topic.

#### Appropriateness of sentence

*State v. Miller*, 400 S.E.2d 897 (1990) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Recidivism, (p. 458) for discussion of topic.

## SENTENCING

### Recidivism (continued)

#### Double jeopardy

*Gibson v. Legursky*, 415 S.E.2d 457 (1992) (Miller, J.)

See DOUBLE JEOPARDY Recidivism, (p. 176) for discussion of topic.

### Recommendation of mercy

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

Appellant was convicted of first-degree murder. On appeal he claimed that the trial judge erred in refusing to reject the jury's recommendation of no mercy and sentence appellant to life with mercy.

Syl. pt. 6 - "When a circuit court determines in a post-conviction *habeas* corpus proceeding that assistance of counsel in a homicide was ineffective, the circuit court has no authority to modify the original final judgment to award a recommendation of mercy when none was awarded by the jury that heard the case." Syl. Pt. 4, *Schofield v. West Virginia Dept. of Corrections*, 185 W.Va. 199, 406 S.E.2d 425 (1991).

Syl. pt. 7 - The recommendation of mercy in a first-degree murder case lies solely in the discretion of the jury. Therefore, it would be improper for the trial court to set aside a jury verdict of first-degree murder without a recommendation of mercy in order to give a recommendation of mercy.

The Court noted that *W.Va. Code*, 62-3-15 allows the jury to recommend mercy; if it does not, the trial court cannot sentence appellant to life with mercy.

### Resentencing

#### When accused is fugitive

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

## SENTENCING

### Reviewing sentence

#### Standard for

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

Appellant was convicted of issuing a worthless check in exchange for “property or a thing of value” pursuant to *W.Va. Code*, 61-3-39. He was sentenced to a term of one to ten years. Appellant claimed error in that the trial court sentenced him to the maximum allowable sentence.

Syl. pt. 9 - “Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

*W.Va. Code*, 61-3-39 carries a penalty of one to five years, not one to ten. Remanded for correction of sentence. No error in sentencing to the maximum term.

*State v. Layton*, 432 S.E.2d 740 (1993) (Brotherton, J.)

Appellant was convicted of aggravated robbery. After the jury returned its verdict, the trial court asked appellant if there were any reason he should not then be sentenced; he asked to be sentenced then, despite the lack of post-conviction motions. Appellant had been convicted of a prior felony.

Syl. pt. 7 - “Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.” Syllables point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

Because a recidivist information was apparently not filed at the time of sentencing, the Court found appellant was trying to avoid being sentenced as a recidivist. Although finding that a presentence report should have been presented or formal waiver given by appellant, the Court found no error. Rule 32, *W.Va. Rules of Crim.P.*

*State v. Ross*, 402 S.E.2d 248 (1990) (Per Curiam)

See PROPORTIONALITY Generally, (p. 459) for discussion of topic.

## SENTENCING

### Revised order following reversal

*Brumfield v. Legursky*, No. 19932 (3/14/91) (Per Curiam)

See MANDAMUS Revised sentence, (p. 393) for discussion of topic.

### Work release

*State ex rel. Moomau v. Hamilton*, 400 S.E.2d 259 (1990) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Third offense DUI, Sentencing, (p. 185) for discussion of topic.

*State v. Caskey*, 406 S.E.2d 717 (1991) (Brotherton, J.)

See PROBATION Right to, (p. 447) for discussion of topic.

## SEXUAL ATTACKS

### Bail

#### Right to in sexual assault

*State ex rel. Spaulding v. Watt*, 423 S.E.2d 217 (1992) (Miller,)

Relator, prosecuting attorney of Putnam County, asked that the bail of Mark J. McClelland be revoked pursuant to *W.Va. Code*, 62-1C-1(b). McClelland was convicted of first-degree sexual assault. Following a motion for new trial based on newly-discovered evidence, he was freed on post-conviction bail.

The prosecution thereupon was granted a writ of prohibition, preventing the new trial and moved to revoke bail, arguing that sexual assault is a crime involving the use of violence. That motion was denied, resulting in this appeal.

Syl. pt. - The offense of first-degree sexual assault under *W.Va. Code*, 61-8B-3(a)(2) (1984), involves violence to a person and is, therefore, subject to the provisions of *W.Va. Code*, 62-1C-1(b) (1983), with regard to post-conviction bail.

Although recognizing that *W.Va. Code*, 61-8B-3(a)(2) (sexual assault of children) does not require proof of violence, unlike the first-degree sexual assault in *W.Va. Code*, 61-8B-3(a)(1), the Court reasoned that violence can mean emotional and psychological harm, as well as physical harm. Merely because the statute dictated prosecution under a subsection omitting violence as an element does not mean the victims were not subjected to violence. Writ granted.

#### Child assault or abuse

*Jennifer A. v. Burgess*, No. 21009 (7/16/93) (Per Curiam)

Petitioner asked for writ of mandamus to compel respondent Department of Health and Human Resources to create guidelines for cases of alleged sexual abuse of children. The Department of Health and Human Resources answered that sufficient guidelines are already in place.

The Court found that present Department of Health and Human Resources child abuse guidelines to be both too detailed for practical use and not specific enough with regard to sexual abuse. The Court noted the ephemeral nature of evidence in these cases and the need for immediate investigation. The Court ordered the Department of Health and Human Resources to formulate concise guidelines giving specific steps to follow, even recommending a checklist. Training programs were required and a review procedure recommended before a case is closed. Writ granted. Ninety days to develop guidelines.

## SEXUAL ATTACKS

### Child assault or abuse (continued)

#### Abuse

*State v. Rummer*, 432 S.E.2d 39 (1993) (Miller, J.)

See DOUBLE JEOPARDY Multiple punishments, (p. 174) for discussion of topic.

#### Collateral crimes

*State v. Lola Mae C.*, 408 S.E.2d 31 (1991) (Workman, J.)

See SEXUAL ATTACKS Evidence, Collateral crimes, (p. 566) for discussion of topic.

#### Double jeopardy

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

See DOUBLE JEOPARDY Sexual assault, Abuse (by a parent or guardian), (p. 177) for discussion of topic.

*State v. Gill*, 416 S.E.2d 253 (1992) (Miller, J.)

See DOUBLE JEOPARDY Sexual assault, Abuse (by a parent or guardian), (p. 178) for discussion of topic.

#### State confesses error

*State v. Walter*, 423 S.E.2d 222 (1992) (Per Curiam)

See CONFESSION OF ERROR Effect of, (p. 127) for discussion of topic.

### Collateral crimes

#### Child assault or abuse

*State v. Lola Mae C.*, 408 S.E.2d 31 (1991) (Workman, J.)

See SEXUAL ATTACKS Evidence, Collateral crimes, (p. 566) for discussion of topic.

## SEXUAL ATTACKS

### Concerted acts

*State v. Lola Mae C.*, 408 S.E.2d 31 (1991) (Workman, J.)

See SEXUAL ATTACKS Multiple acts of intercourse, (p. 568) for discussion of topic.

### Double jeopardy

#### Assault

##### Abuse (by a parent)

*State v. Gill*, 416 S.E.2d 253 (1992) (Miller, J.)

See DOUBLE JEOPARDY Sexual assault, Abuse (by a parent or guardian), (p. 178) for discussion of topic.

### Evidence

#### Collateral crimes

*State v. Lola Mae C.*, 408 S.E.2d 31 (1991) (Workman, J.)

Appellant was convicted of two counts of first-degree sexual assault for assaulting and aiding and abetting her husband's assault on his nine year old son. On appeal she claimed that the trial court improperly admitted evidence of her husband's prior sexual assaults against the same victim, during which assaults appellant was not present.

Syl. pt. 3 - "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(s) giving rise to the indictment." Syl. Pt. 2, in part, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syl. pt. 4 - Where collateral act evidence would have been admissible against the principal in the first-degree, it is also admissible against an aider and abettor to show the underlying offense was committed, a necessary pre-requisite of proving aiding and abetting.

The Court found the evidence here tended to show appellant's husband's propensity to commit the assault appellant aided. Admissible. No error.

## **SEXUAL ATTACKS**

### **Evidence (continued)**

#### **Prompt complaint/excited utterance**

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prompt complaint, (p. 220) for discussion of topic.

#### **Use of civil abuse in criminal matters**

*State v. James R.*, 422 S.E.2d 521 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Conflict of interest, (p. 470) for discussion of topic.

### **Indictment**

#### **Sufficiency of**

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

See INDICTMENT Sufficiency of, Sexual abuse, (p. 299) for discussion of topic.

### **Instructions**

#### **Assault and abuse**

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See LESSER INCLUDED OFFENSES Generally, (p. 376) for discussion of topic.

### **Lesser included offenses**

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See LESSER INCLUDED OFFENSES Generally, (p. 376) for discussion of topic.

## SEXUAL ATTACKS

### Lesser included offenses (continued)

#### Assault and abuse

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See LESSER INCLUDED OFFENSES Generally, (p. 376) for discussion of topic.

#### Multiple acts of intercourse

*State v. Koon*, 440 S.E.2d 442 (1993) (Per Curiam)

Appellant was convicted of eight counts of sexual assault of her sixth grade pupil. She claimed that some of the counts related to oral sex which was ancillary to subsequent vaginal sex, and therefore should not have counted as separate offenses.

The Court noted that each act of “sexual intercourse” can be prosecuted. *State v. Lola Mae C.*, 185 W.Va. 452, 408 S.E.2d 31 (1991). *W.Va. Code*, 61-8B-1(7) defines “sexual intercourse” in the alternative so that either oral or vaginal sex can be an offense. Where, however, the contact is immediately preceding subsequent acts so that one is preparatory for the other, only one offense has occurred. *State v. Reed*, 166 W.Va. 558, 276 S.E.2d 313 (1981).

Here, however, the Court found two separate acts.

*State v. Lola Mae C.*, 408 S.E.2d 31 (1991) (Workman, J.)

Appellant was convicted of two counts of first-degree sexual assault and sentenced to two concurrent terms of 15 to 25 years. The victim, a nine-year old boy was the natural child of the father; appellant was convicted for her part in aiding the father’s assault and for watching while the father assaulted him. Appellant claimed that conviction of two separate offenses arising from one set of facts violates double jeopardy principles.

Syl. pt. 1 - “Where a defendant commits separate acts of our statutorily defined term ‘sexual intercourse’ in different ways, each act may be prosecuted and punished as a separate offense.” Syl. Pt. 2, *State v. Carter*, 168 W.Va. 90, 282 S.E.2d 277 (1981).

Syl. pt. 2 - “‘Under the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator.’ Syllabus Point 11, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).” Syl. Pt. 6, *State v. Davis*, 182 W.Va. 482, 388 S.E.2d 508 (1989).

## SEXUAL ATTACKS

### Multiple acts of intercourse (continued)

#### *State v. Lola Mae C.*, (continued)

The Court found two separate and distinct acts here; appellant both assaulted the victim and aided in the father's assault in that she inserted her finger into the child's anus and then failed to intervene although she had a duty to do so. No error.

### Sufficiency of evidence

#### *State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

Appellant was convicted of incest, sexual assault and sexual abuse by a guardian or custodian. He claimed on appeal that the uncorroborated testimony of the victim was inherently untrustworthy because it was substantially different from earlier statements given to police. Appellant claimed the victim fabricated the evidence because of resentment over the parents' refusal to allow her to participate in band. Appellant also claimed cumulative error.

Syl. pt. 12 - "A Conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syllabus Point 5, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981).

Syl. pt. 13 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978)." Syllabus Point 10, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992).

Syl. pt. 14 - "Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syllabus Point 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

The Court found the evidence sufficient. Further, no cumulative error was present sufficient for reversal. (Reversed on other grounds).

## SIXTH AMENDMENT

### Right to confront

#### Admissibility of extrajudicial statements

*State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

See RIGHT TO CONFRONT Admissibility of extrajudicial statements, (p. 499) for discussion of topic.

#### Seizure of evidence pursuant to lawful arrest

*State v. Julius*, 408 S.E.2d 1 (1991) (Miller, C.J.)

See SEARCH AND SEIZURE Plain view exception, (p. 522) for discussion of topic.

## **SPECIAL PROSECUTOR**

### **Fees for**

*State v. Kerns*, 420 S.E.2d 891 (1992) (McHugh, C.J.)

See PROBATION Conditions of, Special prosecutor fees, (p. 443) for discussion of topic.

## SPECTATORS IN COURT

### Victim

#### Weeping in court

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See JURY Bias, Victim weeping in court, (p. 355) for discussion of topic.

## **SPEEDY TRIAL**

### **Indictment delayed**

*State ex rel. Henderson v. Hey*, 424 S.E.2d 741 (1992) (Per Curiam)

See INDICTMENT Dismissal of, Undue delay, (p. 295) for discussion of topic.

### **Right to**

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See RIGHT TO SPEEDY TRIAL Standard for determining, (p. 510) for discussion of topic.

### **Right to in magistrate court**

*State ex rel. Johnson v. Zakaib*, 400 S.E.2d 590 (1990) (Miller.)

See RIGHT TO SPEEDY TRIAL Generally, (p. 509) for discussion of topic.

## STATUTES

### Legislative intent

*State v. White*, 425 S.E.2d 210 (1992) (Workman, J.)

See SENTENCING Probation, Incarceration as condition of, (p. 558) for discussion of topic.

### Plain language

*State ex rel. Roach v. Dietrick*, 404 S.E.2d 415 (1991) (Miller, C.J.)

See SENTENCING Good time credit, (p. 555) for discussion of topic.

### Presumption of constitutionality

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See also, *Frank Billotti v. A.V. Dodrill*, 183 W.Va. 48, 394 S.E.2d 32 (1990), Volume IV of the Criminal Law Digest, (p. 553) for discussion of topic.

### Specificity and notice

*State v. Blair*, 438 S.E.2d 605 (1993) (McHugh, J.)

Appellant was convicted of seven misdemeanors for failing to “establish and maintain adequate and suitable facilities for customers...” in the course of his business as President of the McDowell County Water Company, all in violation of *W.Va. Code*, 24-3-1. Appellant claimed he was financially unable to comply with the statute. An engineer testified that fixing the problems would cost two to three million dollars.

Appellant claimed on appeal that the statute was unconstitutionally vague in that specific prohibited acts are not enumerated therein.

Syl. pt. 1 - “A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.” Syl. pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

## Specificity and notice (continued)

### *State v. Blair*, (continued)

Syl. pt. 2 - “There is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions. The basic requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language.” Syl. pt. 1, *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (1970).

Syl. pt. 3 - “Criminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied.” Syl. pt. 3, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

Syl. pt. 4 - *W.Va. Code*, 24-3-1 [1923] is unconstitutionally vague in violation of *W.Va. Const.* art. III, §§ 10 and 14 because the language “establish and maintain adequate and suitable facilities” and “perform such service . . . as shall be reasonable, safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees” does not provide adequate standards for adjudication or set forth with sufficient definiteness the specific acts which are prohibited.

The Court found this statute impermissibly vague. Reversed.

### *State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

Appellant was convicted of issuing a worthless check in exchange for “property or a thing of value.” *W.Va. Code*, 61-3-39. On appeal, he claimed that this section is void for vagueness pursuant to Art. III, § 10 of the *West Virginia Constitution* and § 1 of the Fourteenth Amendment to the *United States Constitution*.

Appellant’s check was issued for a security deposit on a commercial lease. Therefore, he claimed that the check was not issued for “property or a thing of value” since that phrase implies tangible goods and he was not properly charged under *W.Va. Code*, 61-3-39.

Syl. pt. 1 - “A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.” Syl. pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

## STATUTES

### Specificity and notice (continued)

#### *State v. Hays*, (continued)

Syl. pt. 2 - *W.Va. Code*, 61-3-39 [1977] and *W.Va. Code*, 61-3-39a [1977] are not unconstitutionally vague in violation of *U.S. Const.* amend. XIV Section 1, or *W.Va. Const.* art. III, Section 10.

In an odd turn of reasoning, the Court treated this appeal as a challenge to both *W.Va. Code*, 61-3-39a as well as to 61-3-39. Appellant clearly received a “thing of value” in return for his worthless check. The statute met the test for vagueness. No error.

### Statutory construction

#### Generally

#### *State ex rel. Roach v. Dietrick*, 404 S.E.2d 415 (1991) (Miller, C.J.)

See SENTENCING Good time credit, (p. 555) for discussion of topic.

#### *State v. Boatright*, 399 S.E.2d 57 (1990) (Per Curiam)

Defendant was convicted on charges involving a controlled substance listed in Schedule IV of *W.Va. Code*, 60A-2-210. Defendant argued successfully at trial that the statute was unconstitutional because the Board of Pharmacy failed to give reasons to the Legislature for including the drug at issue as a Schedule IV substance.

Syl. pt. 1 - “Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed.” Syllabus Point 1, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

Syl. pt. 2 - “The constitutional prerequisite to a valid statute is that the law shall be complete when enacted.” Syllabus Point 4, *State v. Grinstead*, 157 W.Va. 1001, 206 S.E.2d 912 (1974).

The Court found the statute to be clear and unambiguous. Reversed.

#### *State v. White*, 425 S.E.2d 210 (1992) (Workman, J.)

See SENTENCING Probation, Incarceration as condition of, (p. 558) for discussion of topic.

## STATUTES

### Void for vagueness

*State v. Blair*, 438 S.E.2d 605 (1993) (McHugh, J.)

See STATUTES Specificity and notice, (p. 574) for discussion of topic.

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

See STATUTES Specificity and notice, (p. 575) for discussion of topic.

### Worthless checks

*State ex rel. Walls v. Noland*, 433 S.E.2d 541 (1993) (Brotherton, J.)

Appellant, a magistrate in Jefferson County, appealed from a writ of prohibition granted by the circuit court ordering her to halt proceedings against Cindy Walls on worthless check charges. Ms. Walls was charged with delivering worthless checks in violation of *W.Va. Code*, 61-3-39a, *et seq.* The complaint forms required information relating to *W.Va. Code*, 61-3-39f. The complaints were sworn to before a magistrate court clerk and the original checks were tendered to the clerk.

The circuit court dismissed the complaints on the grounds that *W.Va. Code*, 61-3-39a, *et seq.* is unconstitutional because it allows issuance of an arrest warrant upon information which is conclusory only and allows the complaint to be sworn to before a non-judicial officer.

Syl. pt - The statutory complaint form in *W.Va. Code*, § 61-3-39f is constitutionally sound; it requires a detailed itemization of the relevant facts and provides a sufficient basis for an independent determination of whether there is probable cause to proceed with a worthless check prosecution.

The Court noted the reason for a complaint is “as a basis for an application for an arrest warrant.” See *Gaither v. United States*, 413 F.2d 1061, 1076 (D.C. Cir. 1969). Dismissing appellant’s objection that no underlying facts are necessary for this complaint, only statutory elements, the Court noted the facts in this sort of matter are limited; the checks themselves serve to supplement the complaint as to details.

## STATUTES

### Worthless checks (continued)

#### *State ex rel. Walls v. Noland*, (continued)

Potential misidentification of the alleged offender is prevented by the opportunity to make good the check before a warrant issues. Similarly, *W.Va. Code*, 61-3-39(c) allows for an inference of intent to utter a worthless check by showing of the check itself. The statutory complaint form is thus adequate in that it provides detailed facts and a sufficient basis for an independent determination of whether to proceed; and the Legislature is clearly empowered by Art. VIII, Section 12 of the *West Virginia Constitution* to allow swearing of a warrant before a magistrate clerk. Reversed and remanded.

#### *State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

See STATUTES Specificity and notice, (p. 575) for discussion of topic.

## SUBPOENAS

### **Mental health records**

*Nelson v. Ferguson*, 399 S.E.2d 909 (1990) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Records relating to, (p. 243) for discussion of topic.

## SUFFICIENCY OF EVIDENCE

### Burglary

*State v. Tharp*, 400 S.E.2d 300 (1990) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Generally, (p. 582) for discussion of topic.

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See BURGLARY Sufficiency of evidence, (p. 114) for discussion of topic.

### Circumstantial evidence

*State v. Nelson*, 436 S.E.2d 308 (1993) (Neely, J.)

Appellant helped obtain a job for a friend by using a false address. She then found her friend another job as a poll worker which required the friend to be registered to vote in a county other than where she was registered. Appellant apparently filled out a false registration card for her friend, containing the false address.

Appellant was convicted for violating *W.Va. Code*, 3-2-42, knowingly offering an unqualified registration. The issue was whether the evidence was sufficient.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "Circumstantial evidence will not support a guilty verdict, unless the fact of guilt is proved to the exclusion of every reasonable hypothesis of innocence; and circumstances which create only a suspicion of guilt but do not prove the actual commission of the crime charged, are not sufficient to sustain a conviction." Syl. pt. 2, *State v. Dobbs*, 163 W.Va. 630, 259 S.E.2d 829 (1979)." Syl. pt. 2, *State v. Phillips*, 176 W.Va. 244, 342 S.E.2d 210 (1986).

Here, a handwriting expert testified that the signature on the registration card was not that of the applicant and that it was reasonably certain that appellant prepared hand-printed parts of the form. He concluded that it was only possible, not even probable, that appellant signed the card.

## SUFFICIENCY OF EVIDENCE

### **Circumstantial evidence** (continued)

#### *State v. Nelson*, (continued)

The Court found the prosecution established only that appellant filled out part of the form for the applicant, a perfectly legal act. Reversed for insufficient evidence.

### **Concerted action**

#### *State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See CONCERTED ACTS Liability for, (p. 125) for discussion of topic.

### **Conflicting oral testimony**

#### *State v. Ross*, 402 S.E.2d 248 (1990) (Per Curiam)

Appellant was convicted of attempted aggravated robbery, burglary and sexual assault and sentenced to one hundred years, one to fifteen years and one to five years, respectively, all sentences to run consecutively. On appeal, he claimed that the evidence was insufficient to support the verdict.

The state's evidence showed that a man grabbed the victim as she was entering her apartment, threatened her, and sexually assaulted her. The man asked if she had any money and led her to another room to get it. The victim screamed, causing her neighbor to summon police. When officers arrived, a black male exited the building, pushing the victim in front of him as he ran from the scene. The police pursued the man, who turned out to be the defendant.

The defendant claimed to have been a voluntary social companion of the victim for six months prior to the incident. He claimed that the victim loaned him money and was upset because of his failure to repay her. He alleged that the victim voluntarily took him to her apartment and an argument ensued over the unpaid loan. He admitted being confronted by police upon exiting.

Syl. pt. 1 - "A new trial will not be granted in a criminal case on the ground of insufficiency of the evidence, when the verdict against the defendant is based on conflicting oral testimony and the credibility of witnesses is involved, or when the verdict is supported by substantial evidence." Syllabus point 3, of *State v. Vance*, 146 W.Va. 925, 124 S.E.2d 252 (1962).

The Court noted that the evidence did not conflict as to defendant's presence in the victim's apartment. The victim's testimony, together with other evidence, was sufficient to support a conviction; the jury's finding of credibility is not to be disturbed.

## SUFFICIENCY OF EVIDENCE

### Conspiracy

*State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

See CONSPIRACY Sufficiency of evidence, (p. 134) for discussion of topic.

*State v. Stevens*, 436 S.E.2d 312 (1993) (Per Curiam)

See CONSPIRACY Sufficiency of evidence, (p. 134) for discussion of topic.

### Embezzlement

*State v. Brown*, 422 S.E.2d 489 (1992) (Workman, J.)

See EMBEZZLEMENT Intent, Public official, (p. 191) for discussion of topic.

### Generally

*State v. Hose*, 419 S.E.2d 690 (1992) (Per Curiam)

See EVIDENCE Expert witnesses, Admissibility of opinions, (p. 235) for discussion of topic.

*State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

See APPEAL Standard for review, Setting aside verdict, (p. 29) for discussion of topic.

*State v. Scarberry*, 418 S.E.2d 361 (1992) (Per Curiam)

See INDICTMENT Sufficiency of, Specific acts alleged, (p. 300) for discussion of topic.

*State v. Tharp*, 400 S.E.2d 300 (1990) (Per Curiam)

Appellant was convicted of grand larceny and burglary. He claimed on appeal that there was no evidence to show that he entered the victim's home against her will or that he had the intent to commit the crimes. With respect to grand larceny, he claimed that the value of the rifle taken was not established and that the victim was "obviously prepped" to say that more than \$200 in money was taken.

## SUFFICIENCY OF EVIDENCE

### Generally (continued)

#### *State v. Tharp*, (continued)

Syl. pt. 2 - “In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.” Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Viewing the evidence in the light most favorable to the prosecution the Court found testimony sufficient to establish that appellant entered without permission, that the damage the victim described to herself and her home was corroborated by other witnesses, and that money and other personal property were taken. There was also testimony that appellant had attempted to get money from his grandmother the evening of the crimes. Evidence sufficient. No error.

#### *State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See HOMICIDE Malice, Inferred from deadly weapon, (p. 283) for discussion of topic.

#### *State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See BURGLARY Sufficiency of evidence, (p. 114) for discussion of topic.

#### *State v. Williams*, 438 S.E.2d 881 (1993) (Per Curiam)

See CONCERTED ACTS Liability for, (p. 125) for discussion of topic.

### Grand larceny

#### *State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

See GRAND LARCENY Sufficiency of evidence, (p. 264) for discussion of topic.

## SUFFICIENCY OF EVIDENCE

### Grand larceny (continued)

*State v. Tharp*, 400 S.E.2d 300 (1990) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Generally, (p. 582) for discussion of topic.

### Homicide

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See APPEAL Standard for review, Setting aside verdict, (p. 28) for discussion of topic.

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See HOMICIDE Sufficiency of evidence, (p. 285) for discussion of topic.

### Larceny

*State v. Scarberry*, 418 S.E.2d 361 (1992) (Per Curiam)

See INDICTMENT Sufficiency of, Specific acts alleged, (p. 300) for discussion of topic.

### Murder

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See APPEAL Standard for review, Setting aside verdict, (p. 28) for discussion of topic.

*State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

See APPEAL Standard for review, Setting aside verdict, (p. 29) for discussion of topic.

### Sentencing

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See BURGLARY Sufficiency of evidence, (p. 114) for discussion of topic.

## SUFFICIENCY OF EVIDENCE

### Sexual abuse

*State v. Gill*, 416 S.E.2d 253 (1992) (Miller, J.)

See DOUBLE JEOPARDY Sexual assault, Abuse (by a parent or guardian), (p. 178) for discussion of topic.

### Sexual abuse by a guardian or parent

*State v. George W.H.*, 439 S.E.2d 423 (1993) (Miller, J.)

See SEXUAL ATTACKS Sufficiency of evidence, (p. 569) for discussion of topic.

*State v. Gill*, 416 S.E.2d 253 (1992) (Miller, J.)

See DOUBLE JEOPARDY Sexual assault, Abuse (by a parent or guardian), (p. 178) for discussion of topic.

### Sexual assault

*State v. Walter*, 423 S.E.2d 222 (1992) (Per Curiam)

See CONFESSION OF ERROR Effect of, (p. 127) for discussion of topic.

## SUICIDE

### Felony-murder

*State ex rel. Painter v. Zakaib*, 411 S.E.2d 25 (1991) (Brotherton, J.)

See FELONY Murder, Suicide, (p. 256) for discussion of topic.

## **TAPE RECORDING**

### **Failure to disclose**

*State v. Miller*, 400 S.E.2d 897 (1990) (Per Curiam)

See EVIDENCE Exculpatory, Duty to disclose, (p. 233) for discussion of topic.

# TERMINATION OF PARENTAL RIGHTS

## Abandonment

### Failure to pay support

*In re adoption of Mullins by Farley*, 421 S.E.2d 680 (1992) (Per Curiam)

Petitioners attempted to adopt their granddaughter. The trial court denied the adoption on the grounds that the father did not intend to abandon the child.

Syl. pt. 1 - “‘The standard of proof required to support a court order limiting or terminating parental rights to custody of minor children is clear, cogent and convincing proof.’ Syllabus Pt. 6, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).” Syllabus Point 1, *In the Matter of Adoption of Schoffstall*, 179 W.Va. 350, 368 S.E.2d 720 (1988).

Syl. pt. 2 - “Under *W.Va. Code*, 48-4-3(a) [1984], failure to pay child support alone does not constitute abandonment of the natural parents’ rights in an adoption proceeding.” Syllabus Point 2, *In the Matter of Adoption of Schoffstall*, 179 W.Va. 350, 368 S.E.2d 720 (1988).

The Court noted that the father testified that his efforts to see his daughter were rejected and that he was too young and inexperienced to seek legal assistance. The record did not clearly support the proposition that the father intended to abandon. No error. For definition of what constitutes abandonment, see *Schoffstall*, *id.* at 352; also, *In re Harris*, 160 W.Va. 422, 236 S.E.2d 426 (1977).

## Abuse and neglect

### Evidence of prior abuse

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

Appellant claimed the circuit court erred in terminating her parental rights because the Department of Human Services did not make a reasonable effort to reunify the family as required by *W.Va. Code*, 49-6-5; the caseworker did not develop a realistic case plan as required by *W.Va. Code*, 49-6D-3; the court found appellant’s outbursts of anger and erratic behavior impaired her ability to parent; and the court allowed improper evidence of abuse to other children.

Syl. pt. 8 - Prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of *W.Va.R.Evid.* 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court.

No abuse of discretion here. No error.

## TERMINATION OF PARENTAL RIGHTS

### Abuse and neglect (continued)

#### Least restrictive alternative

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

Appellant claimed the circuit court erred in terminating her parental rights because the Department of Human Services did not make a reasonable effort to reunify the family as required by *W.Va. Code*, 49-6-5; the caseworker did not develop a realistic case plan as required by *W.Va. Code*, 49-6D-3; the circuit court found appellant's outbursts of anger and erratic behavior impaired her ability to parent; and the circuit court allowed improper evidence of abuse to other children. Two six-month improvement periods were allowed and two case plans were implemented with little success.

Syl. pt. 7 - "As a general rule the least restrictive alternative regarding parental rights to custody of a child under *W.Va. Code*, 49-6-5 [1977] will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened. ..." Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

The Court found the measures taken here to be reasonable. No error.

#### Procedural delays

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Procedural delays, (p. 10) for discussion of topic.

#### Sufficient to terminate

*In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 593) for discussion of topic.

## TERMINATION OF PARENTAL RIGHTS

### Association with siblings

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

Appellant claimed the circuit court erred in terminating her parental rights because the Department of Human Services did not make a reasonable effort to reunify the family as required by *W.Va. Code*, 49-6-5; the caseworker did not develop a realistic case plan as required by *W.Va. Code*, 49-6D-3; the court found appellant's outbursts of anger and erratic behavior impaired her ability to parent; and the court allowed improper evidence of abuse to other children.

In affirming the decision the Court noted that association with siblings should be encouraged whenever possible.

Syl. pt. 9 - "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact." Syl. Pt. 4, *In re James M.*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

### Duty of guardian to initiate

*In the Matter of Scottie D.*, 406 S.E.2d 214 (1991) (McHugh, J.)

See ABUSE AND NEGLECT Termination of parental rights, Guardian's duty, (p. 6) for discussion of topic.

### Failure to pay child support

*In re adoption of Mullins by Farley*, 421 S.E.2d 680 (1992) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Abandonment, Failure to pay support, (p. 588) for discussion of topic.

### Generally

*Snyder v. Scheerer*, 436 S.E.2d 299 (1993) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Voluntary relinquishment, Subsequent rescission of, (p. 596) for discussion of topic.

## TERMINATION OF PARENTAL RIGHTS

### **Guardian *ad litem***

#### **Duty of counsel**

*In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

See TERMINATION OF PARENTAL RIGHTS Standard of proof, (p. 593) for discussion of topic.

### **Guardian *ad litem* for children**

*Cleo A.E. v. Rickie Gene E.*, 438 S.E.2d 886 (1993) (Workman, C.J.)

See GUARDIAN AD LITEM Paternity, (p. 265) for discussion of topic.

### **Improvement period**

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Improvement period, (p. 7) for discussion of topic.

### **Length of**

*In re Lacey P.*, 433 S.E.2d 518 (1993) (Brotherton, J.)

The mother of the children herein appealed the termination of parental rights previously ordered. Appellant had five children, ranging in age from one to six years, was 23 years old and had never been married. She had been investigated since 1989 on various allegations of abuse and neglect. DHHS alleged that she had a history of moving whenever charges were filed.

Following an Ohio investigation in 1991, appellant's children were to be taken but she moved to West Virginia before the allegations of drug use and abandonment could be proven. Despite the efforts of a West Virginia social worker, appellant failed to enroll her children in preschool, daycare and infant stimulation classes. Both her electric and water utilities were turned off because of non-payment.

The social worker observed appellant strike her children and on subsequent visits found the children bruised and unattended. Although appellant agreed to a protective services plan to budget her finances and provide treat her children better, the childrens' physical condition worsened. Appellant failed to follow the provisions of a second plan.

## TERMINATION OF PARENTAL RIGHTS

### Improvement period (continued)

#### Length of (continued)

##### *In re Lacey P.*, (continued)

Finally, DHHS filed a petition seeking temporary custody. By order dated 15 October 1991, the Court found the children were neglected pursuant to *W.Va. Code*, 49-1-3(c) and 49-1-3(g)(1)(A) but allowed an improvement period while the children were in foster care. In December the Court approved a family case plan. On 12 June 1992, after several reviews, the Court terminated appellant's parental rights, ordered DHHS to provide assistance to appellant in sterilization (since she expressed the desire to be sterilized) and to take custody of the children until further order.

Syl. pt. 1 - “[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.’ *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).” Syllabus point 1, *In the Interest of Darla B.*, 175 W.Va. 137, 331 S.E.2d 868 (1985).

Syl. pt. 2 - Neither *W.Va. Code* § 49-6-2(b) nor *W.Va. Code* § 49-6-5(c) mandates that an improvement period must last for twelve months. It is within the court's discretion to grant an improvement period within the applicable statutory requirements; it is also within the court's discretion to terminate the improvement period before the twelve month time frame has expired if the court is not satisfied that the defendant is making the necessary progress. The only minimum time period set forth in the statute is the three-month period granted in the predispositional section *W.Va. Code* § 49-6-2(b).

The Court found the Circuit Court's actions reasonable in terminating appellant's parental rights. The sterilization issue was moot since appellant was not sterilized but instead had a contraceptive implanted. No error.

#### Least restrictive alternative

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

See TERMINATION OF PARENTAL RIGHTS Abuse and neglect, Least restrictive alternative, (p. 589) for discussion of topic.

## TERMINATION OF PARENTAL RIGHTS

### Presumption for parent

*In the Interest of Carlita B.*, 408 S.E.2d 365 (1991) (Workman, J.)

See ABUSE AND NEGLECT Termination of parental rights, Improvement period, (p. 7) for discussion of topic.

### Standard of proof

*In re adoption of Mullins by Farley*, 421 S.E.2d 680 (1992) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Abandonment, Failure to pay support, (p. 588) for discussion of topic.

*In re Jeffrey R.L.*, 435 S.E.2d 162 (1993) (McHugh, J.)

Jeffrey R.L. was born 23 May 1991. For his first three months he was in the care of his natural parents and maternal grandparents. He was treated for hemangioma, an overgrowth of blood vessels on the back of the neck and vomiting which recurred since his birth. On 30 August 1991 the examining physician found fractures of his skull, clavicle, ribs, arms and legs. Physicians at West Virginia University hospital confirmed 15 fractures at various stages of healing, none of which were disease-related. They diagnosed battered child syndrome.

Following an investigation DHHR was given emergency custody and a petition to terminate parental rights was filed. The trial court found probable cause to believe Jeffrey R.L. was an abused child and granted temporary custody to DHHR; limited visitation was allowed and the parents were directed to undergo psychological evaluations.

At the final hearing both parents admitted to the trauma occurring but neither admitted to harming the child. The court found abuse, granted an improvement period and ordered DHHR to continue with custody. DHHR was further ordered to complete a treatment plan. A later hearing resulted in continued supervised visitation.

The mother challenged an amended treatment plan; at subsequent hearings testimony was heard that the mother had improved her parenting skills. DHHR protested that unsupervised visitation should not occur until the abuser was identified. The court required another amended plan.

The child was subsequently hospitalized for the hemangioma; hospital records showed conflict between his mother and foster mother over feeding and care. The prosecuting attorney advised the circuit court that a social worker contacted the foster mother to tell her the baby did not eat well for the mother.

## TERMINATION OF PARENTAL RIGHTS

### Standard of proof (continued)

#### *In re Jeffrey R.L.*, (continued)

At the final hearing testimony was taken that showed neglect and rough treatment of the child in public. The mother testified that her grandfather hit her and that she told an EMT she could not call the police because her grandfather would have her put in jail. The foster care worker testified the mother was nervous in handling the child but that she had fulfilled the case plan requirements. The court found insufficient evidence to terminate parental rights.

Later supplemental information from various social workers said the parents had completed their parenting classes but it was not recommended that the child be restored to them. The child's treating physician contacted the Juvenile Justice Committee, noting the court had granted unrestricted visitation and that the child seemed to be bonding with the foster mother. In a subsequent status hearing the court returned custody to the mother despite the guardian *ad litem's* request for a stay. The guardian did not appeal; a later-appointed guardian sought this appeal.

Syl. pt. 1 - "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syllabus point 4, *In re Johathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

Syl. pt. 2 - "*W.Va. Code*, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. pt. 3, *In re Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988).

Syl. pt. 3 - Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

## TERMINATION OF PARENTAL RIGHTS

### Standard of proof (continued)

#### *In re Jeffrey R.L.*, (continued)

Syl. pt. 4 - “In a proceeding to terminate parental rights pursuant to *W.Va. Code*, 49-6-1 to 49-6-10, as amended, a guardian *ad litem*, appointed pursuant to *W.Va. Code*, 49-6-2(a), as amended must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian *ad litem*, an appeal is necessary.” Syl. pt. 3, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991).

Syl. pt. 5 - Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W.Va. Code*, 49-6-2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client. The *Guidelines for Guardians Ad Litem* in Abuse and Neglect cases, which are adopted in this opinion and attached as Appendix A, are in harmony with the applicable provisions of the *West Virginia Code*, the *West Virginia Rules of Professional Conduct*, and provide attorneys who serve as guardians *ad litem* with direction as to their duties in representing the best interests of the children for whom they are appointed.

The Court noted that the best interests of the child must always be paramount in these cases. Further, the State has a clear interest in protecting children.

Here, the mother made no attempt to stem the abuse, even after her divorce from the natural father. Returning the child to his mother prior to the discovery of who inflicted the abuse is clearly wrong.

More importantly for future cases, the Court adopted guidelines for representation by guardians *ad litem* (see Appendix A of the opinion) and clarified current PDS practice of paying for representation in footnote 27 (see opinion).

## TERMINATION OF PARENTAL RIGHTS

### Standard of proof (continued)

*State v. Krystal T.*, 407 S.E.2d 395 (1991) (Per Curiam)

Appellants claimed that the circuit court erroneously terminated their parental rights and failed to grant an extended improvement period. In November, 1989, the Department of Human Services caused the child to be hospitalized for malnutrition. When the father threatened to remove the infant, the Department of Human Services took custody and the court ordered psychological tests of appellants. A three month improvement period was granted, conditioned on both parents attending weekly counseling sessions.

At the subsequent hearing, it was shown that appellants did not attend the counseling sessions regularly and that, even with counseling, their chances of improvement were slim. Appellants' motion for another improvement period was denied and the court terminated their parental rights.

Syl. pt. - "The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syllabus point 6, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

The Court found sufficient evidence here to justify termination; further, the Court found no compelling reason to believe an additional improvement period would be efficacious. Affirmed.

### Voluntary relinquishment

#### Subsequent recession of

*Snyder v. Scheerer*, 436 S.E.2d 299 (1993) (Per Curiam)

Appellant had suffered from a long history of mental illness. Following release from one of numerous hospitalizations, appellant signed a temporary custody agreement granting temporary custody to appellees, acknowledging that she was then unable to care for her child. The agreement called for a modification of the order whenever the best interests of the child required.

After extensive evidence on the relative abilities of appellant and the appellees to care for the child, the circuit court found appellees were the "psychological parents" and the "real issue" was appellant's medical condition. The court found appellant's condition subject to repeated relapses, despite her apparent current fitness, and rejected her claim.

## TERMINATION OF PARENTAL RIGHTS

### Voluntary relinquishment (continued)

#### Subsequent recession of (continued)

##### *Snyder v. Scheerer*, (continued)

Syl. pt. 1 - “ “A parent has the natural right to the custody of his or her infant child, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her child will be recognized and enforced by the courts.” Syl. pt. 2, *Hammack v. Wise*, 158 W.Va. 343, 211 S.E.2d 118 (1975).” Syllabus, *State ex rel. Kiger v. Hancock*, 153 W.Va. 404, 168 S.E.2d 798 (1969); Syllabus, *Whiteman v. Robinson*, 145 W.Va. 685, 116 S.E.2d 691 (1960).’ Syl. pt. 1, *Leach v. Bright*, 165 W.Va. 636, 270 S.E.2d 793 (1980).” Syllabus, *Ford v. Ford*, 172 W.Va. 25, 303 S.E.2d 253 (1983).

Syl. pt. 2 - “ “When a parent, by agreement or otherwise, has transferred, relinquished or surrendered the custody of his or her child to a third person and subsequently demands the return of the child, the action of the court in determining whether the custody of the child shall remain in such third person or whether the child shall be returned to its parent depends upon which course will promote the welfare and the best interests of the child; and the parent will not be permitted to reclaim the custody of the child unless the parent shows that such change of custody will materially promote the moral and physical welfare of the child.’ Point 4 Syllabus, *State ex rel. Harmon v. Utterback*, 144 W.Va. 419, 108 S.E.2d 521 (1959).” Syl. Pt. 1, *Davis v. Hadox*, 145 W.Va. 233, 114 S.E.2d 468 (1960).

Syl. pt. 3 - “ “If a child has resided with an individual other than a parent for a significant period of time such that the non-parent with whom the child resides serves as the child’s psychological parent, during a period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so, the equitable rights of the child must be considered in connection with any decision that would alter the child’s custody. To protect the equitable rights of the child in this situation, the child’s environment should not be disturbed without a clear showing of significant benefit to him, notwithstanding the parent’s assertion of a legal right to the child.” Syl. Pt. 4, *In re Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515 (1990).

Syl. pt. 4 - “ “The granting of temporary custody of a child by its natural parent to a third person is not tantamount to a divestiture of the right of the parent to custody of the child.” Syl. Pt. 1, *McCartney v. Coberly*, W.Va., 250 S.E.2d 777 (1978).

## TERMINATION OF PARENTAL RIGHTS

### Voluntary relinquishment (continued)

#### Subsequent recession of (continued)

##### *Snyder v. Scheerer*, (continued)

Syl. pt. 5 - “When a parent transfers temporary custody of a child to a third person, the parent may reclaim custody without showing that the change of custody will materially promote the moral and physical welfare of the child.” Syl. Pt. 2, *McCartney v. Coberly*, W.Va., 250 S.E.2d 777 (1978).

The Court noted appellant maintained regular contact with her child and attempted to regain custody at the earliest possible time. Mental illness alone is insufficient to deny custody unless it would have a continuous negative effect on the child. Finding no such continuous effect, the Court found for appellant. However, because the appellees clearly were a major part of the child’s life, the Court directed the circuit court to devise a plan of gradual termination of contact with them. Reversed and remanded.

### Voluntary termination

#### Guardian for children

*Cleo A.E. v. Rickie Gene E.*, 438 S.E.2d 886 (1993) (Workman, C.J.)

See GUARDIAN AD LITEM Paternity, (p. 265) for discussion of topic.

## TRANSCRIPTS

### Right to

*Billotti v. Dodrill*, 394 S.E.2d 32 (1990) (Brotherton, J.)

See RIGHT TO APPEAL Constitutional right, Right to counsel, (p. 493) for discussion of topic.

*State v. Rogers*, 434 S.E.2d 402 (1993) (Workman, C.J.)

See RIGHT TO APPEAL Constitutional right, Generally, (p. 492) for discussion of topic.

### Distinguished from appeal

*State ex rel. Phillips v. Boggess*, 416 S.E.2d 270 (1992) (McHugh, C.J.)

See PLEA BARGAINS Setting aside, Right to transcript unaffected, (p. 420) for discussion of topic.

### Failure to provide

*Philyaw v. Bogovich*, No. 21541 (4/28/93) (Per Curiam)

and

*State ex rel. Scott v. Bogovich*, No. 21480 (2/10/93) (Per Curiam)

Petitioners sought writ of mandamus to compel production of a transcript in eight different proceedings. Rule to show cause was issued 14 January 1993, returnable 2 March 1993 for the Philyaw cases, and 24 November 1992, returnable 12 January 1993 for the Scott case; respondent failed to answer.

Citing *W.Va. Code*, 51-7-4, *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985) and *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), the Court granted the writ, ordering the transcripts delivered by 15 March 1993 in the *Scott* case and by 28 May 1993 in the *Philyaw* cases or suffer a rule to show cause for contempt.

*State ex rel. Baker v. Bogovich*, No. 21450 (12/11/92) (Per Curiam)

Petitioner was sentenced on May 6, 1992 and filed a timely notice of appeal. When the trial transcript was unavailable, he was given an extension to appeal until November 6, 1992. A rule to show cause was issued by this Court on October 30, 1992, returnable December 1, 1992.

**Right to** (continued)

**Failure to provide** (continued)

*State ex rel. Baker v. Bogovich*, (continued)

Citing *W.Va. Code*, 51-7-4 and *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985) (reporters subject to control of Court) the Court ordered respondent to produce a transcript thirty days from the date of this order (December 11, 1992).

*State ex rel. Dawson v. Williams*, 423 S.E.2d 375 (1992) (Per Curiam)

Relator was convicted of second-degree murder and requested an extension of time to file an appeal because he was unable to obtain a transcript. Relator was sentenced on 10 February 1992 and had four months to file an appeal pursuant to Rule 37(3) of the Rules of Criminal Procedure. On 24 March 1992 the circuit court directed preparation of the transcript.

Even after successfully moving, pursuant to Rule 3(a) of the Rules of Appellate Procedure, for a two-month extension, relator was still unable to obtain the transcript. He asks for another two-month extension herewith.

*W.Va. Code*, 51-7-4 provides that “the reporter shall furnish, upon request, to any party to a case, a typewritten transcript of his shorthand notes of the testimony or other proceedings.....” *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985) recognized that court reporters are subject to regulation by the Supreme Court. Treating this petition as a mandamus action, the Court directed the respondent to furnish the transcript within thirty days from the date of this order and that relator have an additional thirty days after filing of the transcript to file an appeal.

*State ex rel. Hodge v. Reid-Williams*, No. 21621 (4/28/93) (Per Curiam)

Petitioner sought writ of mandamus to compel production of a transcript. He was sentenced 28 April 1992 and requested a transcript within the thirty-day period required by Rule 37(a) of the Rules of Criminal Procedure. To date, no transcript has been provided despite a rule to show cause issued 4 March 1993, returnable 6 April 1993.

Citing *W.Va. Code*, 51-7-4, *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985) and *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969) the Court granted the writ, directing the transcript to be produced by 28 May 1993 or risk a rule to show cause for contempt.

**Right to** (continued)

**Failure to provide** (continued)

*State ex rel. Jenkins v. Marchbank*, No. 21428 (2/10/93) (Per Curiam)

Petitioner sought writ of mandamus to compel production of a transcript. He was sentenced 21 April 1992. Rule to show cause issued 19 October 1992, returnable 1 December 1992; no response was made.

Citing *W.Va. Code*, 51-7-4, *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985) and *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969) the court ordered production of the transcript by 15 March 1993 or risk a rule to show cause for contempt.

*State ex rel. Rouse v. Bogovich*, No. 21464 (12/14/92) (Per Curiam)

Relator asked for extension of time to file an appeal and that respondent be required to produce the necessary transcript. On May 8, 1992 relator was sentenced; he filed timely notice of intent to appeal but a transcript was unavailable in time. He was given an extension of time until November 8, 1992. Upon petition to the Court a transcript was still unavailable.

Citing *W.Va. Code*, 51-7-4 and *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985) (court reporters are subject to control of the Court), the Court found a duty to produce the transcript and ordered respondent to comply within thirty days of the date of this order (December 14, 1992). Relator was given six months to appeal from the date of the filing of the transcript.

*State ex rel. Stephens v. Bratton*, No. 21619 (4/28/93) (Per Curiam)

and

*State ex rel. Hall v. Bratton*, No. 21618 (4/28/93) (Per Curiam)

Petitioners sought production of a transcript after his sentencing on 6 July 1992 and 30 June 1992, respectively. In both cases request was made within the thirty days required by Rule 37(a) of the Rules of Criminal Procedure. Rule to show cause, issued 4 March 1993, returnable 6 April 1993 was unanswered.

Citing *W.Va. Code*, 51-7-4, *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985) and *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969) the Court granted the writ, ordering production of the transcript by 28 May 1993 or risk a rule to show cause for contempt.

## TRANSCRIPTS

### Right to (continued)

#### Failure to provide (continued)

*State ex rel. Walker v. Miller*, No. 21496 (2/10/93) (Per Curiam)

Petitioner sought writ of mandamus to compel production of a transcript. A rule to show cause was sent to respondent 15 December 1992, with no response to date.

Petitioner was sentenced 18 December 1990; a transcript was requested within the 30-day period prescribed in Rule 37(a) of the Rules of Criminal Procedure. No transcript was produced.

Citing *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985), and *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969) the Court granted the writ, ordering a transcript to be produced by 15 March 1993. Failure was to result in a rule show cause for contempt.

*State ex rel. Stine v. Gagich*, No. 21962 (12/1/93) (Per Curiam)

Within thirty days of an order entered 1 July 1993 respondent, Court Reporter for the Circuit Court of Ohio County, was asked to produce a transcript. Petitioner's right to appeal has been frustrated by respondent's failure.

The Court granted the writ of mandamus directing respondent to prepare the requested transcript on or before 4 January 1994.

*Thomas v. Janco-Parsons*, No. 19976 (3/29/91) (Per Curiam)

Petitioner was convicted of first-degree murder on 2 October 1987 and sentenced to life with mercy. A complete transcript was never produced. A rule to show cause issued 24 January 1991, returnable 12 March 1991.

“Although subject to the direction and supervision of the circuit judges to whom they are assigned, court reporters, as employees of the Supreme Court of Appeals, whose primary functions consist of recording, transcribing, and certifying records of proceedings for purposes of appellate review, are subject to the ultimate regulation, control and discipline of the Supreme Court of Appeals.” Syl. Pt. 3, *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985).

## TRANSCRIPTS

**Right to** (continued)

**Failure to provide** (continued)

*Thomas v. Janco-Parsons*, (continued)

*W.Va. Code*, 51-7-4 requires that a transcript be provided on request. Petitioner therefore had a clear legal right and respondent a non-discretionary duty to provide a transcript. In *Toler v. Sites*, (No. 19213, January 9, 1991), the Court found a reporter in contempt, ordered her arrest and fined her. Here, the reporter had left the state but the Court noted that contempt orders are enforceable in other states. Writ granted.

## TRANSFER TO ADULT JURISDICTION

### Generally

*State v. Michael S.*, 423 S.E.2d 632 (1992) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Factors to consider, (p. 369) for discussion of topic.

### Mandatory factors to consider

*State v. Michael S.*, 423 S.E.2d 632 (1992) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Factors to consider, (p. 369) for discussion of topic.

### Probable cause

*Comer v. Tom A.M.*, 403 S.E.2d 182 (1991) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Probable cause, (p. 370) for discussion of topic.

*In the Interest of David Zane B.*, 403 S.E.2d 10 (1991) (Per Curiam)

See JUVENILES Transfer to adult jurisdiction, Probable cause, (p. 371) for discussion of topic.

## **TRIAL**

### **Arrest of witness**

*State v. Ferrell*, 412 S.E.2d 501 (1991) (Per Curiam)

See JUDGES Examining witnesses, (p. 348) for discussion of topic.

### **Clothing**

#### **Right to appear without prison attire**

*State v. Rood*, 422 S.E.2d 516 (1992) (Per Curiam)

See DUE PROCESS Prison uniforms, Trial while wearing, (p. 188) for discussion of topic.

### **New trial**

#### **Jury misconduct**

*State v. Strauss*, 415 S.E.2d 888 (1992) (Per Curiam)

See JURY Bias, Juror talking with witnesses, (p. 355) for discussion of topic.

#### **Newly discovered evidence**

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 405) for discussion of topic.

### **Prison attire**

#### **Right to appear without**

*State v. Rood*, 422 S.E.2d 516 (1992) (Per Curiam)

See DUE PROCESS Prison uniforms, Trial while wearing, (p. 188) for discussion of topic.

## **TRIAL**

### **Restraints**

#### **Right to be free of**

*State v. Holliday*, 424 S.E.2d 248 (1992) (Per Curiam)

See RESTRAINTS Right to be free of at trial, (p. 491) for discussion of topic.

### **Right to speedy trial**

#### **Magistrate courts**

*State ex rel. Johnson v. Zakaib*, 400 S.E.2d 590 (1990) (Miller,)

See RIGHT TO SPEEDY TRIAL Generally, (p. 509) for discussion of topic.

### **Spectators**

#### **Victim weeping in court**

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See JURY Bias, Victim weeping in court, (p. 355) for discussion of topic.

### **Speedy trial**

#### **Right to**

*State v. Bonham*, 401 S.E.2d 901 (1990) (Per Curiam)

See RIGHT TO SPEEDY TRIAL Standard for determining, (p. 510) for discussion of topic.

### **Venue**

#### **Proof required to change**

*State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

See VENUE Change of venue, Sufficiency of proof for, (p. 609) for discussion of topic.

## UNLAWFUL WOUNDING

### Probation for

*Davis v. Duncil*, No. 19652 (11/9/90) (Per Curiam)

See *HABEAS CORPUS* Probation, (p. 272) for discussion of topic.

## UTTERING

### Probable cause for

*State ex rel. Walls v. Noland*, 433 S.E.2d 541 (1993) (Brotherton, J.)

See STATUTES Worthless checks, (p. 577) for discussion of topic.

**Change of venue**

**Abuse of discretion in not granting**

*State ex rel. Walker v. Schlaegel*, No. 20033 (4/11/91) (Per Curiam)

Relator was charged with murder, burglary and other offenses in Boone County. Relator's brother was tried and convicted in December, 1990. Relator claimed that the adverse publicity in his brother's trial made it impossible to receive a fair trial in Boone County and moved for a change of venue. His motion was refused. He sought a writ of prohibition to prevent further proceedings and asked the Court to order a change of venue.

Relator introduced at hearing eighty-two pages of local newspaper coverage in two local papers. Regional radio and television coverage was also introduced. Testimony by local newspaper editors showed that local interest ran extremely high. Other testimony showed that relator's mother received threatening phone calls and suffered harassment. Relator's counsel said he received calls from other clients expressing anger over his representation of relator.

A change of venue is proper when hostile sentiment exists in the community such that a defendant cannot receive a fair trial. See *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978); *State v. Sette*, 161 W.Va. 384, 242 S.E.2d 464 (1978); *State v. Dandy*, 151 W.Va. 547, 153 S.E.2d 507 (1967); and *State v. Viers*, 103 W.Va. 30, 136 S.E. 503 (1927). Writ granted; respondent judge ordered to transfer.

**Sufficiency of proof for**

*State v. Beegle*, 425 S.E.2d 823 (1992) (Per Curiam)

Appellant was convicted of first-degree murder. He claimed self-defense. Appellant's plea agreement with the prosecuting attorney was rejected by the judge, resulting in considerable pretrial publicity. The judge rejected appellant's motion for change of venue.

Syl. pt. 1 - "‘Good cause shown’ for change of venue, as the phrase is used in *W.Va. Constitution*, Article III, Section 14 and *W.Va. Code*, 62-3-13, means proof that a defendant cannot get a fair trial in the county where the offense occurred because of the existence of locally extensive present hostile sentiment against him." Syllabus point 1, *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978).

## VENUE

### Change of venue

#### Sufficiency of proof for (continued)

##### *State v. Beegle*, (continued)

See also, *State v. Wooldridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946) and *State v. Lassiter*, 177 W.Va. 499, 354 S.E.2d 595 (1987). Publicity of itself does not require a change of venue. *State v. Gangwer*, 169 W.Va. 177, 286 S.E.2d 389 (1982) and *State v. McFarland*, 175 W.Va. 205, 332 S.E.2d 217 (1985).

The Court noted appellant's own witnesses said a fair trial was possible. No abuse of discretion; no error.

### Denial of change

##### *Lewis v. Henry*, No. 20194 (7/11/91) (Per Curiam)

See ABUSE OF DISCRETION Denial of change of venue, (p. 13) for discussion of topic.

## VERDICT

### Polling jury

*State v. Vandevender*, 438 S.E.2d 24 (1993) (Per Curiam)

See JURY Unanimity required for verdict, (p. 362) for discussion of topic.

### Setting aside

*State v. Drennen*, 408 S.E.2d 24 (1991) (Per Curiam)

See APPEAL Standard for review, Setting aside verdict, (p. 27) for discussion of topic.

*State v. Knotts*, 421 S.E.2d 917 (1992) (Workman, J.)

See APPEAL Standard for review, Setting aside verdict, (p. 28) for discussion of topic.

### Cumulative error

*State v. Walker*, 425 S.E.2d 616 (1992) (Neely, J.)

See HOMICIDE Sufficiency of evidence, (p. 285) for discussion of topic.

### Sufficiency of evidence

*State v. Gill*, 416 S.E.2d 253 (1992) (Miller, J.)

See DOUBLE JEOPARDY Sexual assault, Abuse (by a parent or guardian), (p. 178) for discussion of topic.

*State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

See CONSPIRACY Sufficiency of evidence, (p. 134) for discussion of topic.

*State v. McCarty*, 401 S.E.2d 457 (1990) (Per Curiam)

See APPEAL Standard for review, Setting aside verdict, (p. 29) for discussion of topic.

## VERDICT

### Setting aside (continued)

#### Sufficiency of evidence (continued)

*State v. Petrice*, 398 S.E.2d 521 (1990) (Per Curiam)

See GRAND LARCENY Sufficiency of evidence, (p. 264) for discussion of topic.

*State v. Ward*, 407 S.E.2d 365 (1991) (Brotherton, J.)

See BURGLARY Sufficiency of evidence, (p. 114) for discussion of topic.

## VIDEO POKER

### Declared unlawful

*United States v. Dobkin*, 423 S.E.2d 612 (1992) (Neely, J.)

Defendants here were indicted pursuant to 18 U.S.C. 1955 and 18 U.S.C. 1956(a)(1) and the predicate state statute, *W.Va. Code*, 61-10-1. They maintained that the actions for which they were indicted were not crimes under the state statute.

The defendants' alleged offenses involved the use of video poker machines. The United States District Court for the Northern District certified questions as follows:

- (1) Whether use of these machines violates any West Virginia criminal statute, including but limited to, *W.Va. Code*, 61-10-1, -5, -6 and -11?
- (2) If the result of machine play are determined by chance, does the answer to question 1 change?
- (3) If the results of machine play are determined predominantly by chance, does the answer to question 1 change?

The video poker machines at issue are so designed that a player can either receive money or additional plays. Generally, an employee of the business wherein the machine is located dispenses money based on the games' outcomes.

Syl. pt. 1 - "Penal statutes must be strictly construed against the State in favor of the defendant." Syl. pt. 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1979).

Syl. pt. 2 - It is gambling prohibited by *W.Va. Code*, 61-10-1 [1970] to use a video poker machine that does not disburse money directly but is equipped with a free play feature when the player is reimbursed in money or any other thing of value except free plays for accumulated free plays.

Syl. pt. 3 - When a video poker machine is provided for gambling rather than amusement purposes, betting on the outcome of such a machine violates *W.Va. Code*, 61-10-5 [1923].

Syl. pt. 4 - It is illegal under *W.Va. Code*, 61-10-6 [1923] to permit a video poker machine to be used for gambling purposes at a hotel, tavern or other location as described in the statute.

## VIDEO POKER

### Declared unlawful (continued)

#### *United States v. Dobkin*, (continued)

Syl. pt. 5 - The use of a video poker machine for gambling purposes is not prohibited by *W.Va. Code*, 61-10-11 [1939].

The Court found video poker machines not violative of *W.Va. Code*, 61-10-11 because the machines are unrelated to lotteries or raffles.

***VOIR DIRE***

**Abuse of discretion**

*State v. Ward*, 424 S.E.2d 725 (1991) (Workman, J.)

See JURY *Voir dire*, (p. 363) for discussion of topic.

## WAIVER

### Right to appeal

*State ex rel. Phillips v. Boggess*, 416 S.E.2d 270 (1992) (McHugh, C.J.)

See PLEA BARGAINS Setting aside, Right to transcript unaffected, (p. 420) for discussion of topic.

## WARRANTS

### Citizen's complaint as basis for

*Harman v. Frye*, 425 S.E.2d 566 (1992) (McHugh, C.J.)

Relator, a magistrate, sought a writ of mandamus to force respondent circuit judge to appoint a special prosecutor in a cross-warrant action. Two citizens filed complaints against each other for battery stemming from the same incident. Following a police investigation, the prosecuting attorney's office concluded the warrants were valid and sought a continuance so that a special prosecutor could be appointed for one of the complaints.

The circuit judge, however, directed Magistrate Harman to proceed without a prosecuting attorney for either complaint. Following the magistrate's petition to the Court, a show cause rule was entered as to why a writ of mandamus should not issue directing appointment. The judge thereupon issued a second order that a magistrate may not issue a felony warrant without police investigation of the complaint. An amended petition and show cause rule followed.

Syl. pt. 1 - Except where there is a specific statutory exception, a magistrate may not issue a warrant or summons for a misdemeanor or felony solely upon the complaint of a private citizen without a prior evaluation of the citizen's complaint by the prosecuting attorney or an investigation by the appropriate law enforcement agency. Following such evaluation by the prosecuting attorney or investigation by the appropriate law enforcement agency, the prosecuting attorney shall institute all necessary and proper proceedings before the magistrate, and, in suitable cases, law enforcement officers may obtain warrants and assist private citizens in obtaining the warrant or summons from the magistrate. To the extent *In re Monroe*, 174 W.Va. 401, 327 S.E.2d 163 (1985), is inconsistent with our holding in this case, it is overruled.

Syl. pt. 2 - "By application to the circuit judge, whose duty is to insure access to the grand jury, any person may go to the grand jury to present a complaint to it. *W.Va. Const.* art. 3, § 17." Syl. pt. 1, *State ex rel. Miller v. Smith*, 168 W.Va. 745, 285 S.E.2d 500 (1981).

Syl. pt. 3 - Criminal cases involving the issuance of cross-warrants must be prosecuted by the prosecuting attorney, who is charged with the duty under *W.Va. Code*, 7-4-1 [1971] of instituting and prosecuting all necessary and proper criminal proceedings against offenders, and, in cases where it would be improper for the prosecuting attorney or his assistants to act, by a competent attorney who is appointed to act under *W.Va. Code*, 7-7-8 [1987].

The Court noted that *In re Monroe*, 174 W.Va. 401, 327 S.E.2d 163 (1985), held a police investigation is not a prerequisite to issuance of an arrest warrant. The Court reversed itself herein after noting the abuse to which the citizen cross-warrant process is subject.

## WARRANTS

### **Citizen's complaint as basis for** (continued)

#### *Harman v. Frye*, (continued)

The rule enunciated here parallels the usual practice in federal courts, a practice recommended by the United States Judicial Conference. The theory is that only the U.S. attorney can prosecute so allowing warrants without his involvement is potentially a waste of time; if he chooses not to proceed the entire process is mooted. Similarly, the ABA discourages "private prosecution" without the involvement of a public prosecutor; as here, the ABA also recommends an alternative if the prosecutor refuses to act.

The Court noted the potential for abuse of innocent persons and the substantial cost of appointing counsel where indigents are involved. The prosecuting attorney's discretion is also compromised. Requiring a police officer and a prosecuting attorney to be involved insures the integrity of the system. The Court recognized the exceptions for domestic violence cases, *W.Va. Code*, 48-2A-4(a), and worthless checks, *W.Va. Code*, 61-3-39a and 39f.

Finally, by ordering the prosecutor not to prosecute, the circuit court was requiring the magistrate to act as both judge and prosecutor. Prosecuting attorneys must, therefore, handle cross complaints. Writ granted.

### **Cross-warrants**

#### **Prosecutor to pursue**

*Harman v. Frye*, 425 S.E.2d 566 (1992) (McHugh, C.J.)

See WARRANTS Citizen's complaint as basis for, (p. 617) for discussion of topic.

### **Plain view exception**

*State v. Slaman*, 431 S.E.2d 91 (1993) (Per Curiam)

See SEARCH AND SEIZURE Plain view exception, (p. 523) for discussion of topic.

## WARRANTS

### Search warrant

#### Probable cause for

*State v. Hlavacek*, 407 S.E.2d 375 (1991) (Brotherton, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 524) for discussion of topic.

*State v. Kilmer*, 439 S.E.2d 881 (1993) (Workman, C.J.)

See SEARCH AND SEIZURE Warrant, Probable cause, (p. 526) for discussion of topic.

*State v. Thomas*, 421 S.E.2d 227 (1992) (Neely, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 527) for discussion of topic.

## WIRETAPS

### Admissibility

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

See EVIDENCE Admissibility, Wiretaps, (p. 224) for discussion of topic.

## WITNESSES

### Arrest in presence of jury

*State v. Ferrell*, 412 S.E.2d 501 (1991) (Per Curiam)

See JUDGES Examining witnesses, (p. 348) for discussion of topic.

### Credibility

*State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

See PROSECUTING ATTORNEY Comments at trial, Comments during closing argument, (p. 463) for discussion of topic.

### Cross-examination

#### Generally

*State v. Gibson*, 413 S.E.2d 120 (1991) (Per Curiam)

Appellant was convicted of first-degree murder. On appeal, he claimed that defense counsel was prevented from inquiring into a prosecution witness' contacts and cooperation with the investigating police officer. Another witness, a deputy sheriff, had previously used one of those present at the killing as a confidential drug informant; the judge refused to allow the deputy to be questioned. Also prohibited was appellant's testimony regarding threats made against him by the informant's family. Appellant challenged the sufficiency of the evidence to support a conviction.

Syl. pt. 6 - "A witness may be cross-examined regarding bias, prejudice or expected favor or any other fact which might affect his credibility.' Syllabus Point 5, *State v. Jones*, 161 W.Va. 55, 239 S.E.2d 763 (1977), *overruled on other grounds*, *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980)." Syl. Pt. 8, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

Syl. pt. 7 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in a light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. Pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The Court questioned the relevance of the appellant's excluded testimony and of any prior relationship between the police and the other witness. Further, there was sufficient evidence to support the conviction. No error.

## WITNESSES

### Cross-examination (continued)

#### Prejudice or bias

*State v. James Edward S.*, 400 S.E.2d 843 (1990) (Miller, J.)

Appellant was convicted of incest. He claimed that the trial court erroneously refused to allow extrinsic evidence to show bias by the state's chief witness. Appellant's brother was to testify as to the witness' bias toward appellant.

Syl. pt. 8 - "A witness may be cross-examined regarding bias, prejudice or expected favor or any other fact which might affect his credibility." Syllabus Point 5, *State v. Jones*, 161 W.Va. 55, 239 S.E.2d 763 (1977), *overruled on other grounds*, *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980).

Syl. pt. 9 - Bias is a term used in the common law of evidence to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness's like, dislike, or fear of a party, or by the witness's self-interest.

Syl. pt. 10 - The requirements of Rule 613(b) of the *West Virginia Rules of Evidence* apply to cases where a defendant seeks to introduce extrinsic evidence of bias to impeach a witness's trial testimony. Three criteria must be met before evidence of a witness's prior statement can be admitted to contradict the denial of bias:

- (1) The statement must be a prior inconsistent statement of the witness;
- (2) The witness must be afforded an opportunity to explain or deny having made the statement; and
- (3) The opposing party must be afforded an opportunity to interrogate the witness concerning the statement.

Here, the witness was never asked about her alleged bias during cross-examination and defense counsel's vouch of the record did not clearly show that the excluded witness would testify as to prior inconsistent statements. No abuse of discretion.

#### Scope of

*State v. Asbury*, 415 S.E.2d 891 (1992) (Per Curiam)

See CROSS-EXAMINATION Scope of, (p. 147) for discussion of topic.

## WITNESSES

### Cross-examination (continued)

#### Scope of (continued)

*State v. Green*, 415 S.E.2d 449 (1992) (Per Curiam)

See CROSS-EXAMINATION Scope of, (p. 148) for discussion of topic.

### Experts

#### Admissibility of expert opinion

*State v. Triplett*, 421 S.E.2d 511 (1992) (Workman, J.)

See EVIDENCE Expert witnesses, Admissibility of opinions, (p. 235) for discussion of topic.

#### Qualifying as such

*State v. Hose*, 419 S.E.2d 690 (1992) (Per Curiam)

See EVIDENCE Expert witnesses, Admissibility of opinions, (p. 235) for discussion of topic.

### Failure to disclose

*State v. Ward*, 424 S.E.2d 725 (1991) (Workman, J.)

See DISCOVERY Failure to disclose, Witnesses, (p. 163) for discussion of topic.

### Hostile

#### Interrogation of

*State v. Perolis*, 398 S.E.2d 512 (1990) (Neely, C.J.)

See EVIDENCE Witnesses, Hostile, (p. 250) for discussion of topic.

## WITNESSES

### Impeachment

#### Mental health records

*Nelson v. Ferguson*, 399 S.E.2d 909 (1990) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Records relating to, (p. 243) for discussion of topic.

### Judges' examining

*State v. Ferrell*, 412 S.E.2d 501 (1991) (Per Curiam)

See JUDGES Examining witnesses, (p. 348) for discussion of topic.

### Personal knowledge

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

See EVIDENCE Admissibility, Testimony based on personal knowledge, (p. 222) for discussion of topic.

### Prior statements

#### Admissibility

*State v. Carrico*, 427 S.E.2d 474 (1993) (Neely, J.)

See EVIDENCE Admissibility, Prior inconsistent statements, (p. 217) for discussion of topic.

#### Discovery of

*State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

See PROSECUTING ATTORNEY Failure to disclose, Exculpatory evidence, (p. 476) for discussion of topic.

## **WITNESSES**

### **Prosecution called for defense**

*State ex rel. Karr v. McCarty*, 417 S.E.2d 120 (1992) (Per Curiam)

See ATTORNEYS Discipline, Lawyer as witness, (p. 79) for discussion of topic.

### **Sequestration**

*State v. Ward*, 424 S.E.2d 725 (1991) (Workman, J.)

See DISCOVERY Failure to disclose, Witnesses, (p. 163) for discussion of topic.

### **Sexual assault**

#### **Prompt complaint**

*State v. McClure*, 400 S.E.2d 853 (1990) (Per Curiam)

See EVIDENCE Admissibility, Prompt complaint, (p. 220) for discussion of topic.

### **Surviving spouse**

*State v. Wheeler*, 419 S.E.2d 447 (1992) (Brotherton, J.)

See EVIDENCE Surviving spouse, (p. 247) for discussion of topic.

### **Testimony**

#### **Admissibility based on personal knowledge**

*State v. Whitt*, 400 S.E.2d 584 (1990) (Miller, J.)

See EVIDENCE Admissibility, Testimony based on personal knowledge, (p. 222) for discussion of topic.

## WITNESSES

### Unavailability

#### Juvenile transfer hearing

*State v. Gary F.*, 432 S.E.2d 793 (1993) (Workman, C.J.)

See JUVENILES Transfer to adult jurisdiction, Right to confront, (p. 372) for discussion of topic.

#### Prosecution's burden

*State v. Phillips*, 417 S.E.2d 124 (1992) (Per Curiam)

See HEARING Witness unavailable, Prosecution's burden, (p. 278) for discussion of topic.

### Writings by

*State v. Perolis*, 398 S.E.2d 512 (1990) (Neely, C.J.)

See EVIDENCE Admissibility, Writing by witness, (p. 225) for discussion of topic.

## **WORK RELEASE**

### **Escape from**

*Craig v. Legursky*, 398 S.E.2d 160 (1990) (Workman, J.)

Petitioner asserts that his felony escape conviction should be voided since absence from work release is not a crime. Petitioner was earlier convicted of breaking and entering and later assigned to the Charleston Work Release Center.

Syl. pt. - “A convict confined in the penitentiary or medium security prison who is transferred to a work release and/or study center established pursuant to *W.Va. Code*, Section 25-1-3 (1977) remains in the custody of officers of the Department of Corrections. Consequently if such convict absconds from a work release and/or study center, he shall be deemed guilty of felony escape pursuant to *W.Va. Code*, Section 62-8-1 (1959).”

The Court noted that work release centers are really extensions of the institutions of the Department of Corrections. An inmate is clearly on notice that escape is a punishable offense. Writ denied.

### **In lieu of magistrate court sentence**

*State v. Caskey*, 406 S.E.2d 717 (1991) (Brotherton, J.)

See PROBATION Right to, (p. 447) for discussion of topic.

### **Psychiatric or psychological records**

*Nelson v. Ferguson*, 399 S.E.2d 909 (1990) (Per Curiam)

See EVIDENCE Psychiatric or psychological disability, Records relating to, (p. 243) for discussion of topic.

## **WORTHLESS CHECKS**

### **Attorney reprimand for**

*Committee on Legal Ethics v. Taylor*, 415 S.E.2d 280 (1992) (Miller, J.)

See ATTORNEYS Discipline, Moral turpitude, (p. 81) for discussion of topic.

### **Lesser included offenses**

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

See LESSER INCLUDED OFFENSES Worthless checks, (p. 376) for discussion of topic.

### **Probable cause**

#### **Statutory procedures for**

*State ex rel. Walls v. Noland*, 433 S.E.2d 541 (1993) (Brotherton, J.)

See STATUTES Worthless checks, (p. 577) for discussion of topic.

### **Statute not vague**

*State v. Hays*, 408 S.E.2d 614 (1991) (McHugh, J.)

See STATUTES Specificity and notice, (p. 575) for discussion of topic.

**CASES SUMMARIZED**

<b><i>Bayles v. Hedrick</i>,</b> 422 S.E.2d 524 (W.Va. 1992) .....	45, 104, 116, 467, 472
<b><i>Billotti v. Dodrill</i>,</b> 394 S.E.2d 32 (W.Va. 1990) . . .	21, 24, 186, 189, 194, 268-270, 274, 283, 317, 319, 492, 493, 574, 599
<b><i>Brumfield v. Legursky</i>,</b> No. 19932 (W.Va. 3/14/91) .....	24, 393, 563
<b><i>Cleo A.E. v. Rickie Gene E.</i>,</b> 438 S.E.2d 886 (W.Va. 1993) .....	265, 412, 591, 598
<b><i>Comer v. Tom A.M.</i>,</b> 403 S.E.2d 182 (W.Va. 1991) .....	205, 237, 323, 368-370, 442, 604
<b><i>Committee on Legal Ethics v. Adams</i>,</b> No. 21867 (W.Va. 12/9/93) .....	90, 107
<b><i>Committee on Legal Ethics v. Battistelli</i>,</b> 405 S.E.2d 242 (W.Va. 1991) .....	68, 80, 89, 99, 196
<b><i>Committee on Legal Ethics v. Boettner</i>,</b> 422 S.E.2d 478 (W.Va. 1992) .....	39, 46, 57, 97, 102, 107, 197
<b><i>Committee on Legal Ethics v. Carman</i>,</b> No. 20161 (W.Va. 7/16/91) .....	39, 58, 97, 102
<b><i>Committee on Legal Ethics v. Charonis</i>,</b> 400 S.E.2d 276 (W.Va. 1990) .....	52, 95, 108, 197
<b><i>Committee on Legal Ethics v. Charonis</i>,</b> 410 S.E.2d 418 (W.Va. 1991) .....	77, 100, 108
<b><i>Committee on Legal Ethics v. Cometti</i>,</b> 430 S.E.2d 320 (W.Va. 1993) .....	43, 48, 74, 87, 94, 95, 108, 133, 196, 449
<b><i>Committee on Legal Ethics v. Cowgill</i>,</b> No. 21518 (W.Va. 2/24/93) .....	19, 74, 80, 100, 102, 108
<b><i>Committee on Legal Ethics v. Craig</i>,</b> 415 S.E.2d 255 (W.Va. 1992) .....	82, 96, 103, 108, 197
<b><i>Committee on Legal Ethics v. Dues</i>,</b> No. 21424 (W.Va. 12/11/92) .....	59, 97, 106, 196
<b><i>Committee on Legal Ethics v. Farber</i>,</b> 408 S.E.2d 274 (W.Va. 1991) .....	75, 94, 100, 101, 103, 108
<b><i>Committee on Legal Ethics v. Folio</i>,</b> 401 S.E.2d 248 (W.Va. 1990) .....	39, 47, 59, 97, 102, 186, 197
<b><i>Committee on Legal Ethics v. Frame &amp; Benninger</i>,</b> 433 S.E.2d 579 (W.Va. 1993) .....	44, 45, 85, 103, 107
<b><i>Committee on Legal Ethics v. Goode</i>,</b> No. 21857 (W.Va. 11/23/93) .....	45, 56, 84, 86, 103, 105, 200
<b><i>Committee on Legal Ethics v. Gordon</i>,</b> No. 21979 (W.Va. 12/9/93) .....	91, 108
<b><i>Committee on Legal Ethics v. Gorrell</i>,</b> 407 S.E.2d 923 (W.Va. 1991) .....	39, 40, 60, 95, 97
<b><i>Committee on Legal Ethics v. Grubb</i>,</b> 420 S.E.2d 744 (W.Va. 1992) .....	39, 46, 61, 98, 331
<b><i>Committee on Legal Ethics v. Hart</i>,</b> 410 S.E.2d 714 (W.Va. 1991) .....	39, 62, 98, 102

<b><i>Committee on Legal Ethics v. Hess,</i></b> 413 S.E.2d 169 (W.Va. 1991) .....	69, 86, 99, 108, 196
<b><i>Committee on Legal Ethics v. Hobbs,</i></b> 439 S.E.2d 629 (W.Va. 1993) .....	78, 95, 109, 197
<b><i>Committee on Legal Ethics v. Ikner,</i></b> 438 S.E.2d 613 (W.Va. 1993) .....	46, 70, 87, 89, 99, 104, 109, 197
<b><i>Committee on Legal Ethics v. Keenan,</i></b> 427 S.E.2d 471 (W.Va. 1993) .....	54, 73, 91, 92, 95, 100, 109, 200
<b><i>Committee on Legal Ethics v. Lambert,</i></b> 428 S.E.2d 65 (W.Va. 1993) .....	40, 42, 48, 54, 74, 89, 96, 196, 197
<b><i>Committee on Legal Ethics v. Lambert,</i></b> No. 20970 (W.Va. 7/10/92) .....	69, 91, 101
<b><i>Committee on Legal Ethics v. Martin,</i></b> 419 S.E.2d 4 (W.Va. 1992) .....	47, 74, 100, 107
<b><i>Committee on Legal Ethics v. Matthews,</i></b> 411 S.E.2d 265 (W.Va. 1991) .....	54, 86, 96, 107
<b><i>Committee on Legal Ethics v. McCreight,</i></b> No. 21507 (W.Va. 3/26/93) .....	72, 74, 88, 99, 109
<b><i>Committee on Legal Ethics v. Mitchell,</i></b> 418 S.E.2d 733 (W.Va. 1992) .....	40, 96, 109
<b><i>Committee on Legal Ethics v. Moore,</i></b> 411 S.E.2d 452 (W.Va. 1991) .....	40, 46, 63, 96, 98, 102
<b><i>Committee on Legal Ethics v. Morton,</i></b> 410 S.E.2d 279 (W.Va. 1991) .....	55, 96, 101, 107
<b><i>Committee on Legal Ethics v. Printz,</i></b> 416 S.E.2d 720 (W.Va. 1992) .....	67, 98, 197
<b><i>Committee on Legal Ethics v. Simmons,</i></b> 399 S.E.2d 894 (W.Va. 1990) .....	46, 51, 95, 109, 198
<b><i>Committee on Legal Ethics v. Smith,</i></b> 399 S.E.2d 36 (W.Va. 1990) .....	46, 71, 99, 109, 198
<b><i>Committee on Legal Ethics v. Taylor,</i></b> 415 S.E.2d 280 (W.Va. 1992) .....	81, 94, 103, 107, 110, 628
<b><i>Committee on Legal Ethics v. Taylor,</i></b> 437 S.E.2d 443 (W.Va. 1993) .....	47, 83, 84, 88, 103, 110
<b><i>Committee on Legal Ethics v. Veneri,</i></b> 411 S.E.2d 865 (W.Va. 1991) .....	44, 55, 89, 96, 97, 99, 109
<b><i>Committee on Legal Ethics v. White,</i></b> 428 S.E.2d 556 (W.Va. 1993) .....	64, 98, 106, 110, 196, 198
<b><i>Committee on Legal Ethics v. Wilson,</i></b> 408 S.E.2d 350 (W.Va. 1991) .....	40, 65, 90, 94, 98, 101, 102
<b><i>Cooper v. Murenky,</i></b> No. 21438 (W.Va. 12/18/92) .....	33, 44, 97, 392
<b><i>Craigo v. Legursky,</i></b> 398 S.E.2d 160 (W.Va. 1990) .....	195, 627
<b><i>Crain v. Bordenkircher,</i></b> 408 S.E.2d 355 (W.Va. 1991) .....	432
<b><i>Crain v. Bordenkircher,</i></b> 420 S.E.2d 732 (W.Va. 1992) .....	432
<b><i>Crain v. Bordenkircher,</i></b> 424 S.E.2d 751 (W.Va. 1992) .....	433

<b><i>Crain v. Bordenkircher,</i></b> 433 S.E.2d 526 (W.Va. 1993) .....	434
<b><i>Davis v. Duncil,</i></b> No. 19652 (W.Va. 11/9/90) .....	272, 444, 445, 554, 607
<b><i>Department of Human Services v. Peggy F.,</i></b> 399 S.E.2d 460 (W.Va. 1990) .....	1, 2, 4
<b><i>Dietz v. Legursky,</i></b> 425 S.E.2d 202 (W.Va. 1992) .....	93, 186, 202, 227, 248, 249, 305, 341, 397, 513
<b><i>Facilities Review Panel v. Coe,</i></b> 420 S.E.2d 532 (W.Va. 1992) .....	153, 154, 365, 366, 431
<b><i>Facilities Review Panel v. Miller,</i></b> No. 19849 (W.Va. 3/14/91) .....	365, 434
<b><i>Gibson v. Legursky,</i></b> 415 S.E.2d 457 (W.Va. 1992) .....	176, 269, 273, 487, 561
<b><i>Goines v. James,</i></b> 433 S.E.2d 572 (W.Va. 1993) .....	259, 291, 423, 520
<b><i>Harman v. Frye,</i></b> 425 S.E.2d 566 (W.Va. 1992) .....	34, 118, 263, 617, 618
<b><i>In re adoption of Mullins by Farley,</i></b> 421 S.E.2d 680 (W.Va. 1992) .....	588, 590, 593
<b><i>In re Jeffrey R.L.,</i></b> 435 S.E.2d 162 (W.Va. 1993) .....	2, 6, 11, 265, 367, 368, 502, 589, 591, 593
<b><i>In re Lacey P.,</i></b> 433 S.E.2d 518 (W.Va. 1993) .....	7, 591
<b><i>In the Interest of Betty L. Taylor,</i></b> No. 21302 (W.Va. 4/23/93) .....	199, 340, 346, 383, 385, 387
<b><i>In the Interest of Carlita B.,</i></b> 408 S.E.2d 365 (W.Va. 1991) .....	3, 6, 7, 10, 121, 201, 230, 243, 247, 588-593
<b><i>In the Interest of David Zane B.,</i></b> 403 S.E.2d 10 (W.Va. 1991) .....	371, 442, 604
<b><i>In the Matter of Atkinson,</i></b> 423 S.E.2d 902 (W.Va. 1992) .....	332, 346, 382
<b><i>In the Matter of Baughman,</i></b> No. 20686 (W.Va. 10/23/92) .....	387, 389
<b><i>In the Matter of Bivens,</i></b> No. 19378 (W.Va. 11/9/90) .....	198, 330, 344, 346
<b><i>In the Matter of Boese,</i></b> 410 S.E.2d 282 (W.Va. 1991) .....	199, 330, 345, 385, 387
<b><i>In the Matter of Codispoti,</i></b> 414 S.E.2d 628 (W.Va. 1992) .....	383, 386, 388
<b><i>In the Matter of Codispoti,</i></b> 438 S.E.2d 549 (W.Va. 1993) .....	199, 332, 381, 383
<b><i>In the Matter of Damron,</i></b> No. 21499 (W.Va. 10/18/93) .....	199, 329, 332, 344
<b><i>In the Matter of Egnor,</i></b> 412 S.E.2d 485 (W.Va. 1991) .....	333, 345, 346, 349, 365
<b><i>In the Matter of Eplin,</i></b> 410 S.E.2d 273 (W.Va. 1991) .....	158, 199, 330, 346, 386, 388
<b><i>In the Matter of Eplin,</i></b> 411 S.E.2d 862 (W.Va. 1991) .....	379, 384, 386

<b><i>In the Matter of Eplin,</i></b> 416 S.E.2d 248 (W.Va. 1992) .....	157, 199, 385, 386, 388
<b><i>In the Matter of Gainer,</i></b> 404 S.E.2d 251 (W.Va. 1991) .....	333, 385
<b><i>In the Matter of Grubb,</i></b> 417 S.E.2d 919 (W.Va. 1992) .....	335, 350
<b><i>In the Matter of Hey,</i></b> 425 S.E.2d 221 (W.Va. 1992) .....	198, 333, 334, 347, 349
<b><i>In the Matter of Hill,</i></b> 437 S.E.2d 738 (W.Va. 1993) .....	199, 331, 332, 344, 347
<b><i>In the Matter of Kaufman,</i></b> 416 S.E.2d 480 (W.Va. 1992) .....	39, 72, 100, 329, 347
<b><i>In the Matter of Phillips,</i></b> No. 21473 (W.Va. 10/14/93) .....	200, 378, 380
<b><i>In the Matter of Scottie D.,</i></b> 406 S.E.2d 214 (W.Va. 1991) .....	6, 265, 590
<b><i>In the Matter of Shaver,</i></b> No. 19689 (W.Va. 10/26/90) .....	156, 198, 332, 346, 386, 388
<b><i>In the Matter of Suder,</i></b> 398 S.E.2d 162 (W.Va. 1990) .....	156, 198, 332, 346, 386, 388
<b><i>In the Matter of Twyman,</i></b> 437 S.E.2d 764 (W.Va. 1993) .....	200, 332, 380
<b><i>In the Matter of W.Va. State Police Crime Lab.,</i></b> 438 S.E.2d 501 (W.Va. 1993) .....	240, 276, 402, 417
<b><i>In the Matter of Wilson,</i></b> 411 S.E.2d 847 (W.Va. 1991) .....	158, 199, 330, 346, 386, 388
<b><i>James M. v. Maynard,</i></b> 408 S.E.2d 400 (W.Va. 1991) .....	3, 9, 117, 265
<b><i>Jennifer A. v. Burgess,</i></b> No. 21009 (W.Va. 7/16/93) .....	2, 392, 393, 564
<b><i>Johnson v. Tsapis,</i></b> 413 S.E.2d 699 (W.Va. 1991) .....	325, 424, 440
<b><i>Judy v. White,</i></b> 425 S.E.2d 588 (W.Va. 1992) .....	12, 18, 41, 42, 340
<b><i>Kelly v. Allen,</i></b> No. 20663 (W.Va. 12/19/91) .....	136, 258, 268, 508, 543
<b><i>Kincaid v. Mangum,</i></b> 432 S.E.2d 74 (W.Va. 1993) .....	126, 326, 434, 435, 489
<b><i>Kutsch v. Broadwater,</i></b> 404 S.E.2d 249 (W.Va. 1991) .....	105, 451, 471
<b><i>Lewis v. Henry,</i></b> 400 S.E.2d 567 (W.Va. 1990) .....	137, 337
<b><i>Lewis v. Henry,</i></b> No. 20194 (W.Va. 7/11/91) .....	13, 450, 610
<b><i>Nelson v. Ferguson,</i></b> 399 S.E.2d 909 (W.Va. 1990) .....	238, 240, 243, 579, 624, 627
<b><i>Peyatt v. Kopp,</i></b> 428 S.E.2d 535 (W.Va. 1993) .....	211, 236, 263, 427, 452, 479
<b><i>Philyaw v. Bogovich,</i></b> No. 21541 (W.Va. 4/28/93) .....	142, 394, 514, 599

<b><i>Sherry L.H. v. Hey,</i></b> 419 S.E.2d 17 (W.Va. 1992) .....	4
<b><i>Snyder v. Scheerer,</i></b> 436 S.E.2d 299 (W.Va. 1993) .....	117, 268, 590, 596
<b><i>State ex rel. Adkins v. Trent,</i></b> No. 21441 (W.Va. 12/10/92) .....	32, 274, 495
<b><i>State ex rel. Bailey v. Facemire,</i></b> 413 S.E.2d 183 (W.Va. 1991) .....	104, 133, 439, 468
<b><i>State ex rel. Baker v. Bogovich,</i></b> No. 21450 (W.Va. 12/11/92) .....	394, 514, 599
<b><i>State ex rel. Billy Ray C. v. Skaff,</i></b> 438 S.E.2d 847 (W.Va. 1993) .....	393, 424
<b><i>State ex rel. Cooper v. Schlaegel,</i></b> No. 21481 (W.Va. 2/16/93) .....	140, 343, 393, 437
<b><i>State ex rel. Forbes v. Kaufman,</i></b> 404 S.E.2d 763 (W.Va. 1991) .....	267, 418, 557
<b><i>State ex rel. Friend v. Hamilton,</i></b> No. 21449 (W.Va. 12/16/92) .....	13, 14, 290, 329, 337, 339, 349, 451, 478
<b><i>State ex rel. Galford v. Mark Anthony B.,</i></b> 433 S.E.2d 41 (W.Va. 1993) .....	369, 374, 529
<b><i>State ex rel. Hall v. Bratton,</i></b> No. 21618 (W.Va. 4/28/93) .....	143, 394, 514, 601
<b><i>State ex rel. Henderson v. Hey,</i></b> 424 S.E.2d 741 (W.Va. 1992) .....	187, 295, 450, 451, 510, 573
<b><i>State ex rel. Hodge v. Reid-Williams,</i></b> No. 21621 (W.Va. 4/28/93) .....	142, 394, 514, 600
<b><i>State ex rel. Jenkins v. Marchbank,</i></b> No. 21428 (W.Va. 2/10/93) .....	142, 394, 514, 601
<b><i>State ex rel. Johnson v. Zakaib,</i></b> 400 S.E.2d 590 (W.Va. 1990) .....	294, 349, 352, 379, 389, 509, 516, 573, 606
<b><i>State ex rel. Justice v. Allen,</i></b> 432 S.E.2d 199 (W.Va. 1993) .....	129, 131, 268, 535, 545
<b><i>State ex rel. Karr v. McCarty,</i></b> 417 S.E.2d 120 (W.Va. 1992) .....	79, 101, 198, 481, 625
<b><i>State ex rel. Knotts v. Watt,</i></b> 413 S.E.2d 173 (W.Va. 1991) .....	105, 294, 472
<b><i>State ex rel. Kutsch v. Wilson,</i></b> 427 S.E.2d 481 (W.Va. 1993) .....	183, 430, 451, 452
<b><i>State ex rel. McClanahan v. Hamilton,</i></b> 430 S.E.2d 569 (W.Va. 1993) .....	133, 451, 468, 469, 472
<b><i>State ex rel. Mikulik v. Fields,</i></b> 410 S.E.2d 717 (W.Va. 1991) .....	254, 255, 261, 268
<b><i>State ex rel. Moomau v. Hamilton,</i></b> 400 S.E.2d 259 (W.Va. 1990) .....	184, 185, 550, 551, 563
<b><i>State ex rel. Painter v. Zakaib,</i></b> 411 S.E.2d 25 (W.Va. 1991) .....	256, 257, 282, 586
<b><i>State ex rel. Palumbo v. Graley's,</i></b> 425 S.E.2d 177 (W.Va. 1992) .....	119, 145, 414
<b><i>State ex rel. Phillips v. Boggess,</i></b> 416 S.E.2d 270 (W.Va. 1992) .....	31, 194, 302, 418, 420, 421, 494, 599, 616

<i>State ex rel. Phillips v. Legursky</i> , 420 S.E.2d 743 (W.Va. 1992) .....	21, 269
<i>State ex rel. Philyaw v. Williams</i> , 438 S.E.2d 64 (W.Va. 1993) .....	142, 394
<i>State ex rel. Redman v. Hedrick</i> , 408 S.E.2d 659 (W.Va. 1991) .....	93, 146, 263, 275, 305, 348, 479, 500
<i>State ex rel. Reed v. Douglass</i> , 427 S.E.2d 751 (W.Va. 1993) .....	445, 446, 452
<i>State ex rel. Riggall v. Duncil</i> , No. 21138 (W.Va. 7/26/92) .....	270, 273
<i>State ex rel. Roach v. Dietrick</i> , 404 S.E.2d 415 (W.Va. 1991) .....	270, 555, 556, 574, 576
<i>State ex rel. Rouse v. Bogovich</i> , No. 21464 (W.Va. 12/14/92) .....	394, 601
<i>State ex rel. Scott v. Bogovich</i> , No. 21480 (W.Va. 2/10/93) .....	142, 394, 514, 599
<i>State ex rel. Smith v. Hatcher</i> , No. 21640 (W.Va. 6/10/93) .....	274, 343, 392
<i>State ex rel. Smith v. Skaff</i> , 420 S.E.2d 922 (W.Va. 1992) .....	140, 272, 273, 411, 437
<i>State ex rel. Smith v. Skaff</i> , 428 S.E.2d 54 (W.Va. 1993) .....	22, 140, 272, 273, 411, 434, 438
<i>State ex rel. Spaulding v. Watt</i> , 411 S.E.2d 450 (W.Va. 1991) .....	152, 450
<i>State ex rel. Spaulding v. Watt</i> , 422 S.E.2d 818 (W.Va. 1992) .....	14, 175, 329, 338, 403, 450, 461, 480, 510
<i>State ex rel. Spaulding v. Watt</i> , 423 S.E.2d 217 (W.Va. 1992) .....	111, 113, 450, 462, 564
<i>State ex rel. Spaulding v. Watt</i> , No. 21502 (W.Va. 4/23/93) .....	183, 451-453, 479
<i>State ex rel. Stephens v. Bratton</i> , No. 21619 (W.Va. 4/28/93) .....	143, 394, 514, 601
<i>State ex rel. Stine v. Gagich</i> , No. 21962 (W.Va. 12/1/93) .....	143, 395, 514, 602
<i>State ex rel. Stump v. Cline</i> , 406 S.E.2d 749 (W.Va. 1991) .....	24, 412, 490
<i>State ex rel. Walker v. Miller</i> , No. 21496 (W.Va. 2/10/93) .....	144, 395, 514, 602
<i>State ex rel. Walker v. Schlaegel</i> , No. 20033 (W.Va. 4/11/91) .....	14, 450, 609
<i>State ex rel. Walls v. Noland</i> , 433 S.E.2d 541 (W.Va. 1993) .....	442, 577, 608, 628
<i>State ex rel. Woods v. Wolverton</i> , No. 20165 (W.Va. 7/11/91) .....	12, 111, 112, 268, 392
<i>State v. Asbury</i> , 415 S.E.2d 891 (W.Va. 1992) .....	20, 147, 151, 213, 239, 321, 339, 463, 532, 621, 622
<i>State v. Barker</i> , 410 S.E.2d 712 (W.Va. 1991) .....	455, 459, 548, 560
<i>State v. Bass</i> , 432 S.E.2d 86 (W.Va. 1993) .....	12, 166, 168, 194, 216, 242, 336, 342, 357, 362

<b><i>State v. Beegle,</i></b>	
425 S.E.2d 823 (W.Va. 1992)	. . . . . 22, 209, 210, 223, 228, 231, 236, 245, 248, 316, 338, 533, 606, 609
<b><i>State v. Belcher,</i></b>	
422 S.E.2d 640 (W.Va. 1992)	..... 254, 270
<b><i>State v. Bell,</i></b>	
432 S.E.2d 532 (W.Va. 1993)	..... 14, 26, 104, 138, 209, 258, 297, 327, 339, 444, 463, 534
<b><i>State v. Bess,</i></b>	
406 S.E.2d 721 (W.Va. 1991)	..... 90, 92, 130, 132, 543, 545
<b><i>State v. Blair,</i></b>	
438 S.E.2d 605 (W.Va. 1993)	..... 190, 574, 577
<b><i>State v. Boatright,</i></b>	
399 S.E.2d 57 (W.Va. 1990)	..... 576
<b><i>State v. Bonham,</i></b>	
401 S.E.2d 901 (W.Va. 1990)	. . . . . 137, 201, 214, 226, 227, 293, 337, 338, 405, 439, 478, 510, 516, 573, 605, 606
<b><i>State v. Brown,</i></b>	
422 S.E.2d 489 (W.Va. 1992)	..... 191, 322, 582
<b><i>State v. Bunda and Devault,</i></b>	
419 S.E.2d 457 (W.Va. 1992)	..... 121, 130, 205, 231, 336, 535
<b><i>State v. Burd,</i></b>	
419 S.E.2d 676 (W.Va. 1991)	..... 37, 38, 280, 281, 400
<b><i>State v. Carrico,</i></b>	
427 S.E.2d 474 (W.Va. 1993)	..... 189, 217, 242, 511, 512, 624
<b><i>State v. Caskey,</i></b>	
406 S.E.2d 717 (W.Va. 1991)	..... 445, 447, 448, 556, 563, 627
<b><i>State v. Childers,</i></b>	
415 S.E.2d 460 (W.Va. 1992)	..... 139, 176, 298, 299
<b><i>State v. Conrad,</i></b>	
421 S.E.2d 41 (W.Va. 1992)	..... 182, 201, 226
<b><i>State v. Cook,</i></b>	
403 S.E.2d 27 (W.Va. 1991)	..... 267, 417, 422
<b><i>State v. Davis,</i></b>	
427 S.E.2d 754 (W.Va. 1993)	..... 455, 460, 487, 560
<b><i>State v. De Berry,</i></b>	
408 S.E.2d 91 (W.Va. 1991)	..... 3, 4, 188
<b><i>State v. Delaney,</i></b>	
417 S.E.2d 903 (W.Va. 1992)	..... 93, 163, 164, 279, 306, 339
<b><i>State v. Donald S.B.,</i></b>	
399 S.E.2d 898 (W.Va. 1990)	..... 267, 299, 313, 419, 422
<b><i>State v. Dorisio,</i></b>	
434 S.E.2d 707 (W.Va. 1993)	..... 121, 206, 210, 212, 221, 229, 287
<b><i>State v. Drennen,</i></b>	
408 S.E.2d 24 (W.Va. 1991)	..... 13, 27, 173, 327, 399, 557, 611
<b><i>State v. Elliott,</i></b>	
412 S.E.2d 762 (W.Va. 1991)	..... 169, 257, 282, 517
<b><i>State v. Farmer,</i></b>	
406 S.E.2d 458 (W.Va. 1991)	..... 28, 210, 221, 237, 240, 243, 245, 277, 396, 430
<b><i>State v. Ferrell,</i></b>	
412 S.E.2d 501 (W.Va. 1991)	..... 34, 348, 605, 621, 624
<b><i>State v. Gary F.,</i></b>	
432 S.E.2d 793 (W.Va. 1993)	..... 162, 250, 251, 369, 372, 501, 626

<b><i>State v. George W.H.</i></b> , 439 S.E.2d 423 (W.Va. 1993) . . . . .	12, 18, 25, 29, 30, 177, 221, 252, 291, 299, 551, 565, 567, 569, 585
<b><i>State v. George</i></b> , 408 S.E.2d 291 (W.Va. 1991) . . . . .	131, 169, 171, 172, 203, 231, 281, 536
<b><i>State v. Gibson</i></b> , 413 S.E.2d 120 (W.Va. 1991) . . . . .	147, 186, 190, 246, 275, 315, 342, 358, 513, 544, 621
<b><i>State v. Gill</i></b> , 416 S.E.2d 253 (W.Va. 1992) . . . . .	25, 30, 172, 178, 556, 565, 566, 585, 611
<b><i>State v. Gray</i></b> , 418 S.E.2d 597 (W.Va. 1992) . . . . .	131, 338, 340, 360, 362, 536
<b><i>State v. Green</i></b> , 415 S.E.2d 449 (W.Va. 1992) . . . . .	25, 30, 134, 148, 160-162, 213, 339, 344, 477, 582, 611, 623
<b><i>State v. Hamilton</i></b> , 403 S.E.2d 739 (W.Va. 1991) . . . . .	256, 275, 362, 496, 501
<b><i>State v. Harding</i></b> , 422 S.E.2d 619 (W.Va. 1992) . . . . .	12, 111, 223, 239, 336, 443, 446
<b><i>State v. Harris</i></b> , 432 S.E.2d 93 (W.Va. 1993) . . . . .	23, 167, 168, 342, 357, 362, 416
<b><i>State v. Hatfield</i></b> , 413 S.E.2d 162 (W.Va. 1991) . . . . .	14, 122, 267, 340, 341, 417, 482
<b><i>State v. Hays</i></b> , 408 S.E.2d 614 (W.Va. 1991) . . . . .	23, 26, 27, 190, 360, 376, 418, 422, 464, 562, 575, 577, 578, 628
<b><i>State v. Hensler</i></b> , 415 S.E.2d 885 (W.Va. 1992) . . . . .	551, 554
<b><i>State v. Hlavacek</i></b> , 407 S.E.2d 375 (W.Va. 1991) . . . . .	259, 524, 528, 530, 619
<b><i>State v. Holliday</i></b> , 424 S.E.2d 248 (W.Va. 1992) . . . . .	491, 606
<b><i>State v. Hose</i></b> , 419 S.E.2d 690 (W.Va. 1992) . . . . .	235, 253, 337, 582, 623
<b><i>State v. Hott</i></b> , 421 S.E.2d 500 (W.Va. 1992) . . . . .	175, 452, 461, 480, 510
<b><i>State v. Housden</i></b> , 399 S.E.2d 882 (W.Va. 1990) . . . . .	455, 459, 460, 487, 548, 549, 551, 560
<b><i>State v. James Edward S.</i></b> , 400 S.E.2d 843 (W.Va. 1990) . . . . .	147, 226, 227, 236, 238, 249, 251, 292, 499, 570, 622
<b><i>State v. James R.</i></b> , 422 S.E.2d 521 (W.Va. 1992) . . . . .	2, 45, 105, 201, 470, 472, 474, 477, 567
<b><i>State v. James</i></b> , 411 S.E.2d 692 (W.Va. 1991) . . . . .	106, 232, 237, 288, 289, 477
<b><i>State v. Johnson and State v. Barber</i></b> , 419 S.E.2d 300 (W.Va. 1992) . . . . .	297, 341, 445, 551, 553, 559
<b><i>State v. Jones</i></b> , 420 S.E.2d 736 (W.Va. 1992) . . . . .	93, 304, 457, 487, 553, 560
<b><i>State v. Julius</i></b> , 408 S.E.2d 1 (W.Va. 1991) . . . . .	35, 36, 92, 170, 257-259, 282, 303, 322, 391, 504, 522, 528, 531, 534, 570
<b><i>State v. Kerns</i></b> , 420 S.E.2d 891 (W.Va. 1992) . . . . .	45, 105, 141, 160, 211, 232, 233, 336, 443, 472, 475, 476, 481, 549, 571

<b><i>State v. Kilmer,</i></b>	
439 S.E.2d 881 (W.Va. 1993) . . .	22, 26, 32, 128, 131, 132, 186, 188, 203, 231, 259, 275, 306, 323, 389, 424, 442, 453, 502, 506, 526, 619
<b><i>State v. Knotts,</i></b>	
421 S.E.2d 917 (W.Va. 1992) . .	28, 29, 106, 217, 238, 242, 263, 284, 340, 354, 453, 478, 532, 533, 542, 584, 611
<b><i>State v. Koon,</i></b>	
440 S.E.2d 442 (W.Va. 1993) . .	27, 34, 128, 131, 203, 223, 239, 245, 248, 314, 537, 547, 554, 568
<b><i>State v. Krystal T.,</i></b>	
407 S.E.2d 395 (W.Va. 1991) . . . . .	11, 117, 596
<b><i>State v. Layton,</i></b>	
432 S.E.2d 740 (W.Va. 1993) . . . . .	24, 27, 146, 263, 297, 303, 312, 497, 504, 506, 513, 562
<b><i>State v. Leadingham,</i></b>	
438 S.E.2d 825 (W.Va. 1993) . . . . .	27, 258, 464, 482, 506, 508, 543
<b><i>State v. Lewis,</i></b>	
422 S.E.2d 807 (W.Va. 1992) . . . . .	116, 176, 329, 352, 452, 461, 510
<b><i>State v. Lola Mae C.,</i></b>	
408 S.E.2d 31 (W.Va. 1991) . . . . .	17, 125, 207, 230, 399, 565, 566, 568
<b><i>State v. McCarty,</i></b>	
401 S.E.2d 457 (W.Va. 1990) . . . . .	20, 29, 34, 223, 248, 316, 441, 442, 544, 582, 584, 611
<b><i>State v. McClure,</i></b>	
400 S.E.2d 853 (W.Va. 1990) . . . . .	20, 220, 243, 249, 279, 318, 354-357, 360, 361, 376, 567, 568, 572
<b><i>State v. Michael S.,</i></b>	
423 S.E.2d 632 (W.Va. 1992) . . . . .	369, 370, 604
<b><i>State v. Miller,</i></b>	
400 S.E.2d 611 (W.Va. 1990) . . . . .	316, 319, 321, 343, 507
<b><i>State v. Miller,</i></b>	
400 S.E.2d 897 (W.Va. 1990) . . . . .	233, 234, 458, 477, 548, 550, 560, 587
<b><i>State v. Miller,</i></b>	
401 S.E.2d 237 (W.Va. 1990) . . . .	150, 201, 213, 214, 216, 227, 238, 241, 242, 315, 318, 319, 321, 322, 324, 390, 398, 426, 428
<b><i>State v. Moore,</i></b>	
427 S.E.2d 450 (W.Va. 1992) . . . . .	218, 237, 242, 276, 323, 415
<b><i>State v. Morris,</i></b>	
421 S.E.2d 488 (W.Va. 1992) . . . . .	184, 185, 444, 550
<b><i>State v. Nelson,</i></b>	
434 S.E.2d 697 (W.Va. 1993) . . . . .	121, 155, 192, 207, 230, 259, 424, 484-486, 488, 523, 530
<b><i>State v. Nelson,</i></b>	
436 S.E.2d 308 (W.Va. 1993) . . . . .	30, 229, 580
<b><i>State v. O'Donnell,</i></b>	
433 S.E.2d 566 (W.Va. 1993) . . . . .	23, 240, 405
<b><i>State v. Perolis,</i></b>	
398 S.E.2d 512 (W.Va. 1990) . . . . .	225, 232, 250, 251, 336, 623, 626
<b><i>State v. Petrice,</i></b>	
398 S.E.2d 521 (W.Va. 1990) . . . .	16, 104, 187, 246, 264, 296, 297, 299, 375, 416, 465, 583, 612
<b><i>State v. Phillips,</i></b>	
417 S.E.2d 124 (W.Va. 1992) . . . . .	212, 278, 279, 626
<b><i>State v. Plumley,</i></b>	
401 S.E.2d 469 (W.Va. 1990) . . . . .	18, 132, 315, 318, 336, 426, 429, 447, 533, 547, 557
<b><i>State v. Richards,</i></b>	
438 S.E.2d 331 (W.Va. 1993) . . . . .	202, 207, 226, 229, 230, 245, 552, 557

<b><i>State v. Rogers,</i></b> 434 S.E.2d 402 (W.Va. 1993) .....	19, 21, 23, 24, 31-33, 492, 502, 515, 561, 599
<b><i>State v. Rood,</i></b> 422 S.E.2d 516 (W.Va. 1992) .....	120, 188, 605
<b><i>State v. Ross,</i></b> 402 S.E.2d 248 (W.Va. 1990) .....	407, 408, 410, 459, 517, 559, 562, 581
<b><i>State v. Rummer,</i></b> 432 S.E.2d 39 (W.Va. 1993) .	129, 132, 171, 174, 177, 202, 204, 212, 220, 238, 288, 454, 543, 565
<b><i>State v. Scarberry,</i></b> 418 S.E.2d 361 (W.Va. 1992) .....	114, 300, 375, 582, 584
<b><i>State v. Seibert,</i></b> 429 S.E.2d 243 (W.Va. 1992) .....	171, 172, 263, 293
<b><i>State v. Sharpless,</i></b> 429 S.E.2d 56 (W.Va. 1993) .....	215, 240, 290, 423
<b><i>State v. Slaman,</i></b> 431 S.E.2d 91 (W.Va. 1993) .....	12, 129, 204, 231, 336, 523, 538, 542, 618
<b><i>State v. Smarr,</i></b> 418 S.E.2d 592 (W.Va. 1992) .....	45, 136, 330, 337
<b><i>State v. Smith,</i></b> 410 S.E.2d 269 (W.Va. 1991) .....	129, 303, 307, 534
<b><i>State v. Smith,</i></b> 438 S.E.2d 554 (W.Va. 1993) .	30, 104, 106, 121, 208, 230, 260, 292, 353, 357, 361, 422, 441, 448, 466, 479, 528, 530
<b><i>State v. Stevens,</i></b> 436 S.E.2d 312 (W.Va. 1993) .....	19, 26, 134, 155, 582
<b><i>State v. Stewart,</i></b> 419 S.E.2d 683 (W.Va. 1992) .....	21, 94, 105, 200, 308, 466, 473, 480
<b><i>State v. Strauss,</i></b> 415 S.E.2d 888 (W.Va. 1992) .....	338, 355, 358, 360, 397, 605
<b><i>State v. Tharp,</i></b> 400 S.E.2d 300 (W.Va. 1990) .....	30, 212, 289, 580, 582, 584
<b><i>State v. Thomas,</i></b> 421 S.E.2d 227 (W.Va. 1992) ....	201, 231, 239, 349, 351, 388, 442, 474, 475, 518, 519, 527, 619
<b><i>State v. Townsend,</i></b> 412 S.E.2d 477 (W.Va. 1991) .....	210, 213, 521, 522, 524
<b><i>State v. Triplett,</i></b> 421 S.E.2d 511 (W.Va. 1992) ...	19, 31, 93, 150, 210, 235, 239, 270, 283-285, 304, 308, 338-340, 358, 359, 390, 401, 561, 583, 623
<b><i>State v. Vandevender,</i></b> 438 S.E.2d 24 (W.Va. 1993) .....	25, 359, 362, 611
<b><i>State v. Walker,</i></b> 425 S.E.2d 616 (W.Va. 1992) ....	149, 170, 175, 189, 212, 227, 230, 236, 237, 257, 281, 282, 285, 316, 318, 400, 401, 584, 611
<b><i>State v. Walter,</i></b> 423 S.E.2d 222 (W.Va. 1992) .....	127, 181, 467, 565, 585
<b><i>State v. Walters,</i></b> 411 S.E.2d 688 (W.Va. 1991) .....	19, 22, 378
<b><i>State v. Ward,</i></b> 407 S.E.2d 365 (W.Va. 1991) ..	25, 30, 114, 171, 256, 275, 330, 356, 397, 443, 444, 496, 497, 501, 548, 549, 580, 583, 584, 612

<b><i>State v. Ward,</i></b>	
424 S.E.2d 725 (W.Va. 1991) . . . . .	15, 163, 165, 187, 234, 363, 475, 476, 615, 623, 625
<b><i>State v. Wheeler,</i></b>	
419 S.E.2d 447 (W.Va. 1992) . . . . .	160, 165, 215, 240, 247, 281, 292, 337, 466, 476, 624, 625
<b><i>State v. White,</i></b>	
425 S.E.2d 210 (W.Va. 1992) . . . . .	445, 558, 574, 576
<b><i>State v. Whitt,</i></b>	
400 S.E.2d 584 (W.Va. 1990) . . . . .	20, 132, 212, 222, 224, 226, 247, 249, 304, 453, 538, 620, 624, 625
<b><i>State v. Wickline,</i></b>	
399 S.E.2d 42 (W.Va. 1990) . . . . .	93, 132, 237, 246, 304, 309, 542, 543, 545
<b><i>State v. Williams,</i></b>	
438 S.E.2d 881 (W.Va. 1993) . . . . .	18, 25, 125, 128, 131, 188, 204, 231, 323, 424, 504, 506, 539, 581, 583
<b><i>State v. Wilson,</i></b>	
439 S.E.2d 448 (W.Va. 1993) . . . . .	18, 23, 26, 128, 204, 216, 242, 315, 321, 416, 540, 545
<b><i>Thomas v. Janco-Parsons,</i></b>	
No. 19976 (W.Va. 3/29/91) . . . . .	395, 602
<b><i>United States v. Dobkin,</i></b>	
423 S.E.2d 612 (W.Va. 1992) . . . . .	116, 262, 613
<b><i>Wagner v. Burke,</i></b>	
420 S.E.2d 298 (W.Va. 1992) . . . . .	140, 431
<b><i>Warth v. Ferguson,</i></b>	
No. 19824 (W.Va. 12/13/90) . . . . .	274, 393
<b><i>Wickline v. House,</i></b>	
424 S.E.2d 579 (W.Va. 1992) . . . . .	93, 94, 122, 310, 502

**CASES CITED IN TEXT**

<b><i>Addair v. Bryant,</i></b>	
168 W.Va. 306, 284 S.E.2d 374 (1981) .....	134, 219
<b><i>Adkins v. Bordenkircher,</i></b>	
164 W.Va. 292, 262 S.E.2d 885 (1980) .....	252, 554
<b><i>Allen v. Smith,</i></b>	
179 W.Va. 360, 368 S.E.2d 924 (1988) .....	244
<b><i>Antoine v. Byers &amp; Associates,</i></b>	
U.S., 113 S.Ct. 2167, 124 L.Ed.2d 391 (1993) .....	143
<b><i>Armstead v. Dale,</i></b>	
170 W.Va. 319, 294 S.E.2d 122 (1982) .....	443
<b><i>Ball v. Whyte,</i></b>	
170 W.Va. 417, 294 S.E.2d 270 (1982) .....	550
<b><i>Bank of Mill Creek v. Elk Horn Coal Corp.,</i></b>	
133 W.Va. 639, 57 S.E.2d 736 (1950) .....	49
<b><i>Bank of Nova Scotia v. United States,</i></b>	
487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1986) .....	294
<b><i>Barker v. Fox,</i></b>	
160 W.Va. 749, 238 S.E.2d 235 (1977) .....	297
<b><i>Batson v. Kentucky,</i></b>	
476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) .....	166, 168
<b><i>Bennett v. Coffman,</i></b>	
178 W.Va. 500, 361 S.E.2d 465 (1987) .....	520
<b><i>Benton v. Maryland,</i></b>	
395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)	
.....	179
<b><i>Blackburn v. State,</i></b>	
170 W.Va. 96, 290 S.E.2d 22 (1982) .....	421
<b><i>Blockburger v. United States,</i></b>	
284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) .....	170, 175, 178-180
<b><i>Bradley v. Appalachian Power Co.,</i></b>	
163 W.Va. 332, 256 S.E.2d 879 (1979) .....	436
<b><i>Brady v. Maryland,</i></b>	
373 U.S. 83 (1963) .....	518, 519
<b><i>Burns v. United States,</i></b>	
501 U.S. ___, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991) .....	446
<b><i>Call v. McKenzie,</i></b>	
159 W.Va. 191, 220 S.E.2d 665 (1975) .....	123, 124, 420
<b><i>Carroll v. United States,</i></b>	
267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.543 (1925) .....	441
<b><i>Casto v. Martin,</i></b>	
159 W.Va. 761, 230 S.E.2d 722 (1976) .....	225, 250, 524
<b><i>Committee on Legal Ethics v. Blair,</i></b>	
174 W.Va. 494, 327 S.E.2d 671 (1984) .....	50, 53, 55, 67, 76, 77, 82, 86, 87
<b><i>Committee on Legal Ethics v. Boettner,</i></b>	
183 W.Va. 136, 394 S.E.2d 735 (1990) .....	57-60, 62, 63, 66
<b><i>Committee on Legal Ethics v. Charonis,</i></b>	
184 W.Va. 268, 400 S.E.2d 276 (1990) .....	50, 77, 86, 87

<b><i>Committee on Legal Ethics v. Craig,</i></b> 187 W.Va. 14, 415 S.E.2d 255 (1992) .....	78
<b><i>Committee on Legal Ethics v. Douglas,</i></b> 179 W.Va. 490, 370 S.E.2d 325 (1988) .....	76
<b><i>Committee on Legal Ethics v. Folio,</i></b> 184 W.Va. 503, 401 S.E.2d 248 (1990) .....	57, 62, 64
<b><i>Committee on Legal Ethics v. Higinbotham,</i></b> 176 W.Va. 186, 342 S.E.2d 152 (1986) .....	58, 59, 65, 79
<b><i>Committee on Legal Ethics v. Lewis,</i></b> 156 W.Va. 809, 197 S.E.2d 312 (1973) .....	41, 48, 51, 54-56, 70, 71, 73, 75, 83
<b><i>Committee on Legal Ethics v. Martin,</i></b> 187 W.Va. 340, 419 S.E.2d 4 (1992) .....	49, 50
<b><i>Committee on Legal Ethics v. Moore,</i></b> 186 W.Va. 127, 411 S.E.2d 452 (1991) .....	61
<b><i>Committee on Legal Ethics v. Mullins,</i></b> 159 W.Va. 647, 226 S.E.2d 427 (1976) .....	50, 58, 65, 79
<b><i>Committee on Legal Ethics v. Pence,</i></b> 161 W.Va. 240, 240 S.E.2d 668 (1977) .....	75
<b><i>Committee on Legal Ethics v. Pence,</i></b> 216 S.E.2d 236 (W.Va. 1975) .....	54, 60, 61, 63, 75
<b><i>Committee on Legal Ethics v. Roark,</i></b> 181 W.Va. 260, 382 S.E.2d 313 (1989) .....	58, 65, 78, 79, 82
<b><i>Committee on Legal Ethics v. Scherr,</i></b> 149 W.Va. 721, 143 S.E.2d 141 (1965) .....	81
<b><i>Committee on Legal Ethics v. Six,</i></b> 181 W.Va. 52, 380 S.E.2d 219 (1989) .....	54, 59-64, 66
<b><i>Committee on Legal Ethics v. Smith,</i></b> 184 W.Va. 6, 399 S.E.2d 36 (1990) .....	70
<b><i>Committee on Legal Ethics v. Tatterson,</i></b> 173 W.Va. 613, 319 S.E.2d 381 (1984) .....	50, 51, 76, 85
<b><i>Committee on Legal Ethics v. Tatterson,</i></b> 177 W.Va. 356, 352 S.E.2d 107 (1986) .....	71, 83
<b><i>Committee on Legal Ethics v. Walker,</i></b> 178 W.Va. 150, 358 S.E.2d 234 (1987) .....	54, 60, 61, 63, 65, 78, 82
<b><i>Conner v. Griffith,</i></b> 160 W.Va. 680, 238 S.E.2d 529 (1977) .....	170, 174, 177, 179
<b><i>Coolidge v. New Hampshire,</i></b> 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) .....	441
<b><i>Cooper v. Gwinn,</i></b> 171 W.Va. 245, 298 S.E.2d 781 (1981) .....	433
<b><i>County Commission of Mercer County v. Dodrill,</i></b> 182 W.Va. 10, 385 S.E.2d 248 (1989) .....	438
<b><i>Crain I,</i></b> 176 W.Va. 338, 342 S.E.2d 422 (1986) .....	433
<b><i>Crain v. Bordenkircher,</i></b> 180 W.Va. 246, 376 S.E.2d 140 (1988) .....	432-434
<b><i>Crain v. Bordenkircher,</i></b> 182 W.Va. 787, 392 S.E.2d 227 (1990) .....	432
<b><i>Crain v. Bordenkircher,</i></b> 187 W.Va. 596, 420 S.E.2d 732 (1992) .....	438

<b><i>Crain v. Bordenkircher,</i></b>	
188 W.Va. 406, 424 S.E.2d 751 (1992) .....	434
<b><i>Davis v. Hadox,</i></b>	
145 W.Va. 233, 114 S.E.2d 468 (1960) .....	597
<b><i>Delardas v. Morgantown Water Commission,</i></b>	
148 W.Va. 776, 137 S.E.2d 426 (1964) .....	143
<b><i>Dietz v. Legursky,</i></b>	
188 W.Va. 526, 425 S.E.2d 202 (1992) .....	248
<b><i>Facilities Review Panel et al. v. Miller,</i></b>	
No. 19690 (W.Va. 1990) .....	365
<b><i>Farber v. Douglas,</i></b>	
178 W.Va. 491, 361 S.E.2d 456 (1985) .....	295
<b><i>Ford v. Ford,</i></b>	
172 W.Va. 25, 303 S.E.2d 253 (1983) .....	597
<b><i>Frank Billotti v. A.V. Dodrill,</i></b>	
183 W.Va. 48, 394 S.E.2d 32 (1990) .....	21, 186, 269, 274, 492, 574
<b><i>Franks v. Delaware,</i></b>	
438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) .....	525
<b><i>Gable v. Kroger Co.,</i></b>	
186 W.Va. 62, 410 S.E.2d 701 (1991) .....	206, 216, 222
<b><i>Gaither v. United States,</i></b>	
413 F.2d 1061 (D.C. Cir. 1969) .....	577
<b><i>Gilkerson v. Lilly,</i></b>	
169 W.Va. 412, 288 S.E.2d 164 (1982) .....	328
<b><i>Good v. Handlan,</i></b>	
176 W.Va. 145, 342 S.E.2d 111 (1986) .....	137, 511
<b><i>Goshorn's Ex'rs v. County Court of Kanawha County,</i></b>	
42 W.Va. 735, 26 S.E. 452 (1896) .....	408
<b><i>Halstead v. Horton,</i></b>	
38 W.Va. 727, 18 S.E. 953 (1894) .....	402, 406
<b><i>Hammack v. Wise,</i></b>	
158 W.Va. 343, 211 S.E.2d 118 (1975) .....	7, 597
<b><i>Hendershot v. Hendershot,</i></b>	
164 W.Va. 190, 263 S.E.2d 90 (1980) .....	136
<b><i>Heydinger v. Adkins,</i></b>	
178 W.Va. 463, 360 S.E.2d 240 (1987) .....	164
<b><i>Hinkle v. Black,</i></b>	
164 W.Va. 112, 262 S.E.2d 744 (1979) .....	470
<b><i>Horton v. Horton,</i></b>	
164 W.Va. 358, 264 S.E.2d 160 (1980) .....	20
<b><i>Housden v. Leverette,</i></b>	
161 W.Va. 324, 241 S.E.2d 810 (1978) .....	304
<b><i>Hundley v. Ashworth,</i></b>	
181 W.Va. 379, 382 S.E.2d 573 (1989) .....	296
<b><i>In Interest of S.C.,</i></b>	
168 W.Va. 366, 284 S.E.2d 867 (1981) .....	1
<b><i>In re Barron,</i></b>	
155 W.Va. 98, 181 S.E.2d 273 (1971) .....	58
<b><i>In re Brandon L.E.,</i></b>	
183 W.Va. 113, 394 S.E.2d 515 (1990) .....	597

<b><i>In re Brown,</i></b>	
166 W.Va. 226, 273 S.E.2d 567 (1980) .....	41, 56, 71, 73, 77, 78
<b><i>In re Darla B.,</i></b>	
175 W.Va. 137, 331 S.E.2d 868 (1985) .....	9, 592
<b><i>In re Harris,</i></b>	
160 W.Va. 422, 236 S.E.2d 426 (1977) .....	588
<b><i>In re Harshbarger,</i></b>	
173 W.Va. 206, 314 S.E.2d 79 (1984) .....	330
<b><i>In re James M.,</i></b>	
185 W.Va. 648, 408 S.E.2d 400 (1991) .....	590
<b><i>In re Johathan P.,</i></b>	
182 W.Va. 302, 387 S.E.2d 537 (1989) .....	594
<b><i>In re McIntosh's Estate,</i></b>	
144 W.Va. 583, 109 S.E.2d 153 (1959) .....	412
<b><i>In re Monroe,</i></b>	
174 W.Va. 401, 327 S.E.2d 163 (1985) .....	617
<b><i>In re Osborne,</i></b>	
173 W.Va. 381, 315 S.E.2d 640 (1984) .....	330
<b><i>In re Pauley,</i></b>	
172 W.Va. 228, 314 S.E.2d 391 (1983) .....	334
<b><i>In re Pauley,</i></b>	
173 W.Va. 228, 314 S.E.2d 391 (1983) .....	157, 159, 330, 333, 345, 380-382, 384, 385, 387
<b><i>In re R.J.M.,</i></b>	
164 W.Va. 496, 266 S.E.2d 114 (1980) .....	9, 589, 592, 594
<b><i>In re Robertson,</i></b>	
156 W.Va. 463, 194 S.E.2d 650 (1973) .....	58
<b><i>In re Scottie D.,</i></b>	
185 W.Va. 191, 406 S.E.2d 214 (1991) .....	595
<b><i>In re Smith,</i></b>	
158 W.Va. 13, 206 S.E.2d 920 (1974) .....	58, 61
<b><i>In re West,</i></b>	
155 W.Va. 648, 186 S.E.2d 776 (1972) .....	57
<b><i>In re Willis,</i></b>	
157 W.Va. 225, 207 S.E.2d 129 (1973) .....	588, 596
<b><i>In re Yoho,</i></b>	
171 W.Va. 625, 301 S.E.2d 581 (1983) .....	544
<b><i>In the Interest of Betty J.W.,</i></b>	
179 W.Va. 605, 371 S.E.2d 326 (1988) .....	6, 594
<b><i>In the Interest of Moss,</i></b>	
170 W.Va. 543, 295 S.E.2d 33 (1982) .....	368, 371, 372
<b><i>In the Matter of Adoption of Schoffstall,</i></b>	
179 W.Va. 350, 368 S.E.2d 720 (1988) .....	588
<b><i>In the Matter of Crislip,</i></b>	
182 W.Va. 637, 391 S.E.2d 84 (1990) .....	157-159, 330, 331, 333, 382, 384
<b><i>In the Matter of Eplin,</i></b>	
187 W.Va. 131, 416 S.E.2d 248 (1992) .....	382
<b><i>In the Matter of Ferrell,</i></b>	
180 W.Va. 620, 378 S.E.2d 662 (1989) .....	156
<b><i>In the Matter of Gorby,</i></b>	
176 W.Va. 11, 339 S.E.2d 697 (1985) .....	157, 158, 331, 333, 382, 384, 387

<b><i>In the Matter of Karr,</i></b>	
182 W.Va. 221, 387 S.E.2d 126 (1989) .....	156, 332, 381
<b><i>In the Matter of Kaufman,</i></b>	
187 W.Va. 166, 416 S.E.2d 480 (1992) .....	334
<b><i>In the Matter of Mann,</i></b>	
151 W.Va. 644, 154 S.E.2d 860 (1967) .....	57, 58, 61
<b><i>In the Matter of Mark E.P.,</i></b>	
175 W.Va. 83, 331 S.E.2d 813 (1985) .....	368
<b><i>In the Matter of Mendez,</i></b>	
176 W.Va. 401, 344 S.E.2d 396 (1986) .....	156
<b><i>In the Matter of Suder,</i></b>	
183 W.Va. 680, 398 S.E.2d 162 (1990) .....	332
<b><i>In the Matter of Trent,</i></b>	
154 W.Va. 333, 175 S.E.2d 461 (1970) .....	58
<b><i>In the Matter of Vandelinde,</i></b>	
179 W.Va. 183, 366 S.E.2d 631 (1988) .....	331
<b><i>Jennings v. Smith,</i></b>	
165 W.Va. 791, 272 S.E.2d 229 (1980) .....	342
<b><i>Jenrett v. Smith,</i></b>	
173 W.Va. 325, 315 S.E.2d 583 (1983) .....	342
<b><i>Jewell v. Maynard,</i></b>	
181 W.Va. 571, 383 S.E.2d 536 (1989) .....	42
<b><i>Johnson v. Monongahela Power Co.,</i></b>	
146 W.Va. 900, 123 S.E.2d 81 (1961) .....	215
<b><i>Judicial Inquiry Com'n of W.Va. v. McGraw,</i></b>	
171 W.Va. 441, 299 S.E.2d 872 (1983) .....	335
<b><i>Judith R. v. Hey,</i></b>	
185 W.Va. 117, 405 S.E.2d 447 (1990) .....	334
<b><i>Keenan v. Scott,</i></b>	
64 W.Va. 137, 61 S.E. 806 (1908) .....	52
<b><i>Keller v. Ferguson,</i></b>	
177 W.Va. 616, 355 S.E.2d 405 (1987) .....	171
<b><i>Kennedy v. Mendoza-Martinez,</i></b>	
372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) .....	414
<b><i>Kerns v. Wolverton,</i></b>	
181 W.Va. 143, 381 S.E.2d 258 (1989) .....	472
<b><i>Koontz, Phillips &amp; Stamm v. Mylius,</i></b>	
77 W.Va. 499, 87 S.E. 851 (1916) .....	359
<b><i>Krivonyak v. Hey,</i></b>	
178 W.Va. 692, 364 S.E.2d 18 (1987) .....	43
<b><i>Leach v. Bright,</i></b>	
165 W.Va. 636, 270 S.E.2d 793 (1980) .....	597
<b><i>Linger v. Jennings,</i></b>	
143 W.Va. 57, 99 S.E.2d 740 (1957) .....	493
<b><i>Lott v. Bechtold,</i></b>	
169 W.Va. 578, 289 S.E.2d 210 (1982) .....	255
<b><i>Louk v. Hayes,</i></b>	
159 W.Va. 482, 223 S.E.2d 780 (1976) .....	273
<b><i>M.B.A.F.B. Federal Credit Union v. Cumis Insurance Society, Inc.,</i></b>	
681 F.2d 930 (4th Cir. 1982) .....	222

<b><i>Marano v. Holland,</i></b>	
179 W.Va. 156, 366 S.E.2d 117 (1988) .....	523
<b><i>Marshall v. Casey,</i></b>	
174 W.Va. 204, 324 S.E.2d 346 (1984) .....	111, 112
<b><i>Mary D. v. Watt,</i></b>	
190 W.Va. 341, 438 S.E.2d 521 (1992) .....	5
<b><i>Mayle v. Ferguson,</i></b>	
174 W.Va. 430, 327 S.E.2d 409 (1985) .....	143, 599-602
<b><i>McAllister v. Weirton Hospital Co.,</i></b>	
173 W.Va. 75, 312 S.E.2d 738 (1983) .....	342
<b><i>McCartney v. Coberly,</i></b>	
250 S.E.2d 777 (W.Va. 1978) .....	597, 598
<b><i>Michael K.T. v. Tina L.T.,</i></b>	
182 W.Va. 399, 387 S.E.2d 866 (1989) .....	266, 413
<b><i>Miller v. California,</i></b>	
413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) .....	408
<b><i>Moore v. Coiner,</i></b>	
303 F. Supp. 185 (N.D. W.Va. 1969) .....	456
<b><i>Moore v. Starcher,</i></b>	
167 W.Va. 848, 280 S.E.2d 693 (1981) .....	295
<b><i>Morgan v. Price,</i></b>	
151 W.Va. 158, 150 S.E.2d 897 (1966) .....	342
<b><i>Myers v. Frazier,</i></b>	
173 W.Va. 658, 319 S.E.2d 782 (1984) .....	290, 418
<b><i>Nancy Darlene M. v. James Lee M. Jr.,</i></b>	
184 W.Va. 447, 400 S.E.2d 882 (1990) .....	413
<b><i>Nancy Viola R. v. Randolph W.,</i></b>	
177 W.Va. 710, 356 S.E.2d 464 (1987) .....	7
<b><i>Nelson v. West Virginia Public Employees Insurance Board,</i></b>	
171 W.Va. 445, 300 S.E.2d 86 (1982) .....	425
<b><i>Nicholas v. Sammons,</i></b>	
178 W.Va. 631, 363 S.E.2d 516 (1987) .....	467, 469, 470
<b><i>Powers v. Ohio,</i></b>	
499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) .....	168
<b><i>Preiser v. MacQueen,</i></b>	
177 W.Va. 273, 352 S.E.2d 22 (1985) .....	296
<b><i>Pries v. Watt,</i></b>	
186 W.Va. 49, 410 S.E.2d 285 (1991) .....	446
<b><i>Pullano v. City of Bluefield,</i></b>	
176 W.Va. 198, 342 S.E.2d 164 (1986) .....	555
<b><i>Rhodes v. Leverette,</i></b>	
160 W.Va. 781, 239 S.E.2d 136 (1977) .....	494
<b><i>Ristaino v. Ross,</i></b>	
424 U.S. 589 (1976) .....	364
<b><i>Robertson v. Goldman,</i></b>	
179 W.Va. 453, 369 S.E.2d 888 (1988) .....	421
<b><i>Rodgers v. Rodgers,</i></b>	
184 W.Va. 82, 399 S.E.2d 664 (1990) .....	49
<b><i>Sayre's Adm'r v. Harpold,</i></b>	
33 W.Va. 583, 11 S.E. 16 (1890) .....	412

<b><i>Schmerber v. California</i></b> , 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966) .....	523
<b><i>Schofield v. West Virginia Dept. of Corrections</i></b> , 185 W.Va. 199, 406 S.E.2d 425 (1991) .....	561
<b><i>Shell v. Bechtold</i></b> , 175 W.Va. 792, 338 S.E.2d 393 (1985) .....	559
<b><i>Smith v. State Workmen's Compensation Commissioner</i></b> , 159 W.Va. 108, 219 S.E.2d 361 (1975) .....	559
<b><i>Smith v. West Virginia State Board of Education</i></b> , 170 W.Va. 593, 295 S.E.2d 680 (1982) .....	425
<b><i>Smithson v. United States Fidelity &amp; Guar. Co.</i></b> , 186 W.Va. 195, 411 S.E.2d 850 (1991) .....	79
<b><i>State ex rel. Arnold v. Conley</i></b> , 151 W.Va. 584, 153 S.E.2d 681 (1966) .....	136
<b><i>State ex rel. Ayers v. Cline</i></b> , 176 W.Va. 123, 342 S.E.2d 89 (1985) .....	152, 185
<b><i>State ex rel. Bailey v. Facemire</i></b> , 186 W.Va. 528, 413 S.E.2d 183 (1991) .....	44
<b><i>State ex rel. Barker v. Manchin</i></b> , 167 W.Va. 155, 279 S.E.2d 622 (1981) .....	435
<b><i>State ex rel. Bess v. Hey</i></b> , 171 W.Va. 624, 301 S.E.2d 580 (1983) .....	296
<b><i>State ex rel. Blake v. Doeppe</i></b> , 97 W.Va. 203, 124 S.E. 667 (1924) .....	255
<b><i>State ex rel. Boner v. Boles</i></b> , 148 W.Va. 802, 137 S.E.2d 418 (1964) .....	496
<b><i>State ex rel. Boso v. Hedrick</i></b> , 182 W.Va. 701, 391 S.E.2d 614 (1990) .....	460
<b><i>State ex rel. Bratcher v. Cooke</i></b> , 155 W.Va. 850, 188 S.E.2d 769 (1972) .....	493
<b><i>State ex rel. Brooks v. Worrell</i></b> , 156 W.Va. 8, 190 S.E.2d 474 (1972) .....	171
<b><i>State ex rel. Brown v. MacQueen</i></b> , 169 W.Va. 56, 285 S.E.2d 486 (1981) .....	544
<b><i>State ex rel. Burdette v. Scott</i></b> , 163 W.Va. 705, 259 S.E.2d 626 (1979) .....	379
<b><i>State ex rel. Cackowska v. Knapp</i></b> , 147 W.Va. 699, 130 S.E.2d 204 (1963) .....	274
<b><i>State ex rel. Carson v. Wood</i></b> , 154 W.Va. 397, 175 S.E.2d 482 (1970) .....	192, 613
<b><i>State ex rel. Cook v. Helms</i></b> , 170 W.Va. 200, 292 S.E.2d 610 (1981) .....	370, 371, 373
<b><i>State ex rel. Dandy v. Thompson</i></b> , 148 W.Va. 263, 134 S.E.2d 730 (1964) .....	243
<b><i>State ex rel. Dodrill v. Scott</i></b> , 177 W.Va. 452, 352 S.E.2d 741 (1986) .....	438
<b><i>State ex rel. Dowdy v. Robinson</i></b> , 163 W.Va. 154, 257 S.E.2d 167 (1979) .....	173
<b><i>State ex rel. Fetters v. Hott</i></b> , 173 W.Va. 502, 318 S.E.2d 446 (1984) .....	559

<b><i>State ex rel. Forbes v. McGraw,</i></b> 183 W.Va. 144, 394 S.E.2d 743 (1990) .....	509
<b><i>State ex rel. Ginsberg v. Naum,</i></b> 173 W.Va. 510, 318 S.E.2d 454 (1984) .....	480
<b><i>State ex rel. Gonzales v. Wilt,</i></b> 163 W.Va. 270, 256 S.E.2d 15 (1979) .....	255
<b><i>State ex rel. Gray v. McClure,</i></b> 161 W.Va. 488, 242 S.E.2d 704 (1978) .....	422
<b><i>State ex rel. Grob v. Blair,</i></b> 158 W.Va. 647, 214 S.E.2d 330 (1975) .....	187, 361, 496, 497, 500
<b><i>State ex rel. Hagg v. Spillers,</i></b> 181 W.Va. 387, 382 S.E.2d 581 (1989) .....	185
<b><i>State ex rel. Hamstead v. Dostert,</i></b> 173 W.Va. 133, 313 S.E.2d 409 (1984) .....	480
<b><i>State ex rel. Harmon v. Utterback,</i></b> 144 W.Va. 419, 108 S.E.2d 521 (1959) .....	597
<b><i>State ex rel. Johnson v. Hamilton,</i></b> 164 W.Va. 682, 266 S.E.2d 125 (1980) .....	173, 328
<b><i>State ex rel. Johnson v. McKenzie,</i></b> 159 W.Va. 795, 226 S.E.2d 721 (1976) .....	494
<b><i>State ex rel. Kiger v. Hancock,</i></b> 153 W.Va. 404, 168 S.E.2d 798 (1969) .....	7, 597
<b><i>State ex rel. Kucera v. City of Wheeling,</i></b> 153 W.Va. 538, 170 S.E.2d 367 (1969) .....	344, 425, 431, 599-602
<b><i>State ex rel. Lehman v. Strickler,</i></b> 174 W.Va. 809, 329 S.E.2d 882 (1985) .....	169
<b><i>State ex rel. Leonard v. Hey,</i></b> 269 S.E.2d 394 (W.Va. 1980) .....	295, 511
<b><i>State ex rel. Lilly v. Carter,</i></b> 63 W.Va. 684, 60 S.E. 873 (1908) .....	438
<b><i>State ex rel. M.C.H. v. Kinder,</i></b> 173 W.Va. 387, 317 S.E.2d 150 (1984) .....	366
<b><i>State ex rel. McCartney v. Nuzum,</i></b> 161 W.Va. 740, 248 S.E.2d 318 (1978) .....	446
<b><i>State ex rel. McMannis v. Mohn,</i></b> 163 W.Va. 129, 254 S.E.2d 805 (1979) .....	189, 269, 494
<b><i>State ex rel. Medley v. Skeen,</i></b> 138 W.Va. 409, 76 S.E.2d 146 (1953) .....	456
<b><i>State ex rel. Miller v. Smith,</i></b> 168 W.Va. 745, 285 S.E.2d 500 (1981) .....	478, 617
<b><i>State ex rel. Mitchell v. Allen,</i></b> 155 W.Va. 530, 185 S.E.2d 355 (1971) .....	254, 255
<b><i>State ex rel. Moomau v. Hamilton,</i></b> 184 W.Va. 251, 400 S.E.2d 259 (1990) .....	152, 184
<b><i>State ex rel. Moran v. Ziegler,</i></b> 161 W.Va. 609, 244 S.E.2d 550 (1978) .....	467
<b><i>State ex rel. Myers v. Wood,</i></b> 154 W.Va. 431, 175 S.E.2d 637 (1970) .....	331, 575
<b><i>State ex rel. Patterson v. Aldredge,</i></b> 173 W.Va. 446, 317 S.E.2d 805 (1984) .....	274

<b><i>State ex rel. Patterson v. Aldredge,</i></b> 176 W.Va. 446, 317 S.E.2d 805 (1984) .....	343
<b><i>State ex rel. Pinson v. Maynard,</i></b> 181 W.Va. 662, 383 S.E.2d 844 (1989) .....	294
<b><i>State ex rel. Preissler v. Dostert,</i></b> 163 W.Va. 719, 260 S.E.2d 279 (1979) .....	473
<b><i>State ex rel. Prince v. West Virginia Department of Highways,</i></b> 156 W.Va. 178, 195 S.E.2d 160 (1972) .....	43
<b><i>State ex rel. Ringer v. Boles,</i></b> 151 W.Va. 864, 157 S.E.2d 554 (1967) .....	457
<b><i>State ex rel. Robinson v. Michael,</i></b> 166 W.Va. 660, 276 S.E.2d 812 (1981) .....	544
<b><i>State ex rel. Shorter v. Hey,</i></b> 170 W.Va. 249, 294 S.E.2d 51 (1981) .....	137
<b><i>State ex rel. Simpkins v. Harvey,</i></b> 172 W.Va. 312, 305 S.E.2d 268 (1983) .....	559
<b><i>State ex rel. Skinner v. Dostert,</i></b> 166 W.Va. 743, 278 S.E.2d 624 (1981) .....	480
<b><i>State ex rel. Smith v. DeBerry,</i></b> 146 W.Va. 534, 120 S.E.2d 504 (1961) .....	512
<b><i>State ex rel. Smith v. Skaff,</i></b> 187 W.Va. 651, 420 S.E.2d 922 (1992) .....	438
<b><i>State ex rel. Stanley v. MacQueen,</i></b> 187 W.Va. 97, 416 S.E.2d 55 (1992) .....	44
<b><i>State ex rel. Starr v. Halbritter,</i></b> 183 W.Va. 350, 395 S.E.2d 773 (1990) .....	295
<b><i>State ex rel. Stiltner v. Harshbarger,</i></b> 178 W.Va. 739, 296 S.E.2d 861 (1982) .....	380, 509
<b><i>State ex rel. UMWA International Union v. Maynard,</i></b> 176 W.Va. 131, 342 S.E.2d 96 (1985) .....	152, 185
<b><i>State ex rel. Vandal v. Adams,</i></b> 145 W.Va. 566, 115 S.E.2d 489 (1960) .....	556
<b><i>State ex rel. W.Va. Dep't of Human Servs. v. Cheryl M.,</i></b> 177 W.Va. 688, 356 S.E.2d 181 (1987) .....	1, 8
<b><i>State ex rel. Watson v. Ferguson,</i></b> 166 W.Va. 337, 274 S.E.2d 440 (1980) .....	328
<b><i>State ex rel. Webb v. Wilson,</i></b> 182 W.Va. 538, 390 S.E.2d 9 (1990) .....	509
<b><i>State ex rel. West Virginia Secondary School Activities Commission v. Oakley,</i></b> 152 W.Va. 533, 164 S.E.2d 775 (1968) .....	438
<b><i>State v. Adkins,</i></b> 176 W.Va. 613, 346 S.E.2d 762 (1986) .....	525, 526
<b><i>State v. Adkins,</i></b> 182 W.Va. 443, 388 S.E.2d 316 (1989) .....	137
<b><i>State v. Allman,</i></b> 177 W.Va. 365, 352 S.E.2d 116 (1986) .....	296
<b><i>State v. Angel,</i></b> 154 W.Va. 615, 177 S.E.2d 562 (1970) .....	524
<b><i>State v. Archer,</i></b> 169 W.Va. 564, 289 S.E.2d 178 (1982) .....	358

<b><i>State v. Atkins,</i></b>	
163 W.Va. 502, 261 S.E.2d 55 (1979) .....	219, 286, 403
<b><i>State v. Ayers,</i></b>	
179 W.Va. 365, 369 S.E.2d 22 (1988) .....	243
<b><i>State v. Bair,</i></b>	
112 W.Va. 655, 166 S.E.2d 369 (1932) .....	301
<b><i>State v. Baker,</i></b>	
177 W.Va. 769, 356 S.E.2d 862 (1987) .....	533
<b><i>State v. Baker,</i></b>	
180 W.Va. 233, 376 S.E.2d 127 (1988) .....	235
<b><i>State v. Barker,</i></b>	
35 Wash. App. 38, 8 P.2d 108 (1983) .....	505
<b><i>State v. Beacraft,</i></b>	
126 W.Va. 895, 30 S.E.2d 541 (1944) .....	364
<b><i>State v. Beck,</i></b>	
167 W.Va. 830, 286 S.E.2d 234 (1981) .....	455-458, 460, 569
<b><i>State v. Beckett,</i></b>	
172 W.Va. 817, 310 S.E.2d 883 (1983) .....	357, 364
<b><i>State v. Bennett,</i></b>	
172 W.Va. 123, 304 S.E.2d 28 (1983) .....	296
<b><i>State v. Bennett,</i></b>	
179 W.Va. 464, 370 S.E.2d 120 (1988) .....	292
<b><i>State v. Bolling,</i></b>	
162 W.Va. 103, 246 S.E.2d 631 (1978) .....	315
<b><i>State v. Bongalis,</i></b>	
180 W.Va. 584, 378 S.E.2d 449 (1989) .....	533
<b><i>State v. Bonham,</i></b>	
184 W.Va. 55, 401 S.E.2d 901 (1990) .....	297
<b><i>State v. Bowman,</i></b>	
155 W.Va. 562, 184 S.E.2d 314 (1971) .....	213
<b><i>State v. Bowyer,</i></b>	
181 W.Va. 26, 380 S.E.2d 193 (1989) .....	503
<b><i>State v. Boyd,</i></b>	
160 W.Va. 234, 233 S.E.2d 710 (1977) .....	361, 473, 496, 497, 500
<b><i>State v. Boyd,</i></b>	
166 W.Va. 690, 276 S.E.2d 829 (1981) .....	136
<b><i>State v. Brant,</i></b>	
162 W.Va. 762, 252 S.E.2d 901 (1979) .....	283
<b><i>State v. Brewster,</i></b>	
164 W.Va. 173, 261 S.E.2d 77 (1979) .....	491
<b><i>State v. Britton,</i></b>	
157 W.Va. 711, 203 S.E.2d 462 (1974) .....	467, 470
<b><i>State v. Brown,</i></b>	
159 W.Va. 438, 223 S.E.2d 193 (1976) .....	462
<b><i>State v. Brumfield,</i></b>	
178 W.Va. 240, 358 S.E.2d 801 (1987) .....	393
<b><i>State v. Burton,</i></b>	
163 W.Va. 40, 254 S.E.2d 129 (1979) .....	348
<b><i>State v. Bush,</i></b>	
163 W.Va. 168, 255 S.E.2d 539 (1979) .....	405

<b><i>State v. Byers,</i></b> 159 W.Va. 596, 224 S.E.2d 726 (1976) .....	284
<b><i>State v. Byrd,</i></b> 163 W.Va. 248, 256 S.E.2d 323 (1979) .....	558
<b><i>State v. C.J.S.,</i></b> 164 W.Va. 473, 263 S.E.2d 899 (1980) .....	370, 371, 373
<b><i>State v. Canby,</i></b> 162 W.Va. 666, 252 S.E.2d 164 (1979) .....	129
<b><i>State v. Carduff,</i></b> 142 W.Va. 18, 93 S.E.2d 502 (1956) .....	148, 356
<b><i>State v. Carter,</i></b> 168 W.Va. 90, 282 S.E.2d 277 (1981) .....	568
<b><i>State v. Casdorph,</i></b> 159 W.Va. 909, 230 S.E.2d 476 (1976) .....	288, 289
<b><i>State v. Caskey,</i></b> 185 W.Va. 286, 406 S.E.2d 717 (1991) .....	446
<b><i>State v. Cheshire,</i></b> 170 W.Va. 217, 292 S.E.2d 628 (1982) .....	123
<b><i>State v. Childers,</i></b> 187 W.Va. 54, 415 S.E.2d 460 (1992) .....	293, 300
<b><i>State v. Choat,</i></b> 178 W.Va. 607, 363 S.E.2d 493 (1987) .....	531
<b><i>State v. Cirullo,</i></b> 142 W.Va. 56, 93 S.E.2d 526 (1956) .....	147
<b><i>State v. Clark,</i></b> 171 W.Va. 74, 297 S.E.2d 849 (1982) .....	236
<b><i>State v. Clawson,</i></b> 165 W.Va. 588, 270 S.E.2d 659 (1980) .....	215
<b><i>State v. Collins,</i></b> 186 W.Va. 1, 409 S.E.2d 181 (1990) .....	218, 542
<b><i>State v. Conners,</i></b> 20 W.Va. 1 (1882) .....	492
<b><i>State v. Cooper,</i></b> 172 W.Va. 266, 304 S.E.2d 851 (1983) .....	459
<b><i>State v. Cox,</i></b> 162 W.Va. 915, 253 S.E.2d 517 (1979) .....	423
<b><i>State v. Craft,</i></b> 165 W.Va. 741, 272 S.E.2d 46 (1980) .....	114, 115
<b><i>State v. Crawford,</i></b> 84 W.Va. 556, 98 S.E. 615 (1919) .....	512
<b><i>State v. Critzer,</i></b> 167 W.Va. 655, 280 S.E.2d 288 (1981) .....	463, 465
<b><i>State v. Crouch,</i></b> 178 W.Va. 221, 358 S.E.2d 782 (1987) .....	356, 503, 540
<b><i>State v. Crowder,</i></b> 146 W.Va. 810, 123 S.E.2d 42 (1961) .....	301
<b><i>State v. Daggett,</i></b> 167 W.Va. 411, 280 S.E.2d 545 (1981) .....	314
<b><i>State v. Dandy,</i></b> 151 W.Va. 547, 153 S.E.2d 507 (1967) .....	13, 609

<b><i>State v. Daniel,</i></b>	
182 W.Va. 643, 391 S.E.2d 90 (1990) .....	322, 355
<b><i>State v. Davis,</i></b>	
170 W.Va. 376, 294 S.E.2d 179 (1982) .....	521
<b><i>State v. Davis,</i></b>	
176 W.Va. 454, 345 S.E.2d 549 (1986) .....	135, 474
<b><i>State v. Davis,</i></b>	
182 W.Va. 482, 388 S.E.2d 508 (1989) .....	568
<b><i>State v. Deaner,</i></b>	
175 W.Va. 489, 334 S.E.2d 627 (1985) .....	358
<b><i>State v. Demastus,</i></b>	
165 W.Va. 572, 270 S.E.2d 649 (1980) .....	123
<b><i>State v. Deskins,</i></b>	
181 W.Va. 112, 380 S.E.2d 676 (1989) .....	215, 342
<b><i>State v. Dietz,</i></b>	
182 W.Va. 544, 390 S.E.2d 15 (1990) .....	227, 248, 284, 341
<b><i>State v. Dobbs,</i></b>	
163 W.Va. 630, 259 S.E.2d 829 (1979) .....	580
<b><i>State v. Dolin,</i></b>	
171 W.Va. 688, 347 S.E.2d 208 (1986) .....	207
<b><i>State v. Dolin,</i></b>	
176 W.Va. 688, 347 S.E.2d 208 (1986) .....	205, 206
<b><i>State v. Drachman,</i></b>	
178 W.Va. 207, 358 S.E.2d 603 (1987) .....	511
<b><i>State v. Duell,</i></b>	
175 W.Va. 233, 332 S.E.2d 246 (1985) .....	544
<b><i>State v. Dunn,</i></b>	
162 W.Va. 63, 246 S.E.2d 245 (1978) .....	215
<b><i>State v. Dyer,</i></b>	
160 W.Va. 166, 233 S.E.2d 309 (1977) .....	182
<b><i>State v. Edward Charles L.,</i></b>	
183 W.Va. 641, 398 S.E.2d 123 (1990) .....	207, 214, 220, 285, 566
<b><i>State v. Elder,</i></b>	
152 W.Va. 571, 165 S.E.2d 108 (1968) .....	555, 576
<b><i>State v. England,</i></b>	
180 W.Va. 342, 376 S.E.2d 548 (1988) .....	92, 130, 303, 304, 310, 466, 542
<b><i>State v. Etchell,</i></b>	
147 W.Va. 338, 127 S.E.2d 609 (1962) .....	115
<b><i>State v. Farmer,</i></b>	
185 W.Va. 232, 406 S.E.2d 458 (1991) .....	209, 216
<b><i>State v. Finley,</i></b>	
177 W.Va. 554, 355 S.E.2d 47 (1987) .....	354
<b><i>State v. Fischer,</i></b>	
158 W.Va. 72, 211 S.E.2d 666 (1974) .....	135
<b><i>State v. Flinn,</i></b>	
158 W.Va. 111, 208 S.E.2d 538 (1974) .....	4, 574, 575
<b><i>State v. Flint,</i></b>	
142 W.Va. 509, 96 S.E.2d 677 (1957) .....	544
<b><i>State v. Foddrell,</i></b>	
171 W.Va. 54, 297 S.E.2d 829 (1982) .....	511

<b><i>State v. Foley,</i></b>	
131 W.Va. 326, 47 S.E.2d 40 (1948) .....	532
<b><i>State v. Forshey,</i></b>	
182 W.Va. 87, 386 S.E.2d 15 (1989) .....	521
<b><i>State v. Fortner,</i></b>	
182 W.Va. 345, 387 S.E.2d 812 (1989) .....	125, 160, 233, 234, 568
<b><i>State v. Franklin,</i></b>	
174 W.Va. 469, 327 S.E.2d 449 (1985) .....	355
<b><i>State v. Frazier,</i></b>	
162 W.Va. 602, 252 S.E.2d 39 (1979) .....	541
<b><i>State v. Frazier,</i></b>	
162 W.Va. 935, 253 S.E.2d 534 (1979) .....	402, 404-406
<b><i>State v. Furner,</i></b>	
161 W.Va. 680, 245 S.E.2d 618 (1978) .....	298, 300
<b><i>State v. Gale,</i></b>	
177 W.Va. 337, 352 S.E.2d 87 (1986) .....	241
<b><i>State v. Gangwer,</i></b>	
169 W.Va. 177, 286 S.E.2d 389 (1982) .....	21, 610
<b><i>State v. Gibson,</i></b>	
181 W.Va. 747, 384 S.E.2d 358 (1989) .....	171
<b><i>State v. Giles,</i></b>	
183 W.Va. 237, 395 S.E.2d 481 (1990) .....	317
<b><i>State v. Gill,</i></b>	
187 W.Va. 136, 416 S.E.2d 253 (1992) .....	174, 175, 177, 178, 569
<b><i>State v. Goff,</i></b>	
159 W.Va. 348, 221 S.E.2d 891 (1976) .....	127
<b><i>State v. Goff,</i></b>	
169 W.Va. 778, 289 S.E.2d 473 (1982) .....	308
<b><i>State v. Goodman,</i></b>	
170 W.Va. 123, 290 S.E.2d 260 (1981) .....	217
<b><i>State v. Goodnight,</i></b>	
169 W.Va. 366, 287 S.E.2d 504 (1982) .....	264, 555, 562
<b><i>State v. Green,</i></b>	
157 W.Va. 1031, 206 S.E.2d 923 (1974) .....	315
<b><i>State v. Grimm,</i></b>	
165 W.Va. 547, 270 S.E.2d 173 (1980) .....	162, 373, 476
<b><i>State v. Grinstead,</i></b>	
157 W.Va. 1001, 206 S.E.2d 912 (1974) .....	408, 576
<b><i>State v. Grubbs,</i></b>	
178 W.Va. 811, 364 S.E.2d 824 (1987) .....	523
<b><i>State v. Gum,</i></b>	
172 W.Va. 534, 309 S.E.2d 32 (1983) .....	285
<b><i>State v. Guthrie,</i></b>	
173 W.Va. 290, 315 S.E.2d 397 (1984) .....	290, 539, 546
<b><i>State v. Gwinn,</i></b>	
169 W.Va. 456, 288 S.E.2d 533 (1982) .....	544
<b><i>State v. Hager,</i></b>	
176 W.Va. 313, 342 S.E.2d 281 (1986) .....	161
<b><i>State v. Hall,</i></b>	
172 W.Va. 138, 304 S.E.2d 43 (1983) .....	264, 298, 300, 420

<b><i>State v. Hall,</i></b>	
174 W.Va. 599, 328 S.E.2d 206 (1985) .....	322
<b><i>State v. Hamric,</i></b>	
151 W.Va. 1, 151 S.E.2d 252 (1966) .....	316
<b><i>State v. Hardway,</i></b>	
182 W.Va. 1, 385 S.E.2d 62 (1989) .....	211
<b><i>State v. Harless,</i></b>	
168 W.Va. 707, 285 S.E.2d 461 (1981) .....	288
<b><i>State v. Harlow,</i></b>	
176 W.Va. 559, 346 S.E.2d 350 (1986) .....	422
<b><i>State v. Harris,</i></b>	
189 W.Va. 423, 432 S.E.2d 93 (1993) .....	167
<b><i>State v. Hatfield,</i></b>	
169 W.Va. 191, 286 S.E.2d 402 (1982) .....	232-234, 476, 494, 518
<b><i>State v. Hatfield,</i></b>	
48 W.Va. 561, 37 S.E. 626 (1900) .....	356
<b><i>State v. Hayes,</i></b>	
136 W.Va. 199, 67 S.E.2d 9 (1951) .....	321
<b><i>State v. Hays,</i></b>	
185 W.Va. 664, 408 S.E.2d 614 (1991) .....	465, 555
<b><i>State v. Hensler,</i></b>	
187 W.Va. 81, 415 S.E.2d 885 (1992) .....	252
<b><i>State v. Hinkle,</i></b>	
169 W.Va. 271, 286 S.E.2d 699 (1982) .....	193
<b><i>State v. Hlavacek,</i></b>	
185 W.Va. 371, 407 S.E.2d 375 (1991) .....	526
<b><i>State v. Hood,</i></b>	
155 W.Va. 337, 184 S.E.2d 334 (1971) .....	182
<b><i>State v. Housden,</i></b>	
184 W.Va. 171, 399 S.E.2d 882 (1990) .....	457
<b><i>State v. Howerton,</i></b>	
174 W.Va. 801, 329 S.E.2d 874 (1985) .....	34
<b><i>State v. Huffman,</i></b>	
141 W.Va. 55, 87 S.E.2d 541 (1955) .....	225, 250, 524
<b><i>State v. Humphrey,</i></b>	
177 W.Va. 264, 351 S.E.2d 613 (1986) .....	504, 546
<b><i>State v. Hutcheson,</i></b>	
177 W.Va. 391, 352 S.E.2d 143 (1986) .....	546
<b><i>State v. Jackson,</i></b>	
171 W.Va. 329, 298 S.E.2d 866 (1982) .....	465, 482
<b><i>State v. Jacobs,</i></b>	
171 W.Va. 300, 298 S.E.2d 836 (1982) .....	278
<b><i>State v. James Edward S.,</i></b>	
184 W.Va. 408, 400 S.E.2d 843 (1990) .....	278, 285, 621
<b><i>State v. Johnson,</i></b>	
111 W.Va. 653, 164 S.E. 31 (1932) .....	355
<b><i>State v. Johnson,</i></b>	
159 W.Va. 682, 226 S.E.2d 442 (1976) .....	545
<b><i>State v. Johnson,</i></b>	
179 W.Va. 619, 371 S.E.2d 340 (1988) .....	135, 373

<b><i>State v. Johnson,</i></b> 187 W.Va. 360, 419 S.E.2d 300 (1992) .....	553
<b><i>State v. Jones,</i></b> 161 W.Va. 55, 239 S.E.2d 763 (1977) .....	621, 622
<b><i>State v. Jones,</i></b> 178 W.Va. 627, 363 S.E.2d 513 (1987) .....	462
<b><i>State v. Joseph T.,</i></b> 175 W.Va. 598, 336 S.E.2d 728 (1985) .....	529
<b><i>State v. Julius,</i></b> 185 W.Va. 422, 408 S.E.2d 1 (1991) .....	127, 193
<b><i>State v. Kearns,</i></b> 183 W.Va. 130, 394 S.E.2d 532 (1990) .....	447
<b><i>State v. Kennedy,</i></b> 162 W.Va. 244, 249 S.E.2d 188 (1978) .....	247, 464
<b><i>State v. Kilmer,</i></b> 190 W.Va. 617, 439 S.E.2d 881 (1993) .....	188
<b><i>State v. King,</i></b> 173 W.Va. 164, 313 S.E.2d 440 (1984) .....	402, 405, 406
<b><i>State v. Kirtley,</i></b> 162 W.Va. 249, 252 S.E.2d 374 (1978) .....	315
<b><i>State v. Knight,</i></b> 159 W.Va. 924, 230 S.E.2d 732 (1976) .....	193
<b><i>State v. Knight,</i></b> 168 W.Va. 615, 285 S.E.2d 401 (1981) .....	471
<b><i>State v. Knotts,</i></b> 187 W.Va. 795, 421 S.E.2d 917 (1992) .....	220
<b><i>State v. Kopa,</i></b> 173 W.Va. 43, 311 S.E.2d 412 (1983) .....	225, 250, 423
<b><i>State v. Lamp,</i></b> 163 W.Va. 93, 254 S.E.2d 697 (1979) .....	536
<b><i>State v. Lassiter,</i></b> 177 W.Va. 499, 354 S.E.2d 595 (1987) .....	610
<b><i>State v. Laws,</i></b> 162 W.Va. 359, 251 S.E.2d 769 (1978) .....	368
<b><i>State v. Legg,</i></b> 151 W.Va. 401, 151 S.E.2d 215 (1966) .....	493
<b><i>State v. Less,</i></b> 170 W.Va. 259, 294 S.E.2d 62 (1981) .....	134, 135, 280
<b><i>State v. Lewis,</i></b> 188 W.Va. 85, 422 S.E.2d 807 (1992) .....	404, 461
<b><i>State v. Littleton,</i></b> 77 W.Va. 804, 88 S.E. 458 (1916) .....	112
<b><i>State v. Lola Mae C.,</i></b> 185 W.Va. 452, 408 S.E.2d 31 (1991) .....	568
<b><i>State v. Louk,</i></b> 169 W.Va. 24, 285 S.E.2d 432 (1981) .....	264, 301, 376, 377
<b><i>State v. Louk,</i></b> 171 W.Va. 623, 301 S.E.2d 596 (1983) .....	209, 221
<b><i>State v. Louk,</i></b> 171 W.Va. 639, 301 S.E.2d 596 (1983) .....	216, 222, 228

<b><i>State v. Marrs,</i></b> 180 W.Va. 693, 379 S.E.2d 497 (1989) .....	166-168
<b><i>State v. Martin,</i></b> 120 W.Va. 229, 197 S.E. 727 (1938) .....	496
<b><i>State v. Massey,</i></b> 178 W.Va. 427, 359 S.E.2d 865 (1987) .....	348
<b><i>State v. Mayle,</i></b> 178 W.Va. 26, 357 S.E.2d 219 (1987) .....	364
<b><i>State v. Maynard,</i></b> 183 W.Va. 1, 393 S.E.2d 221 (1990) .....	221, 278
<b><i>State v. McDonough,</i></b> 178 W.Va. 1, 357 S.E.2d 34 (1987) .....	547
<b><i>State v. McFarland,</i></b> 175 W.Va. 205, 332 S.E.2d 217 (1985) .....	610
<b><i>State v. Michael,</i></b> 141 W.Va. 1, 87 S.E.2d 595 (1955) .....	474
<b><i>State v. Miller,</i></b> 178 W.Va. 618, 363 S.E.2d 504 (1987) .....	162
<b><i>State v. Miller,</i></b> 184 W.Va. 367, 400 S.E.2d 611 (1990) .....	342
<b><i>State v. Miller,</i></b> 184 W.Va. 462, 400 S.E.2d 897 (1990) .....	460
<b><i>State v. Mitter,</i></b> 168 W.Va. 531, 285 S.E.2d 376 (1981) .....	327
<b><i>State v. Moore,</i></b> 165 W.Va. 837, 272 S.E.2d 804 (1980) .....	441, 522
<b><i>State v. Muegge,</i></b> 178 W.Va. 439, 360 S.E.2d 216 (1987) .....	546
<b><i>State v. Mullins,</i></b> 177 W.Va. 531, 355 S.E.2d 24 (1987) .....	129
<b><i>State v. Mullins,</i></b> 181 W.Va. 415, 383 S.E.2d 47 (1989) .....	264
<b><i>State v. Myers,</i></b> 159 W.Va. 353, 222 S.E.2d 300 (1976) .....	314
<b><i>State v. Myers,</i></b> 171 W.Va. 277, 298 S.E.2d 813 (1982) .....	169
<b><i>State v. Neary,</i></b> 179 W.Va. 115, 365 S.E.2d 395 (1987) .....	315
<b><i>State v. Neider,</i></b> 170 W.Va. 662, 295 S.E.2d 902 (1982) .....	376, 377
<b><i>State v. Neuman,</i></b> 179 W.Va. 580, 371 S.E.2d 77 (1988) .....	187
<b><i>State v. Nicaastro,</i></b> 181 W.Va. 556, 383 S.E.2d 521 (1989) .....	444
<b><i>State v. Nicholson,</i></b> 174 W.Va. 573, 328 S.E.2d 180 (1985) .....	188, 203, 536, 540, 547
<b><i>State v. Ocheltree,</i></b> 170 W.Va. 68, 289 S.E.2d 742 (1982) .....	463-465
<b><i>State v. Oldaker,</i></b> 172 W.Va. 258, 304 S.E.2d 843 (1983) .....	171, 225, 250

<b><i>State v. Olish,</i></b>	
164 W.Va. 712, 266 S.E.2d 134 (1980) .....	403, 420
<b><i>State v. Oxier,</i></b>	
179 W.Va. 431, 369 S.E.2d 866 (1988) .....	456
<b><i>State v. O'Donnell,</i></b>	
189 W.Va. 628, 433 S.E.2d 566 (1993) .....	402
<b><i>State v. Pancake,</i></b>	
170 W.Va. 690, 296 S.E.2d 37 (1982) .....	170
<b><i>State v. Pannell,</i></b>	
175 W.Va. 35, 330 S.E.2d 844 (1985) .....	552
<b><i>State v. Parsons,</i></b>	
108 W.Va. 705, 152 S.E. 745 (1930) .....	535
<b><i>State v. Parsons,</i></b>	
181 W.Va. 131, 381 S.E.2d 246 (1989) .....	314
<b><i>State v. Payne,</i></b>	
167 W.Va. 252, 280 S.E.2d 72 (1981) .....	209
<b><i>State v. Peacher,</i></b>	
167 W.Va. 540, 280 S.E.2d 559 (1981) .....	356
<b><i>State v. Pennington,</i></b>	
179 W.Va. 139, 365 S.E.2d 803 (1987) .....	471
<b><i>State v. Persinger,</i></b>	
169 W.Va. 121, 286 S.E.2d 261 (1982) .....	503, 535, 539, 546
<b><i>State v. Petrice,</i></b>	
183 W.Va. 695, 398 S.E.2d 521 (1990) .....	296
<b><i>State v. Petry,</i></b>	
166 W.Va. 153, 273 S.E.2d 346 (1980) .....	370, 373, 621, 622
<b><i>State v. Pettigrew,</i></b>	
168 W.Va. 299, 284 S.E.2d 370 (1981) .....	403
<b><i>State v. Peyatt,</i></b>	
173 W.Va. 317, 315 S.E.2d 574 (1983) .....	209, 216, 221, 222
<b><i>State v. Phillips,</i></b>	
176 W.Va. 244, 342 S.E.2d 210 (1986) .....	269, 580
<b><i>State v. Pratt,</i></b>	
161 W.Va. 530, 244 S.E.2d 227 (1978) .....	13, 287, 609
<b><i>State v. Preece,</i></b>	
181 W.Va. 633, 383 S.E.2d 815 (1989) .....	536
<b><i>State v. R.H.,</i></b>	
166 W.Va. 280, 273 S.E.2d 578 (1980) .....	371, 554
<b><i>State v. Rector,</i></b>	
167 W.Va. 748, 280 S.E.2d 597 (1981) .....	225, 250
<b><i>State v. Reed,</i></b>	
166 W.Va. 558, 276 S.E.2d 313 (1981) .....	568
<b><i>State v. Richey,</i></b>	
171 W.Va. 342, 298 S.E.2d 879 (1982) .....	147, 148, 295, 355
<b><i>State v. Robinson,</i></b>	
180 W.Va. 400, 376 S.E.2d 606 (1988) .....	187
<b><i>State v. Sandler,</i></b>	
175 W.Va. 572, 336 S.E.2d 535 (1985) .....	112
<b><i>State v. Schoolcraft,</i></b>	
183 W.Va. 579, 396 S.E.2d 760 (1990) .....	219

<b><i>State v. Sette,</i></b>	
161 W.Va. 384, 242 S.E.2d 464 (1978) .....	13, 609
<b><i>State v. Shafer,</i></b>	
168 W.Va. 474, 284 S.E.2d 916 (1981) .....	444
<b><i>State v. Sheppard,</i></b>	
172 W.Va. 656, 310 S.E.2d 173 (1983) .....	505
<b><i>State v. Short,</i></b>	
177 W.Va. 1, 350 S.E.2d 1 (1986) .....	554
<b><i>State v. Simmons,</i></b>	
171 W.Va. 722, 301 S.E.2d 812 (1983) .....	296
<b><i>State v. Sims,</i></b>	
162 W.Va. 212, 248 S.E.2d 834 (1978) .....	256
<b><i>State v. Smith,</i></b>	
156 W.Va. 385, 193 S.E.2d 550 (1972) .....	285, 321, 569
<b><i>State v. Smith,</i></b>	
170 W.Va. 654, 295 S.E.2d 820 (1982) .....	533
<b><i>State v. Smith,</i></b>	
178 W.Va. 104, 358 S.E.2d 188 (1987) .....	112, 219, 236, 277
<b><i>State v. Smith,</i></b>	
186 W.Va. 33, 410 S.E.2d 269 (1991) .....	537
<b><i>State v. Snyder,</i></b>	
64 W.Va. 659, 63 S.E. 385 (1908) .....	559
<b><i>State v. Sonja B.,</i></b>	
183 W.Va. 380, 395 S.E.2d 803 (1990) .....	370, 373
<b><i>State v. Spence,</i></b>	
182 W.Va. 472, 388 S.E.2d 498 (1989) .....	288, 289
<b><i>State v. Sprouse,</i></b>	
171 W.Va. 58, 297 S.E.2d 833 (1982) .....	129
<b><i>State v. St. Clair,</i></b>	
177 W.Va. 629, 355 S.E.2d 418 (1987) .....	443
<b><i>State v. Starkey,</i></b>	
161 W.Va. 517, 244 S.E.2d 219 (1978) . . . .	27-29, 31, 114, 125, 134, 180, 209, 235, 264, 280, 283, 300, 327, 363, 533, 538, 569, 580, 583, 621
<b><i>State v. Starr,</i></b>	
158 W.Va. 905, 216 S.E.2d 242 (1975) .....	535, 538, 541
<b><i>State v. Steele,</i></b>	
178 W.Va. 330, 359 S.E.2d 558 (1987) .....	163
<b><i>State v. Stone,</i></b>	
165 W.Va. 266, 268 S.E.2d 50 (1980) .....	522, 525, 526
<b><i>State v. Tamez,</i></b>	
169 W.Va. 382, 290 S.E.2d 14 (1982) .....	161
<b><i>State v. Tanner,</i></b>	
175 W.Va. 264, 332 S.E.2d 277 (1985) .....	241, 476
<b><i>State v. Tennant,</i></b>	
173 W.Va. 627, 319 S.E.2d 395 (1984) .....	363
<b><i>State v. Thomas,</i></b>	
157 W.Va. 640, 203 S.E.2d 445 (1974) .....	92, 130, 164, 205, 206, 228, 305-309, 311, 474
<b><i>State v. Thomas,</i></b>	
187 W.Va. 686, 421 S.E.2d 227 (1992) .....	526
<b><i>State v. Thompson,</i></b>	
178 W.Va. 254, 358 S.E.2d 815 (1987) .....	525

<b><i>State v. Tiller,</i></b>	
168 W.Va. 522, 285 S.E.2d 371 (1981) .....	496, 498
<b><i>State v. Triplett,</i></b>	
187 W.Va. 760, 421 S.E.2d 511 (1992) .....	306
<b><i>State v. Vance,</i></b>	
146 W.Va. 925, 124 S.E.2d 252 (1962) .....	496, 581
<b><i>State v. Vance,</i></b>	
162 W.Va. 467, 250 S.E.2d 146 (1978) .....	130, 204, 536-538, 540-542, 547
<b><i>State v. Vance,</i></b>	
164 W.Va. 216, 262 S.E.2d 423 (1980) .....	456, 460
<b><i>State v. Viers,</i></b>	
103 W.Va. 30, 136 S.E. 503 (1927) .....	609
<b><i>State v. W.J.B.,</i></b>	
166 W.Va. 602, 276 S.E.2d 550 (1981) .....	315
<b><i>State v. Wade,</i></b>	
174 W.Va. 381, 327 S.E.2d 142 (1985) .....	420
<b><i>State v. Walls,</i></b>	
170 W.Va. 419, 294 S.E.2d 272 (1982) .....	525
<b><i>State v. Watson,</i></b>	
173 W.Va. 553, 318 S.E.2d 603 (1984) .....	123, 475
<b><i>State v. Wayne,</i></b>	
162 W.Va. 41, 245 S.E.2d 838 (1978) .....	423
<b><i>State v. West,</i></b>	
153 W.Va. 325, 168 S.E.2d 716 (1969) .....	135
<b><i>State v. Wickline,</i></b>	
184 W.Va. 12, 399 S.E.2d 42 (1990) .....	130, 310, 453, 539
<b><i>State v. Williams,</i></b>	
172 W.Va. 295, 305 S.E.2d 251 (1983) .....	169, 170, 243
<b><i>State v. Wilson,</i></b>	
157 W.Va. 1036, 207 S.E.2d 174 (1974) .....	163, 358, 361
<b><i>State v. Wood,</i></b>	
167 W.Va. 700, 280 S.E.2d 309 (1981) .....	148
<b><i>State v. Woodall,</i></b>	
182 W.Va. 15, 385 S.E.2d 253 (1989) .....	518
<b><i>State v. Woods,</i></b>	
169 W.Va. 767, 289 S.E.2d 500 (1982) .....	535, 536
<b><i>State v. Woodson,</i></b>	
181 W.Va. 325, 382 S.E.2d 519 (1989) .....	202, 228, 229, 248
<b><i>State v. Wooldridge,</i></b>	
129 W.Va. 448, 40 S.E.2d 899 (1946) .....	610
<b><i>State v. Worley,</i></b>	
179 W.Va. 403, 369 S.E.2d 706 (1988) .....	546
<b><i>State v. Young,</i></b>	
166 W.Va. 309, 273 S.E.2d 592 (1980) .....	246, 277
<b><i>State v. Zaccagnini,</i></b>	
172 W.Va. 491, 308 S.E.2d 131 (1983) .....	172, 174, 177, 179
<b><i>Stowers &amp; Sons Trucking Co. v. Public Service Commission,</i></b>	
182 W.Va. 374, 387 S.E.2d 841 (1989) .....	555
<b><i>Tasker v. Mohn,</i></b>	
165 W.Va. 55, 267 S.E.2d 183 (1980) .....	272, 437

<b><i>Terry v. Ohio</i></b> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) .....	441
<b><i>Thrasher v. Amere Gas Utilities Co.</i></b> , 138 W.Va. 166, 75 S.E.2d 376 (1953) .....	215
<b><i>Toler v. Sites</i></b> , No. 19213 (W.Va. 1991) .....	603
<b><i>Turner v. Murray</i></b> , 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) .....	364
<b><i>TXO Production Corp. v. Alliance Resources Corp.</i></b> , 187 W.Va. 457, 419 S.E.2d 870 (1992) .....	208
<b><i>United States v. Bagley</i></b> , 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) .....	160, 233
<b><i>United States v. Colyer</i></b> , 878 F.2d 469 (D.C. Cir. 1989) .....	441
<b><i>United States v. Duncan</i></b> , 712 F. Supp. 124 (S.D. Ohio 1988) .....	250
<b><i>United States v. Hicks</i></b> , 748 F.2d 854 (4th Cir. 1984) .....	250
<b><i>United States v. Leon</i></b> , 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) .....	526
<b><i>United States v. Stanley</i></b> , 915 F.2d 54 (1st Cir. 1990) .....	441
<b><i>United States v. Ward</i></b> , 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980) .....	414
<b><i>United States v. Watson</i></b> , 953 F.2d 895 (1992) .....	441
<b><i>Vest v. Cobb</i></b> , 138 W.Va. 660, 76 S.E.2d 885 (1953) .....	555
<b><i>Wanstreet v. Bordenkircher</i></b> , 166 W.Va. 523, 276 S.E.2d 205 (1981) .....	272, 457, 458, 460
<b><i>Wayne County Bank v. Hodges</i></b> , 175 W.Va. 723, 338 S.E.2d 202 (1985) .....	296
<b><i>West Virginia Judicial Hearing Board v. Romanello</i></b> , 175 W.Va. 577, 336 S.E.2d 540 (1985) .....	158, 330
<b><i>West Virginia Judicial Inquiry Commission v. Dostert</i></b> , 165 W.Va. 233, 271 S.E.2d 427 (1980) .	157, 158, 331, 333, 334, 345, 347, 380-382, 384, 385, 387
<b><i>Whiteman v. Robinson</i></b> , 145 W.Va. 685, 116 S.E.2d 691 (1960) .....	597
<b><i>Wilhelm v. Whyte</i></b> , 161 W.Va. 67, 239 S.E.2d 735 (1977) .....	545
<b><i>Yates v. Buchanan</i></b> , 170 So.2d 72 (Fla. 1965) .....	273
<b><i>Yuncke v. Welker</i></b> , 128 W.Va. 299, 36 S.E.2d 410 (1945) .....	147, 544
<b><i>Zogg v. Hedges</i></b> , 126 W.Va. 523, 29 S.E.2d 871 (1944) .....	70