

# The Defender

INSIDE THIS  
ISSUE:

VOLUME 12, ISSUE 2

AUGUST / SEPTEMBER 2011

## From The Executive Director's Chair

From the Ex-  
ecutive Direc-  
tor's Chair 1

West Virginia  
Supreme Court  
Update 2

CLE  
Information 8

Fall is drawing near—the temperatures are beginning to drop and the leaves are beginning to fade to yellow and brown.

First, an apology is due for the delay in the publication of this newsletter. “Quarterly” is our goal, but a perfect storm of issues and factors have served to delay the publication of this issue for a full season.

On June 16 & 17 WVPDS sponsored our Annual Conference at The Resort at Glade Springs. The evaluations were generally positive, with particular accolades being given to the selection of the location. From our standpoint, the personnel at Glade Springs were extremely cooperative and helpful and were able to meet all of our needs.

WVPDS is moving very close to the first phase of attorney-testing of our new On-Line Voucher Submission (OVS) system. We have spent the past few months working with the system internally—it is our goal to make sure that the

system, when made available for general use, is fully tested and ready for use by all persons preparing vouchers for submission. We hope to have the system on-line by January 1, 2012.

In January, of course, we will embark upon a new Legislative session. Funding is our chief concern, and as in past years we anticipate requesting supplemental funding to fully fund fiscal year 2012. The Legislature and Governor Earl Ray Tomblin acted swiftly in providing supplemental funding in the spring—as a result, there was little if any interruption in voucher payments. It is incumbent on all concerned parties to communicate with their Legislators regarding the necessity of continued adequate funding.

Lastly, in my previous column I pointed out the unfortunate fact that possible financial fraud by a very few attorneys is a continuing problem with WVPDS. On September 9, 2011 federal fraud charges

were filed against two attorneys who are alleged to have defrauded WVPDS in separate billing schemes.

The Legislative Commission on Special Investigations has been and will be working closely with WVPDS to investigate and prosecute any allegations of fraud. These investigations are not intended to target or disparage any group, but are necessary to assure the Legislature and the taxpayers that the funds designated for public defender offices and private attorneys are being properly utilized. As pointed out in my last column every dollar paid in false claim or misused in any form is one less dollar available for the vast numbers of attorneys and staff members putting in hours of hard work on behalf of their clients.

Russell S. Cook  
Acting Executive Director  
(304) 558-3905  
[Russell.S.Cook@wv.gov](mailto:Russell.S.Cook@wv.gov)



All West Virginia  
Supreme Court  
opinions may be  
reviewed online at  
[www.courtswv.gov](http://www.courtswv.gov)

## West Virginia Supreme Court Update

**State v. Hicks**, No. 35670 – April 14, 2011 – Per Curiam (*McDowell* – *Stevens, J.*)

The appellant was indicted for first degree murder and other charges. The State alleged that the appellant had hired a person to kill the victim and other persons in retaliation for a burglary at the appellant's home. The State's evidence included the testimony of the shooter, who stated that he had agreed to participate in the killings in order to satisfy a drug debt owed to the appellant. The shooter indicated that the appellant had provided him a semi-automatic pistol to accomplish the killings, and that accompanied by his neighbor, he subsequently met with the victims and opened fire, killing one person and seriously wounding the other individuals.

The appellant was convicted as an accessory before the fact of first degree murder, malicious wounding and conspiracy. On appeal the appellant argued that the State had presented improper character evidence in violation of Rule 404(b), and that the remaining evidence was insufficient to sustain his convictions. The appellant's Rule 404(b) argument centered on testimony that the appellant was a dealer in illegal prescription drugs. The appellant argued that the evidence would taint the jury's opinion of the appellant's character, while the State argued that the evidence went to the motive for the killing.

**Held:** The Court noted that the trial court had conducted a lengthy *McGinnis* hearing and considered the "specific and detailed purposes" of the drug evidence. Noting that the jury had been instructed to the purpose of such evidence on several occasions, the Court held that the challenged evidence was "at the very core of

the motive for the shootings" and its admission did not constitute an abuse of discretion.

The Court similarly rejected the appellant's insufficiency argument. The Court noted that the evidence presented at trial indicated that the decedent and another woman had broken into the appellant's home to obtain drugs and had removed jewelry and guns from the residence. The Court cited testimony that the appellant had confronted the decedent and a third party about the burglary and had threatened to kill both, and had on one occasion beaten the decedent with a belt to obtain the whereabouts of his stolen property. The Court also noted the testimony of the shooter regarding the circumstances of the killings and cited testimony that the appellant's sister-in-law had accompanied the appellant's wife to an attorney's office and had presented the attorney with \$10,000 as payment for the shooter's defense. Citing all of these factors, the Court held that there was sufficient evidence presented to sustain the appellant's convictions.

**State v. James**, No. 35557 – May 2, 2011 – McHugh, J. (*consol. with State v. Hedrick*, No. 35561 and *State v. Daniels*, No. 35762)

In these consolidated cases the appellants challenged the "extended supervision" provisions of W.Va. Code §62-12-26 (2009). The primary constitutional grounds relied on by the appellants included arguments that the provisions constituted cruel and unusual punishment, violated due process, and subjected the appellants to double jeopardy.

**Held:** The Court considered the language of §62-12-26, noting that the statute specifies that extended

supervision shall be imposed "as part of the sentence imposed at final disposition...in addition to any other penalty or condition imposed by the court." The Court further noted that the premise of the statute was to state "the intent of the Legislature that the sentence imposed for certain felony offenses must include the additional penalty of a period of supervised release of up to fifty years."

The Court rejected the appellant's "cruel and unusual punishment" argument, utilizing the "subjective/objective" tests cited in *State v. Cooper*, 172 W.Va. 266, 304 S.E. 2d 851 (1983) and *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E. 2d 205 (1981). The Court held that the statutory periods of extended supervision did not "shock the conscience" because the supervision is a less restrictive restraint than other forms of societal protection that the Legislature could have adopted, and further, that the extended supervision does not result on a disproportionate punishment in relation to the nature of the offenses.

The Court also rejected the appellant's reliance on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The appellants argued that under *Apprendi*, it was improper for judges to enhance the statutory maximum punishment for designated offenses without jury involvement. The Court, citing *Blakely v. Washington*, 542 U.S. 296 (2004), held that the "statutory maximum" for *Apprendi* purposes is based solely on the facts reflected in the verdict or admitted by the defendant. The Court noted that no additional facts were necessary for imposition of the extended supervision, beyond the conviction of the relevant offense, and thus *Apprendi* was not controlling.

Finally, the Court rejected the argument proffered by James that the terms of §62-12-26 violate federal and state double jeopardy provisions. Citing the Legislature’s inherent power to prescribe multiple punishments for the same act, the Court observed that the Legislature had clearly intended to permit extended supervision as a punishment separate and distinct from incarceration and/or fines set forth in the relevant statutes.

**Sims v. Miller, Comm’r, DMV**, No. 35673 – May 13, 2011 – Davis, J. (Nicholas – Johnson, J.)

In November 2007 the appellee was arrested for DUI following a single-car accident. The appellee was not found at the scene of the accident but was located at a nearby residence a short time later. The appellee took a secondary chemical breath test which indicated that his blood alcohol content was .091. The appellee subsequently requested a hearing to contest the revocation of his driver’s license, and the Commissioner upheld the initial order of revocation. The revocation was appealed to the circuit court, and after the criminal DUI charge was dismissed as part of a plea agreement, the parties agreed to remand the matter to the Commissioner for further consideration under *Muscattell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996) and *Choma v. West Virginia Division of Motor Vehicles*, 210 W.Va. 256, 557 S.E.2d 310 (2001).

Following remand, the Commissioner affirmed his initial revocation order. The circuit court reversed, concluding that the Commissioner (1) had relied on improper secondary chemical test results; (2) had failed to reconcile conflicting testimony between the arresting officer and the appellee; (3) had failed to give substantial weight to the dismissal of the criminal case, as required under *Choma*; and (4) had not considered that the arresting officer’s failure to admit a videotape of the arrest created an adverse inference against the officer’s testimony.

**Held:** The Court rejected each of these grounds and reversed the circuit court’s ruling. The Court initially held that the circuit court erroneously interpreted W.Va. Code §17C-5-8 to require that a secondary chemical test be administered within two hours after a driver had allegedly last driven a motor vehicle. (The circuit court had ruled that there had been no evidence presented that the breath test was administered within two hours from the time the appellee had

driven the automobile.) The Court, citing the plain language of §17C-5-8, held in a new syllabus point that the secondary chemical test could be administered within two hours of “the time of the arrest or of the acts alleged.” The Court noted that the breath test had been administered within two hours of the appellee’s arrest and that evidence of the breath test was therefore admissible.

The Court also held (1) that discrepancies between the testimony of the appellee and the arresting officer were simply credibility issues to be resolved by the Commissioner; (2) the appellee had failed to provide sufficient evidence of the circumstances of the dismissal of the criminal charge to permit the Commissioner to consider the issue under *Choma*; and (3) that because the appellee had not attempted to obtain or utilize the videotape of the arrest, he was not entitled to an “adverse inference” determination.

**State v. Juntilla**, No. 35739 – May 17, 2011 – Per Curiam (Berkeley – Sanders, J.)

The appellant was convicted of first degree murder, first degree sexual assault and conspiracy in connection with the May 2007 death of a young woman identified as T.S. The State alleged that the appellant and a co-defendant named Fred Douty met T.S. and took her to the appellant’s home, where she was beaten, sexually assaulted and murdered. At trial, the State presented the testimony of co-defendant Douty as to the acts, along with evidence of inculpatory admissions made by the appellant to his girlfriend and DNA evidence from the co-defendant found on the appellant’s couch.

Following his convictions and consecutive sentences, the appellant argued on appeal (1) the trial court had erred in denying his motion for acquittal based on sufficiency of the evidence; (2) an incriminating statement made by the appellant to a police officer was inadmissible because the appellant was not provided *Miranda* warnings prior to the statement; (3) the trial court erroneously denied the appellant’s motion to strike a juror for cause; and (4) the trial court had failed to give a jury instruction setting forth guidelines for determining mercy in a unitary trial.

**Held:** The Court held that the testimony of co-defendant Douty as to the murder of T.S., corroborated by the testimony of the appellant’s girlfriend as to the

appellant’s admissions to the murder, the forensic evidence obtained from the appellant’s home and a statement by the appellant to a police officer that the State had a “pretty solid case”, was sufficient to sustain the convictions.

The Court also held admissible the statement made by the appellant to a state trooper indicating that the State had a “solid case” and that if he were in Virginia he would have already been tried and sentenced. The Court noted that the state trooper was not engaged in an interrogation of the appellant at the time of the statement, but was merely obtaining a DNA sample pursuant to a court order. Because the officer was not interrogating the appellant in a custodial setting, the statement was not prohibited under *Miranda*.

The Court also held (1) that the trial court did not err in refusing to strike for cause a juror who indicated his belief in the death penalty, noting that the juror had also indicated during voir dire that he could grant mercy and would have to listen to the facts before rendering a decision; and (2) that the trial court’s failure to *sua sponte* provide an instruction as to standards to be considered in rendering a mercy determination was not error.

**Notice**

The West Virginia Supreme Court of Appeals has substantially revised its’ website. The new design features comprehensive information regarding the West Virginia Court system.

For further information, please log on to [www.courtswv.gov](http://www.courtswv.gov)

Based on this study, the DHHR sought

**State v. Myers**, No. 35672 – May 26, 2011 – McHugh, J. (*Berkeley – Groh*)

The appellant sought review of two orders of the circuit court finding that the appellant was a sexually violent predator under the Sex Offender Registration Act, W.Va. Code §15-12-1, et. seq.. The appellant had been convicted of several sexual offenses in 1996, but the convictions were later reversed on the grounds of ineffective assistance of counsel in 2002 (*State ex rel. Myers v. Painter*, 213 W.Va. 32, 576 S.E. 2d 277 (2002) ). On remand the appellant entered into a guilty plea to lesser charges and was released from prison in June of 2006. Three years later, and prompted by a new investigation, the State filed a motion under W.Va. Code §15-12-2a (2009) to have the appellant classified as a sexually violent predator. Following a psychiatric evaluation and upon receipt of a report from the Sex Offender Registry Advisory Board, the court ruled that the appellant was a sexually violent predator.

On appeal, the appellant argued that the determination of whether a person is a sexually violent predator must be made before the person is released from incarceration and/or placed on parole.

**Held:** The Court considered the appellant's argument and determined that while the Act does not specify a particular time period for the predator determination, a summary proceeding authorized under §15-12-2a should take place "as an adjunct to sentencing." Citing the community notification aspects of the Act, the Court held that it did not believe that the Legislature intended for there to be an open-ended time limit on sexually violent predator determinations. Thus, the Court held that the predator determination authorized under the Act should be made at the time or the sentencing or, at the latest, prior to the offender's release from incarceration.

**In Re: N.A., I.A., C. P. and M.P.**, No. 35743 & 35744 – May 26, 2011 – Per Curiam (*Mingo – Thornsby, J.*)

The DHHR and J.G., the biological father of M.P., appealed the ruling of

the circuit court granting a post-dispositional improvement period to the appellee grandparents and denying J.G.'s request for custody of M.P. The four children were the biological children of T.P, the daughter of the appellee grandparents. Abuse and neglect proceedings were instituted in August 2009 against T.P. based on allegations of domestic violence between T.P and her father, and the petition cited prior DHHR referrals regarding the mother's drug abuse and the unexplained death of another child in the home in 2007.

The mother was subsequently adjudicated as an abusive/neglectful parent and physical custody of the children was granted to the grandparents. Allegations arose, however, that the appellee grandparents were not capable of providing adequate care for the children and that the grandparents were permitting visitation with T.P. in violation of an order of the court. There was also an allegation that one of the children had been sexually abused while in the grandparent's custody. The DHHR requested immediate physical custody of the children and the children were placed in foster care.

While these proceedings were pending, J.G. learned for the first time that he was the biological father of M.P. Paternity was subsequently established and J.G. was joined as a party to the petition, but was subsequently dismissed as a party and was granted intervenor status. At a March 2010 dispositional hearing, the DHHR asserted that placement with the appellee grandparents would not be in the best interests of the children. The DHHR concurred in J.G.'s request that he be granted custody of M.P.

The circuit court determined that the appellee grandparents were the "psychological parents" of the children, and that despite their neglect of the children, including their failure to prevent domestic violence and unapproved visitation with the mother, the appellee grandparents should be provided another opportunity to correct the issues. The court ruled that J.G.

was entitled only to visitation with M.P., determining that it was in the best interests of the children to remain united under the care of the appellee grandparents.

**Held:** The Court first determined that the circuit court erred in denying J.G.'s request for custody of M.P. The Court noted that there had been no allegations of abuse or neglect against J.G., and that there was nothing in the record to support a finding that J.G. could not be a suitable biological father for M.P. Consequently, the Court reversed and remanded for a determination of whether it would be in the best interests of M.P. to have continued visitation with his siblings.

The Court also determined that the circuit court had erred in granting the appellee grandparents a post-adjudicatory improvement period and custody of the children. The Court noted that while the grandparent's may have been the "psychological grandparents" of the children, such status did not assure that custody was in the best interests of the children. The Court cited numerous violations of circuit court orders by the grandparents regarding visitation, and noted that psychological reports and a home study (which were not referenced by the circuit court in its dispositional order) concerning the grandparents had recommended that the children not be placed with the grandparents.

**In Re: Hunter H.**, No. 35750 & 35751 – June 14, 2011 – Per Curiam (*Ohio – Mazzone, J.*)

Based upon incidents of drug use by his biological parents, Hunter H. was placed in the custody of his maternal grandmother, appellee Donna D. However, due to subsequent incidents of marijuana and alcohol usage by Donna D.'s husband, an abuse/neglect petition was filed and the child was placed with a foster family in August 2007. Donna D. subsequently divorced her husband and requested a home study for the purposes of obtaining custody of the child. A psychological examination noted Donna D.'s commitment to the child but pointed out limitations in her ability to properly control and discipline the child.

to remove the child from his foster family and return him to his grandmother's residence. The child's guardian *ad litem* objected, noting that Hunter H. had established solid familial bonds and was thriving with his foster family.

Citing the results of the home study, the recommendation of the DHHR and the statutory "grandparent preference", the circuit court ordered the child returned to the custody of Donna D. The guardian *ad litem* and the foster parents (who had been granted leave to intervene) appealed this ruling. The appellants argued that the circuit court had given improper weight to the statutory grandparent preference in determining permanent placement for Hunter H., and had not taken into account the best interests of the child, which the appellant asserted was permanent placement with his foster family.

**Held:** The Court noted that the grandparent preference was not absolute and must be considered in conjunction with the best interests of the child. The Court observed that the guardian *ad litem* and the only expert to testify in the proceedings (a psychologist) had both opined that it was in the child's best interests to remain with his foster family. The Court also noted that multiple case plans prepared by the DHHR supported the guardian's conclusion that the foster family was a stable and loving environment for the child.

**In Re: Kristin Y., et. al.**, No. 11-0300 – June 14, 2011 – Per Curiam (*Harrison – Matish, J*)

Following an apparent suicide attempt by the mother, the DHHR obtained emergency custody of the children of appellee Anna Y. and Ricky Y. The children were placed in the custody of the DHHR and an abuse/neglect petition was filed shortly thereafter, alleging a variety of abusive and neglectful acts by the parents, including physical and sexual abuse, filthy conditions in the home, educational deprivation and exposure to domestic violence. The DHHR later amended the petition to include additional allegations against the parents. In June 2008 the parents stipulated to the conditions of abuse/neglect, and each was placed on a post-adjudicatory improvement period.

During the post-adjudicatory improvement period, additional information was obtained by DHHR regarding allegations of abuse. In addition, the children were demonstrating serious symptoms of emotional problems related to the previous abuse. Anna Y., after an initial period of compliance with the requirements of the improvement period and a three-month extension, began to relapse in her willingness to cooperate with the terms of the plan. Despite this, the appellee was granted a six-month dispositional improvement period.

The appellee's cooperation continued to decrease and the DHHR filed another amended petition in July 2009, which disclosed that the children were reporting additional sexual abuse and reported witnessing sexual activity between their parents. The DHHR moved to terminate the improvement period, but the period lapsed before a hearing could be held.

Following a series of dispositional hearings, the court terminated the parental rights of Ricky Y., but chose not to terminate the parental rights of Anna Y. The DHHR, guardian *ad litem* and CASA recommended termination, but the court found that termination was not warranted due to the appellee's "commitment" to proper treatment and the mental and physical abuse that she had suffered from her husband. The court therefore ordered that temporary and physical custody would continue with DHHR with an eye towards possible reunification.

On appeal, the DHHR argued that the court erred in not terminating the appellee's parental rights because there was no reasonable likelihood that the conditions of abuse could be corrected in the near future, and also that it was in the best interests of the children to have the appellee's rights terminated in order to effectuate a prompt permanent placement plan.

**Held:** The Court concurred with the DHHR on each of these issues. While finding no error with the court's findings of fact, the Court noted that despite sixteen (16) months of parenting and life skills training, the appellee had been unable to complete the program. The Court found that the clear and convincing evidence presented by the DHHR showed that there was no reasonable likelihood that the conditions of abuse could be substantially corrected, that the best interests of the children would be served by a prompt placement plan, and that the facts supported termination of the appellee's parental rights.

**Humphries v. Detch**, No. 35649 – June 22, 2011 – Workman, J. (*Putnam – Spaulding, J.*)

The appellant was convicted in 1999 of conspiracy and of acting as an accessory before the fact to first degree murder. The appellant's petition for appeal was refused in 2000 and he subsequently filed a petition for *habeas corpus* relief alleging, *inter alia*, ineffective assistance of counsel. Upon denial of his *habeas* petition, the appellant appealed to the Supreme Court of Appeals, which reversed his conviction in 2007 on grounds of ineffective assistance of counsel and remanded the matter for a new trial. On remand, the appellant entered a *nolo contendere* plea as an accessory to second degree murder, and he was sentenced to five to eighteen years imprisonment, with credit for time served.

Prior to his release from prison in February 2008, the appellant filed a legal malpractice suit against the appellee, who was his original trial counsel. The appellee filed a motion to dismiss under Rule 12(b) (6) of the Rules of Civil Procedure, arguing that the appellant was required to prove his actual innocence to the crime in order to prevail in the malpractice suit. The circuit court indicated during the hearing

that it was inclined to deny the motion to dismiss, but no order to that effect was ever entered.

A hearing was held in December 2009 before a different circuit court judge on the appellee's motion to dismiss. The court granted the appellee's motion and ordered the matter dismissed. The appellant sought review, arguing that the trial court erred (1) in determining that the appellant was required to prove his actual innocence to the underlying criminal offense in order to prevail in a legal malpractice action, and (2) that the court erred in basing its determination on the appellant's plea of *nolo contendere* to the underlying charge.

**Held:** The Court affirmed the decision of the circuit court. Noting that a majority of other jurisdictions have adopted the "actual innocence" requirement, the Court announced that a plaintiff in a legal malpractice action arising from a criminal proceeding must establish his/her actual innocence of the underlying crime in order to prevail in the action.

The Court rejected the appellant's argument that the circuit court improperly based its determination on his *nolo contendere* plea. The appellant argued that the court's consideration of his *nolo* plea in determining whether he was actually innocent of the underlying offense violated West Virginia Rule of Evidence 410. The Court noted that Rule 410 does not apply to a *nolo contendere* conviction, and that such convictions and resulting sentences can be used to prove that a plaintiff in a legal malpractice actions was convicted of the underlying offense.



**State v. Thornton**, No. 35533 - June 22, 2011 – Per Curiam (*Kanawha – Kaufman, J.*)

The appellant was convicted of child neglect resulting in the death of her 22-month old son. On appeal, the appellant argued (1) that the State had failed to prove, beyond a reasonable doubt, that a delay in seeking medical treatment caused the child's death; and (2) that the court had erred in denying her motion for a mistrial after the State violated a pretrial order to avoid reference to Child Protective Services ("CPS") proceedings.

The State alleged that in May of 2008, the appellant's infant son suffered serious head injuries as a result of abuse inflicted by either the appellant or by the child's father. The appellant and the child's father explained that the child had fallen against a table several days earlier, but that the child had not demonstrated serious symptoms and had presented only flu-like symptoms (vomiting, listlessness, etc.). The child was not taken to the hospital for several days and died two days after his hospitalization. The Department of Health and Human Resources ("DHHR") filed an abuse/neglect petition against the parents, who were subsequently indicted for child neglect causing death.

**Held:** The Court rejected the appellant's sufficiency argument and discussed, in considerable detail, the evidence presented at trial regarding the child's death. The appellant argued that there was no evidence presented at trial that proved that the child would have survived but for the appellant's failure to provide immediate medical treatment. The Court determined that while there was some conflict in the evidence, there was sufficient evidence (chiefly the testimony of a Dr. Chebib) that the child would have survived if he had received prompt medical attention after his injury.

The Court also rejected the appellant's argument that the circuit court should have granted a mistrial because of the State's reference to the "CPS" (i.e., abuse and neglect) proceedings. The court had ruled prior to trial that the State could not refer to the abuse/neglect proceedings, but during the State's opening statement (and during

the testimony of one of its witnesses) a reference was made to calls to "CPS". The Court determined that the references referred only to the mere mention of CPS and not to any particular abuse/neglect proceedings, and that the court did not err in denying the motion for mistrial.

**Lawyer Disciplinary Board v. Grafton**, No. 35283 – June 22, 2011 – McHugh, J.

An ethics complaint was filed against the respondent regarding his handling of a personal injury action. The complaint indicated that the respondent had filed a complaint on behalf of the plaintiff in October 2004, but had failed to take further actions in the case, including missed deadlines, failure to file necessary pleading and other documents, and failure to advise the client of the status of the case. The personal injury case was dismissed by the circuit court on a motion for summary judgment in February 2007, based in part upon the respondent's failure to respond to requests for admissions. The respondent was granted leave to file an appeal and after being granted three extensions a petition for appeal was filed in August 2007. The appeal was filed without a designation of record, docketing statement, the required number of copies and without a processing fee. Despite the respondent's failure to perfect the appeal, the client was advised by the respondent's office that the appeal was pending.

The client filed her complaint with the Office of Disciplinary Counsel in March 2009. The respondent did not file a response to the complaint. The respondent appeared at an evidentiary hearing in February 2010 and expressed remorse for his handling of the case. The Hearing Panel Subcommittee ("HPS") found evidence to substantiate the charges of failing to act with reasonable diligence, failure to abide by court orders, failure to preserve the client's appellate rights, inadequate communication with the client and deception, and failure to respond to the ODC regarding the

complaint. The HPS recommended, *inter alia*, a one-year suspension of the respondent's law license.

Following the issuance of the HPS's report, the ODC filed another petition against the respondent, which alleged that the respondent had essentially abandoned his law practice to the detriment of his clients. The ODC requested that the Court appoint a trustee to inventory the respondent's files. The Court granted this request, but the ODC subsequently notified the Court that the respondent had failed to deliver the files to the trustee as ordered.

**Held:** After quickly affirming the HPS's findings in regard to the specific violations, the Court discussed the sanctions to be imposed for the misconduct. The Court noted mitigating circumstances involving serious injuries sustained by the respondent in an automobile accident and his expressed remorse at the February 2010 evidentiary hearing. The Court found, however, a number of aggravating factors, including a previous sanction for similar misconduct, a pattern of failing to communicate with his clients and the ODC, and his deception in allowing his client to believe that an appeal had been filed in her case.

The Court also found that the respondent's conduct following the filing of the HPS's report necessitated an increased sanction. In a new syllabus point, the Court held that a person named in a disciplinary proceeding who commits a violation of the Rules of Professional Conduct related to the facts of the original complaint may be subject to increased sanctions for the original misconduct.

The Court therefore adopted the majority of the sanctions recommended by the HPS, but increased the suspension of the respondent's law license to a two-year suspension.

**State v. Kaufman**, No. 35691 – June 22, 2011 –  
McHugh, J. (*Wood – Waters, J.*)

The appellant was charged with first degree murder in connection with the December 2007 shooting death of his estranged wife. At trial, the State introduced the testimony of several witnesses who testified to statements made by the victim regarding alleged incidents of threats and violence by the appellant in the weeks prior to the victim's death. The State also introduced a sixty-three page diary apparently written by the victim, portions of which recounted alleged violent acts and threats by the appellant. The appellant vigorously objected to the introduction of this evidence, arguing that his right to confrontation was violated by admission of the diary and the out-of-court statements of his wife.

The appellant was convicted and sentenced to life without the possibility of parole. On appeal he urged the Court to find that the admission of the statements and diary violated his right of confrontation.

**Held:** The Court first addressed the admission into evidence of the contents of the victim's diary. The appellant argued that the statements contained in the diary were testimonial statements and were thus barred under *Crawford v. Washington*, 541 U.S. 36 (2004) and *State v. Mechling*, 219 W.Va. 366 (2006). The Court determined that the statements in the diary were non-testimonial statements in that they were not made to law enforcement officials and did not indicate the presence of an on-going emergency. Thus, the Court determined that the appellant's rights under *Crawford* and *Mechling* were not violated.

However, having rejected the appellant's *Crawford* argument, the Court determined that the non-testimonial statements in the diary were subject to the reliability test noted in *Mechling* and cited in *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990). Under this test, the court is required to determine whether a particular statement bears adequate indicia of reliability or falls within a firmly rooted hearsay exception. The Court found that the trial court had not made such a determination for all of the statements in the diary, because the court had erroneously considered the entire diary as a single statement.

Thus, the Court found that the admission of the diary was an abuse of discretion and ordered the conviction reversed and the case remanded for a new trial. The Court stated that upon remand, all of the statements in the diary must be viewed as separate statements, and the State must prove the admissibility of each individual declaration or remark.





## WVPDS - CONTINUING EDUCATION SCHEDULE

### Computer Forensics 101

Frederick Lane, Esq.  
September 27, 2011 - 9:00 am—4:30 pm  
Summit Conference Center  
129 Summers Street  
Charleston, West Virginia  
6.30 general CLE credits

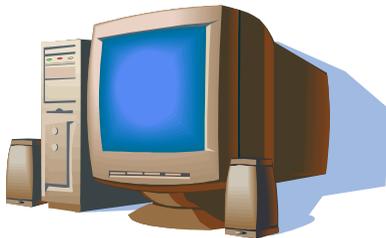
### Jury Selection and Voir Dire

Ira Mickenberg, Esq.  
October 26, 2011 - 9:00 am - 2:30 pm  
Summit Conference Center  
129 Summers Street  
Charleston, West Virginia  
Approximately 5.20 general CLE credits

### Jury Selection and Voir Dire

Ira Mickenberg, Esq.  
December 2, 2011 - 9:00 am - 2:30 pm  
Location TBA  
Martinsburg, West Virginia  
Approximately 5.20 general CLE credits

FOR REGISTRATION INFORMATION PLEASE CONTACT  
ERIN FINK AT (304) 558-3905 or at [Erin.V.Fink@wv.gov](mailto:Erin.V.Fink@wv.gov)



## **West Virginia Public Defender Services**

One Players Club Drive  
Suite 301  
Charleston, West Virginia 25311

Phone: 304-558-3905

Fax: 304-558-1098

Voucher Processing Fax:

304-558-6612

[www.wvpds.org](http://www.wvpds.org)

**THE DEFENDER** is a quarterly publication of  
**West Virginia Public Defender Services**

**Russell S. Cook - Acting Executive Director**

**Robert Ferguson, Jr. - Secretary of Administration**

**Earl Ray Tomblin - Governor**

**Criminal Law Research Center:**

**Russell S. Cook - Director**

**Erin Fink - Administrative Assistant**

[www.wvpds.org](http://www.wvpds.org)

