

THE DEFENDER



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Inquiries, articles and suggestions
are always welcome.

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FROM THE EXECUTIVE DIRECTOR'S CHAIR

by Jack Rogers

Legislature Encourages Public Defender Offices

In 1998, the Legislature separated Public Defender offices from the single line item formerly used to pay both private counsel and full-time Public Defenders. In most subsequent years that separate funding has continued, with a further separation made in 2004 between funding for private counsel working in counties with or without Public Defender offices.

For FY 2007 (beginning 1 July 2006) the Legislature increased the Public Defender line item by \$1 million dollars. During the subsequent First Extraordinary Session, the Legislature added an additional \$1.5 million dollars. While private counsel also received \$3.5 million (\$1.3 million for areas with Public Defender offices, \$2.2 million for those without), the private system was substantially underfunded (\$7.8 million was requested for private counsel).

The clear legislative intent seems to be to encourage the opening of more Public Defender offices. Since May, 2006, I have contacted both Circuit Judges and local Bar Presidents (where those can be identified) offering to fund a Public Defender office in the remaining Circuits where those offices can be cost effective. The areas are: Morgantown, Fairmont, Parkersburg, Winfield, Elkins, Romney and Petersburg.

As the readers of this article know, only a local initiative can trigger the opening of a Public Defender office. All authority resides at the local level. If you have any interest of having a Public Defender office in your Circuit please contact me. The offer of funds will stay open until 1 January 2007.

U.S. SUPREME COURT UPDATE

SUPREME COURT OF THE UNITED STATES

Selected Opinions

October, 2005 Term of Court

October 2005 – May 22, 2006

Oregon v. Guzek, 126 S.Ct. 1226 (Feb. 22, 2006) (Breyer, J)

- **State may limit the innocence-related evidence a capital defendant can introduce at a sentencing proceeding to the evidence introduced at the original trial.**

Respondent was found guilty of capital murder and sentenced to death. On appeal, the Oregon Supreme Court affirmed the conviction but vacated the sentence and ordered a new sentencing proceeding. The question before the Court is whether the State may limit the innocence-related evidence he can introduce at that proceeding to the evidence he introduced at his original trial.

The Court found nothing in the Eighth or Fourteenth Amendments provides a capital defendant a right to present additional alibi evidence at resentencing.

Held: the Constitution does not prohibit a State from limiting the innocence-related evidence a capital defendant can introduce at a sentencing proceeding to the evidence introduced at the original trial.

United States v. Grubbs, 126 S.Ct. 1494 (March 21, 2006) (Scalia, J.)

- **Anticipatory warrants are not categorically unconstitutional; Fourth Amendment does not require triggering condition for anticipatory search warrant be set forth in warrant itself**

Respondent purchased a videotape containing child pornography from a web site operated by an undercover postal inspector. Officers from the Postal Inspection Service arranged a controlled delivery of a package containing the videotape to his residence. A search warrant for respondent's house was obtained on an application accompanied by an affidavit describing the proposed operation in detail - that the warrant would be executed only after the parcel had been received and physically taken into the residence. The affidavit also referred to two attachments describing the residence and the items to be seized. The attachments, but not the body of the affidavit, were incorporated into the warrant. The package was delivered and the videotape and other items were seized. Respondent was indicted for receiving child pornography and his motion to suppress the seized evidence was denied. He plead guilty, reserving his right to appeal the suppression issue. The Ninth Circuit reversed, finding the Fourth Amendment's particularity requirement applies to the conditions precedent to an anticipatory warrant and that the warrant failed in that regard.

The Supreme Court found anticipatory search warrants are not categorically unconstitutional under the Fourth Amendment. An anticipatory warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time - a so-called "triggering condition." Respondent argued that because the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued, anticipatory warrants contravene the Fourth Amendment. The Supreme Court found anticipatory warrants are no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is now probable that (2) contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed. The Court found for a conditioned anticipatory warrant to

comply with the Fourth Amendment's requirement of probable cause, two prerequisites of probability must be satisfied. It must be true not only that if the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place, but also that there is probable cause to believe the triggering condition will occur. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination. The Court found here, the occurrence of the triggering condition - successful delivery of the videotape to respondent's residence - would plainly establish probable cause for the search. In addition, the affidavit established probable cause to believe the triggering condition would be satisfied.

The Court also found the warrant did not violate the Fourth Amendment's particularity requirement. The Fourth Amendment specifies only two matters that must be "particularly described" in the warrant: "the place to be searched" and "the persons or things to be seized." The Court found it does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself. Reversed and remanded.

Georgia v. Randolph, 126 S.Ct. 1515 (March 22, 2006) (Souter, J.)

- **Fourth Amendment - consent to conduct warrantless search of residence given by one occupant is not valid in face of refusal of another occupant who is physically present at the scene**

Respondent's estranged wife gave consent for police to search the marital residence after the respondent, who was also present, had unequivocally refused to consent. Respondent was indicted for possession of cocaine and his motion to suppress the evidence, as products of a warrantless search of his house unauthorized by his wife's consent over his express refusal, was denied by the trial court. The Georgia Court of Appeals reversed and the Georgia Supreme Court affirmed the reversal.

The Supreme Court granted certiorari and affirmed. The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent.

Held: in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.

Salinas v. United States, 126 S.Ct. 1675 (April 24, 2006) (Per Curiam)

- **Fifth Circuit erred in treating simple possession conviction as sentencing guidelines "controlled substance offense"**

The Fifth Circuit concluded that petitioner's prior conviction for simple possession of a controlled substance constituted a "controlled substance offense" for purposes of the sentencing guidelines Sec. 4B1.1(a) (2003). The term "controlled substance offense" is defined in pertinent part, however, as "an offense under federal or state law...that prohibits... the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." Sec. 4B1.2 (b).

Held: the Fifth Circuit erred in treating petitioner's conviction for simple possession as a "controlled substance offense".

Day v. McDonough, 126 S.Ct. 1675 (April 25, 2006) (Ginsburg, J.)

- **Federal Habeas Corpus - one-year limitation period for filing**

The question presented is whether a federal court lacks authority, on its own initiative, to dismiss a habeas petition as untimely, once the State has answered the petition without contesting its timeliness. Here the federal court confronted no intelligent waiver on the State's part, only an evident miscalculation of the elapsed time.

Held: in the circumstances here presented, the federal court had discretion to correct the State's error and, accordingly, to dismiss the petition as untimely under AEDPA's one-year limitation. District courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition. Before acting on its own initiative to dismiss a petition as untimely, a court must accord the parties fair notice and an opportunity to present their positions.

Holmes v. South Carolina, 126 S.Ct. 1727 (May 1, 2006) (Alito, J. for a unanimous Court)

- **Exclusion of third-party guilt evidence violated defendant's right to present a complete defense**

This case presents the question whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict.

The petitioner was charged with murder and related crimes. The prosecution relied heavily on forensic evidence at trial. The trial court excluded petitioner's third-party guilt evidence citing South Carolina law that such evidence is admissible if it raises a reasonable inference or presumption as to the defendant's own innocence, but is not admissible if it merely casts a bare suspicion upon another or raises a conjectural inference as to the commission of the crime by another. The South Carolina Supreme Court found no error in the exclusion of petitioner's third-party guilt evidence holding that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." Applying this interpretation of the rule, the State Supreme Court held that petitioner could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence."

The Supreme Court of the United States held that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have a meaningful opportunity to present a complete defense. The Court found the rule as applied by the state court focused on evaluating the strength of only one party's evidence, from which no logical conclusion could be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.

The judgment was vacated and the case remanded.

Brigham City v. Stuart, (No. 05-502, May 22) (Roberts, C.J.)

- **Police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury**

At issue in this case is whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. The Court concluded that they may.

At about 3 a.m., four police officers responded to a call regarding a loud party at a residence. Upon arriving, they heard shouting from inside, and proceeded down the driveway to investigate. There, they observed two juveniles drinking beer in the backyard. They entered the backyard, and saw-through a screen door and windows-an altercation taking place in the kitchen. One officer testified that four adults were attempting, with some difficulty, to restrain a juvenile. The juvenile eventually "broke free, swung a fist and struck one of the adults in the face." The officer testified that he observed the victim of the blow spitting blood into a nearby sink. The other adults continued to try to restrain the juvenile, pressing him up against a refrigerator with such force that the refrigerator began moving across the floor. At that point, an officer opened the screen door and announced the officers' presence. Nobody noticed. The officer entered the kitchen and again cried out, and as the occupants slowly became aware that the police were on the scene, the altercation ceased.

The officers subsequently arrested respondents and charged them with contributing to the delinquency of a minor, disorderly conduct, and intoxication. In the trial court, respondents filed a motion to suppress all evidence obtained after the officers entered the home, arguing that the warrantless entry violated the Fourth Amendment. The court granted the motion, and the Utah Court of Appeals and the Supreme Court of Utah affirmed.

The Court granted certiorari in light of differences among state courts and the Courts of Appeals concerning the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation. The Court found the officers' entry was reasonable under the circumstances of this case and the manner of the officers' entry was also reasonable. Reversed and remanded.

Zedner v. United States, (No. 05-5992, June 5, 2006) (Alito, J.)

- **Speedy Trial**

At issue in this case is the application of the doctrines of waiver, judicial estoppel, and harmless error to a violation of the Speedy Trial Act of 1974 (Act). The Act generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance, but the Act contains a detailed scheme under which certain specified periods of delay are not counted. In this case, petitioner's trial did not begin within 70 days of indictment. His trial did not commence until more than seven years after the filing of the indictment, but petitioner, at the suggestion of the trial judge, signed a blanket, prospective waiver of his rights under the Act.

The Court held because a defendant may not prospectively waive the application of the Act, petitioner's waiver "for all time" was ineffective. The Government contended that because "petitioner's express waiver induced the district to grant a continuance without making an express ends-of-justice finding..., basic principles of judicial estoppel preclude petitioner from enjoying the benefit of the continuance, but then challenging the lack of a finding." The Court found no Basis in this case for applying the doctrine of judicial estoppel. The Court concluded that when a district court makes no findings on the record in support of an §3161 (h) (8) continuance, harmless-error review is not appropriate.

House v. Bell, (No. 04-8990, June 12, 2006) (Kennedy, J.)

- **State procedural default rule not a bar to federal habeas petition where compelling claim of actual innocence made**

Some 20 years ago in rural Tennessee, Carolyn Muncey was murdered. A jury convicted petitioner House of the crime and sentenced him to death, but new revelations cast doubt on the jury's verdict. House, protesting his innocence, seeks access to federal court to pursue habeas corpus relief based on constitutional claims that are

procedurally barred under state law. Out of respect for the finality of state-court judgments federal habeas courts, as a general rule, are closed to claims that the state courts would consider defaulted. In certain exceptional cases involving a compelling claim of actual innocence, however, the state procedural default rule is not a bar to a federal habeas corpus petition. See *Schlup v. Delo*, 513 U.S. 298 (1995).

The Court concluded that House has made stringent showing required by this exception and held that his federal habeas action may proceed.

Hill v. McDonough, (No. 05-8794, June 12, 2006) (Kennedy, J.)

- **Challenge to lethal injection procedure could be brought under 42 U.S.C. §1983**

Petitioner challenges the constitutionality of a three-drug sequence the State of Florida likely would use to execute him by lethal injection. Seeking to enjoin the procedure, he filed this action in the United States District Court for the Northern District of Florida, pursuant to 42 U.S.C. §1983. The District Court and the Court of Appeals for the Eleventh Circuit construed the action as a petition for a writ of habeas corpus and ordered it dismissed for noncompliance with the requirements for a second and successive petition. The question before the Court is whether petitioner's claim must be brought by an action for a writ of habeas corpus under the statute authorizing that writ, 28 U.S.C. §2254 or whether it may proceed as an action for relief under 42 U.S.C. §1983.

Because the petitioner's suit is comparable in its essentials to the action the Court allowed to proceed under §1983 in *Nelson v. Campbell*, 541 U.S. 637 (2004) it does not have to be brought in habeas, but may proceed under §1983. Reversed.

Hudson v. Michigan, (No. 04-1360, June 15, 2006) (Scalia, J.)

- **Fourth Amendment – violation of the “knock and announce” rule does not require suppression of evidence**

At issue in this case is whether violation of the “knock-and-announce” rule requires the suppression of all evidence found in the search. The Court found “[i]n sum that the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrents against them are substantial - incomparably greater than the factors deterring warrantless entries when *Mapp* [*v. Ohio*, 367 U.S. 643 (1961)] was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified”. And that “[a] trio of cases – *Segura v. United States*, 468 U.S. 796 (1984); *New York v. Harris*, 495 U.S. 14 (1990); and *United States v. Ramirez*, 523 U.S. 65 (1998) – confirms our conclusion that suppression is unwarranted in this case.

Davis v. Washington, (No. 05-5224, June 19, 2006) (Scalia, J.)

- **Right of Confrontation – Application of *Crawford v. Washington* and What Constitutes “Testimonial” Statement**

The Court reviewed two separate domestic violence convictions and the application of *Crawford v. Washington* to the situations arising in the cases. In the first case, McCottry advised a 911 operator that she had been assaulted by her boyfriend (Davis). McCottry did not testify at trial, and Davis was convicted of felony violation of a domestic no-contact order based on the admission of the 911 recording at trial.

In the second case, police reported to a domestic incident at the home of Hershel and Amy Hammon. Upon arrival, the police separated the parties and obtained a written statement from Amy Hammon, which was used at trial when she did not appear to testify. Hershel Hammon was convicted of domestic battery based on the admission of the written statement.

The Court determined (1) that the statements made during the course of the 911 call in the Davis' case were not "testimonial" because they concerned the occurrence of emergency events while the events were happening, and were elicited to enable the authorities to resolve an on-going emergency; and (2) that the written statements obtained by the police in the Hammon case were clearly testimonial, in that they were obtained to investigate the occurrence of a past criminal action and were not made in the face of an on-going emergency situation.

Therefore, based on these determinations of the meaning of "testimonial" statements, the Court affirmed the conviction of Davis, but reversed and remanded Hammon's conviction.

Youngblood v. West Virginia, (No. 05-6997, June 19, 2006) (Per Curiam)

- **Violation of *Brady v. Maryland* and *Kyles v. Whitley***

The petitioner was convicted in West Virginia of numerous felony offenses involving the alleged sexual assault and abduction of three young women. After his trial, an investigator discovered the existence of a note written by one of the alleged victims, wherein the victim taunted the petitioner for having been "played" for a fool and thanked the petitioner for performing oral sex on one of the alleged victims. The note had been shown to a state trooper during the initial investigation, but the trooper did not take possession of the note and advised that the note be destroyed. The West Virginia Supreme Court of Appeals did not address the specific constitutional issues associated with the suppression of the note, and affirmed the petitioner's conviction.

The Court reviewed the essential holdings of *Brady v. Maryland* and *Kyles v. Whitley*, vacated the judgment of the State Supreme Court, and remanded the case for further proceedings by the State Supreme Court.

Samson v. California, (No. 04-9728, June 19, 2006) (Thomas, J.)

- **Search and Seizure – Suspicionless Search of a Parolee**

Petitioner, a parolee, was searched by an officer pursuant to a California statute authorizing warrantless (and suspicionless) searches of parolees. The petitioner was convicted of possession of methamphetamine. On appeal, the petitioner asserted that such warrantless and suspicionless searches constituted a violation of the Fourth Amendment.

The Court disagreed, finding that the statute did not authorize unreasonable searches in light of the reduced expectations of privacy of parolees. The Court observed that parolees must consent to such searches as a condition of parole, which the Court characterized as an extension of an inmate's legal custody status within the Department of Corrections.

Justice Stevens, along with Justices Souter and Breyer, vigorously dissented to this holding as an "unprecedented curtailment of liberty", and classified the suspicionless search as "the very evil the Fourth Amendment was intended to stamp out."

Dixon v. United States, (No. 05-7053, June 22, 2006) (Stevens, J.)

- **Jury Instruction – Burden to Establish Defense**

Petitioner was charged with receiving a firearm while under indictment in violation of 18 U. S. C. §922(n) and with making false statements in connection with the acquisition of a firearm in violation of §922(a)(6). She admitted at trial that she knew she was under indictment when she purchased the firearms and knew that doing so was a crime, but claimed that she was acting under duress because her boyfriend had threatened to harm her and her daughters if she did not buy the guns for him. Bound by Fifth Circuit precedent, the District Court declined her request for a jury instruction placing upon the Government the burden to disprove, beyond a reasonable doubt, her duress defense. Instead, the jury was instructed that petitioner had the burden to establish her defense by a preponderance of the evidence. She was convicted, and the Fifth Circuit affirmed.

The Court affirmed the petitioner's conviction, holding that (1) the jury instruction utilized did not violate the Due Process Clause, in that the United States still bore the burden of proving all of the requisite elements of the charges against the petitioner beyond a reasonable doubt, and (2) unlike the defense of insanity as presented in *Davis v. United States*, 160 U.S. 469 (1895), the Government does not bear the burden of disproving the defense of duress beyond a reasonable doubt.

United State v. Gonzalez-Lopez, (No. 05-352, June 26, 2006) (Scalia, J.)

- **Right to Counsel of Choice**

Respondent hired attorney Low to represent him on a federal drug charge. The District Court denied Low's application for admission *pro hac vice* on the ground that he had violated a professional conduct rule and then, with one exception, prevented respondent from meeting or consulting with Low throughout the trial. The jury found respondent guilty. Reversing, the Eighth Circuit held that the District Court erred in interpreting the disciplinary rule, that the court's refusal to admit Low therefore violated respondent's Sixth Amendment right to paid counsel of his choosing, and that this violation was not subject to harmless-error review.

The Court determined that the trial court's deprivation of the respondent's choice of counsel entitled him to reversal of his conviction. The Court noted (1) the Government's concession of erroneous deprivation, (2) that there need be no showing of "prejudice" to constitute a violation of the right to counsel of choice, and (3) that the violation of right to counsel of choice is not subject to a harmless error analysis.

Kansas v. Marsh, (No. 04-1170, June 26, 2006) (Thomas, J.)

- **Aggravating vs. Mitigating Factors in Death Penalty Cases**

Finding three aggravating circumstances that were not outweighed by mitigating circumstances, a Kansas jury convicted respondent Marsh of, *inter alia*, capital murder and sentenced him to death. Marsh claimed on direct appeal that Kan. Stat. Ann. §21-4624(e) establishes an unconstitutional presumption in favor of death by directing imposition of the death penalty when aggravating and mitigating circumstances are in equipoise. Agreeing, the Kansas Supreme Court concluded that §21-4624(e)'s weighing equation violated the Eighth and Fourteenth Amendments and remanded for a new trial.

The Court determined (1) that it had jurisdiction to review the judgment; (2) that the judgment of the Kansas Supreme Court was not supported by adequate and independent state grounds separate from federal law

interpretation; and (3) that under *Walton v. Arizona*, 497 U.S. 639 (1990), the Kansas death penalty statute, which provides that the death penalty shall apply when the State has proven that mitigating factors do not outweigh aggravating factors, is constitutional.

Washington v. Rucuenco, (No. 05-83, June 26, 2006) (Thomas, J.)

- **Sentencing Enhancement under *Apprendi v. New Jersey* and *Blakely v. Washington***

After respondent threatened his wife with a handgun, he was convicted of second-degree assault based on the jury's finding that he had assaulted her "with a deadly weapon." A "firearm" qualifies as a "deadly weapon" under Washington law, but nothing in the verdict form specifically required the jury to find that respondent had engaged in assault with a "firearm," as opposed to any other kind of "deadly weapon." Nevertheless, the state trial court applied a 3-year firearm enhancement to respondent's sentence, rather than the 1-year enhancement that specifically applies to assault with a deadly weapon, based on the court's own factual findings that respondent was armed with a firearm. The Court then decided *Apprendi v. New Jersey*, 530 U. S. 466 (2000), holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," and *Blakely v. Washington*, 542 U. S. 296 (2004), clarifying that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*,". Because the trial court could not have subjected respondent to a firearm enhancement based only on the jury's finding that respondent was armed with a "deadly weapon," the State conceded a Sixth Amendment *Blakely* violation before the Washington Supreme Court, but urged the court to find the *Blakely* error harmless. In vacating respondent's sentence and remanding for sentencing based solely on the deadly weapon enhancement, however, the court declared *Blakely* error to be "structural error," which will always invalidate a conviction under *Sullivan v. Louisiana*, 508 U. S. 275 (1993).

The Court held that the failure to submit a sentencing factor to a jury is not "structural" error. The Court determined that while some constitutional errors might constitute structural error, "most constitutional errors are harmless" and are therefore subject to a harmless error analysis. Citing *Neder v. United States*, 527 U.S. 1 (1999), the Court held that failing to submit sentencing factors to a jury, like the failure to submit an instruction that omits an element of an offense as in *Neder*, "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."

Beard v. Banks, (No. 04-1739, June 28, 2006) (Breyer, J.)

- **Prison Conditions – Right of Administrators to Restrict Access to Documents**

The State of Pennsylvania houses its 40 most dangerous and recalcitrant inmates in a Long Term Segregation Unit (LTSU). Inmates begin in level 2, which has the most severe restrictions, but may graduate to the less restrictive level 1. Plaintiff-respondent Banks, a level 2 inmate, filed a federal-court action against defendant-petitioner, the Secretary of the Department of Corrections, alleging that a level 2 policy forbidding inmates any access to newspapers, magazines, and photographs violates the First Amendment. During discovery, Banks deposed Deputy Prison Superintendent Dickson and the parties introduced various policy manuals and documents into the record. The Secretary then filed a summary judgment motion, along with a statement of undisputed facts and the deposition. Rather than filing an opposition to the motion, Banks filed a cross-motion for summary judgment, relying on the undisputed facts, including those in the deposition. Based on this record, the District Court granted the Secretary's motion and denied Banks'. Reversing the Secretary's summary judgment award, the Third Circuit held that the prison regulation could not be supported as a matter of law.

The Court held that the Pennsylvania prison officials had set forth adequate legal grounds for the questioned policy.

The Court noted that under *Turner v. Safley*, 482 U.S. 78 (1987), a prison's attempt to restrict an inmate's constitutional rights must be "reasonably related to legitimate penological interests." Here, the Court held that the prison's policy of restricting access to newspapers, magazines and photographs was reasonably related to the legitimate penal interest in motivating better behavior on the part of particularly troublesome and recalcitrant inmates.

Clark v. Arizona, (No. 05-5966, June 29, 2006) (Souter, J.)

- **Insanity – Evidence of Insanity and Effect upon Criminal *Mens Rea***

The petitioner was charged with first-degree murder under an Arizona statute prohibiting "[i]nten[tionally] or knowing[ly]" killing a police officer in the line of duty. The petitioner did not contest that he shot the officer, but relied on his own undisputed paranoid schizophrenia at the time of the incident to deny that he had the specific intent to shoot an officer or knowledge that he was doing so. The petitioner claimed mental illness, which he sought to introduce for two purposes. First, he raised the affirmative defense of insanity, putting the burden on himself to prove by clear and convincing evidence that, in the words of another state statute, "at the time of the [crime, he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong." Second, he aimed to rebut the prosecution's evidence of the requisite *mens rea*, that he had acted intentionally or knowingly to kill an officer.

The trial court ruled that the petitioner could not rely on evidence bearing on insanity to dispute the *mens rea*, and cited the Arizona Supreme Court's decision in *State v. Mott*, 187 Ariz. 536, 931 P. 2d 1046, which refused to allow psychiatric testimony to negate specific intent and held that Arizona does not allow evidence of a mental disorder short of insanity to negate the *mens rea* element of a crime. The petitioner then presented lay testimony describing his increasingly bizarre behavior over the year before the shooting. A psychiatrist also testified that the petitioner was suffering from paranoid schizophrenia with delusions about "aliens" when he killed the officer, and concluded that he was incapable of luring the officer or understanding right from wrong and was thus insane at the time of the killing. The judge then issued a first-degree murder verdict, finding that in light of that the facts of the crime, the expert evaluations, the petitioner's actions and behavior both before and after the shooting, and the observations of those who knew him, the petitioner had not established that his schizophrenia distorted his perception of reality so severely that he did not know his actions were wrong.

The Court held (1) that due process does not prohibit Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong; and (2) that the Arizona Supreme Court's *Mott* rule does not violate due process.

WV SUPREME COURT UPDATE

Spring 2006 Term

State ex rel. Games-Neely v. Sanders, No. 32875 (February 17, 2006)

- WAIVER OF EXTRADITION – TIME LIMITS ON FUGITIVE WARRANTS

Respondent was indicted for second-degree robbery in the circuit court of Berkeley County and released on bond. He was also charged under a fugitive warrant from the State of Virginia and was incarcerated on this charge. He expressed his desire to waive extradition and return to the State of Virginia to address the pending charges in that state. The prosecuting attorney objected, arguing that respondent's speedy trial rights on the West Virginia indictment would be at risk if he were voluntarily sent to Virginia. The circuit court ruled that respondent could waive extradition on the Virginia charges, and the State sought a writ of prohibition to challenge this order. The petition for writ of prohibition asserted that (1) the State should be permitted to hold Mr. VanMetre until his West Virginia proceedings were concluded, and (2) Mr. VanMetre should be prevented from voluntarily waiving extradition prior to the conclusion of the West Virginia proceedings.

Held: The Court held that the State could not hold the respondent in custody solely on the fugitive warrant in excess of the 90-day limit provided for under West Virginia Code §§ 5-1-9(f) and (h) (2002). The Court denied the prosecuting attorney's request to find that the ninety-day statutory time frame should be tolled when there are charges pending against a defendant in West Virginia.

The Court determined, however, that the State could prevent a voluntary waiver of extradition proceedings pending the conclusion of criminal proceedings in West Virginia. The Court acknowledged VanMetre's right under West Virginia Code § 5-1-11(b) (1999) to waive extradition, but noted that under § 5-1-11(d), the State was not deprived of its "right, power or privilege to try [a] demanded person for an offense committed within this state [.]". The Court further held that the power vested by § 5-1-11(j), permitting a governor to refuse extradition pending the resolution of criminal proceedings, could be exercised by the prosecuting attorney as an "officer ...of this state."

Writ Granted as Moulded.

State v. Frye, No. 32786 (February 17, 2006)

- INEFFECTIVE ASSISTANCE OF COUNSEL – DIRECT APPEAL AND HABEAS CORPUS PROCEEDINGS

The appellant was convicted of grand larceny. On appeal, the appellant asserted that his trial counsel was ineffective, due to counsel's alleged failure to question a potential juror and counsel's refusal to cross-examine any of the State's nine witnesses.

Held: The Court first observed that, contrary to the appellant's assertion, ineffective assistance of counsel was not clearly demonstrable on the face of the existing record. The Court noted that the State had argued that appellant's trial counsel might have been pursuing a particular trial strategy, i.e., that cross-examination of the witnesses was unnecessary because the witnesses were not presenting evidence particularly relevant to the charged offense.

The Court reiterated its preference of addressing assertions of ineffective assistance of counsel during habeas corpus

proceedings and concluded that the record was insufficient to address the appellant's claim on direct appeal. In a new syllabus point, the Court restated its determination that if an appellant's direct appeal argument is not being decided on its merits, the appellant's claim is preserved for habeas corpus relief.

Affirmed.

In Re: Bobby Lee B., No. 32771 (February 21, 2006)

- JUVENILE DELINQUENCY – PAYMENT FOR PROFESSIONAL SERVICES

Juvenile delinquency proceedings were instituted against Bobby Lee B. The juvenile subsequently entered a plea to a charge of sexual abuse in the third degree. Prior to disposition, the circuit court ordered that the juvenile undergo a sexual offender evaluation, and subsequently authorized payment for the examination in the amount of One Thousand Dollars (\$1,000.00) for these services. The Department of Health and Human Services ("DHHR") filed a motion to vacate this order on the grounds that the examiner could only be reimbursed in the amount of \$214.89, the applicable Medicaid rate. This motion was denied by the circuit court and the DHHR appealed.

Held: The Court noted the applicable language of W. Va. Code § 49-7-33 (2002), which provides that the DHHR shall set the fee schedule for professional service evaluations "in accordance with the Medicaid rate." The Court also cited the language of *State ex rel. Arimez v. Recht*, 216 W. Va. 709, 613 S.E. 2d 76 (2005) ("*Hewitt II*"), noting that the Court had held that fee payment orders entered after the effective date of § 49-7-33 (June 7, 2002) were subject to the limitations of the Medicaid rate. Because the order herein was entered after June 7, 2002, the payment order was subject to the provisions of § 49-7-33 and was therefore subject to payment at the applicable Medicaid rate.

Reversed.

State ex rel. Cicchirillo v. Alsop, No. 32876 (April 7, 2006)

- DUI – ADMINISTRATIVE PROCEEDINGS – AUTHORITY OF CIRCUIT COURTS TO MANDATE PROCEDURAL RULES

Two drivers were charged with separate DUI offenses. Each requested administrative hearings on the revocation of their driver's licenses. Following the administrative hearings, a DMV hearing examiner prepared orders dismissing the license revocations due to insufficient evidence. An attorney for the DMV reviewed the orders and determined that the hearing examiner's conclusions were erroneous, and drafted new orders mandating license revocation for the drivers. On appeal, the circuit court determined that the procedure utilized by the DMV in these cases was unconstitutional. The court further ordered that the DMV immediately cease the procedure, and that the DMV draft new regulations to be approved by the circuit court. The DMV, while not challenging the court's underlying conclusion that the procedure was unconstitutional, sought a writ of prohibition to prevent the enforcement of the other terms of the court's order.

Held: The Court agreed with the DMV that the circuit court had exceeded its authority under the Administrative Procedures Act, W. Va. Code § 29A-5-4 (1998). The Court held that this provision does not vest circuit courts with the authority to order an agency to cease certain practices or to direct an agency to draft new procedural rules. The Court stated that the circuit court's decision essentially amounted to extraordinary mandamus relief under the Act, which was held to be impermissible in *State ex rel. Stewart v. Alsop*, 207 W. Va. 430, 533 S.E. 2d 362 (2000).

Writ of Prohibition Granted.

- “GOOD-TIME” CREDITS – PAROLE ELIGIBILITY

Petitioner entered guilty pleas to two counts of first degree sexual assault for acts which occurred between 1985 and 1990. He was sentenced to 15 to 25 years imprisonment on each count, which the trial court ordered to be served consecutively. The Petitioner subsequently filed for post-conviction habeas corpus relief. The Petitioner asserted that under the sentence imposed by the trial court (effectively, a 30 to 50 year sentence), he would be eligible for release with “good-time” credits five years prior to his earliest parole eligibility date. The Petitioner asserted that this scenario presented an infringement of his constitutional rights of due process and equal protection, in that he would be denied an opportunity to appear before the Parole Board and demonstrate his compliance with the requirements of the parole system.

Held: The Court denied the Petitioner’s appeal, noting that (1) the Petitioner’s argument that he would be released with good-time credits five years prior to his parole eligibility date amounted to “speculation upon a contingency”, in that there was no assurance that the Petitioner would be entitled to all of the asserted good-time credits; (2) regardless of the Petitioner’s parole status, he would be required to comply with the Sexual Offender Act; and (3) potential action by the Governor in the form of executive clemency could impact the Petitioner’s status in terms of parole eligibility.

Affirmed.

- DUI- ADMINISTRATIVE PROCEEDINGS – ASSESSMENT OF COSTS

The appellant was arrested in February 2004 and charged with driving under the influence of alcohol. The appellant requested an administrative hearing of the DMV’s order revoking his driver’s license. The hearing was scheduled for October 4, 2004. On that date, the appellant appeared for the hearing along with his attorney and an expert witness from the state of Virginia. However, after waiting for several hours, the appellant was advised that the hearing was to be continued because the arresting officer (who had also been subpoenaed by the appellant) was unavailable due to a magistrate court hearing docket.

The appellant filed for a writ of prohibition and mandamus with the circuit court, which summarily denied the petition. The appellant appealed this decision.

The Court determined that the DMV had improperly continued the appellant’s hearing, and that this continuance had prejudiced the appellant because the appellant had expended a considerable amount of funds in preparation of the cancelled hearing.

The Court noted the plain language of Rules 3.8.1, et. seq. of W. Va. C.S.R. Sec. 91-1-3 permits continuances of administrative DMV hearings if (1) requested in writing at least five days prior to the scheduled hearing date, or (2) on less than five days notice if an “unexpected personal emergenc[y]” arises. The Court held that neither of these circumstances were applicable in the appellant’s case.

The Court noted that the record indicated (1) that the arresting officer had been notified on July 29, 2004 of numerous magistrate court hearings scheduled for October 4, 2004; (2) that the officer had been served with a subpoena for the DMV hearing on September 13, 2004; and (3) that the officer had apparently made no effort prior to the date of the DMV hearing to request a continuance of either the administrative or the magistrate court hearings.

The Court did not, however, dismiss the DMV revocation. The Court remanded the matter to the circuit court for an order requiring the DMV to pay the appellant's expert witness fees, attorney fees, and other travel costs incurred as a result of the aborted hearing.

Reversed and Remanded.

Petry v. Stump, Commissioner, No. 32886 (May 24, 2006)

- DUI – ADMINISTRATIVE PROCEEDINGS – DUE PROCESS VIOLATION

The Appellant was charged with DUI on November 20, 1998. He filed a timely request for an administrative hearing, which was conducted on February 16, 1999. The Division of Motor Vehicles (“DMV”) did not contact the Appellant with regard to this matter until April 23, 2003, when the Appellant was advised that his license was revoked based upon his guilty plea to the underlying DUI offense. The Appellant contested this finding, noting that he had not been convicted of DUI but of a reduced charge of reckless driving. The DMV accepted a corrected abstract of judgment and stayed further revocation, and also scheduled a second administrative hearing for March 7, 2005. The basis for the second hearing was apparently that the DMV had been unable to locate the tapes or any evidence from the February 1999 hearing. The Appellant filed for a writ of prohibition and mandamus and an application for a stay with the Kanawha County Circuit Court, which denied relief.

Held: The Court acknowledged the “important property interest inherent in driver’s licenses”, noting that it had previously concluded that such licenses are entitled to protection under the Due Process Clause of the West Virginia Constitution. Observing that “[d]ue process rights must be considered under our general rules concerning unreasonable delay,” the Court determined that the delay in this case was so egregious that it rose to the level of being “presumptively prejudicial”, and that the DMV had not rebutted the presumption.

The Court also acknowledged that the Appellant had demonstrated ample prejudice should another hearing be conducted, noting that the Appellant had incurred substantial costs in connection with the presentation of expert testimony and other evidence at the February 1999 hearing, and that much of this evidence had been lost by the DMV following the initial hearing.

Reversed and remanded.

State v. McCoy, No. 32860 (May 24, 2006)

- DEFENSES – RIGHT TO PRESENT ALTERNATIVE/INCONSISTENT DEFENSES

Appellant was indicted for first degree murder in connection with the shooting death of a Mr. Brooks, who had engaged the Appellant in a lengthy and violent feud. Mr. Brooks had shot and wounded the Appellant in an incident in 1996, and had physically assaulted the Appellant in 1998. Brooks had also, in a case of mistaken identity, assaulted the Appellant's brother during the summer of 2002. On the day of the killing, Brooks attempted to physically assault the Appellant, who was able to evade the assault. Later that same day, the Appellant saw Brooks in the vicinity of a friend's home and fired five shots at Brooks, three of which struck and killed him.

Prior to trial, the Appellant provided notice that he intended to assert an insanity defense. He also indicated that he would rely upon an alternative defense of self-defense. The trial court ruled that the Appellant could not present both defenses because they were inconsistent, and that the Appellant could not present testimony from witnesses as to

prior threats made by Brooks towards the Appellant. The Appellant was convicted of first degree murder and received a recommendation of mercy. On appeal, the Appellant asserted, *inter alia*, that the trial court had erred in refusing to permit him to put on evidence of self-defense, including lay witness testimony.

Held: The Court, in a case of first impression, held that a criminal defendant may present evidence of alternative defenses, even when such defenses may be inconsistent with one another. The Court noted that in *Mathews v. United States*, 485 U.S. 58, (1988), the United States Supreme Court held that “a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” The Court also cited cases from numerous jurisdictions, all of which had held that a defendant had the right to present alternative yet inconsistent defenses.

Accordingly, the Court determined that the trial court had erred in refusing the Appellant’s request to put on evidence of self-defense. The Court disregarded the State’s assertion that the rejected evidence would not have amounted to self-defense, noting that such evidence must be based upon evidence presented at trial and upon the weakness or strength of such evidence.

The Court also held that the trial court had abused its discretion by erroneously excluding testimony of lay witnesses which would have corroborated the Appellant’s insanity defense experts. The Court noted that because the State had attacked the credibility of the Appellant’s insanity experts, the Appellant should have been permitted to provide corroborating lay testimony of witnesses who had provided information to these experts.

Reversed and remanded.

Crouch v. DMV, No. 32843 (May 24, 2006)

- DUI- ADMINISTRATIVE PROCEEDINGS – ADMISSIBILITY OF STATEMENT OF ARRESTING OFFICER TO ESTABLISH JURISDICTION

Petitioner was arrested for DUI by an officer of the Mabscott Police Department. At an administrative hearing, the police officer testified to the facts of the Petitioner’s arrest, but failed to specifically state that the arrest had occurred within the officer’s jurisdiction, i.e., the Town of Mabscott. The Commissioner of the Division of Motor Vehicles (“DMV”) subsequently revoked the Petitioner’s license, finding, *inter alia*, that the arrest had occurred in the city limits of Mabscott. The Circuit Court of Raleigh County reversed this order, finding that no testimony had been offered as to whether the arresting officer had jurisdiction to arrest the Petitioner. The DMV appealed this order.

Held: The Court determined that the Commissioner had based his determination of proper jurisdiction on the written “Statement of Arresting Officer”, which had been submitted by the officer and which expressly stated that the arrest had occurred within the town limits of Mabscott. The Court noted that under West Virginia Code § 29A-5-2(b), “[a]ll evidence, including...documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case[.]”. The Court determined that under this statutory provision, the Commissioner could properly rely upon the “Statement of Arresting Officer”, along with the other relevant testimony of the police officer, to establish proper jurisdiction.

Reversed.

- ATTORNEYS – DISCIPLINE - RECIPROCAL SANCTIONS

Respondent held a law license in both the State of Colorado and the State of West Virginia. Disciplinary proceedings were initiated against the respondent in the State of Colorado, and were based upon numerous allegations of misconduct. Following a sanctions hearing, the Colorado Hearing Board ordered on July 10, 2001 that the respondent be disbarred. The respondent did not appeal this ruling.

The Office of Disciplinary Counsel initiated reciprocal disciplinary proceedings in West Virginia. Following a July 19, 2004 hearing, the Hearing Panel Subcommittee recommended annulment of the respondent's West Virginia law license.

Held: The Court noted initially that the respondent had failed to report his Colorado disbarment to the State of West Virginia, which the Court determined was a violation of Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure. The Court also rejected the claim that the Colorado disbarment procedure had violated the respondent's due process rights. The Court determined (1) that in appearing at the disciplinary proceedings in Colorado through counsel, the respondent had permitted disciplinary proceedings to continue; and (2) that the respondent had not asserted constitutional defects in the disciplinary procedures through the Colorado court system, which amounted to a waiver of his rights to assert these claims in West Virginia.

Holding that Rule 3.20 requires the imposition of the identical sanction imposed by Colorado, the Court held that the same sanction was mandated.

Law License Annulled.

State v. Ricketts, No. 32896 (June 8, 2006) (Per Curiam)

- EVIDENCE - RULE 404(B) – ADMISSIBILITY OF COLLATERAL CRIME EVIDENCE

Ricketts was charged with malicious wounding. Prior to trial, the State notified the defendant that it intended to introduce 404(b) evidence of a prior felony drug offense. The trial court ruled that the evidence was not admissible, but permitted the prosecuting attorney, during cross-examination of the defendant, to refer to the prior drug offense. Prior to deliberations, the trial court advised the jury to disregard this information. Ricketts was convicted of misdemeanor battery, and asserted on appeal that the trial court had erroneously permitted the State to delve into the 404(b) evidence.

Held: The trial court's admonishment to the jury did not remove the taint of the inadmissible evidence. The Court determined that the trial court's initial decision to prohibit the use of the 404(b) evidence was correct, and that the prosecution should not have been permitted to introduce the evidence during cross examination. The Court further determined that on retrial, Ricketts could not be tried for any offense greater than the offense of which he was convicted, i.e., misdemeanor battery.

Reversed and Remanded.

Pethel v. McBride, No. 32784 (June 8, 2006) (Benjamin, J.)

- INTERSTATE AGREEMENT ON DETAINERS – NATURE OF RIGHTS – JURISDICTION

While in custody in Ohio, Pethel was indicted for numerous offenses in West Virginia. After executing a demand for final disposition and after being transported to West Virginia for arraignment, Pethel was sent back to Ohio. Pethel requested dismissal of the WV charges due to a violation of the Interstate Agreement on Detainers (IAD). This motion was denied, and Pethel was subsequently convicted by a jury of numerous charges. Pethel also entered guilty pleas to other charges in the indictment. Pethel eventually filed for habeas corpus relief, and the circuit court, after a hearing, granted Pethel's motion and ordered dismissal of the charges. The State appealed this decision.

Held: The Court reversed the circuit court. In a number of new syllabus points, the Court held, *inter alia*, that (1) rights created under the IAD are statutory and not constitutional; (2) the IAD is not a jurisdictional statute, and that a defendant's guilty plea may waive all rights conferred under the Act; and (3) a violation of the IAD is not cognizable under the post-conviction habeas corpus statutes.

Reversed.

Lawyer Disciplinary Board v. McCorkle, No. 25321 (June 8, 2006)

- ATTORNEY DISCIPLINE – EFFECT OF PRIOR DISCIPLINE

Attorney was the subject of a two-count statement of charges, alleging (1) misrepresentation during an ethics complaint and in discovery requests, and (2) breach of fiduciary duty in connection with a trust agreement in which the attorney was the trustee. The Hearing Panel Subcommittee found that the charges were supported by clear and convincing evidence and recommended annulment of the attorney's law license. The recommended sanction was based primarily upon two prior, published disciplinary proceedings [*Committee on Legal Ethics v. McCorkle*, 192 W. Va. 286 (1994), and *Lawyer Disciplinary Board v. McCorkle*, 200 W. Va. 261 (1997)].

Held: The Court determined that (1) the allegations against the attorney were proven by clear and convincing evidence, and (2) the attorney's prior disciplinary record, which included a previous suspension, were sufficient aggravating factors to justify the annulment of the attorney's law license.

Law License Annulled.

State v. Bolen, No. 32887 (June 16, 2006) (Per Curiam)

- PROSECUTORIAL MISCONDUCT – REFERENCES TO RELIGIOUS BELIEFS OF VICTIM

The appellant was convicted in 2001 for allegedly sexually assaulting a neighbor between 1992 and 1993. At his trial, the prosecutor made numerous references to the alleged victim's desire to "get himself straight with God", and asserted that the victim was not lying to the jury because to do so would be contrary to his religious beliefs. The appellant asserted that these statements constituted impermissible vouching by the prosecutor for the credibility of the alleged victim.

Held: That the prosecutor’s statements were improper and amounted to prosecutorial misconduct. The Court noted that such statements are clearly inadmissible under Rule 610 of the Rules of Evidence and constituted plain error.

Reversed and Remanded.

In the Matter of Renewed Investigation of the State Police Crime Laboratory, Serology Division,
No. 32885 (June 16, 2006) (Maynard, J.)

- HABEAS CORPUS – NEW PROCEDURE TO CHALLENGE QUESTIONABLE SEROLOGY EVIDENCE

The Court reviewed the findings and recommendations of a special judge named to conduct a third investigation into the State Police Crime Laboratory’s Serology Division. This investigation resulted from previous findings of intentional and negligent misconduct on the part of Fred Zain and other serologists in the Crime Lab [See *Zain I*, 190 W. Va. 321 (1993) and *Zain II*, 191 W. Va. 224 (1994)], and continuing questions as to the accuracy and truthfulness of test results in other cases by Lab personnel other than Fred Zain.

Held: The Court adopted the findings of the special judge insofar as it found insufficient evidence of intentional misconduct by other serologists. However, due to “frequent and recurring errors”, the Court enacted a special habeas corpus procedure to be utilized by affected inmates who were convicted as a result of such serology testimony between 1979 and 1999.

Findings of Special Judge Adopted as Modified.

State v. Inscore, No. 32855 (June 26, 2006) (Starcher, J.)

- PROBATION REVOCATION – DETAINERS

Appellant was placed on probation in West Virginia, and was subsequently arrested and convicted in Virginia. By the time he was returned to West Virginia, his probation period had expired. Appellant moved for dismissal of a petition to revoke his probation, which was denied by the trial court, and the original sentence was imposed.

Held: That (1) a detainer based on a violation of probation is not included in the phrase “untried indictments, informations or complaints” within the meaning of the Agreement on Detainers; (2) W. Va. Code, §62-3-21 (the “three-term” rule) does not apply to Probation revocation proceedings, and (3) it is a sufficient exercise of due diligence for a prosecutor to invoke the detainer process, cause the issuance of bench warrants, and conduct a prompt revocation hearing following the conclusion of the sentence in the asylum state.

Affirmed.

Mathena, et. al., v. Haines, No. 32769 (June 26, 2006) (Starcher, J.)

- SELF-REPRESENTATION – ACCESS TO COURTS BY INMATES

Petitioner/Appellant Blake was among a group of inmates seeking redress through habeas corpus for conditions of confinement. Following dismissal of his action, Blake corresponded with a circuit clerk regarding a filing fee and advised the clerk that he hoped that it would “not be necessary for me to flood your office with additional motions

and litigation” concerning his case. Based on this letter, the circuit court entered an order enjoining Blake from filing any documents unless the documents were approved and signed by an attorney. Blake appealed this order.

Held: That the circuit court order effectively denied Blake his right of self-representation. The Court noted that while access to the courts is not unlimited and may be subject to reasonable limitations, Blake had not “engaged in a course of conduct which demonstrated a clear intention to obstruct the administration of justice.”

Affirmed in Part and Reversed in Part.

State ex rel. Shepard v. Holland, No. 32903 (June 29, 2006) (Per Curiam)

- INDICTMENT – SUFFICIENCY – EFFECT OF RELATED CIVIL PROCEEDINGS

The Petitioner was indicted for failing to meet child support obligations. He filed an original petition for writ of prohibition, arguing (1) that the indictment was too vague for him to properly ascertain the charges against him and formulate a defense, and (2) that a pending civil appeal regarding the propriety of a portion of the child support obligations created a lack of finality regarding his financial obligations.

Held: That (1) the indictment properly stated the elements of failing to meet an obligation to provide child support; and (2) that the civil appeal referenced by the Petitioner was addressed in *Hayhurst v. Shepard* (No. 32902, June 16, 2006), wherein the Court held that the Petitioner was not entitled to certain credits against the amounts allegedly owed.

Writ of Prohibition Denied.

Lawyer Disciplinary Board v. Ball, No. 31794 (June 15, 2005) (Davis, C.J.)

Lawyer Disciplinary Board v. Simmons, No. 32761 (June 29, 2006) (Per Curiam)

Lawyer Disciplinary Board v. Losch, No. 32554 (June 29, 2006)

- ATTORNEY DISCIPLINE – SANCTIONS

In a trio of attorney discipline cases, the Court addressed the issue of sanctions to be imposed upon sufficient proof of attorney misconduct.

In *Ball*, the Court rejected a restitution agreement between the attorney and the LDB. The attorney had committed a series of ethical violations regarding preparation of wills in which he and various family members received personal bequests and fees. The Court vehemently objected to the agreed-upon restitution amount of \$500,000, and ordered the attorney to repay over \$2,800,000 in fees obtained as a result of his preparation of the documents and other actions. The Court also rejected the recommended suspension of the lawyer’s license and ordered the annulment of the attorney’s license.

Law License Annulled.

In the *Simmons* case, the Court found that the attorney had failed to exercise reasonable diligence, failed to attend court hearings, failed to keep his clients reasonably informed about their cases, and failed to explain necessary matters for his clients to make informed decisions. The Court accepted recommended sanctions from a hearing panel, including a 20-day suspension, but modified the recommendations to include additional continuing legal education (CLE) in office management and ethics.

Recommendation Modified.

In the Losch case, the Court considered the attorney's objection to recommended sanctions for altering a suggestion from the circuit court of Nicholas County. The Hearing Panel recommended, *inter alia*, a 30-day suspension of the attorney's law license. The Court accepted the other recommended sanctions but reduced the 30-day suspension to a public reprimand, concluding that a suspension "would likely be more detrimental to the respondent's clients than punitive to the respondent."

Recommendation Modified.

State v. Mechling, No. 32873 (June 30, 2006) (Starcher, J.)

- CONFRONTATION CLAUSE – APPLICATION OF CRAWFORD V. WASHINGTON

The appellant was convicted of domestic battery. At trial, the alleged victim did not appear to testify. The state offered the testimony of two police officers and a neighbor, who testified that the alleged victim had told them that the appellant had struck her. On appeal, the appellant asserted a violation of his right of confrontation under the United States and West Virginia Constitutions.

Held: In a significant opinion, the Court recognized the application of Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 547 U.S. ___ (June 19, 2006). The Court determined that the statements offered by the alleged victim to the police officers upon their arrival at the home were clearly "testimonial", and thus fell under the prohibition set forth in Crawford and Davis. The Court emphasized that there was no "ongoing emergency" at the time the statements were made by the alleged victim, and "that the primary purpose of the [statements was] to establish or prove past events potentially relevant to later criminal prosecution."

Reversed and Remanded.

All cases may be viewed online at: [http://www.state.wv.us/wvsca/docs/Spring06/\(case#\).htm](http://www.state.wv.us/wvsca/docs/Spring06/(case#).htm)

WEST VIRGINIA LEGISLATURE
2006 REGULAR SESSION
Selected Bills Passed Both Houses

The 2006 Regular Session of the Legislature ended at midnight Saturday, March 11. The following selected bills passed both houses.

Full text of bills, a list of bills passed both houses and other information can be found at the legislative web site:
<http://www.legis.state.wv.us/>

When viewing or downloading bill text, be sure to view the *ENROLLED BILL*, which is the final version. (Copies of most of the selected bills listed below have been provided to each office).

Final enrolled bills do not have underscoring or strike-throughs so it is sometimes difficult to discern the changes these bills will make. You should not rely on this update as a substitute for your own careful reading and understanding of the bills.

The Child Protection Act of 2006 – H.B. 101 – An amended version of Legislation which failed to pass during the Regular 2006 session, this bill provides for increased criminal penalties for numerous sexual offenses. It also strengthens and expands several registration requirements under the Sex Offender Registration Act, amends requirements for post-release supervision of convicted sexual offenders, and creates a task force to study the feasibility of post-conviction civil commitment for sexual offenders. This bill passed June 14, 2006, was signed by the Governor on June 19, 2006 and goes into effect on October 1, 2006. For the full text of this bill, see http://www.legis.state.wv.us/Bill_Text_HTML/2006_SESSIONS/1x/BILLS/hb101%20ENR.htm.

A few highlights:

Abuse and Neglect - HB 4694 provides for consideration of factors associated with a battered parent in abuse and neglect cases. *The bill was passed March 11 and is in effect ninety days from passage.* It was approved by the Governor on April 4.

Community Corrections - SB 484 authorizes the use of community corrections programs in pretrial supervision. *The bill was passed March 9 and is in effect from passage.* It was approved by the Governor on April 4.

DUI - SB 353 authorizes DMV legislative rules amending, among other things, 91 CSR 5 to provide that “. . . a plea of nolo contendere stands as neither an admission of guilt nor a conviction for administrative revocation proceedings." *This bill was passed March 11 and is in effect from passage.* It was approved by the Governor on April 5.

This rule seems to be in response to and contravene *State ex rel. Stump v. Johnson*, 217 W.Va. 733, 619 S.E.2d 246 (2005) where the Court found a no contest plea to be a “conviction” for mandatory DUI license revocation.

Fees - SB 114, SB 480, HB 2329 and HB 4018 are fee bills. Some are effective from passage. See full list of selected bills below for more information.

Juvenile - HB 4683 establishes the right to trial by a twelve person jury when a juvenile is accused of acts of delinquency which constitute a crime if committed by an adult and which would subject an adult to incarceration; and eliminates the right to demand trial by jury for status offenses allegedly committed by a juvenile or where the court has ruled pre-trial that incarceration is not a possibility. *The bill was passed March 9 and is in effect ninety days from passage.* It was approved by the Governor April 3.

Mental Hygiene - SB 551 restricts involuntary commitment for addicted persons to those who, as a result of their addiction, are likely to cause serious harm to themselves or others; provides that probable cause hearings may occur in the county where a person is hospitalized; and allows the judicial hearing officer to: (1) use videoconferencing and telephonic technology; (2) permit persons hospitalized for addiction to be involuntarily hospitalized only until detoxification is accomplished; and (3) specify other alternative or modified procedures that are consistent with the article, guarantee due process and access to the least restrictive available treatment to prevent serious harm to self or others. *The bill was passed March 9 and is in effect ninety days from passage.* It was approved by the Governor on March 23.

Methamphetamine - SB 791 - clarifies that offenses and penalties for prohibited acts relating to controlled substances (W.Va. Code 60A-4-401) do not apply to ephedrine, pseudoephedrine or phenylpropanolamine and that the offenses and penalties for prohibited acts set forth in the provisions of W.Va. Code 60A-10 (Methamphetamine Lab Eradication Act) do apply; clarifies the reporting requirements for pharmacists and pharmacy technicians to report sales, transfers and distribution of certain substances containing ephedrine, pseudoephedrine and phenylpropanolamine to the Board of Pharmacy. *The bill was passed March 11 and is in effect ninety days from passage.* It was approved by the Governor on April 4.

Methamphetamine - SB 299 is a rules bill that, among other things, authorizes the Board of Pharmacy to promulgate a legislative rule relating to ephedrine and pseudoephedrine control. (15 CSR 11). See full list of selected bills below for more information on how to locate this rule. *The bill was passed March 11 and is in effect from passage.* It was approved by the Governor on April 4.

Parole - SB 166 increases the number of Parole Board members to nine, provides for the appointment of the chairperson by the Governor and provides for the consideration of parole and parole revocation by panels of the board. *The bill was passed March 11 and is in effect from passage.* It was approved by the Governor on April 4.

Racial Profiling - SB 299 is a rules bill that, among other things, establishes standards for the collection, reporting, compilation and analysis of data for the purpose of studying the possible practice of racial profiling by law enforcement. See full list of selected bills below for more information on this bill. *The bill was passed March 11 and is in effect from passage.* It was approved by the Governor on April 4.

Traffic law photo-monitoring devices - HB 4004 prohibits the use of a traffic law photo-monitoring device by police officers to detect traffic law violations and provides that evidence obtained by the use of a traffic law photo-monitoring device may not be used to prove such violation. *The bill was passed March 11 and is in effect ninety days from passage.* It was approved by the Governor March 31.

Selected Bills Passed

** In effect from passage.

SB 11 – relating generally to the appointment of judges and magistrates to fill vacancies; providing for an additional circuit court judge to be appointed to the twenty-third judicial circuit; and providing for the expeditious filling of judicial vacancies by limiting the time during which a challenge to an appointment may be instituted. Passed March 11, 2006; to take effect July 1, 2006. Approved by Gov. 4/3.

SB 13 - relating to requiring cross-reporting among child protective service workers, adult protective service workers, law-enforcement officers and humane officers of suspected child abuse or neglect, suspected abuse or neglect of incapacitated or elderly adults, suspected animal cruelty or inhumane treatment or suspected domestic violence; and providing penalties. Passed March 8, 2006; in effect ninety days from passage. Approved by Gov. 3/22.

SB 114 - relating to teen court programs; and allowing county commissions and city councils to assess fees of up to five dollars on persons convicted of felonies, misdemeanors or municipal ordinances to fund teen courts. Passed March 7, 2006; in effect ninety days from passage. Approved by Gov. 3/14.

****SB 166 – relating to the West Virginia Parole Board; providing for the appointment, powers and duties of the West Virginia Parole Board; providing for the appointment of the Chairperson of the West Virginia Parole Board by the Governor; providing for the consideration of parole and parole revocation by panels of the board; and providing for panels of the board to conduct parole interviews, consider parolees for discharge from parole and hold any other hearings authorized by the board.**

Passed March 11, 2006; in effect from passage. Approved by Gov. 4/4.

SB 219 - relating to graduated driver's licenses generally; changing the expiration for level one permits and level two licenses; prohibiting the use of a handheld wireless communication device while driving by a minor holding a level one instruction permit or a level two license; and providing penalties for such violations.

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 3/31.

**** SB 299 – Authorizing various executive or administrative agencies promulgate legislative rules.**

Passed March 11, 2006; in effect from passage. Approved by Gov. 4/4.

(**Note:** This rules bill, among other things,: (1) establishes standards for the collection, reporting, compilation and analysis of data, for the purpose of studying the possible practice of racial profiling by law enforcement. Beginning January 1, 2007, specific data collection is required each time a law-enforcement officer stops the operator of a motor vehicle for a violation of any motor vehicle statute or ordinance – (149 CSR 5). (The amendments to the authorized rule set forth in the enrolled bill seem to be the rule in its entirety); (2) authorizes the Board of Pharmacy to promulgate a legislative rule relating to ephedrine and pseudoephedrine control. (15 CSR 11). The bill authorizes the rule filed by the Board of Pharmacy on Oct. 11, 2005 which can be found at: <http://www.wvsos.com/adlaw/proposed/modified/modifiedrules.htm>)

**** SB 353 – Authorizing Department of Transportation promulgate legislative rules.**

Passed March 11, 2006; in effect from passage. Approved by Gov. 4/5.

(**Note:** this rules bill, among other things, authorizes the Division of Motor Vehicles to promulgate legislative rules relating to denial, suspension, revocation, restriction or nonrenewal of driving privileges. Among other things, the bill amends 91 CSR 5 to provide that “. . . a plea of nolo contendere stands as neither an admission of guilt nor a conviction for administrative revocation proceedings.”)

SB 473 - relating to creating the criminal offense of reckless driving causing serious bodily injury; defining serious bodily injury; and penalties.

Passed March 9, 2006; to take effect July 1, 2006. Approved by Gov. 3/23.

****SB 480 - relating to increasing the amount of time to pay costs of criminal proceedings.**

Passed March 11, 2006; in effect from passage. Approved by Gov. 4/4.

****SB 481 - relating to domestic violence protective orders served on persons out-of-state having the same force and effect as those served in-state.**

Passed March 8, 2006; in effect from passage. Approved by Gov. 3/23.

****SB 483 - relating to confidentiality of circuit court records involving guardianship of minors.**

Passed March 11, 2006; in effect from passage. Approved by Gov. 4/4.

****SB 484 - relating to authorizing the use of community corrections programs in pretrial supervision.**

Passed March 9, 2006; in effect from passage. Approved by Gov. 4/4.

****SB 517 - relating to juvenile proceedings and multidisciplinary teams; requiring the Division of Juvenile Services to establish a multidisciplinary team treatment planning process for certain juveniles in its custody; requiring multidisciplinary team to be convened and directed by the Division of Juvenile Services for juveniles committed to its custody by the court for examination and diagnosis; specifying members of the multidisciplinary team; requiring multidisciplinary team to be convened for juveniles prior to discharge from a juvenile correctional facility; authorizing those who convene a multidisciplinary team meeting to obtain an order of the circuit court setting a hearing and compelling attendance; and exceptions to team meeting requirement.**

Passed March 11, 2006; in effect from passage. Approved by Gov. 4/4.

SB 551 - relating to institution of proceedings for involuntary custody for examination; addressing procedures regarding custody, probable cause and other hearings; examination of individuals; admission under involuntary hospitalization for examination; release; institution of final commitment proceedings; other hearing requirements; and defining terms.

Passed March 9, 2006; in effect ninety days from passage. Approved by Gov. 3/23.

(Note: this bill restricts involuntary commitment for addicted persons to those who, as a result of their addiction, are likely to cause serious harm to themselves or others; provides that probable cause hearings may occur in the county where a person is hospitalized; and allows the judicial hearing officer to: (1) use videoconferencing and telephonic technology; (2) permit persons hospitalized for addiction to be involuntarily hospitalized only until detoxification is accomplished; and (3) specify other alternative or modified procedures that are consistent with the article, guarantee due process and access to the least restrictive available treatment to prevent serious harm to self or others.)

SB 554 - relating to clarification of permissible expenditures from the Forensic Medical Examination Fund

Passed March 10, 2006; in effect ninety days from passage. Approved by Gov. 3/31.

(Note: to train nurses to examine sexual assault victims).

SB 566 - relating to increasing the maximum payment for crime scene cleanup costs involving real property damaged by a methamphetamine laboratory; redefining claimant to include as a victim the owner of real property damaged by a methamphetamine laboratory; amending exclusions for motor vehicle claims to include instances in which a third party leaves the scene of the accident; redefining work loss to include the loss of income from work by a parent or guardian of a minor child who was the victim of a crime; redefining allowable expense to include reasonable travel expenses for out-of-state travel to return a minor or incapacitated adult who has been unlawfully taken from the state; specifying the maximum amounts for such travel expenses; imposing certain duties and restrictions on health care providers that file an assignment of benefits with the court; and tolling of statute of limitations to collect unpaid medical bills until the claim is processed by the court.

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 4/5.

SB 631 - relating to process, service and parties charged in summons or warrants for violations of compulsory school attendance; authorizing charge of more than one parent, custodian or guardian in single complaint; and continuing attempts to serve until executed or end of school term.

Passed March 9, 2006; in effect ninety days from passage. Approved by Gov. 3/23.

SB 791 - relating to ephedrine, pseudoephedrine and phenylpropanolamine; clarifying that offenses and penalties for prohibited acts relating to controlled substances do not apply to ephedrine, pseudoephedrine or phenylpropanolamine; clarifying that the offenses and penalties for prohibited acts set forth in the provisions of article ten of said chapter are applicable to ephedrine, pseudoephedrine and phenylpropanolamine; clarifying the reporting requirements requiring pharmacists and pharmacy technicians to report sales, transfers and

distribution of certain substances containing ephedrine, pseudoephedrine and phenylpropanolamine to the Board of Pharmacy ; and providing for the methods of reporting the information required to be reported.

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 4/4.

HB 2118 - *relating to forfeiture of bail bond for failure of a defendant to appear in court; providing for reimbursement to the bail bondsman for the amount of the forfeited bond if the bail bondsman later returns the bonded person to the custody of court; and authorizing the Administrator of the West Virginia Supreme Court to oversee bondsmen and audit, review and suspend bondsmen who have insufficient assets.*

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 3/28.

HB 2329 - *relating to authorizing a court to (in addition to or in lieu of restitution) order a defendant to contribute monetarily or through hours of service to a local crime victim's assistance program or juvenile mediation program which meets certain requirements.*

Passed March 10, 2006; in effect ninety days from passage. Approved by Gov. 3/28.

HB 3213 - *relating to creating crimes against common carriers and providing penalties.*

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 3/30.

HB 4004 - *relating to prohibiting the use of a traffic law photo-monitoring device by police officers to detect traffic law violations; defining "traffic law photo-monitoring device"; providing that evidence obtained by the use of a traffic law photo-monitoring device may not be used to prove a violation of a traffic law; providing that this section does not prohibit the use of microwave devices to prove the speed of a motor vehicle in violation of a traffic law; and providing that evidence obtained by the use of a traffic law photo-monitoring device may be used for other lawful purposes.*

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 3/31.

****HB 4018** - *all relating to the community corrections subcommittee of the Governor's Committee on Crime, Delinquency and Correction; meetings; funding.*

Passed March 10, 2006; in effect from passage. Approved by Gov. 3/30.

(**Note:** *this bill increases by \$5 the not more than \$30 fee from probationers for the WV Community Corrections Fund and increases from \$3 to \$10 the fee allowed to be taxed against a criminal defendant in addition to the usual court costs).*

HB 4036 - *relating to creating the offense of solicitation to commit a felony crime of violence against the person; defining terms; penalties; and defenses.*

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 3/31.

**** HB 4192** – *Authorizing the Department of Military Affairs and Public Safety to promulgate legislative rules.*

Passed March 11, 2006; in effect from passage. Approved by Gov. 4/4.

(**Note:** *This rules bill, among other things, authorizes the State Police to promulgate a legislative rule relating to the West Virginia State Police Grievance Procedure.*)

HB 4313 - *relating to petitions of appeal of domestic violence protective orders.*

Passed March 10, 2006; in effect ninety days from passage. Approved by Gov. 4/4.

(**Note:** *any party who alleges they will be adversely affected or aggrieved by a final protective order or the denial or dismissal of a petition for a protective order may file a petition for appeal).*

HB 4355 - *relating to custody by law-enforcement officials of juveniles who are respondents in an emergency*

protective order in which the petitioner resides with the juvenile respondent.

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 4/4.

HB 4386 - relating to ratifying the National Crime Prevention and Privacy Compact.

Passed March 10, 2006, in effect ninety days from passage. Approved by Gov. 4/4.

(Note: The stated purpose of the bill is to join twenty-one other states in ratifying the National Crime Prevention and Privacy Compact to streamline the transfer of criminal history records for noncriminal purposes between states that ratify the compact.)

HB 4453 - relating to law-enforcement powers and duties of conservation officers; providing for the state-wide authority of conservation officers to enforce litter control laws; providing for conservation officer's authority to initiate complaint for violations of laws related to wildlife, forests and natural resources; and relating to the procurement and execution of related arrest and search warrants.

Passed March 10, 2006; in effect from ninety days from passage. Approved by Gov. 3/31.

HB 4588 - relating to creating a crime for concealing a deceased human body; exceptions; defense of affirmatively informing law enforcement; and prescribing penalties.

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 3/31.

HB 4683 - relating to jury trials in juvenile proceedings; establishing the right to trial by a twelve person jury when a juvenile is accused of acts of juvenile delinquency which constitute a crime if committed by an adult which would subject an adult to incarceration; and eliminating the right to demand trial by jury for status offenses allegedly committed by a juvenile or where the court has ruled pre-trial that incarceration is not a possibility.

Passed March 9, 2006; in effect ninety days from passage. Approved by Gov. 4/3.

HB 4694 - relating to abuse and neglect of children; definition of battered parent; consideration of factors associated with a battered parent in abuse and neglect cases; petition to court; battered parent entitled to an attorney; court determination of battered parent; providing treatment and assistance for battered parent; consideration of acts or attempted acts of murder, voluntary manslaughter or unlawful or malicious wounding with serious injury by one parent against other parent in abuse and neglect cases; considering aggravating circumstances of abuse, neglect or violent acts of parent in temporary and permanent custody determinations when the acts are committed against the other parent; considering aggravating circumstances of abuse, neglect or violent acts of parent in temporary and permanent custody determinations when the acts are committed or against other children in the household or other children under the parent's care or custody; department's obligation to attempt to preserve the family when aggravating circumstances exist; and definitions.

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 4/4.

HB 4790 - relating to prescribing and modifying the duties of the Secretary of the Department of Health and Human Resources in child welfare placement; relating to authority to promulgate emergency rules providing for voluntary registration of relative family child care homes and informal family child care homes; defining terms; updating statutory language; providing for a time study by the Department of Health and Human Resources; modifying requirements related to child care placement in certain homes or facilities; and repealing the section of the code concerning the establishment of pilot day care programs.

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 4/3.

HB 4854 - relating to allowing expert opinions of licensed psychologists with at least five years clinical experience in treatment and evaluation of children; and taking testimony of child witness through use of live two-way closed circuit television.

Passed March 11, 2006; in effect ninety days from passage. Approved by Gov. 4/3.

UPCOMING CLE PROGRAM

AVOIDING TRIAL BY AMBUSH: TAKING ADVANTAGE OF THE LATEST FAVORABLE DEVELOPMENTS IN THE LAW OF BRADY MATERIAL AND CRAWFORD LITIGATION

REGISTRATION BROCHURES WILL BE COMING TO YOU SOON FOR:

Tuesday, October 10, 2006
Tentatively 9:00 A.M. – 4:00 P.M.
Oglebay Resort and Conference Center, Wheeling, West Virginia

or

Tuesday, November 28, 2006
Tentatively 9:00 A.M. – 4:00 P.M.
Tamarack, Beckley, West Virginia

During the past few months there have been major decisions by the U.S. Supreme Court and the West Virginia Supreme Court of Appeals that directly affect our everyday practice of criminal defense in the West Virginia Courts. These are not theoretical or obscure opinions -- they really will change the way many of our cases will now be treated.

In the first of these decisions, Youngblood v. West Virginia, the Court explicitly rejected the way our state courts and prosecutors have been dealing with disclosure of Brady material. In the second series of cases, Davis v. Washington and State v. Mechling, the courts have confirmed interpretations of Crawford that are both fair and very useful to the defense of our clients, particularly in domestic battery cases, and cases involving 911 calls.

During the first portion of this program we will address the Brady issues, focusing on nuts and bolts ways for us to raise Brady issues and make sure (1) that we receive all exculpatory evidence, and (2) that we receive it in time to use it at trial.

During the second portion of the program we will work on the most recent developments in Crawford. Again, the session will be oriented to the most practical of concerns – how we can actually use the new Crawford decision to keep out the most prejudicial hearsay and prevent trials in which the key witnesses never testify.

Please contact Erin Akers at (304) 558-3905 to register for either of these sessions.

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