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

For the past two years (FY 2004 and 2005) this agency has paid private counsel vouchers with no interruptions. Unlike the many past years wherein funds were not available for months at a time, we have had sufficient funds to continue payments.

However, the cuts we have endured over the past five years have created an under-funding that continues to roll from year to year. If one assumes that indigent defense costs cannot be less than $27,000,000 per year, then Public Defender Services has been under-funded by $8,000,000 from FY 2001 through FY 2005, even after a $4,000,000 supplemental appropriation in FY 2004.

Perversely, we are also chronically late in paying. The supplemental did not become available for expenditure until May, 2004. Due to limited staff and the lateness during the fiscal year, much of that appropriation carried over into FY 2005. But despite spending more than $15.7 million in FY 2005, accrued liability as of the end of the fiscal year was still estimated at over $6,000,000. Since this estimate is based on a survey of payees which includes work in progress, a more conservative current deficit estimate is $5,000,000.

This amount has been requested as a supplemental appropriation for this fiscal year. In addition, regular FY 2007 budget requests are predicated on the granting of the supplemental; without a supplemental, then the amount for FY 2007 must be proportionately greater.

In the short term, we are doing everything we can to process vouchers more efficiently. We are making progress but the desired turnaround time of five working days (which we once were able to do) still eludes us. Thank you for your patience during this unusual time. I suggest that you explain to legislators the need for more funding in preparation for the 2006 Regular Session.

DUI Law Ruled Unconstitutional

Va. Presumes Guilt If Blood-Alcohol Level is 0.08, a Judge Says

August 12, 2005
The Associated Press
By Matthew Barakat

McLEAN -- A Fairfax County judge has ruled that key components of Virginia's drunken-driving laws are unconstitutional, citing an obscure, decades-old U.S. Supreme Court decision that could prompt similar challenges nationwide. Virginia's law is unconstitutional because it presumes that an individual with a blood-alcohol content of 0.08 or higher is intoxicated, denying a defendant's right to a presumption of innocence, Judge Ian O'Flaherty ruled in dismissing charges against at least two alleged drunken drivers last month.

As a district judge, O'Flaherty's rulings do not establish any formal precedent, but word of the constitutional argument is spreading quickly among the defense bar. Every state has similar presumptions about intoxication at a 0.08 blood-alcohol level, so defense lawyers across the nation are likely to make similar arguments. "I am sure there will be lawyers out in the field making similar arguments tomorrow," Steven Oberman, chairman of the DUI defense committee at the National Association of Criminal Defense Lawyers, said in a telephone interview yesterday.

Del. David B. Albo, R-Fairfax, a defense lawyer who often practices in Fairfax, said he disagrees with O'Flaherty's ruling and sees no difference between a presumption of intoxication at 0.08 and a presumption of speeding at 80 mph. He said he did not see any reason to change Virginia's drunken-driving laws. "So far not a single judge in Virginia has ruled the same way," he said. "It's just one judge."

Corinne Magee, a McLean defense lawyer who successfully argued the issue to O'Flaherty, said the judge's ruling is based on a 1985 U.S. Supreme Court case called Francis v. Franklin, which deals with prosecutors' obligation to prove all elements of a crime beyond a reasonable doubt. Magee said she came across the Francis case doing research on another case and realized it might apply to Virginia's drunken-driving laws. "Frankly, I was surprised" that the judge dismissed the case based on her constitutional arguments, Magee said yesterday. “But I think Judge O'Flaherty's ruling is based on a very solid reading of this case.” She said Virginia's law is problematic not just because of the presumption of intoxication at 0.08, but also a presumption in the law that the blood-alcohol level at the time the test is taken is equal to the level at the time of the offense, even if the test occurs hours after police make a stop. Magee said a person's blood-alcohol level can fluctuate up or down depending on when a person had their last drink and how their body metabolizes alcohol.

Prosecutors are now taking steps to avoid O'Flaherty on all drunken-driving cases, withdrawing cases assigned to him and instead obtaining indictments that send the cases directly to Circuit Court. Prosecutors cannot appeal cases dismissed by a district court judge, but could appeal if a circuit judge makes a similar ruling. Fairfax County Commonwealth's Attorney Robert F. Horan Jr. did not return phone calls seeking comment yesterday.

Patrick O'Connor, president of the Northern Virginia chapter of Mothers Against Drunk Driving, said O'Flaherty's decision "undermines the efforts of the police and prosecutors to enforce the DUI laws, puts drunk drivers back behind the wheel and potentially denies justice to victims of drunk drivers." He has requested a meeting with the judge. O'Flaherty, who has a reputation as a fairly tough judge among defense lawyers, turned down a request for an interview. Rulings in District Court are made orally, so there is no written ruling outlining his rationale. Oberman said laws establishing a presumption of intoxication at 0.08 blood-alcohol level have been upheld in the past, but a new challenge like the one raised by Magee provides an opportunity to revisit the issue in a different context. He said the argument's potential effectiveness will vary from state to state based on the exact wording of the DUI laws and other factors.

Deck v. Missouri, (No. 04-5293, May 23) (Breyer, J)

- **Visible shackling of defendant during penalty phase of capital case violated due process**

Petitioner was convicted of capital murder and sentenced to death. The Missouri Supreme Court upheld his conviction but set aside the sentence and a new sentencing proceeding was held. The penalty phase proceeded with the petitioner shackled with leg irons, handcuffs, and a belly chain. Counsel's multiple objections to the restraints were overruled and petitioner was again sentenced to death. On appeal, petitioner claimed that his shackling violated both Missouri law and the Federal Constitution. The Missouri Supreme Court rejected these claims.

Certiorari was granted and the Supreme Court considered whether shackling a convicted offender during the penalty phase of a capital case violates the Federal Constitution.

Held: the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is "justified by an essential state interest"--such as the interest in courtroom security-- specific to the defendant on trial. Where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict.

Reversed and remanded.

Arthur Andersen LLP v. United States, (No. 04-368, May 31) (Rehnquist, C.J.)

- **Jury instructions failed to properly convey elements of offense charged**

As Enron Corporation's financial difficulties became public in 2001, petitioner Arthur Andersen LLP, Enron's auditor, instructed its employees to destroy documents pursuant to its document retention policy. A jury found that this action made petitioner guilty of violating 18 U.S.C. 1512(b)(2)(A) and (B). These sections make it a crime to "knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person … with intent to … cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding."

The Court of Appeals for the Fifth Circuit affirmed holding that the jury instructions properly conveyed the meaning of "corruptly persuades" and "official proceeding"; that the jury need not find any consciousness of wrongdoing; and that there was no reversible error. Certiorari was granted.

Held: the jury instructions failed to convey properly the elements of a "corrup[t] persuas[ion]" conviction under §1512(b).

Reversed.

The Court found the jury instructions failed to convey the requisite consciousness of wrongdoing and found it striking how little culpability the instructions required. For example, the jury was told that, "even if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty." The Court found the instructions also diluted the meaning of "corruptly" so that it covered innocent conduct. The instructions required no type of "dishonest[y]" necessary to a finding of guilt, and it was enough for petitioner to have simply "impede[d]" the Government's fact finding ability. The Court found the instructions were also infirm because they led the jury to believe that it did not have to find any nexus between the "persua[sion]" to destroy documents and any particular proceeding. A "knowingly … corrup[t] persaude[r]" cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.

Reversed and remanded.

Cutter v. Wilkinson, 125 S.Ct. 2113 (2005) (Ginsburg, J.)

- **Section of Religious Land Use and Institutionalized Persons Act increasing level of protection of prisoners' and other incarcerated persons' religious rights did not violate Establishment Clause**

Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 804, 42 U.S.C. 2000 1(a)(1)-(2), provides in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." Plaintiffs below, petitioners here, are current and former inmates of institutions operated by the Ohio Department of Rehabilitation and Correction and assert that they are adherents of "non-mainstream" religions: the Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian. They complain that respondents, Ohio prison officials, in violation of RLUIPA, have failed to accommodate their religious exercise "in a variety of different ways, including retaliating and discriminating against them for exercising their nontraditional faiths, denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to provide a chaplain trained in their faith."

In response to the complaints, respondents mounted a facial challenge to the institutionalized-persons provision of RLUIPA contending, inter alia, that the Act improperly advances religion in violation of the First Amendment's Establishment Clause. The District Court denied respondents' motion to dismiss the complaints, but the Court of Appeals reversed that determination. The appeals court held that the portion of RLUIPA applicable to institutionalized persons violates the Establishment Clause.

Held: reversed. The Court noted its long recognition that the government may accommodate religious practices without violating the Establishment Clause and also noted its recognition that at some point, accommodation may devolve into an unlawful fostering of religion. The Court held that section 3 of RLUIPA at issue does not, on its face, exceed the limits of permissible government accommodation of religious practices.

Gonzales v. Raich, 125 S.Ct. 2195 (2005) (Stevens, J.)

- **Medical Marijuana - Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law**

California is one of at least nine States that authorize the use of marijuana for medicinal purposes. The question presented is whether the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all

Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

Held: Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law. The Controlled Substances Act is a valid exercise of federal power, even as applied to the troubling facts of this case.

Wilkinson v. Austin, 125 S.Ct. 2384 (2005) (Kennedy, J.)

- **Due Process - the procedures Ohio has adopted in classifying prisoners for placement at its highest security prison provide sufficient procedural protection to comply with due process requirements.**

This case involves the process by which Ohio classifies prisoners for placement at its highest security prison, known as a "Supermax" facility. Supermax facilities are maximum-security prisons with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population. At issue is what process the Fourteenth Amendment requires Ohio to afford to inmates before assigning them to Supermax.

Held: the procedures Ohio has adopted provide sufficient procedural protection to comply with due process requirements.

Miller-El v. Dretke, 125 S.Ct. 2317 (2005) (Souter, J.)

- **Batson challenge upheld**

During jury selection in Miller-El's trial for capital murder, prosecutors used peremptory strikes against 10 qualified black venire members. Miller-El objected that the strikes were based on race and could not be presumed legitimate, given a history of excluding black members from criminal juries by the Dallas County District Attorney's Office. The trial court received evidence of the practice alleged but found no "systematic exclusion of blacks as a matter of policy" by that office, and therefore no entitlement to relief under Swain v. Alabama, 380 U.S. 202 (1965), the case then defining and marking the limits of relief from racially biased jury selection. The court denied Miller-El's request to pick a new jury, and the trial ended with his death sentence for capital murder.

While an appeal was pending, Batson v. Kentucky, 476 U.S. 79 (1986) was decided, which replaced Swain's threshold requirement to prove systemic discrimination under a Fourteenth Amendment jury claim, with the rule that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish the constitutional violation. The Texas Court of Criminal Appeals then remanded the matter to the trial court to determine whether Miller-El could show that prosecutors in his case peremptorily struck prospective black jurors because of race.

The trial court found no such demonstration. After reviewing the voir dire record of the explanations given for some of the challenged strikes, and after hearing one of the prosecutors give his justification for those previously unexplained, the trial court accepted the stated race-neutral reasons for the strikes. The Court of Criminal Appeals affirmed, stating it found "ample support" in the voir dire record for the race-neutral explanations offered by prosecutors for the peremptory strikes.

Miller-El then sought habeas relief under 28 U.S.C. § 2254 again pressing his Batson claim, among others. The District Court denied relief and the Court of Appeals for the Fifth Circuit precluded appeal by denying a certificate of appealability. Certiorari was granted to consider whether Miller-El was entitled to review on the Batson claim and the Supreme Court reversed the Court of Appeals. After examining the record of Miller-El's extensive evidence of purposeful discrimination by the Dallas County District Attorney's Office before and during his trial, the Court found an appeal was in order, since the merits of the Batson claim were, at the least, debatable by jurists of reason. 537 U.S. 322 (2003). After granting a certificate of appealability, the Fifth Circuit rejected Miller-El's Batson claim on the merits. Certiorari was again granted.

Held: reversed. The Court held Miller-El is entitled to prevail on his Batson claim and is entitled to habeas relief. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venie members. In addition to bare statistics, the Court did a side-by-side comparison of some black venire panelists who were struck; looked to the prosecutor's resort to a procedure known as the jury shuffle; and looked at disparate voir dire questions posed to black and non-black panel members into views on the death penalty and about minimum acceptable sentences. The Court also found the appearance of discrimination confirmed by widely known evidence of the general policy of the office to exclude black venire members from juries at the time Miller-El's jury was selected.

Bradshaw v. Stumpf, 125 S.Ct. 2398 (2005) (O'Connor, J.)

- **Guilty plea found valid; Court defers judgment on whether Due Process violated by imposition of death penalty where prosecutors relied on inconsistent factual theories to obtain convictions against multiple defendants in separate trials and sentencing panel imposing the death penalty found petitioner was principal offender**

This case concerns respondent's conviction and death sentence for murder. The United States Court of Appeals for the Sixth Circuit granted respondent relief in habeas on two grounds: that his guilty plea was not knowing, voluntary, and intelligent, and that his conviction and sentence could not stand because the State, in a later trial of respondent's accomplice, pursued a theory of the case inconsistent with the theory it had advanced in respondent's case.

Respondent and his accomplice committed an armed robbery that left one wounded and one dead. He plead guilty to aggravated murder and attempted aggravated murder. A contested penalty hearing was held. Respondent's mitigation case was based in part on his difficult childhood, limited education, dependable work history, youth, and lack of prior serious offenses. His principal argument, however, was that he had participated in the plot only at the urging and under the influence of the accomplice, that it was the accomplice who had fired the fatal shots, and that his assertedly minor role in the murder counseled against the death sentence. The State argued that respondent had fired the shot and also noted that Ohio law did not restrict the death penalty to those who commit murder by their own hands--an accomplice to murder could also receive the death penalty, so long as he acted with the specific intent to cause death. The State argued respondent deserved death even if he had not personally shot the victim, because the circumstances of the robbery provided a basis from which to infer respondent's intent to cause death. The three-judge panel specifically found that respondent "was the principal offender" in the aggravated murder. Determining that the aggravating factors outweighed any mitigating factors, the panel sentenced respondent to death.

At the accomplice's subsequent jury trial, the State (same prosecutor) presented evidence that the accomplice had admitted to the killing and deserved to be put to death. The accomplice countered this argument in part by noting that the prosecutor had taken a contrary position in respondent's trial, and that respondent had already been sentenced to death for the crime. The accomplice testified that respondent fired the fatal shot. The accomplice was sentenced to life imprisonment with the possibility of parole after 20 years.

After the accomplice's trial, the respondent moved to withdraw his plea or vacate his death sentence on the ground that the evidence endorsed by the State in the accomplice's trial cast doubt on respondent's conviction and sentence. The prosecutor emphasized other evidence confirming the respondent as the shooter and, in the alternative, again raised the aider and abettor theory. The motion was denied, the Ohio appellate courts affirmed and the Federal District Court denied habeas relief. The Sixth Circuit, however, reversed on two grounds: 1. that the respondent's plea had not been knowingly and intelligently entered. The court concluded respondent plead without understanding that specific intent to cause death was a necessary element of the charge; and 2. the respondent's due process rights were violated by the State's deliberate action in securing convictions of both respondent and the accomplice for the same crime using inconsistent theories.

Held: The Court of Appeals erred in concluding that respondent was uninformed about the nature of the charge he pleaded guilty to, and the Supreme Court reversed that portion of the judgment below. The Court found respondent's guilty plea would indeed be invalid if he had not been aware of the nature of the charges against him, including the elements of the aggravated murder charge to which he pleaded guilty. The Court found the Court of Appeals erred in finding that respondent had not been properly informed before pleading guilty. In respondent's plea hearing, his attorneys represented on the record that they had explained to their client the elements of the aggravated murder charge; respondent then confirmed that this representation was true. The Court found while the court taking a defendant's plea is responsible for ensuring "a record adequate for any review that may be later sought," Boykin v. Alabama, 395 U.S. 238 (1969), they have never held that the judge must himself explain the elements of each charge to the defendant on the record. Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel. The Court found where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.

The Court found the Court of Appeals was also wrong to hold that prosecutorial inconsistencies between the two cases required voiding respondent's guilty plea. The Court found the prosecutor's use of allegedly inconsistent theories may have a more direct effect on respondent's sentence, however, for it is at least arguable that the sentencing panel's conclusion about respondent's principal role in the offense was material to its sentencing determination. The Court found the opinion below leaves some ambiguity as to the overlap between how the lower court resolved respondent's due process challenge to his conviction, and how it resolved his challenge to his sentence. The Court found it would be premature to resolve the merits of respondent's sentencing claim, and therefore expressed no opinion on whether the prosecutor's actions amounted to a due process violation, or whether any such violation would have been prejudicial. The Court vacated the portion of the judgment below relating to respondent's prosecutorial inconsistency claim and remanded the case for further proceedings.

Johnson v. California, 125 S.Ct. 2410 (2005) (Stevens, J.)

- **Batson challenges - California's "more likely than not" standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case.**

The issue in this case concerns the scope of the first of three steps enumerated in Batson v. Kentucky, 476 U.S. 79 (1986) which together guide trial courts' constitutional review of peremptory strikes. First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination."

The question here is whether Batson permits California to require at step one that "the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias."

Held: although the Court recognized that States do have flexibility in formulating appropriate procedures to comply with Batson, the Court concluded that California's "more likely than not" standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case.

Dodd v. United States, 125 S.Ct. 2478 (2005) (O'Connor, J.)

- **One-year limitation period for federal prisoner to file motion to vacate, set aside, or correct sentence ran from the date on which the Supreme Court initially recognized the right asserted, not from the date on which the right asserted was made retroactive**

Title 28 U.S.C. § 2255 establishes a "1-year period of limitation" within which a federal prisoner may file a motion to vacate, set aside, or correct his sentence under that section. That period runs from "the latest" of a number of events. This case involves subparagraph (3), which provides that the limitation period begins to run on "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." At issue is whether the date from which the limitation period begins to run under ¶ 6(3) is the date on which this Court "initially recognized" the right asserted in the motion, or whether, instead, it is the date on which the right is "made retroactiv[e]."

Petitioner was convicted of knowingly and intentionally engaging in a continuing criminal enterprise and other offenses. More than three years after his conviction became final, he filed a pro se motion under 28 U.S.C. § 2255 seeking to set aside his conviction based on Richardson v. United States, 526 U.S. 813 (1999) which held that a jury must agree unanimously that a defendant is guilty of each of the specific violations that together constitute the continuing criminal enterprise. The District Court dismissed the motion as time barred because Richardson had been decided more than one year before petitioner filed his motion. It also rejected his request for equitable tolling.

Petitioner appealed, arguing that the limitation period in § 2255, ¶ 6(3), did not begin to run until the Court of Appeals for the Eleventh Circuit held in Ross v. United States, 289 F.3d 677 that the right recognized in Richardson applies retroactively to cases on collateral review. The Eleventh Circuit held that the limitation period began to run on "the date the Supreme Court initially recognizes the right"--the date Richardson was decided--and accordingly affirmed the dismissal of the motion as time barred.

Held: affirmed. The one-year limitation period ran from the date on which the Supreme Court initially recognized the right asserted, not from the date on which the right asserted was made retroactively applicable.

Rompilla v. Beard, 125 S.Ct. 2456 (2005) (Souter, J.)

- **Ineffective Assistance of Counsel**

Even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.

Petitioner was charged with murder and other offenses and the death penalty was sought. He was convicted on all counts. At the penalty phase, the Commonwealth sought to prove three aggravating factors, one of which was that petitioner had a significant history of felony convictions indicating the use of threat of violence. Petitioner put on evidence in mitigation - family members argued in effect for residual doubt and asked for mercy and his 14 year old son testified that he loved his father and would visit him in prison. The jury sentenced petitioner to death. The Supreme Court of Pennsylvania affirmed both conviction and sentence. In state post-conviction proceedings, petitioner alleged his trial counsel were ineffective in failing to present significant mitigating evidence about his childhood, mental capacity and health, and alcoholism. The post-conviction trial court denied relief and the Supreme Court of Pennsylvania affirmed.

Petitioner petitioned for a writ of habeas corpus in Federal District Court raising claims that included inadequate representation. The District Court found that the State Supreme Court had unreasonably applied Strickland v. Washington as to the penalty phase and granted relief for ineffective assistance of counsel. The District Court found that in preparing the mitigation case, the defense lawyers had failed to investigate "pretty obvious signs" that petitioner had a troubled childhood and suffered from mental illness and alcoholism and instead had relied unjustifiably on petitioner's own description of an unexceptional background.

A divided Third Circuit panel reversed finding nothing unreasonable in the state court's application of Strickland given defense counsel's efforts to uncover mitigation material which included interviewing the petitioner and certain family members, as well as consultation with three mental health experts. Although the majority noted that the lawyers did not unearth the "useful information" to be found in petitioner's "school, medical, police and prison records", it thought the lawyers were justified in failing to hunt through these records when their other efforts gave no reason to believe the search would yield anything helpful.

Held: the Supreme Court reversed holding that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.

The Supreme Court found defense counsel knew that the Commonwealth would attempt to seek the death penalty by proving petitioner had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. Counsel further knew the Commonwealth would attempt to establish this history by proving petitioner's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial. They also found it was undisputed that the prior conviction file was a public document readily available at the courthouse.
The Court found the lawyers were deficient in failing to examine the court file on petitioner’s prior conviction and that the petitioner showed beyond any doubt that counsel's lapse was prejudicial. If counsel had looked in the file on the prior conviction, they would have found a range of mitigation leads that no other source had opened up that would have destroyed the benign conception of petitioner's upbringing and mental capacity defense counsel had formed from talking with petitioner and his family members and from the reports of the mental health experts. The Court found this would have caused counsel to have gone further to build a mitigation case that bore no relation to the one put before the jury.

Gonzalez v. Crosby, 125 S.Ct. 2641 (12005) (Scalia, J.)

- **Federal Habeas Corpus**

After the federal courts denied petitioner habeas corpus relief from his state conviction, he filed a motion for relief from that judgment, pursuant to Federal Rule of Civil Procedure 60(b). The question presented is whether, in a habeas case, such motions are subject to the additional restrictions that apply to "second or successive" habeas corpus petitions under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Held: a Rule 60(b)(6) motion in a § 2254 case is not to be treated as a successive habeas petition if it does not assert, or reassert, claims of error in the movant's state conviction. A motion that, like petitioner's, challenges only the District Court's failure to reach the merits does not warrant such treatment, and can therefore be ruled upon by the District Court without pre-certification by the Court of Appeals pursuant to § 2244(b)(3). In this case, however, petitioner's Rule 60(b)(6) motion fails to set forth an "extraordinary circumstance" justifying relief. For that reason, the judgment of the Court of Appeals was affirmed.

Mayle v. Felix , 125 S.Ct. 2562 (2005) (Ginsburg, J.)

- **Federal Habeas Corpus**

An amended habeas petition does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth

This case involves two federal prescriptions: the one-year limitation period imposed on federal habeas corpus petitioners by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the rule that pleading amendments relate back to the filing date of the original pleading when both the original plea and the amendment arise out of the same "conduct, transaction, or occurrence," Fed. Rule Civ. Pro 15(c)(2).

Petitioner was convicted in California state court of first-degree murder and second-degree robbery, and received a life sentence. Within the one-year limitation period AEDPA allows for habeas petitions, he filed a pro se petition in federal court initially alleged, inter alia, that the admission into evidence of videotaped testimony of a witness for the prosecution violated his rights under the Sixth Amendment's Confrontation Clause. Five months after the expiration of AEDPA's time limit, and eight months after the federal court appointed counsel to represent him, he filed an amended petition in which he added a claim that, in the course of pretrial interrogation, the police used coercive tactics to obtain damaging statements from him, and that admission of those statements at trial violated his Fifth Amendment right against self-incrimination. The question presented concerns the timeliness of the Fifth Amendment claim.

Held: an amended habeas petition does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.

Halbert v. Michigan, 125 S.Ct. 2582 (2005) (Ginsburg, J.)

- **Due Process and Equal Protection require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals**

In 1994, Michigan voters approved a proposal amending the State Constitution to provide that "an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court." Thereafter, "several

Michigan state judges began to deny appointed appellate counsel to indigents" convicted by plea. Rejecting challenges based on the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Federal Constitution, the Michigan Supreme Court upheld this practice, and its codification. Petitioner was convicted on his plea of nolo contendere and sought the appointment of counsel to assist him in applying for leave to appeal to the Michigan Court of Appeals. The state trial court and the Court of Appeals denied his requests for appointed counsel, and the Michigan Supreme Court declined review.

Michigan Court of Appeals review of an application for leave to appeal, petitioner contends, ranks as a first-tier appellate proceeding requiring appointment of counsel under Douglas v. California, 372 U.S. 353 (1963). Michigan urges that appeal to the State Court of Appeals is discretionary and, for an appeal of that order, Ross v. Moffitt, 417 U.S. 600 (1974) holds counsel need not be appointed.

Held: the Court concluded that petitioner's case is properly ranked with Douglas rather than Ross and accordingly held that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals.> The Court also disagreed with Michigan's position that even if petitioner had a constitutionally guaranteed right to appointed counsel for first-level appellate review, he waived that right by entering a plea of nolo contendere. The Court found at the time petitioner entered his plea, he, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forgo. Moreover, the trial court did not tell petitioner, simply and directly, that in his case, there would be no access to appointed counsel.

Castle Rock v. Gonzales, 125 S.Ct. 2796 (2005) (Scalia, J.)

- **Due Process - Respondent did not have property interest in police enforcement of restraining order**

At issue in this case is whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated.

Held: respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband.

Mullen v. West Virginia Division of Motor Vehicles, No. 31740 – March 17, 2005 [*Ohio County*]– Starcher, J.

Two days following his arrest, criminal DUI charges against the appellee were dismissed. The appellee erroneously assumed that dismissal of the criminal charges would end the mandatory administrative license revocation procedures, and therefore declined to request an administrative hearing. The appellee's license was subsequently revoked and reinstated after the requisite period.

The appellee subsequently filed a petition pursuant to W. Va. Code § 61-11-25 (2000) for expungement of all records pertaining to his DUI arrest. The circuit court granted the appellee's petition and ordered expungement of all records of the offense, including the administrative records pertaining to the revocation of the appellee's driver's license.

The Division of Motor Vehicles appealed these findings, arguing that §61-11-25 does not authorize the expungement of records of driver's license suspensions or other substantive administrative actions by the DMV.

Held: The Court noted that the language of §61-11-25 permitting expungement of "all records relating to" or "arising out of" the criminal proceedings was arguably broad enough to include the appellee's DMV records. However, by exercising a "reasonableness" analysis and reviewing three opinions on the issue from Pennsylvania and Nevada, the Court determined that the Legislature had not specifically intended to include such records within the scope of §61-11-25. The Court also observed that the administrative suspension did not result as a matter of law from the fact of the appellee's arrest or conviction, but upon a separate and uncontested administrative charge and finding against the appellee.

The Court therefore determined that while the circuit court's expungement of the appellee's criminal records was correct, the order of expungement pertaining to the DMV records was erroneous.

Affirmed in part, reversed in part and remanded.

State v. Kenneth Y., No. 31742 – March 22, 2005 [Jackson County] – PER CURIAM
(*Elizabeth Shaver, Public Defender Corporation, Ripley, W. Va., for Appellant*).

The appellant, a sixteen-year-old juvenile, entered an admission to a charge of destruction of property. Following an unsuccessful period of attendance at the Mountaineer Challenge Academy, the appellant appeared before the Circuit Court for a disposition hearing. At the disposition hearing, the Circuit Court heard the testimony of the appellant's sister and the probation officer regarding potential disposition options. The Circuit Court immediately adopted the recommendations of the probation officer and, without providing the appellant or counsel further opportunity for comment, sentenced the appellant to the Industrial Home for Youth.

On appeal, the appellant asserted that the Circuit Court had abused its discretion by failing to provide either the appellant or his counsel with an opportunity to comment upon alternative sentencing arrangements.

Held: The Court noted that under W. Va. Code § 49-5-13 (2002), a circuit court is vested with numerous options with regard to sentencing of juvenile delinquency offenders. In this regard, the Court also examined the provisions of W. Va. Code § 49-5-2(i) (2001), which provide a juvenile offender an "opportunity to be heard", and § 49-5-2(h) (2001), which further provides a juvenile with the right to effective representation of counsel at all stages of the proceedings. The Court determined that these provisions clearly encompass the right of a juvenile to comment upon alternative sentencing arrangements as a part of the proceedings.

The Court compared these provisions with the relevant provisions concerning adult offenders and the right of

allocution provided to such offenders in criminal proceedings. The Court held that a circuit court must "affirmatively provide an opportunity" for a juvenile or his counsel to address the circuit court regarding alternative sentencing arrangements. The Court held that the circuit court's failure to provide such an opportunity constitutes plain error.

Remanded for resentencing.

State v. Winebarger, No. 31696 – May 11, 2005 [McDowell County] – PER CURIAM

The appellant shot and killed his son-in-law during the course of an altercation at the appellant's home. The appellant asserted that he had not intended to kill his son-in-law, and that he had merely fired a shot from his handgun as a warning to the intoxicated and violent decedent. The State countered the appellant's assertion by presenting, pursuant to Rule 404(b) of the Rules of Evidence, evidence of gun-related acts committed by the appellant five to fifteen years prior to the date of the decedent's death. These incidents did not involve the decedent, but included three particular examples where the appellant had brandished weapons following arguments with other persons. The State offered this evidence to show that the appellant's familiarity with handguns and to show the absence of mistake or accident on the part of the appellant.

The appellant was subsequently convicted of voluntary manslaughter and sentenced to a term of ten years imprisonment.

Held: The Court evaluated the trial court's admission of the 404(b) evidence under the standards announced in *State v. McGinnis*, 193 W. Va. 147, 455 S.E. 2d 516 (1994), and noted that the trial court had performed a proper *in camera* evaluation of the evidence offered by the State, and had correctly determined that the evidence was admissible for the limited purpose of demonstrating the appellant's intent and the absence of a mistake or accident on the appellant's part. The Court also noted that the trial court had twice provided a proper limiting instruction to the jury regarding the limited purpose of the evidence.

The Court also addressed the issue of the remoteness of the evidence, and noted that the Court had previously held that the issue of remoteness goes to the weight to be afforded such evidence and not its admissibility. (*State v. McIntosh*, 207 W. Va. 561, 573, 534 S.E. 2d 757, 769 (2000)). In reviewing all of these assertions by the appellant, the Court determined that the trial court had not abused its discretion in admitting the 404(b) evidence in question.

Affirmed.

Lawyer Disciplinary Board v. Wade, No. 31613 – May 26, 2005 – PER CURIAM

The respondent, a licensed attorney since 1985, was the subject of a number of ethics complaints filed by various individuals. The respondent did not immediately cooperate with the State Bar's investigative processes. When subpoenaed to the Court, he admitted the basic allegations against him. He asserted in mitigation that he was engaged in a bitter divorce and was being treated for depression.

Held: The Court, noting that the respondent had not contested the Bar's conclusions that he had violated numerous Rules of Professional Conduct, addressed the sole issue of sanctions. The Court noted that the sole mitigating factor (personal and emotional problems) was eclipsed by numerous aggravating factors, including the respondent's failure to cooperate with the disciplinary proceedings, the existence of a prior disciplinary record, and the nature and effect of the respondent's actions regarding his clients.

The Court therefore adopted the Bar's recommendations that the respondent's law license be annulled.

Law License Annulled.

<u>**Lilly v. Stump, Commissioner**</u>, No. 31945 – May 31, 2005 – PER CURIAM [*Raleigh County*]

The appellee was arrested on January 19, 2002 following a single-car accident. The investigating officer noted that the appellee was the only occupant of the vehicle and, when he arrived at the scene, was attempting to move the vehicle from the location of the accident. The officer attempted to administer field sobriety tests, which the appellee eventually refused. The appellee refused to take the designated secondary breath test after being advised by the officer on three occasions of the implications of such a decision. The circuit court reversed the Commissioner's order revoking the appellee's license, finding that the field sobriety tests had no evidentiary weight and that the officer had failed to testify that he had been properly trained to administer such tests. The court also concluded that the appellee had not been provided a written copy of the implied consent statement listing the penalties for refusing to submit to a secondary chemical test. The court also determined that the officer's testimony as to the appellee's condition (bloodshot eyes, slurred speech, etc.) was insufficient to prove that the appellee had driven under the influence of alcohol.

Held: The Court concluded that the circuit court had erred in reversing the Commissioner's revocation of the appellee's license. The Court noted that a full review of the record clearly indicated (1) that the appellee had flatly refused to perform or attempt additional field sobriety tests after failing the first test; (2) that the implied consent form had not only been read to the appellee on three occasions but had also been provided to the appellee; and (3) that there was "substantial evidence" justifying the Commissioner's conclusions that the appellee had driven while under the influence of alcohol.

Reversed and Remanded.

<u>**Lawyer Disciplinary Board v. Roberts**</u>, No. 31511 – May 31, 2005 – PER CURIAM

The respondent represented a client on a domestic relations matter. The respondent apparently missed several mistakes while reviewing an order regarding equitable distribution and alimony. The client alleged other ethical violations by the respondent, including the failure to keep the client informed of the status of her case; failing to return multiple phone calls; failing to appear in person at scheduled hearings; failing to abide by the decision of the client; failing to return unearned portions of her fee; and failing to act with reasonable diligence. The respondent did not contest these allegations and reached an agreement with the Office of Disciplinary Counsel (ODC) in which the respondent accepted the findings of ethical violations and agreed to a number of recommended sanctions, including a reprimand and a period of supervised practice.

Held: On review, the Court accepted the majority of these sanctions but struck or modified three recommended sanctions, finding that (1) it was not necessary that the respondent's supervised practice be supervised by counsel outside of her firm; (2) a sanction requiring the respondent's withdrawal from representing another attorney in a disciplinary proceeding was moot; and (3) a sanction mandating an immediate ninety-day suspension in the event of a failure to respond to potential ethics complaints was an unnecessary prospective sanction.

Reprimanded, with other sanctions as modified.

<u>**In Re: Elizabeth A., et. al**</u>., No. 31761 & 32166 – June 10, 2005 – PER CURIAM [*Roane County*]

The guardian ad litem for three children appealed the circuit court's dismissal of two abuse/neglect petitions. The initial petition was based upon allegations of sexual activities and misconduct on the part of the respondent, Richard O. The petition was dismissed following an adjudicatory hearing, the court having found the testimony of some of the witnesses contradictory and not credible. While an appeal of this action was pending, a second petition was filed alleging additional sexual abuse by the respondent Richard O. The trial court subsequently dismissed this petition on similar grounds.

Held: The Court determined that the trial court had erroneously dismissed the petitions. The Court found "specific deficiencies" in the trial court's evaluation and resolution of the petitions, including the dismissal of the second petition without a full adjudicatory hearing and the failure to provide the guardian ad litem with a full opportunity to present evidence and obtain testing of the children.

Reversed and Remanded with Directions.

State v. Cooper, No. 31766 – June 17, 2005 – PER CURIAM [*Cabell County*]

The appellant was convicted of two counts of aiding and abetting first degree robbery. On appeal, the appellant asserted several errors, including (1) the prosecution's failure to disclose the address and statements of a potentially exculpatory witness; (2) the wrongful concealment by the prosecution of offers of leniency regarding a co-defendant's guilty plea; (3) the revocation by the trial court of his bond without the presence of the appellant or his counsel; and (4) the improper denial of his motion for a new trial.

Held: The Court reviewed each of these assertions and affirmed the appellant's convictions. The Court determined that the appellant had knowledge of the allegedly exculpatory witness and possessed sufficient information to locate the witness. The Court also determined that the statements in question were neither necessarily exculpatory nor suppressed by the State, and that the appellant had all of this information sufficiently prior to trial.

In regard to the appellant's second argument, the Court noted that while the prosecution has a duty to provide evidence of inducements given to witnesses (i.e., offers of leniency in a plea agreement), the State had made no such offers to the appellant's co-defendant. The Court noted that this duty to disclose did not extend, as in the appellant's case, to requests for leniency made by the co-defendant's counsel in a motion for reduction of sentence.

The Court also determined that the appellant's challenge to the revocation of his bond was untimely and was unrelated to the fairness of the appellant's trial. The Court concluded by stating that the appellant had not shown that the trial court had abused its discretion in denying the appellant's motion for a new trial.

Affirmed.

State v. Leonard, No. 31857 – June 22, 2005 – PER CURIAM [*Jackson County*]

The appellant was charged with first degree murder in the death of his mother. The pair had apparently been engaged in a series of domestic disturbances, and the appellant had made statements that he wanted to kill his mother and commit suicide. At trial, the appellant asserted that he and his mother had been attacked in their home by an intruder. The appellant's primary assignment of error on appeal concerned the trial court's refusal to provide an instruction to the jury on the lesser offense of voluntary manslaughter. The appellant asserted that this instruction was justified by the State's evidence indicating that the appellant had killed his mother after becoming enraged while discovering her eavesdropping on a telephone conversation.

Held: The trial court's decision not to instruct the jury on voluntary manslaughter was not error. The Court noted that

(1) the appellant's theory of defense (the murder was committed by an intruder in the home) did not support such an instruction; (2) counsel for the appellant had indicated at the close of evidence that the appellant, against the advice of counsel, was not requesting such an instruction; and (3) that the evidence offered at trial would not have supported such an instruction, given that there was no evidence that the victim had ever committed, or threatened to commit, harm to the appellant.

The Court also determined (1) that there was sufficient evidence placed before the jury regarding the contents of a voicemail, thus denying the appellant's argument that the State's failure to preserve the original message was error; (2) that that trial court had not abused its discretion in limiting the appellant's cross-examination of a witness who was on the telephone with the appellant at the time of the killing; and (3) that the appellant's right to a speedy trial under the "three-term" rule was not violated.

Affirmed.

Lawyer Disciplinary Board v. Hardin, No. 31678 – June 23, 2005 – PER CURIAM

The respondent represented a plaintiff in a medical malpractice action in West Virginia. Several allegations of misconduct were made against the respondent, including failure to appear at hearings and failure to follow the discovery orders of the court. The respondent's conduct resulted in findings of contempt of court, fines, assessment of attorney's fees, and referral to the Office of Disciplinary Counsel (ODC). The respondent admitted to several violations of the Rules of Professional Conduct and subsequently came to an agreement with the ODC regarding sanctions. These sanctions included a reprimand, prompt payment of fines and attorneys fees, and additional hours of continuing legal education. This agreement was adopted by the Hearing Panel Subcommittee, which made an additional recommendation that the respondent be permanently barred from medical malpractice cases in West Virginia.

Held: The Court reviewed its authority to design and impose sanctions for violations of ethical conduct. In regard to the respondent's case, the Court fashioned a new set of sanctions, including the elimination of the permanent ban on acceptance of medical malpractice cases. The Court added, however, a two-year suspension of the respondent's West Virginia law license and a requirement for the involvement of local counsel for two years after the suspension.

Recommendation Modified.

Lawyer Disciplinary Board v. Lakin, No. 30559 – June 24, 2005 – PER CURIAM

The respondent was the owner of the Lakin Law Firm, located in the State of Illinois. Two ethics complaints were lodged against the respondent and his firm based upon allegations that agents of the firm had solicited personal injury clients who were represented by a West Virginia attorney. The respondent denied involvement in solicitation activities and asserted that any such actions were undertaken by satisfied former clients and/or office employees who may have been "overzealous" in their communications with the West Virginia clients. The respondent and the Special Lawyer Disciplinary Counsel eventually submitted a written agreement on sanctions. This agreement provided, *inter alia*, for a one-year prohibition on practice within West Virginia by the respondent and a direct prohibition of further solicitation activities.

Held: The Court, upon reviewing the Subcommittee's recommendation for adoption of the agreement on sanctions, found that the allegations against the respondent had been proven by clear and convincing evidence. The Court noted that the record contained ample evidence of connections between the persons directly soliciting the clients and the respondent's firm. (The Court noted that the evidence indicated that the respondent had personally traveled to the

home of one of the clients.). The Court imposed the sanctions as set forth in the agreement and as recommended by the Subcommittee.

Recommended Sanctions Adopted.

State v. Youngblood, No. 31765 – June 24, 2005 – PER CURIAM [*Morgan County*]

The appellant was convicted of multiple counts of sexual assault, brandishing, wanton endangerment and indecent exposure. The appellant's convictions resulted from allegations by three young women that the appellant had sexually assaulted one of them on two separate occasions while threatening the others with a firearm. The appellant asserted numerous errors on appeal, including (1) the admission of uncharged collateral act evidence in violation of Rule 404(b); (2) the appellant's wearing of a "stun belt" during voir dire; (3) a break in the chain of custody of the blood sample of the alleged victim; (4) the trial court's limitation on the cross examination of the victim regarding her psychological history; (5) the trial court's failure to grant his motion for a judgment of acquittal due to a lack of evidence of "forcible compulsion"; and (6) the trial court's failure to grant a new trial based upon newly discovered evidence.

Held: On appeal, the Court made the following determinations: (1) *Uncharged Collateral Act Evidence* –The Court determined that 404(b) was inapplicable, in that the evidence in question was intrinsic to the offense charged and was admitted to complete the story of the act; (2) *Stun Belt* –Concurring with the trial court's determination that the device was not "readily apparent", the Court held that the trial court's decision to require the use of the stun belt during voir dire (it was removed for the remainder of the trial) was not an abuse of discretion; (3) *Chain of Custody of Victim's Blood* - The appellant objected to the admission of the victim's blood sample because the State had failed to identify the nurse who had drawn the sample at the hospital. The Court noted that the trial court had found "sufficient indicia of trustworthiness" in the chain of custody to permit the introduction of the evidence and found no abuse of discretion; (4) *Limitation on Cross-Examination of Victim* – The trial court permitted counsel for the appellant to cross-examine the alleged victim regarding a lie she had told a boyfriend regarding a false pregnancy. The trial court refused, however, to permit counsel to cross-examine the alleged victim regarding her history of manipulative behavior and her employment as an exotic dancer. Noting that (a) the victim's career as a topless dancer did not begin until two years after the alleged offenses, and (b) no specific diagnosis of any disorder relating to her manipulative had ever been made, the Court found no abuse of discretion in the limitation of the cross examination; (5) *Evidence of Forcible Compulsion* – The appellant asserted that evidence of a threat by the appellant not to drive the alleged victim to her home did not constitute "forcible compulsion" under W. Va. Code §61-8B-1 (2000). The Court noted, however, that the State had presented evidence that the appellant was armed at the time of the threats and that the victim was aware of this fact. The Court determined that these facts constituted sufficient evidence of forcible compulsion; and (6) *Newly Discovered Evidence* – The appellant's final assignment concerned the post-trial discovery of a handwritten note indicating that any sexual act performed upon the appellant was consensual. The trial court determined that the note would only have been impeachment evidence and therefore did not justify the granting of a new trial. The Court affirmed this decision. (*In a strongly-worded dissent, Justice Davis found a clear violation of Brady v. Maryland, citing the specific language of the note and testimony that a state trooper had directed that the note be destroyed after it was discovered.*)

Affirmed.

In Re: Petition of Kenneth Donley, No. 32531 – June 30, 2005 – PER CURIAM [*Mercer County*]

The appellant was arrested in April 1998 and charged with second offense DUI. He pleaded guilty in June 1998, but the abstract of his conviction was not sent to the Division of Motor Vehicles (DMV) until March of 2001.

A hearing date was scheduled by the Commissioner for March of 2002, but this date was continued by the Commissioner *sua sponte* until September 9, 2002. The Commissioner subsequently revoked the appellant's driver's license for a ten-year period, effective September 9, 2003. On appeal, the circuit court affirmed the revocation but modified the effective date of the revocation to October 1, 1998. On appeal, the appellant asserted that his license was revoked in violation of the relevant statute of limitations and due process principles.

Held: The Court noted that the 180-day limit for holding a hearing under W. Va. Code § 17C-5A-2(b) is triggered only when a request for a hearing is made and not by the date of an arrest or conviction. Noting that the Commissioner is vested with the authority to grant a *sua sponte* continuance of a hearing, the Court found no merit to the appellant's statute of limitations argument. The Court also denied the appellant's argument that the three year delay between the date of his conviction and the receipt of the abstract of judgment violated due process principles. While the Court acknowledged that the delay was "unreasonable as a matter of law", the Court noted that the appellant had not demonstrated any prejudice resulting from the delay.

Affirmed.

State ex rel. Sexton v. Vickers, No. 32649 – June 30, 2005 – PER CURIAM [*Fayette County*]

After a jury trial the petitioner was convicted of twelve counts of first degree sexual abuse, twelve counts of sexual abuse by a custodian, and five counts of exhibiting obscene material to a minor. The petitioner's direct appeal was refused, and the petitioner pursued habeas corpus relief. The petitioner's chief assertion was ineffective assistance of counsel based upon trial counsel's failure to ascertain that the appellant's convictions for exhibiting obscene material were not felonies but were misdemeanors at the time the acts were committed. The circuit court granted the petition and ordered a retrial on all of the charges. The petitioner contested this finding, arguing that the retrial should not encompass any offense other than those that were improperly classified, and that double jeopardy would be violated by compelling a retrial on all of the offenses.

Held: The Court, citing *State v. Holland*, 149 W. Va. 731, 143 S.E. 2d 148 (1965), noted that double jeopardy principles are not applicable when a conviction and sentence are set aside as a result of habeas corpus proceedings. Noting that the petitioner's "unqualified request for relief" had specifically asked for a new trial, the Court found no basis for the issuance of a writ of prohibition.

Writ of Prohibition Denied.

State v. Gray, # 32051 – July 6, 2005 – PER CURIAM [*Raleigh County*]

The appellant was convicted of first degree murder in connection with the shooting death of his girlfriend. The appellant asserted numerous errors on appeal, including (1) the admission of a statement made by the appellant in violation of the prompt presentment rule; (2) juror misconduct, in that the appellant alleged that two of the jurors were reading books during the presentation of evidence; (3) the trial court's denial of the right to present character evidence of the victim; (4) the improper admission of evidence of other bad acts; (5) the failure of the State to provide the weapon used in the homicide for testing by the appellant; and (6) the trial court's refusal to permit the appellant to accept a guilty plea.

Held: In affirming the appellant's conviction, the Court made the following determinations: (1) *Statement Obtained in Violation of the Prompt Presentment Rule* – Following the homicide, the appellant had voluntarily accompanied the police to the police station where, upon arrival, the officers decided to place the appellant under arrest. The police then obtained a statement from the appellant. The Court determined that the appellant, after being advised of his

Miranda rights, voluntarily gave a partial statement to the authorities (the appellant subsequently invoked his right to counsel and terminated the interrogation). The Court determined that the thirty-five minute delay between the appellant attaining custodial status and the start of the interrogation did not constitute an "unnecessary delay" as prohibited under W. Va. Code § 62-1-5(a)(1) (1997); (2) *Juror Misconduct* – The appellant alleged that two jurors were observed reading books during the presentation of evidence, which the appellant argued had deprived him of a fair trial. The Court noted that the only evidence of this allegation occurred following a break and during the playing of a tape being used to refresh the recollection of a witness. The Court determined that appellant's immediate objection and the trial court's admonishment to the jury cured any alleged error; (3) *Character of the Victim* – The Court observed that the appellant had relied on the defense of an accidental discharge of the shotgun while the gun was being handed to the victim. Noting that the character of a victim may be relevant under certain circumstances, the Court held that the appellant's failure to assert self-defense or allege aggressive behavior on the part of the victim made the victim's character irrelevant; (4) *Other Bad Acts* – The appellant objected to the testimony of one of the investigating officers that the appellant's criminal intent was obvious due to "prior acts of violence and documented threats…toward the victim." The Court noted that this testimony concerned acts and threats in the days immediately preceding the homicide, which were evidence of *res gestae* and the appellant's state of mind at the time of the killing; (5) *State's Failure to Provide Weapon for Examination* – The appellant asserted that the State had failed to turn over for inspection and testing the .410 shotgun that was used in the killing. The Court observed, however, that the appellant had not filed a motion for such an examination until being notified of a similar examination being conducted by the State one week before the trial. The Court further noted that the trial court had offered the appellant a continuance of the trial in order to permit the appellant to prepare a response to the State's report, which offer was declined by the appellant; (6) *Refusal to Permit Plea* – Prior to trial, the State offered the appellant an opportunity to plead guilty to second degree murder. This offer was conditioned upon the appellant's acceptance of the offer by the Friday before the trial date. After refusing the offer and while in the midst of he State's case-in-chief, the appellant expressed his desire to accept the original offer. The State rebuffed this offer, and the Court found no error, noting that there had been no enforceable agreement between the parties.

Affirmed.

In Re: Alyssa W. & Sierra W., # 32520 – July 6, 2005 – PER CURIAM [*Mineral County*]

After receiving reports that Robert H. had sexually molested his stepdaughter, the Department of Health and Human Services (DHHR) filed a petition for the custody of the alleged victim and another child in the home, Robert H.'s natural daughter. The children were both subsequently returned to the custody of Mildred H., the mother of both children. Robert H.'s parental rights were subsequently terminated by the circuit court, and he was granted supervised post-termination visitation with his natural daughter. After serving a period of incarceration, he petitioned for reinstatement of post-termination visitation. The circuit court granted the motion over the objections of Mildred H., noting that Mildred H. had not sustained her burden of proof to show why the visitation should not resume.

Held: The Court held that the trial court had erred as a matter of law by placing the burden on Mildred H. to show why visitation should not be reinstated. The Court held that the circuit court had failed to give special weight to the determinations of Mildred H. regarding her daughter's best interests. Finding that there had been no proof of a strong emotional bond between Robert H. and his daughter, and that the requested visitation would unreasonably interfere with the permanent placement of the children by placing considerable stress upon the children, the Court reversed the order of supervised visitation.

Reversed.

In Re: Michael S. Jr., # 32167 – July 6, 2005 – PER CURIAM [*Mingo County*]

The Department of Health and Human Resources (DHHR) received a referral in October 2003 regarding the living conditions of Michael S. Jr., a five-year old child. The referral resulted in the filing of an abuse and neglect petition against the child's parents. While the abuse and neglect proceedings were pending, Tina S. was permitted to intervene in the matter as a possible adoptive parent. DHHR officials subsequently reported, however, that the child and Tina S. had shown no particular emotional bond at a scheduled visitation.

The parental rights of both parents were subsequently terminated. The intervenor failed to appear at the final dispositional hearing. She also failed to appear at a scheduled psychological evaluation; did not complete a required home study; and failed to appear at a multi-disciplinary treatment team meeting regarding the child. Based upon these factors, the circuit court terminated Tina S.'s status as an intervenor and denied placement. Tina S. appealed this ruling, asserting that she had not had notice of the time of the dispositional hearing, which had been changed the day before the hearing.

Held: The Court held that the testimony presented at the dispositional hearing established that Tina S. had notice of the time of the hearing. The Court also noted Tina's repeated failures to participate and cooperate with the required processes. Taking these factors into account, the Court held that the circuit court had clearly not abused its discretion in terminating Tina's intervenor status.

Affirmed.

State ex rel. Stump v. Johnson, et. al., # 32651 – July 7, 2005 – Benjamin, J. [*Nicholas County*]

The respondent Bishop was charged in September 2004 with driving under the influence (DUI). Upon receipt of the Notice of Revocation, Bishop requested an administrative hearing on the revocation of his driver's license. At the hearing, the hearing examiner was advised that the parties had entered into a plea agreement whereby Bishop would enter a plea to the DUI offense. As part of the plea agreement, the prosecution and the arresting officer agreed that no evidence would be presented at the administrative hearing, and in fact no evidence was presented.

Two months later, Bishop was advised in a letter from the Division of Motor Vehicles (DMV) that the proposed agreement "was not accepted", and that an additional hearing on Bishop's license revocation would be scheduled. Bishop then filed an action in the Circuit Court of Nicholas County seeking to compel the performance of the plea agreement and to prohibit the DMV from proceeding with the scheduled hearing.

The DMV then filed for a writ of prohibition with the Supreme Court of Appeals, arguing that jurisdiction and venue were improper in the Circuit Court of Nicholas County, and that since the action was a "suit" against a state agency, the action could only be brought in the Circuit Court of Kanawha County.

Held: The Court agreed with the Commissioner, holding that under W. Va. Code § 53-1-2 (1933) and § 14-2-2 (1976), extraordinary writs relating to a "record or proceeding" of the DMV must be filed in the Circuit Court of Kanawha County. The Court noted that Bishop's action was "all about Bishop's driver's license", and that since all such records are maintained at the State Capitol in Charleston, jurisdiction and venue were properly vested in Kanawha County.

While not addressed in the DMV's petition, the Court also discussed (1) the nature of a "conviction" for the purposes of an administrative DUI revocation and (2) the legality of the plea agreement.

The Court held that under the plain language of W. Va. Code § 17C-5A-1a(e), the appellant's *nolo contendre* plea was a finding of guilt requiring the DMV to revoke the driver's license of the operator. The Court noted that the

provision requiring revocation "when the person enters a plea of guilty *or is found guilty by a court* or jury" (emphasis in original) did not limit or otherwise qualify the manner in which the criminal conviction occurred. The Court also held that in light of the important policy considerations regarding administrative license revocations, no prosecuting attorney, police officer or other person may enter into any agreement preventing the Commissioner from carrying out his legal duties, or prevent or impede a law enforcement officer from presenting evidence at administrative hearings.

Writ of Prohibition Granted.

RELEVANT SYLLABUS POINTS
Syllabus Point 2 - In giving effect to the plain language contained within W. Va. Code § 17C-5A- 1a (e), a person pleading guilty or found guilty by a court or jury of driving under the influence of alcohol, controlled substances, or drugs, shall be considered "convicted," and the Commissioner has a mandatory duty to revoke the person's license to operate a motor vehicle in the State of West Virginia as provided by W. Va. Code § 17C-5A-1a(a).

Syllabus Point 3 - Neither a prosecuting attorney, law enforcement officer nor any other person has the authority to enter into an agreement that would prevent the Commissioner of the West Virginia Department of Motor Vehicles from carrying out his or her legislative responsibilities or to prevent or impede a law enforcement officer from presenting evidence of the arrest in the Commissioner's license revocation administrative hearing.

Carroll v. Stump, Comm'r, #32501 – July 7, 2005 – Benjamin, J. [*Wayne County*]

The Petitioner was arrested by an officer of the Huntington Police Department for driving under the influence (DUI). After the administration of an Intoxilyzer test at police headquarters, Mr. Carroll was transported to the Wayne County Magistrate Court. The police officer completed a criminal complaint but neglected to sign the document. Based on this failure, the magistrate found no probable cause and did not issue a criminal warrant.

Although no criminal proceedings were initiated, administrative proceedings to revoke Carroll's license were scheduled by the Division of Motor Vehicles (DMV). After an administrative hearing, the DMV ordered the revocation of the Carroll's driver's license. Carroll appealed to the Circuit Court of Wayne County, arguing that the officer's failure to file formal charges deprived the DMV of jurisdiction to administratively revoke his license. The Circuit Court agreed, holding that the formal initiation of criminal proceedings was a necessary jurisdictional prerequisite to the commencement of administrative proceedings.

Held: The Court, after first rejecting Carroll's due process claim, discussed the meaning of W. Va. Code § 17C-5A-1(b) (1994). This statute requires the filing of the "Statement of Arresting Officer" following the arrest of a person for a DUI offense in order to initiate administrative revocation proceedings. The Court noted that the Statement requires the inclusion of information regarding the "specific offense with which the person is charged."

The Court determined, in a new syllabus point, that a person is "charged" within the meaning of § 17C-5A-1 when the person is lawfully arrested for a DUI offense. Since Carroll had been lawfully arrested for DUI, the Court determined that the DMV had jurisdiction to proceed with the administrative sanction process. The Court further held that a magistrate's finding of probable cause and the issuance of a warrant are not jurisdictional prerequisites to the commencement of administrative revocation procedures.

Reversed and Remanded with Directions.

RELEVANT SYLLABUS POINTS

Syllabus Point 2 - A person is “charged” with an offense, for the purposes of W.Va. Code § 17C- 5A-1 (1994), when he or she is lawfully arrested by a law-enforcement officer having probable cause to suspect the person was driving a motor vehicle under the influence of alcohol, controlled substances or drugs.

Syllabus Point 3 - Administrative license revocation proceedings for driving a motor vehicle under the influence of alcohol, controlled substances or drugs which are initiated pursuant to Chapter 17C of the West Virginia Code are proceedings separate and distinct from criminal proceedings arising from driving a motor vehicle under the influence of alcohol, controlled substances or drugs. The presentation of a sworn complaint before a magistrate and the magistrate's finding of probable cause and issuance of a warrant are not jurisdictional prerequisites to the commencement of administrative license revocation proceedings pursuant to Chapter 17C of the West Virginia Code.

Cooper v. Stump, Commissioner, #32529 – July 7, 2005 – PER CURIAM [*Raleigh County*]

The appellee was arrested in August 2001 and charged with driving under the influence (DUI). He requested an administrative hearing on the revocation of his driver’s license. At the administrative hearing, the arresting officer indicated that an “agreement” had been reached wherein the officer would not pursue to administrative revocation. Despite this agreement, the hearing examiner recommended the revocation of the appellee’s driver’s license. The appellee appealed this ruling to the Circuit Court of Raleigh County, which reversed the revocation, holding that the appellee was entitled to keep his license pursuant to the agreement. On appeal by the Division of Motor Vehicles (DMV), the Court reversed the decision of the circuit court. The Court cited its opinion in *State ex rel. Stump v. Johnson*, ___W. Va. ___, ___S.E. 2d ___ (2005) (issued on the same day) as authority for the proposition that any agreement entered into between the police officer and the appellee was void.

Reversed.

All cases may be viewed online at: http://www.state.wv.us.wvsca.docs/spring05/(case#).htm

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