

# THE DEFENDER



Volume 8, Issue 1

An informative newsletter of the State of West Virginia Public Defender Services

February 2007

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Inquiries, articles and suggestions are always welcome.

Available in large print upon request.

## FROM THE EXECUTIVE DIRECTOR'S CHAIR

by Jack Rogers

Governor Manchin has caused a bill to be introduced to reestablish a statewide governing board for this agency (see S.B. 152 and H.B. 2412 on legislative web site, [www.legis.state.wv.us](http://www.legis.state.wv.us) or link from [www.wv.gov](http://www.wv.gov)). The proposed Indigent Defense Commission would establish guidelines for the following: eligibility of clients; qualifications for Public Defenders; training for Public Defender and private attorneys; standards for provision and compensation of experts, investigators and others; and standards and recommendations to Public Defender offices on various issues. Under this bill, private counsel billings must be submitted within ninety days of the last date of service.

Most importantly, the bill gives this Commission the power to approve activation of new Public Defender Corporations (established in 1981 pursuant to W.Va. Code 29-21-8). Upon approval, the Executive Director would certify to the Secretary of Administration the need for the new office and proceed to fund the office as necessary.

The original bill gave Public Defender Corporations authority to contract for representation (this office has had that authority since 1981). Contract attorneys were also made a part of the statutory order of appointment. These provisions were removed by the Senate Judiciary Committee.

The Governor has also recommended additional funding of \$6.5 million (\$5 million over current funding, counting the current FY 07 supplemental funds) with the express purpose of using \$4.5 million to establish more Public Defender offices. As you know, private counsel funds for the remainder of this year will run out in March, 2007; payments will cover vouchers received through mid to late December, 2006. A supplemental appropriation for this year has also been requested by this office.

Finally, in order to ease the decades old transition from one fiscal year to the next, PDS recommends the use of a new order approving payment. This order will clearly continue in effect through succeeding fiscal years. A copy of the new order is on our web site, [www.wvpds.org](http://www.wvpds.org) in the voucher processing section. Three formats are given: Word Perfect; Word and PDF. Using this new form should eliminate this age-old problem.

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY

STATE OF WEST VIRGINIA  
VS.

CASE NUMBER \_\_\_\_\_

**ORDER APPROVING PAYMENT OF  
APPOINTED COUNSEL FEES AND EXPENSES**

On a former date an affidavit was filed in this Court reciting that \_\_\_\_\_ was financially unable to employ counsel for representation in certain proceedings before this Court; and the Court being of the opinion the eligibility requirements of W.Va. Code § 29-21-1, et seq, were satisfied appointed \_\_\_\_\_ a licensed Attorney at Law practicing before the Bar of this Court as counsel.

Counsel informs this Court these proceedings have been completed, and has tendered to the Court a defense counsel voucher indicating the services performed and the expenses incurred in connection with the representation of this client. This Court has inspected said voucher and accompanying documentation and does hereby approve a payment of: \$ \_\_\_\_\_ for services of counsel and for expenses incurred in connection with the representation; which amount shall be recorded by the Circuit Clerk a part of the costs of these proceedings.

Accordingly it is **HEREBY ORDERED**:

- (1) That the Clerk forward to Public Defender Services two certified copies of this Order together with two copies of the defense counsel voucher and all attachments;
- (2) That Public Defender Services issue payment in the appropriate amount, at whatever time as funds may become available, whether in the current or succeeding fiscal years, and subject to statutory limits, to:

\_\_\_\_\_, \_\_\_\_\_  
Tax Identification Number

ENTER THIS \_\_\_\_\_, DAY OF \_\_\_\_\_, \_\_\_\_\_  
(date) (month) (year)

\_\_\_\_\_  
JUDGE

**IMPORTANT NOTE:** All required orders of court must be certified copies and must bear the Circuit Clerk's seal.

Revised January 2007

{SAMPLE PAGE ONLY – NOT FOR OFFICIAL USE}

# WV SUPREME COURT UPDATE

Fall 2006 Term

**State v. Saunders**, No. 33034 – October 5, 2006 – Albright, J.

Appellant was prosecuted under the provisions of the Solid Waste Management Act, which provides in part that “[a]ny person convicted of a second offense or subsequent willful violation of subdivision (2) or (3) of this subsection or knowingly and willfully violating any provision of any permit, rule or order issued under or subject to the provisions of this article or knowingly and willfully violating any provision of this article, is guilty of a felony[.]”

On appeal, the appellant asserted that she could not be convicted of a felony under this section, and argued that such a conviction requires a previous conviction under the provisions of the Act. The Court disagreed with the appellant, noting that the relevant language in the section was phrased with the disjunctive “or”, and that such language “ordinarily connotes an alternative between the two [or more] clauses it connects.”

*Affirmed.*

**State v. Tommy Y., Jr.**, No. 33055 – October 27, 2006 – Davis, C. J.

Appellant was adjudicated a juvenile delinquent for assaulting a school employee and brandishing a deadly weapon. The appellant assigned three primary errors on appeal: (1) that the juvenile petition was defective because it had failed to state the venue of the offenses; (2) that the trial court had failed to dismiss two jurors for cause; and (3) that the appellant had erroneously been brought to the courthouse dressed in institutional clothing and shackled.

On the venue issue, the Court determined that the West Virginia Rules of Criminal Procedure, to the extent that they are not inconsistent with juvenile delinquency statutes, are applicable to juvenile proceedings, and that the failure of the petition to state venue was a non-jurisdictional error which had been waived by the appellant’s failure to make a pre-trial challenge to the petition. The Court similarly disposed of the appellant’s remaining issues, noting (1) that the appellant had failed to challenge for cause two jurors during voir dire, and that such failure constituted a waiver of the appellant’s right to assert the error on direct appeal, and (2) that the appellant had not shown that he was shackled or in institutional clothing during any portion of his trial, and had asserted only the possibility that jurors might have seen him clothed and shackled in the courthouse.

*Affirmed.*

**State ex rel. McLaurin v. McBride**, No. 32983 – November 15, 2006 – Per Curiam

Petitioner was convicted in 1989 of two counts of kidnapping and seven counts of sexual assault. The charges stemmed from three separate incidents involving three victims. He was granted habeas relief on two occasions, resulting in the reversal of both kidnapping and two sexual assault convictions, and the award of a new trial. The petitioner appealed this determination, arguing that the circuit court erred in not setting aside the five remaining sexual assault convictions.

The petitioner asserted (1) error in denying a motion to continue so that the petitioner could obtain a competency evaluation; (2) error in denying his motion to sever; (3) improper refusal of a cautionary instruction; (4) violation of double jeopardy; and (5) denial of the effective assistance of counsel. The Court reviewed the petitioner’s arguments and affirmed the circuit court.

In affirming, the Court held (1) that the petitioner's failure to cooperate with several previously ordered psychiatric examinations, coupled with the petitioner's statements regarding his desire to avoid an insanity defense, demonstrated that the circuit court did not err in denying another evaluation; (2) that the motion to sever was properly denied because similarities between the three incidents demonstrated a common scheme, plan or design; (3) that the circuit court had correctly concluded that the petitioner's proffered instruction regarding the multiple offenses was not a correct statement of the law; (4) that there was no double jeopardy violation, because two of the sexual offenses against one victim had occurred within a very short time; and (5) counsel was not ineffective in failing to present mitigating evidence during sentencing, due to the nature of the offenses and because the petitioner had not demonstrated what evidence should have been presented.

*Affirmed.*

**State v. Finley**, No. 32961 – November 16, 2006 – Albright, J.

Appellant was indicted for the murder and sexual assault of a Cabell County woman. The appellant's trial was bifurcated, and the appellant was convicted of all of the charges in September 2004. On October 12, 2004, the appellant arrived in the courtroom for the first day of the penalty phase. The appellant was clothed in jail clothing from the Western Regional Jail. Counsel objected to the appellant's appearance before the jury in this manner. The trial court, citing a "policy" of Cabell County, determined that because the jury was the same jury that had convicted the appellant, it was no longer necessary to permit the appellant to appear in civilian clothing. At the completion of the guilt phase, the jury did not return a recommendation of mercy.

In a case of first impression, the Court determined that due process requires that a defendant cannot routinely be compelled to appear in jail or prison clothing during the penalty phase of a bifurcated murder trial. The Court noted that while such decisions are within the sound discretion of the trial court, the defendant is entitled to a hearing on the matter, where the State must demonstrate an essential state interest justifying such attire.

While affirming the appellant's convictions, the Court remanded the appellant's case back to the circuit court to empanel a jury for a new sentencing hearing.

*Affirmed in part, Reversed in part, and Remanded.*

**In Re: Skyelan H., et. al.**, No. 33135 – November 17, 2006 – Per Curiam

The Department of Health and Human Resources ("DHHR") filed an abuse and neglect petition against the mother and father of Mersadies K. following the child's hospitalization. The petition alleged, *inter alia*, that the parent's inaction in seeking medical treatment for their children constituted a continuing threat to the safety and welfare of the children.

After conducting a number of hearings, the circuit court dismissed the petition, concluding that while there may have been errors in the parents' judgment, the DHHR had failed to prove that these errors had constituted abuse or neglect.

Upon appeal by the guardian *ad litem* for the children, the Court reversed and remanded the matter. The Court first noted that while the circuit court's decision was "likely correct based on the evidence presented by the parties", evidence was presented into the record after the hearings that three of the children might have been victims of sexual abuse. The Court stated that the circuit court, upon receipt of this information, should have taken a proactive role to compel the DHHR to investigate these allegations.

*Reversed and Remanded with Instructions.*

**Hatcher v. McBride, Warden**, No. 32977 – November 21, 2006 – Starcher, J.

Appellant was indicted in Cabell County in 1996 for first degree murder. The appellant's trial was bifurcated, and the appellant was found guilty of first degree murder on June 27, 1996.

The appellant's sentencing phase began the same day. During this phase, the prosecution called a sitting circuit judge, who was not presiding in the case, as a witness. The judge testified to his experiences with the appellant in the juvenile system. Following this testimony, the jury completed its deliberations and did not recommend mercy.

The Court, while critical of the testimony and procedures utilized in the appellant's trial, determined that the testimony presented by the judge was not so prejudicial as to amount to the denial of due process. The Court set forth a number of new procedural steps to be utilized in calling a judge as a witness in a proceeding, including (1) that a judge should discourage the party from requiring he or she to testify; (2) that a hearing be held to determine the relevancy, materiality and potential prejudice of such testimony; (3) that the party calling the judge, the trial judge and the testifying judge should limit the number of instances that the witness is referred to as "judge"; and (4) that a cautionary instruction regarding the judge's testimony should be given to the jury.

*Affirmed.*

**In Re: Christina W., et. al.**, No. 33133 – November 29, 2006 – Davis, C.J.

Abuse/neglect proceedings were instituted against Linda H., the mother of three daughters. The oldest daughter, Christina W., alleged that Linda H.'s boyfriend had sexually abused her, but subsequently recanted these statements.

During the course of subsequent proceedings, Christina W. met with her court-appointed guardian *ad litem* and disclosed that her mother's boyfriend had, in fact, touched her in an inappropriate manner. Christina requested that the guardian *ad litem* not disclose this information to the court. The guardian complied with this request. Christina subsequently disclosed the boyfriend's sexual misconduct to two case workers, and disclosed that she had advised the guardian of this information.

The Department of Health and Human Resources ("DHHR") filed a motion to remove the guardian *ad litem* due to a potential conflict of interest. The circuit court denied this motion, holding that the attorney/client privilege applied to the relationship between the child and her guardian *ad litem*. The DHHR appealed this order.

The Court first reviewed the status of a lawyer's role in serving as a guardian *ad litem* for a child and determined that because of the nature of this relationship, the rules of professional conduct are applicable. However, the Court determined that the duty of confidentiality owed by a guardian *ad litem* to his or her client is not absolute, and that where such duty would result in potential harm to the child, the guardian must make a disclosure to the court in order to safeguard the child's best interests.

*Affirmed.*

**State v. Daugherty**, No. 33075 – November 29, 2006 – Per Curiam

Appellant was convicted of four counts of sexual abuse by a parent. Following his trial, the appellant learned that one of his jurors had allegedly stated during deliberations that he (the juror) knew the appellant's family and was afraid that something might happen to his children if the appellant were not convicted. On appeal, the appellant argued that the statements attributed to the juror constituted improper extrinsic evidence and entitled the appellant to a new trial.

The Court observed (1) that the trial court had taken testimony from each of the jurors in the appellant's trial, and that eight of the jurors, including the juror to whom the statement was attributed, denied hearing the statement; (2) that the issue of a juror's fear was intrinsically related to the juror's deliberative process and therefore could not be utilized under Rule 606(b) to impeach the conviction; and (3) that the record did not demonstrate that the statement, if made, could have posed a reasonable possibility of prejudice to the appellant.

*Affirmed.*

**State v. Jones**, No. 33072 – November 29, 2006 – Per Curiam

Appellant was convicted of felony murder. On appeal, the appellant alleged that the circuit court erred in denying his motion to suppress a statement taken from the appellant following his arrest and while he was being transported for processing.

The appellant asserted that his statements were involuntary because he had been misled by the police into giving statements involving two homicides. Because he had not been separately advised of his *Miranda* rights for each of the crimes, the appellant argued that had he known he would be questioned for additional charges, he might have requested an attorney or invoke his right to remain silent.

The Court determined that the appellant was clearly aware that he was charged with only one homicide, and that nothing in the record indicated that the appellant was in any manner confused or uncertain as to the specific nature of his charges. The Court held that barring such confusion, there was no indication that the manner of questioning rendered the appellant's statement involuntary under a totality of the circumstances test.

*Affirmed.*

**State v. Middleton**, No. 33048 – November 29, 2006 – Davis, C.J.

The appellant was the subject of a police investigation concerning sexual contact with his girlfriend's daughter who had advised her father that the appellant had touched her in an inappropriate manner. The appellant was contacted by the police and agreed to give a statement to the authorities concerning the allegations. Over the course of two days, the appellant provided two statements to the police and also agreed to take a polygraph test. After undergoing the polygraph examination the appellant was advised that he had failed, and was further questioned by the police for several hours.

During the course of the post-polygraph questioning, an attorney contacted the police department, advised the officers that he would be representing the appellant, and instructed them to conduct no further questioning. The officers did not advise the appellant of this fact, and continued to question him, eventually obtaining several incriminating statements.

The Court held that there was no error in admitting the incriminating statements. The Court determined (1) that there was no *Miranda* violation because the appellant was not subject to a "custodial" interrogation at the time the post-polygraph statements were given; (2) that because the appellant was not in custody, any requests by him for counsel did not invoke the protections of *Miranda*, and that the police were not obliged to cease questioning; (3) that the police were under no obligation to advise the appellant that counsel had been retained for him because the interrogation was in a non-custodial setting; and (4) that the totality of the circumstances did not demonstrate that the statement was involuntary.

The Court also held (1) that there was no violation of the Confrontation Clause because a witness whose testimony was sought by the appellant and excluded by the court was not the complaining witness, and (2) that the trial court correctly apportioned that presentence credit-for-time served to the aggregate maximum of the appellant's sentences.

*Affirmed.*

**State v. Johnson**, No. 32978 – November 29, 2006 – Per Curiam

The appellant was indicted in September 2002 on a charge of first degree robbery. The indictment alleged that the appellant, "by using the threat of deadly force by threatening the use of a firearm", had committed a robbery at a Cabell County convenience store.

During trial the defense moved for a judgment of acquittal, noting that because of statutory changes in 2000, the mere threat of a firearm (as opposed to the actual presentment of a weapon) did not constitute first degree robbery.

The Court agreed that the 2000 amendment to W. Va. Code § 61-2-12 had removed the “threat” element from the offense of first degree robbery, and required the actual presentment of a deadly weapon to sustain such a conviction. The Court noted that because an essential element of first degree robbery (the presenting of a firearm) was not present in the appellant’s indictment, the indictment could not be sustained.

*Reversed.*

**State ex rel. McCabe v. Seifert**, No. 32976 – November 29, 2006 – Per Curiam

Petitioner was convicted in 2000 of several felony fraud offenses and sentenced to a term of imprisonment. The petitioner did not file an appeal of his convictions, but subsequently filed a petition for habeas corpus relief. The petition addressed a discrepancy between the sentencing order and the plea agreement regarding the date that his sentence would begin to run in relation to an earlier offense. The circuit court denied relief, and the petitioner filed an appeal with the Supreme Court of Appeal in August 2005. The petitioner was released on parole prior to oral arguments in the case.

While recognizing the Court’s inherent power to review the petitioner’s case and after some discussion of the merits of his claim, the Court noted that the petitioner’s release from prison effectively rendered the issue as moot. The Court did, nonetheless, grant the petitioner leave to file a motion in circuit court to correct the discrepancy in his sentencing order.

*Dismissed as Moot.*

**L. D. B. v. Albers**, No. 31279 – November 29, 2006 – Per Curiam

Respondent attorney’s law license was suspended in 2001 following her arrest for violation of a domestic violence protection order and the filing of a related ethics complaint. The respondent subsequently entered a guilty plea to misdemeanor charges, was placed on probation, and her license was reinstated in 2002.

Following a subsequent domestic-related arrest and the revocation of her probation, the respondent’s law license was again suspended. (*Office of Disciplinary Counsel v. Albers*, 211 W. Va. 11, 585 S.E. 2d 11 (2003)). After serving a period of jail confinement, the respondent entered guilty pleas to destruction of property and trespassing charges and was placed on home confinement, which she completed in February 2006.

In April 2006, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board conducted a hearing on the original ethics complaint filed in 2001 and the respondent’s petition for reinstatement. The Panel recommended reinstatement of the respondent’s law license, subject to a number of conditions.

The Court adopted the recommendations of the Lawyer Disciplinary Board including (1) eighteen months of supervised practice; (2) that due to the respondent’s ex-husband’s employment as a police officer, the respondent be required to notify her supervisor of all criminal cases accepted; (3) that she not accept any cases involving the Huntington Police Department; (4) that she continue to undergo psychological counseling; and (5) that she reimburse the Board for costs.

*Recommendation Accepted.*

**State v. Kendall**, No. 32689 – November 29, 2006 – Per Curiam

The appellant, a police officer for the City of Glennville, was indicted for numerous charges, including burglary and three counts of wanton endangerment. The charges stemmed from an incident where the appellant had observed an individual operating a motor vehicle at a time when the appellant believed the suspect to be under the influence of alcohol. The appellant later traveled to the suspect’s home where, without a warrant, the appellant entered the home

with his weapon drawn in search of the suspect.

Testimony conflicted over whether the appellant was invited into the home, or whether the appellant entered on his own volition. The appellant was subsequently convicted of burglary and three counts of brandishing a deadly weapon.

The Court determined (1) that the trial court's instruction that "exigent circumstances and hot pursuit" did not exist in the case constituted reversible error, because the issue of exigent circumstances is a question of fact to be determined by a jury; and (2) that the appellant's multiple convictions for brandishing violated double jeopardy principles. The Court held that a single act of brandishing could not produce multiple convictions simply because the act was viewed by three witnesses.

*Reversed and Remanded with Directions.*

**State v. Lanham**, No. 33092 – November 30, 2006 – Per Curiam

The appellant forced his way into the home of an ex-girlfriend and fired several gunshots at the woman's family, fatally shooting Jon Broadwater, who had begun dating the woman. On appeal, the appellant alleged that because the State had permitted the family residing in the home to take up residence after the incident, the State had failed to preserve potentially exculpatory evidence at the crime scene, including blood spatters and the locations of bullet holes.

The Court denied the appellant's claim. The Court observed that there was no scientific test directly implicating the appellant: rather, the evidence in the case from numerous eyewitnesses clearly indicated that the appellant had feloniously entered the crime scene with a firearm. The Court noted that the police had preserved all necessary evidence in the case, and had provided the appellant with approximately 100 photographs of the crime scene.

The Court also observed that, in the context of a dwelling house as a crime scene, it would not have been reasonable to exclude the residents of the home for an indeterminate period of time to permit potential testing by the defense.

*Affirmed.*

**In Re Randy H., et. al.**, No. 33086 – November 30, 2006 – Starcher, J.

The Department of Health and Human Resources ("DHHR") filed an abuse and neglect petition against Lucinda H., who had previously had her parental rights terminated to six other children. At a September 2005 hearing, the DHHR moved to dismiss the petition, citing Lucinda's compliance with services.

The guardian *ad litem* for the children objected, noting evidence that the children were being (and would be) exposed to known sex offenders if returned to the mother's custody. While the DHHR amended their petition, it did not present evidence to substantiate the new charges. The circuit court dismissed the petition, and the guardian *ad litem* appealed.

The Court determined that in light of the allegations of future harm that might come to the children because of Lucinda H.'s association with sex offender, the circuit court had the authority to compel the DHHR to further investigate the allegations. The Court noted that amendments to the Rules of Procedure for Child Abuse and Neglect Proceedings emphasize a "pro-active" role on the part of circuit courts in resolving abuse and neglect cases.

*Reversed and Remanded.*

**State v. Rush**, No. 33035 – November 30, 2006 – Per Curiam

The appellant, who was sixteen years old, was present at a home when the homeowner and a companion were shot and killed. After leaving the scene to contact authorities, the appellant was asked to accompany the police to the crime scene, where they arrived on May 15, 2003 at approximately 2:00 a.m.

The appellant was later transported to a police station, where over the next several hours he was subject to repeated interviews by several different state troopers. The appellant later asserted that one of the troopers had threatened him during this questioning if he attempted to leave the police station. The appellant also undertook a polygraph examination later in the afternoon of the same day. The appellant remained at the state police detachment throughout the afternoon and evening hours, eventually providing an inculpatory statement at 10:02 p.m. The appellant was taken before a magistrate at 11:00 p.m. that night.

The Court determined that the inculpatory statements made by the appellant late in the evening of May 15<sup>th</sup> were obtained in violation of the prompt presentment rule enunciated in W. Va. Code, § 49-5-8 (c)(4) (2006), and that there was no evidence that the excessive delay in presenting the appellant to the magistrate was for any reason other than to obtain a confession from the appellant. The Court therefore determined that two statements taken from the appellant (at 2:00 p.m. and 7:52 p.m., respectively) were therefore inadmissible.

The Court denied the appellant's challenge to the transfer of his case to adult status, determining that the transfer was based on at least one statement obtained prior to the appellant's custody status, and that there was sufficient evidence to support the transfer.

*Affirmed in part, Reversed in part, and Remanded.*

**L. D. B. v. Coleman**, No. 32861 – November 30, 2006 – Per Curiam

The respondent attorney was employed by a Charleston law firm exclusively in the field of bond work. Between September 2004 and May 2005, the respondent substituted a personal bank account number in lieu of the firm's account information on invoices sent to clients for payment by wire transfer. In this period, the respondent converted in excess of \$170,000 to his personal account. (The respondent also attempted a seventh transfer which was discovered before payment was rendered.)

The respondent was charged with six counts of misconduct by the Investigative Panel of the Lawyer Disciplinary Board. Following a hearing, the Panel recommended that the respondent's law license be annulled.

The Court noted that the parties did not dispute the relevant facts, and found the respondent's admitted violation of Rule 8.4 (c) to be dispositive, in that the attorney admitted to engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

Noting the "staggering" amount of money converted, combined with a similar incident by the attorney in 1994 and the lack of any compelling mitigating factors, the Court determined that annulment was an appropriate sanction. The Court also required the respondent to make full restitution to the firm and pay the costs of the disciplinary proceedings.

*License Annulled.*

**State v. Doonan**, No. 33052 – December 1, 2006 – Davis, C.J.

Appellant was charged with first-offense DUI in March of 2004. At the jury trial in magistrate court, the appellant attempted to offer the testimony of an expert witness who would have testified to issues regarding field sobriety testing, as well as the appellant's level of intoxication and the results of the secondary breath test. The magistrate granted the State's motion to exclude the witness on the grounds that the witness had not been disclosed by the appellant.

The appellant was convicted in magistrate court, and his conviction was affirmed by the circuit court. On appeal, the appellant asserted (1) that the magistrate court had erroneously excluded the testimony of his expert witness, and (2)

that the magistrate court erroneously admitted into evidence an illegible copy of a certified copy of the breathalyzer printout.

The Court first observed that the magistrate had improperly invoked a duty of reciprocal discovery on the appellant. The Court held that in the absence of a specific discovery rule in the Rules of Criminal Procedure for Magistrate Courts (and until such a rule is adopted), Rule 16 of the Rules of Criminal Procedure would govern in criminal cases in magistrate courts.

Under the provisions of Rule 16, a defendant is not obligated to provide discovery unless such discovery is specifically requested by the State, and only then after the defendant has requested and received discovery from the State. The Court noted that while the appellant herein had requested discovery, the State had not made a reciprocal request. Since the request was not made by the State, it was held to be error to exclude the appellant's expert witness on nondisclosure grounds.

The Court noted that it was improper, under Rules 1003 and 403 of the Rules of Evidence, to admit the illegible copy of the breathalyzer printout into evidence. However, the Court also determined that the introduction of the illegible copy of the breathalyzer printout was harmless error, because the information had already been introduced, without objection, through the testimony of the arresting officer.

*Reversed and Remanded.*

**All cases may be viewed online at: [http://www.state.wv.us/wvsca/docs/fall06/\(case#\).htm](http://www.state.wv.us/wvsca/docs/fall06/(case#).htm)**

# **UPCOMING CLE PROGRAM**

## **Everything a WV Trial Lawyer Needs to Know About Direct Appeals and Habeas Corpus**

March 15, 2007 at HOLIDAY INN MARTINSBURG, Martinsburg, WV

April 27, 2007 at OGLEBAY RESORT & CONFERENCE CENTER, Wheeling, WV

**\$50.00 *Non-refundable registration fee*** for Appointed Counsel Bar Members

**9:00 a.m. to 3:30 p.m.**

**5.4 General CLE Credits**

**&**

## **DEFENDING ABUSE AND NEGLECT CASES**

Presented by: West Virginia Public Defender Services

Criminal Law Research Center

and the Public Defender Corporation for the 6<sup>th</sup> and 24<sup>th</sup> Judicial Circuits

Friday, May 18, 2007

1:30 p.m. to 4:30 p.m.

Putnam County Courthouse

Old Courtroom (Adjacent to County Commission Offices)

**3.6 CLE General Credits Available**

Contact Info: Erin Akers, (304) 558-3905 ext. 11

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