

THE DEFENDER



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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

Rates Should be Raised

In 1989, the West Virginia Supreme Court of Appeals set the minimal constitutional level for appointed counsel hourly rates at \$45 an hour, out of court, \$65 an hour, in court. The Legislature complied with this mandate and made those rates effective July 1, 1990.

Since that time, no adjustment has been made. If the cumulative rate of inflation were taken into account, the hourly rate should be nearly 50% higher simply to reach 1990 levels. Clearly it is its time for change. A raise of \$10 per hour is surely reasonable and long overdue. Since this issue is inextricably intertwined with the perennial issue of adequate funding you may want to contact your legislators while they are in session.

The Governor had been extremely generous in recommending a supplemental appropriation for this agency and an increase for FY 2007 which should allow payment of all outstanding bills; however, absent passage of this supplemental request we will run out of funds by mid to late March for the remainder of the fiscal year. **(We are asking that you continue to send vouchers regardless of legislative action so that we will not get hopelessly backlogged.)**

Continued opposition to Public Defender offices is also at issue here. Obviously, an increase in hourly rates puts more pressure on our budget. PDS's budget grew from \$6.5 in FY 1989 to over \$28 million in FY 2006. But the increase was caused entirely by past underfunding and the effect of the rise in rates (which took place at the beginning of FY 1991) from \$20 and \$25 per hour to \$45 and \$65 per hour would alone account for the \$28 million dollar current budget.

But the caseload during this period nearly tripled (it is now somewhat less). Despite the rise in both private and Public Defender average costs per case the rapid increase in Public Defender offices offset the cost of the increased caseload. Estimated cumulative savings from Public Defender offices since 1990 are now well over \$100 million but would have been greater without the self-defeating opposition in a few remaining Circuits.

(continued from cover)

The Legislature is tired of continued increases and is very unlikely to consider a raise in the hourly rate until savings from Public Defender offices are maximized (that is, five more offices opened).

The Governor has been remarkably supportive but I fear that legislative resistance may prevent full funding. You should contact your legislators and also express your support for the Governor's budget, Public Defender expansion and a raise in hourly rates.

REGIONAL JAIL AUTHORITY AMENDS POLICY ON CREDIT FOR TIME SERVED FOR INMATES

In a recent policy memo, the Regional Jail Authority advised all regional jails that credit-for-time-served ("CTS") will be required, unless a judge has specifically stated in his or her commitment order that such time shall not be credited.

This policy memo marks a departure from the stated position of the Authority that CTS would only be counted if it was specifically provided for in the commitment or sentencing order. Our Office engaged the Authority over this practice in 2005, when we received information that the Authority was interpreting the CTS issue as discretionary, and that the regional jails would only count CTS if the sentencing order or commitment specifically included language providing for such computations. Our Office provided the Authority with the relevant case citations, and pointed out that such computations are non-discretionary.

The Authority's amended position, while removing the Authority from potential contempt proceedings, does not fully solve the problem. This position erroneously implies that a judge or a magistrate may, in their discretion, deny an inmate credit for time previously spent in custody on their criminal charge.

The cases of *Martin v. Leverette*, 161 W. Va. 547, 244 S.E. 2d 39 (1978); *State ex rel. Roach v. Dietrick*, 185 W. Va. 23, 404 S.E. 2d 415 (1991); *State v. McClain*, 211 W. Va. 61, 561 S.E. 2d 783 (2002); and *State v. Scott*, 214 W. Va. 1, 585 S.E. 2d 1 (2003) clearly mandate the assessment of credit for all time spent in custody prior to the imposition of a sentence. The cases establish the right as one of constitutional scope under the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution.

It is hopeful that this problem is not widespread; however, it is possible that some judges or magistrate might misinterpret the Authority's memo as an indication that CTS may be denied in a judge's discretion. It will be our duty to remain vigilant to attempts to deny such credit.

LEGISLATIVE ACTION

Bill Would Provide for Mandatory “Review” of Life without Parole Sentences

In the opening days of the 2006 Regular Session, the enclosed bill was introduced by Sen. Jon Blair Hunter (D. – Monongalia). This bill marks one of the few attempts in recent years to address the issue of mandatory appellate review of life without mercy sentences.

West Virginia remains the ONLY state that does not provide some form of mandatory appellate review of life sentences. Please contact your local legislator and express your sentiments regarding this legislation.

Senate Bill No. 163

[Introduced January 16, 2006; referred to the Committee on the Judiciary.]

A BILL to amend and reenact §61-2-2 of the Code of West Virginia, 1931, as amended, relating to providing for mandatory review of life without parole sentence by the State Supreme Court of Appeals.

Be it enacted by the Legislature of West Virginia:

That §61-2-2 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 2. CRIMES AGAINST THE PERSON.

§61-2-2. Penalty for murder of first degree.

(a) Murder of the first degree shall be punished by confinement in ~~the penitentiary~~ a correctional facility for life.

(b) Whenever a defendant is sentenced to life without parole, upon entry of the judgment and sentence in the trial court the sentence shall be reviewed on the record by the State Supreme Court of Appeals.

(c) Within ten days of the entry of a judgment and sentence imposing the life without parole penalty, the clerk of the trial court shall transmit notice thereof to the clerk of the Supreme Court of Appeals and to the parties. The notice shall include the caption of the case, its case number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and sentence, and the names and addresses of the attorneys for the parties. The notice shall vest the Supreme Court of Appeals with the jurisdiction to review the sentence of life without parole as provided by this chapter. The failure of the clerk of the trial court to transmit the notice as required does not prevent the Supreme Court of Appeals from conducting the sentence review.

(d) Within ten days after the entry of a judgment and sentence imposing the life without parole penalty, the clerk of the trial court shall cause the preparation of a verbatim report of the trial proceedings to be commenced.

(e) Within five days of the filing and approval of the verbatim report of proceedings, the clerk of the trial court shall transmit the verbatim report of proceedings together with copies of all of the clerk's papers to the clerk of the Supreme Court of Appeals. The clerk of the Supreme Court of Appeals shall acknowledge receipt of these documents by providing notice of receipt to the clerk of the trial court, the defendant or his or her attorney, and the prosecuting attorney.

(f) In all cases in which a person is convicted of aggravated first degree murder, the trial court shall, within thirty days after the entry of the judgment and sentence, submit a report to the clerk of the Supreme Court of Appeals, to the defendant or his or her attorney, and to the prosecuting attorney which provides the information specified under subsections (1) through (8) of this subsection. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Appeals and shall include the following:

(1) Information about the defendant, including the following:

- (A) Name, date of birth, gender, marital status, and race and ethnic origin;
- (B) Number and ages of children;
- (C) Whether his or her parents are living, and date of death where applicable;
- (D) Number of children born to his or her parents;
- (E) The defendant's educational background, intelligence level, and intelligence quotient;
- (F) Whether a psychiatric evaluation was performed, and if so, whether it indicated that the defendant was:
 - (i) Able to distinguish right from wrong;
 - (ii) Able to perceive the nature and quality of his or her act; and
 - (iii) Able to cooperate intelligently with his or her defense;
- (G) Any character or behavior disorders found or other pertinent psychiatric or psychological information;
- (H) The work record of the defendant;
- (I) A list of the defendant's prior convictions including the offense, date, and sentence imposed; and
- (J) The length of time the defendant has resided in West Virginia and the county in which he or she was convicted.

(2) Information about the trial, including:

- (A) The defendant's plea;
- (B) Whether defendant was represented by counsel;
- (C) Whether there was evidence introduced or instructions given as to defenses to aggravated first degree murder, including excusable homicide, justifiable homicide, insanity, duress, entrapment, alibi, intoxication, or other specific defense;
- (D) Any other offenses charged against the defendant and tried at the same trial and whether they resulted in conviction;
- (E) What aggravating circumstances were alleged against the defendant and which of these circumstances was found to have been applicable; and
- (F) Names and charges filed against other defendant(s) if tried jointly and disposition of the charges.

(3) Information concerning the sentencing proceeding, including:

- (A) The date the defendant was convicted and date the sentencing proceeding commenced;
- (B) Whether the jury for the sentencing proceeding was the same jury that returned the guilty verdict, providing an explanation if it was not;
- (C) Whether there was evidence of mitigating circumstances;
- (D) Whether there was, in the court's opinion, credible evidence of the mitigating circumstances;
- (E) The sentence imposed.

(4) Information about the victim, including:

- (A) Whether he or she was related to the defendant by blood or marriage;
- (B) The victim's occupation and whether he or she was an employer or employee of the defendant;
- (C) Whether the victim was acquainted with the defendant, and if so, how well;
- (D) The length of time the victim resided in West Virginia and the county;
- (E) Whether the victim was the same race and/or ethnic origin as the defendant;
- (F) Whether the victim was the same sex as the defendant;
- (G) Whether the victim was held hostage during the crime and if so, how long;
- (H) The nature and extent of any physical harm or torture inflicted upon the victim prior to death;
- (I) The victim's age; and
- (J) The type of weapon used in the crime, if any.

(5) Information about the representation of the defendant, including:

- (A) Date counsel secured;
- (B) Whether counsel was retained or appointed, including the reason for appointment;
- (C) The length of time counsel has practiced law and nature of his or her practice; and
- (D) Whether the same counsel served at both the trial and special sentencing proceeding, and if not, why not.

(6) General considerations, including:

- (A) Whether the race and ethnic origin of the defendant, victim, or any witness was an apparent factor at trial;
- (B) What percentage of the county population is the same race and/or ethnic origin of the defendant;

- (C) Whether members of the defendant's or victim's race and ethnic origin were represented on the jury;
- (D) Whether there was evidence that such members were systematically excluded from the jury;
- (E) Whether the sexual orientation of the defendant, victim, or any witness was a factor in the trial;
- (F) Whether any specific instruction was given to the jury to exclude race, ethnic origin, or sexual orientation as an issue;
- (G) Whether there was extensive publicity concerning the case in the community;
- (H) Whether the jury was instructed to disregard such publicity;
- (I) Whether the jury was instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding;
- (J) The nature of the evidence resulting in such instruction; and
- (K) General comments of the trial judge concerning the appropriateness of the sentence considering the crime, defendant, and other relevant factors.

(7) Information about the chronology of the case, including the date that:

- (A) The defendant was arrested;
- (B) Trial began;
- (C) The verdict was returned;
- (D) Post-trial motions were ruled on;
- (E) Special sentencing proceeding began;
- (F) Sentence was imposed;
- (G) Trial judge's report was completed; and
- (H) Trial judge's report was filed.

(8) The trial judge shall sign and date the questionnaire when it is completed.

The sentence review required by this section shall be in addition to any appeal. The sentence review and an appeal shall be consolidated for consideration. The defendant and the prosecuting attorney may submit briefs within the time prescribed by the supreme court and present oral argument to the court.

With regard to the sentence review, the Supreme Court of Appeals shall determine:

- (a) Whether there was sufficient evidence to justify the sentence; and
- (b) Whether the sentence of life without parole is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases in which the judge or jury considered the imposition of life without parole punishment regardless of whether it was imposed or executed
- (c) Whether the sentence of life without parole was brought about through passion or prejudice; and
- (d) Whether the defendant was mentally retarded.

Upon completion of a sentence review the Supreme Court of Appeals may invalidate the sentence of life without parole and remand the case to the trial court for resentencing or the court may affirm the sentence of life without parole and remand the case to the trial court for execution.

In all cases in which a sentence of life without parole has been imposed, the appellate review, if any, and sentence review to or by the Supreme Court of Appeals shall be decided and an opinion on the merits shall be filed within one year of receipt by the clerk of the Supreme Court of Appeals of the verbatim report of proceedings. If this time requirement is not met, the chief justice of the Supreme Court of Appeals shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting the delay. A failure to comply with the time requirements of this subsection shall in no way preclude the ultimate execution of a sentence of life without parole.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

U.S. SUPREME COURT UPDATE

United States Supreme Court
Selected Opinions
October 2005 – January 18, 2006

Dye v. Hofbauer, 126 S.Ct. 5 (Oct. 11, 2005) (Per Curiam)

- **Federal constitutional issue sufficiently raised in state court and sufficiently stated for federal habeas review**

The Court held that the petitioner sufficiently raised his federal due process claim of prosecutorial misconduct on appeal to state appellate court to satisfy the “exhaustion” requirement for consideration of this claim on federal habeas review and that the petitioner asserted this claim with more than sufficient particularity in his federal habeas petition.

Schriro v. Smith, 126 S.Ct. 7 (Oct. 17, 2005) (Per Curiam)

- **Court of Appeals exceeded its limited habeas review authority by commanding Arizona courts to conduct a jury trial to resolve habeas petitioner's claim that he couldn't be executed due to mental retardation**

Smith was convicted by an Arizona jury of first-degree murder, sexual assault, and kidnapping and was sentenced to death. After *Atkins v. Virginia*, 536 U.S. 304 (2002) was issued, Smith's case returned to the Ninth Circuit and he asserted in briefing shortly thereafter that he is mentally retarded and cannot, under *Atkins*, be executed. The Court of Appeals for the Ninth Circuit ordered suspension of all federal habeas proceedings and directed Smith to institute proceedings in state court to determine whether the state was prohibited from executing him based on alleged mental retardation. The court further ordered that the issue be determined by jury trial unless waived. The State's petition for certiorari was granted and the judgment was reversed.

Held: The Court of Appeals exceeded its limited authority on habeas review by commanding Arizona courts to conduct a jury trial to resolve habeas petitioner's mental retardation claim.

Kane v. Espitia, 126 S.Ct. 407 (Oct. 31, 2005) (Per Curiam)

- **Ninth Circuit erred in holding, based on *Faretta*, that a violation of a law library access right is a basis for federal habeas relief**

Respondent chose to proceed pro se in California state court on carjacking and other charged offenses. Despite his repeated requests, and court orders to the contrary, he received no law library access while in jail before trial. He received about four hours of access during trial just before closing argument. The Court of Appeals for the Ninth Circuit held that the lack of any pretrial access to law books violated respondent's constitutional right to represent himself as established in *Faretta v. California*, 422 U.S. 806 (1975).

Held: A necessary condition for federal habeas relief here is that the state court's decision be contrary to or involve an unreasonable application of clearly established Federal law as determined by the Supreme Court. *Faretta* (which

establishes a Sixth Amendment right to self-representation) does not clearly establish the law library access right and the court below, therefore, erred in holding, based on *Faretta*, that such violation is a basis for federal habeas relief.

Eberhart v. United States, 126 S.Ct. 403 (Oct. 31, 2005) (Per Curiam)

- **Fed. R. Crim. Pro. 33's time limitations for motion for new trial are not jurisdictional, but are instead an example of an "inflexible claim-processing rule". Government forfeited defense of untimeliness by failing to raise it until after District Court reached the merits.**

Federal Rule of Criminal Procedure 33(a) allows a district court to "vacate any judgment and grant a new trial if the interest of justice so requires." But "[a]ny motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7 day period." The Rules provide that courts may not extend the time to take any action under Rule 33 except as stated in Rule 33 itself. Rule 45(b)(2).

Petitioner was convicted of conspiring to distribute cocaine. On the last day available for post-trial motions, he moved for judgment of acquittal or, in the alternative for a new trial, raising a single ground for relief. Nearly six months later, he filed a supplemental memorandum supporting the motion and adding two additional grounds. Rather than arguing that the untimeliness of the supplemental memo barred the District Court from considering the issues it raised, the Government opposed it on the merits. The District Court granted the motion and for the first time on appeal the Government raised untimeliness. The Court of Appeals for the Seventh Circuit construed Rule 33's time limitations as "jurisdictional," permitting the Government to raise noncompliance with those limitations for the first time on appeal.

Held: There is "a critical difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule." Rule 33 is an example of the latter. The Government forfeited the defense of untimeliness by failing to raise it until after the District Court had reached the merits.

Bradshaw v. Richey, 126 S.Ct. 602 (Nov. 28, 2005) (Per Curiam)

- **Sixth Circuit ruling on sufficiency of evidence erroneous; and erred in adjudication of Strickland claim**

Respondent was tried for aggravated murder committed in the course of a felony (arson). The State presented evidence of respondent's intent to kill his ex-girlfriend and her boyfriend, who escaped the fire, but not of specific intent to kill the 2-year old who died in the fire. The Sixth Circuit granted habeas relief on two grounds: 1) that transferred intent was not a permissible theory for aggravated felony murder under Ohio law and that the evidence of direct intent was constitutionally insufficient to support conviction; and 2) trial counsel was constitutionally deficient under *Strickland v. Washington* in his retaining and mishandling of his arson expert and in his inadequate treatment of the State's expert testimony.

Held: the Sixth Circuit erred in holding that the doctrine of transferred intent was inapplicable to aggravated felony murder for the version of Ohio law under which respondent was convicted. Because the Sixth Circuit disregarded the Ohio Supreme Court's authoritative interpretation of Ohio law, its ruling on sufficiency of the evidence was erroneous.

The Court of Appeals also erred in its adjudication of the *Strickland* claim by relying on evidence that was not properly presented to the state habeas courts without first determining whether respondent was at fault for failing

to develop the factual bases for his claims in state court or whether respondent satisfied the criteria established by 28 U.S.C. 2254(e)(2). The Sixth Circuit also erred by disregarding the state habeas courts' conclusion that the defense forensic expert was a "properly qualified expert" without analyzing whether the state court's factual finding had been rebutted by clear and convincing evidence. Additionally, the Sixth Circuit erred in relying on certain grounds that were apparent from the trial record but not raised on direct appeal without first determining whether respondent's procedural default of these subclaims could be excused by a showing of cause and prejudice or by the need to avoid a miscarriage of justice. Vacated and remanded.

Evans v. Chavis, (No. 04-721, January 10, 2006) (Breyer, J.)

- **Federal Habeas Corpus**

- AEDPA 1-Year Time Limit**

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a state prisoner whose conviction has become final to seek federal habeas corpus relief within one year. The Act tolls this 1-year limitations period for the "time during which a properly filed application for State post-conviction or other collateral review ... is pending." The time that an application for state post conviction review is "pending" includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law. *Carey v. Saffold*, 536 U.S. 214 (2002).

In most States a statute sets out the number of days for filing a timely notice of appeal. California, however, has a special system governing appeals when prisoners seek relief on collateral review. Under that system, the equivalent of a notice of appeal is timely if filed within a "reasonable time."

In this case, the Ninth Circuit found timely a California prisoner's request for appellate review made *three years* after the lower state court ruled against him.

Held: the Circuit departed from the Supreme Court's interpretation of the Act as applied to California's system, *Carey v. Saffold*, *supra*, and the judgment was therefore reversed.

United States v. Georgia, (No. 04-1203, January 10, 2006) (Scalia, J.)

The Court considered whether a disabled inmate in a state prison may sue the State for money damages under Title II of the Americans with Disabilities Act of 1990(ADA). The Court held insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.

Brown v. Sanders, (No. 04-980, January 11, 2006) (Scalia, J.)

- **Death Penalty**

The Court considered the circumstances in which an invalidated sentencing factor will render a death sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the jury's weighing process. The Court found the jury's consideration of the invalid "special circumstances" gave rise to no constitutional violation.

Gonzales v. Oregon, (No. 04-623, January 17, 2006) (Kennedy, J.)

- **Controlled Substances Act does not allow Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under state law permitting procedure**

The question presented is whether the federal Controlled Substances Act allows the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure. The Court held it does not.

Rice v. Collins, (No. 04-52, January 18, 2006) (Kennedy, J.)

- **State court's crediting of prosecutor's race-neutral explanation in *Batson* challenge did not constitute unreasonable determination of the facts precluding federal habeas relief**

The question at issue in this federal habeas corpus action is the California courts' rejection of respondent's argument that the prosecutor struck a young, African-American woman, Juror 16, from the panel on account of her race. As race-neutral explanations for striking the juror, the prosecutor said that Juror 16 had rolled her eyes in response to a question from the court, that Juror 16 was young and might be too tolerant of a drug crime, and that Juror 16 was single and lacked ties to the community. A further part of the prosecutor's explanation was her reference to Juror 16's gender. The trial court disallowed any reliance on that ground. The trial court rejected the respondent's challenge.

The California Court of Appeal upheld the conviction. According to its review of the record, nothing suggested the trial court failed to conduct a searching inquiry of the prosecutor's reasons for striking Juror 16. The appeals court thus upheld the trial court's ultimate conclusion to credit the prosecutor. The Supreme Court of California denied respondent's petition for review.

Respondent sought collateral relief on this claim in federal court. The District Court dismissed with prejudice respondent's petition for a writ of habeas corpus. A divided panel of the Court of Appeals for the Ninth Circuit reversed and remanded with instructions to grant the petition. Noting that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governed respondent's petition, the panel majority concluded that it was an unreasonable factual determination to credit the prosecutor's race-neutral reasons for striking Juror 16.

Held: though it recited the proper standard of review, the Ninth Circuit improperly substituted its evaluation of the record for that of the state trial court.

The Court found on direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error. Under AEDPA, however, a federal habeas court must find the state-court conclusion "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Thus, a federal habeas court can only grant respondent's petition if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge.

The Court found the state-court decision was not an unreasonable determination of the facts in light of the evidence presented in the state court. Reversed and remanded.

Avotte v. Planned Parenthood of Northern New England, (No. 04-1144, January 18, 2006) (O'Connor, J.)

- **Constitutional challenge to New Hampshire's parental notification law remanded for reconsideration of choice of remedy**

In 2003, New Hampshire enacted the Parental Notification Prior to Abortion Act. Before the Act took effect, respondents brought suit under 42 U.S.C. Sec.1983 alleging that the Act is unconstitutional. The District Court declared the Act unconstitutional and permanently enjoined its enforcement. The Court of Appeals for the First Circuit affirmed.

Certiorari was granted to decide whether the courts below erred in invalidating the Act in its entirety because it lacks an exception for the preservation of pregnant minors' health.

Held: invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief. The Court vacated and remanded for the Court of Appeals to reconsider its choice of remedy.

WV SUPREME COURT UPDATE

Fall 2005

ABUSE AND NEGLECT – DEGREE OF PROOF TO SUPPORT ALLEGATIONS

State ex rel. Department of Health and Human Resources v. Fox, et. al., No. 32847 – November 17, 2005 – Per Curiam (*Marion County*)

The DHHR obtained custody of Sean M. following the death of his eight-month old brother Dominic in April 2003. Initial reports indicated that Dominic’s injuries were consistent with Shaken Baby Impact Syndrome (“SBIS”). The State alleged that the children’s father, Charles, had intentionally inflicted the injuries upon Dominic. Criminal proceedings were initiated against Charles, which resulted in an *Alford* plea to a charge of involuntary manslaughter and the imposition of two years probation.

During the course of the adjudication hearings, the trial court granted the parents’ motion for a pre-adjudicatory improvement period. This decision was based on medical evidence produced at the adjudicatory hearings and on recommendations from the guardian ad litem and the CASA. Following the parent’s successful completion of the improvement period, the trial court returned custody of Sean M. to his parents. The DHHR sought a writ of prohibition to prevent the enforcement of this order.

Held: The Court affirmed the trial court’s decision to return custody to the child’s parents. The Court noted that there had been substantial evidence submitted at the adjudicatory hearings that Dominic had not died from SBIS, but from a previous accidental injury, which was exacerbated by a re-bleed of the injured area and a blood coagulation disorder. The Court noted that when the child was taken to the hospital, “no other option besides SBIS was considered as a possible source of Dominic’s problems.” Because there was no evidence that Sean had ever been abused, and that there was no showing that Sean resided in a home as another abused child, the Court denied the requested writ of prohibition.

Writ of Prohibition Denied.

ATTORNEYS – DISCIPLINARY PROCEEDINGS

Lawyer Disciplinary Board v. Dues, No. 31713 – November 17, 2005 – Davis, J.

A Hearing Panel Subcommittee of the Lawyer Disciplinary Board determined that the respondent attorney had committed thirty-nine separate violations of the Rules of Professional Conduct. The Lawyer Disciplinary Board recommended a number of sanctions, including an eighteen-month suspension of the attorney’s license to practice law. The attorney did not contest the Board’s findings as to the specific violations and to the majority of the sanctions, but argued that the eighteen-month suspension of his law license was unduly harsh.

Held: The Court agreed with the attorney and determined that, in light of the mitigating factor of the attorney’s mental disability, suspension of the attorney’s law license was not warranted. The Court adopted a new syllabus point regarding the effect of mental disability as a mitigating factor in disciplinary proceedings.

Public Reprimand and Other Sanctions.

INSTRUCTIONS – INFERENCES FROM USE OF DEADLY WEAPON

State ex rel. Corbin v. Haines, No. 32502 – November 17, 2005) – Per Curiam (*Putnam County*)

The petitioner was convicted in 1993 of the execution-style murder of Angela Dailey. His direct appeal was refused, and in 1998 he filed a *pro se* Petition for Habeas Corpus relief in the Circuit Court of Putnam County. Following an omnibus hearing in July 2001, the Circuit Court denied habeas corpus relief.

The petitioner’s primary assertion in his petition was that the jury was improperly instructed as to the inferences of malice, intent and deliberation when a deadly weapon has been utilized in the offense. The petitioner asserted that the instruction used at trial was found unconstitutional in *State v. Jenkins*, 191 W. Va. 87, 443 S.E. 2d 244 (1994) (the *Jenkins* opinion was released two weeks after the refusal of the petitioner’s appeal and fourteen months after the verdict).

Held: The Court determined that the instruction did not violate the principles of *Jenkins* and remains a correct statement of law. Noting that the Court had “consistently validated jury instructions which permit the jury to infer malice and intent where the defendant has shot the victim with a firearm under circumstances not affording the defendant an excuse, justification or provocation”, the Court held that the use of Jury Instruction No. 6 was not error. The Court observed that the defendant had not asserted such grounds, but had simply argued that he was not the person who had shot Ms. Dailey.

Affirmed.

JUVENILE DELINQUENCY – REQUIRE MULTIDISCIPLINARY PROCESS

State v. Brandon B., No. 32052 – November 17, 2005 – Davis, J. (*Berkeley County*)

The DHHR”) appealed from dispositions in two unrelated juvenile delinquency proceedings. In both cases, the trial court adjudicated the juvenile as delinquent and agreed to a similar disposition between the parties, which involved placing the juvenile in out-of-state treatment facilities. In both cases, the juvenile was placed in the legal custody of the DHHR; however, the Department was not notified of the potential placement plan and did not participate in the adjudicatory and dispositional procedures. The DHHR asserted that the respective circuit courts had erred by failing to follow the mandatory multidisciplinary treatment plan procedure set forth in W. Va. Code § 49-5D-3 (2004).

Held: The Court held that the mandatory language of § 49-5D-3 requires notification to the WVDHHR and participation by the Department in a multidisciplinary treatment team process. Citing *E.H. v. Matin*, 201 W. Va. 463, 498 S.E. 2d 35 (1997) and *State ex rel. Ohl v. Egnor*, 201 W. Va. 777, 500 S.E. 2d 890 (1997), the Court held that § 49-5D-3 requires every county to establish and utilize the treatment planning process in juvenile delinquency proceedings when the circuit court is considering placing the juvenile in facilities at the expense of the Department.

Reversed.

IMPROPER CLOSING ARGUMENT – JUROR DISQUALIFICATION – JURY VIEW

State v. Mills, No. 32551 – November 17, 2005 – Per Curiam (*Kanawha County*)

Following the reversal of his conviction for first degree murder, (*State v. Mills*, 211 W. Va. 532, 566 S.E. 2d 891 (2002)), the appellant was retried and convicted of first degree murder with no recommendation of mercy. The appellant cited a number of errors in his petition for appeal. The Court addressed four issues asserted by the appellant:

(1) The appellant was required to exercise two peremptory challenges when the trial court refused to remove two prospective jurors for cause. Each of these jurors had initially indicated during voir dire that they would not be able to consider a life sentence with the possibility of parole after fifteen years if they found the appellant guilty. **Held:** The Court held that the jurors' initial responses were "not so clearly disqualifying as to prevent attempts at explanation", and that the trial court's subsequent inquiry demonstrated no bias or prejudice on the part of the jurors.

(2) The appellant also argued that the prosecuting attorney engaged in improper argument by stating, during the rebuttal phase of closing argument, that the appellant was already getting mercy because West Virginia does not have the death penalty. **Held:** The Court held that these statements were "extremely unconventional" and were a "drastic mischaracterization of the concept of mercy" and were clearly in error. However, the Court determined that no clear prejudice or manifest injustice resulted from these remarks, and that they were of limited duration and not overtly coercive toward the jury.

(3) The Court observed that during a jury view at the crime scene, representatives of the media had appeared and had subsequently published a photograph of the backs of some of the jurors as they walked near the scene. **Held:** The Court affirmed the trial judge's ruling that there had been no showing of any effect on the jury from the media's presence, and affirmed the trial court's refusal to poll the jury as to the effect of the media presence and the subsequently published photograph.

(4) During the trial the victim's daughter testified that her mother was "very much afraid" of the appellant. The appellant objected to this testimony as improper character evidence under Rule 404(a) of the West Virginia Rules of Evidence. The State asserted that the evidence was submitted to show the victim's state of mind and the absence of provocation by the victim. **Held:** The Court determined, however, that even if such evidence could be construed as character evidence, it was not offered to prove that the appellant had acted in conformity with the victim's impression.

Affirmed.

WAIVER OF MIRANDA RIGHTS – VOLUNTARY STATEMENTS

State v. Smith, No. 32582 – November 17, 2005 – Per Curiam (*Marion County*)

The appellant was arrested and charged with possession of cocaine and possession of a deadly weapon. After being transported to the police station, the appellant's Miranda rights were read to him by a police officer. The appellant refused to sign the waiver form and the appellant was taken for fingerprinting and processing. During these procedures, another officer questioned the appellant regarding the ownership of the gun confiscated from the appellant at his arrest. The appellant subsequently claimed ownership of the weapon but denied ownership of the drugs.

The appellant asserted that his eighth grade education and learning disability prevented him from fully understanding

his Miranda rights, and that the statement was involuntary and coerced by the police. The trial court denied these motions and the appellant was subsequently convicted of both charges.

Held: Citing *North Carolina v. Butler*, 441 U.S. 369 (1979) and *State v. Gwinn*, 169 W. Va. 456, 288 S.E. 2d 533 (1982), the Court determined that a defendant's refusal to sign a written waiver form was not dispositive to the issue of the admissibility of the statements.

In reviewing the totality of the circumstances of the appellant's purported waiver, the Court determined that the appellant had waived his rights to counsel and to remain silent. The Court noted that the appellant, when questioned by the officer during the booking process, had not requested an attorney and had voluntarily responded to the officer's questions. The Court also determined that the appellant had not presented independent, concrete evidence of his learning disability sufficient for the trial court to find that the appellant could not comprehend his Miranda rights.

Affirmed.

ATTORNEYS – DISQUALIFICATION OF DEFENSE COUNSEL

State ex rel. Blake v. Hatcher, No. 32747 – November 18, 2005 – Benjamin, J. (*Fayette County*)

The respondent Carroll was indicted by a Fayette County grand jury. He was initially represented by attorney John R. Mitchell, Sr.. After Mr. Mitchell's initial appearance, the State moved to disqualify Mitchell from Carroll's representation, based on Mitchell's prior representation of Charles Keenan, a material witness for the state in the Carroll matter. The circuit court denied the State's motion for lack of standing, and the State sought a writ of prohibition.

Held: The Court (1) determined that the State does indeed have standing to move for disqualification in appropriate circumstances, and (2) emphasized the "heavy burden" resting on the State in such instances, stressing that trial courts, when considering such motions, must conduct a hearing and must balance the defendant's right to counsel of choice with the court's interest in maintaining the integrity of the proceedings. The Court also stressed that the trial courts must remain vigilant to determine "whether a situation truly involves an actual or serious potential for conflict of interest or whether the State is instead seeking to deprive the defendant of his or her counsel of choice."

Writ Granted as Moulded.

INDICTMENTS – AIDING AND ABETTING

State v. Legg, No. 32500 – November 21, 2005 – Starcher, J. (*Greenbrier County*)

The appellant was charged with the felony offense of wrongful removal of timber and was indicted as a principal in the first degree. At trial, the State requested that the jury be instructed as to aiding and abetting. The appellant objected, citing the language of the indictment, and argued that either the indictment was insufficient or the jury instructions were improper.

Held: The Court denied these arguments, noting that under W. Va. Code § 61-11-6 (1923), there is no legal distinction between a principal in the first degree and an aider and abettor. The Court stated that language in an indictment designating an aider/abettor is not required, and that the question of whether a person acted as a principal in the first degree or second degree is a question of fact to be determined by a jury.

The Court denied the appellant's claim that aiding and abetting required additional elements beyond that of a

principal in the first degree, and further held that the appellant had in no way indicated any actual prejudice by the use of the instruction. The Court examined a list of factors (whether the defense would have been presented differently, whether the defenses was sufficient to defend against both theories, and whether the defendant took steps to remedy the prejudice), and determined that the appellant had failed to demonstrate that he had suffered actual prejudice.

Affirmed.

CLOSING ARGUMENTS – DENIAL OF RIGHT TO PRESENT ARGUMENT

State v. Webster, No. 32510 – November 29, 2005 – Maynard, J. (*Greenbrier County*)

The appellant was charged with domestic battery. After being convicted in magistrate court, she appealed to circuit court and received a *de novo* bench trial. After the appellant rested her case, the trial court immediately began to issue a verdict. Counsel for the appellant objected and requested the opportunity to make a closing argument, but the trial court denied this request and informed counsel that a closing argument would not be permitted.

Held: Noting the State’s concession of error, the Court held that the trial court’s decision was improper. Citing *Herring v. New York*, 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975), the Court held that the trial court’s denial of the right to make a closing argument amounted to a denial of the appellant’s right to present her defense. The Court further held that this error could not be cured by a remand for this sole purpose, and accordingly reversed the appellant’s conviction.

Reversed and Remanded.

INEFFECTIVE ASSISTANCE OF COUNSEL – HABEAS CORPUS

State ex rel. Wensell v. Trent, No. 32567 – November 29, 2005 – Per Curiam (*Monongalia County*)

The appellant was convicted in 1996 of numerous sexual offenses and was sentenced to no less than twenty-one years and no more than fifty-five years imprisonment. In 2001, the appellant filed a petition for state habeas corpus relief, which was denied in 2004 after two omnibus evidentiary hearings. On appeal, the appellant’s primary assertion was that he had received ineffective assistance of counsel at trial. The appellant’s primary complaints were (1) that his trial counsel had failed to hire an investigator, and (2) that counsel had failed to retain a psychological expert.

Held: The Court agreed with the circuit court’s ruling that counsel’s failure to hire an investigator and psychologist fell below professional standards, but that the appellant had failed to demonstrate that these omissions had actually prejudiced his defense or had any substantial effect on the outcome of the trial. The Court determined (1) that the appellant had not “shown any actual, new exculpatory evidence which might have been discovered had an investigator been hired”, and that there was no indication that but for this failure the outcome of the trial would have been different; and (2) while the appellant’s trial counsel had not retained a psychologist, habeas counsel had presented such testimony and that the expert retained for this testimony did not express disagreement with the ultimate opinions provided by the State’s psychological expert at trial.

Affirmed.

RETROACTIVE APPLICATION OF CASE LAW - BIFURCATION

State v. Reed, No. 32610 – November 29, 2005 – Per Curiam (*Cabell County*)

The appellant was convicted of third-offense domestic battery and, pursuant to the habitual criminal act, sentenced to two-to-five years' imprisonment. On appeal, the appellant asserted that the trial court had erroneously denied his motion for bifurcation to contest the validity of the prior domestic battery convictions, in accordance with *State v. McCraine*, 214, W. Va. 188, 588 S.E. 2d 177 (2003).

Held: The Court agreed with the appellant that, under the *McCraine* opinion, a defendant is entitled to a bifurcated trial in order to contest the validity of any prior conviction in cases where such convictions are status elements of the offense charged. The Court noted that the *McCraine* opinion was decided after the appellant's conviction and sentencing, but the Court turned determined that because the possibility of direct appeal by the appellant existed at the time of the release of the opinion, retroactive application was possible.

However, the Court determined that the issue had not been properly preserved for appeal. The Court noted that upon the denial of the bifurcation motion, the appellant had stipulated to the prior offenses, and had not requested a pre-trial hearing on the issue pursuant to syllabus point 4 of *State v. Nichols*, 208 W. Va. 432, 541 S.E. 2d 310 (1999). The Court noted there had been no objection to the denial of the bifurcation motion and that the issue had not been raised in post-trial motions.

Affirmed.

RIGHT TO BEAR ARMS – EFFECT OF DOMESTIC VIOLENCE CONVICTIONS

In Re: Petition of Parsons, No. 32662 – November 29, 2005 – Maynard, J. (*Ohio County*)

The appellant, a police officer, was convicted of misdemeanor domestic assault and received a six-month period of probation. Upon the expiration of this term, the appellant filed a petition for the restoration of his right to own and possess a firearm. The circuit court denied relief, reasoning that such a grant would violate federal law.

Held: The Court reviewed the facts and pertinent law and affirmed the trial court's decision. The Court noted that W. Va. Code §61-7-7(c), which permits a person to petition for the restoration of his or her right to possess a firearm, contains a provision prohibiting such restoration if such restoration would violate federal law. The Court observed that under 18 U.S.C. § 922(g)(9), any person convicted of a misdemeanor crime of domestic violence is prohibited from possessing "any firearm or ammunition." The Court agreed with the circuit court that the appellant's case fell under this prohibition.

The Court also determined that (1) the appellant could not have his rights "restored" for the purpose of 18 U.S.C. § 921(a)(33)(B)(ii), because he had not forfeited any of his civil rights as a result of his conviction; (2) that "civil rights", insofar as 18 U.S.C. §921 are concerned, address only the rights to vote, hold elective office, and sit on a jury, and that since the appellant did not lose these rights, he had no "civil rights" to restore; and (3) that 18 U.S.C. §922(g)(9) requires does not require that a state statute include as an element of the offense a domestic relationship between the defendant and the alleged victim.

Affirmed.

DUI ADMINISTRATIVE PROCEEDINGS – SUFFICIENCY OF EVIDENCE FOR REVOCATION

In Re: Petition of McKinney, No. 32748 – November 29, 2005 – Maynard, J. (*Raleigh County*)

McKinney was convicted of DUI in 1997, which resulted in the administrative revocation of his driver’s license. Several years later, while his license remained revoked for the DUI offense, he was arrested for speeding and driving on a revoked license / DUI related (“SRL-DUI”). A plea bargain resulted in a plea to lesser charges, including a plea to the offense of driving on a suspended license / administrative related.

Based upon his arrest on the SRL-DUI charge, the Division of Motor Vehicles (“DMV”) suspended McKinney’s driver’s license for an additional one year. McKinney appealed this ruling to the circuit court, which reversed the increased suspension. The circuit court based this determination on a reading of W. Va. Code §17B-4-3, which does not require the imposition of an additional license suspension for a first offense conviction under §17B-4-3(a).

Held: The Court reversed this decision and held that the DMV had properly revoked McKinney’s license. The Court based its decision on a reading of W. Va. Code §17B-3-6(a), which authorized a suspension “without preliminary hearing” upon the showing of “sufficient evidence” that a licensee has “committed” an offense requiring mandatory revocation. The Court held that it was not necessary to show that the driver had actually been convicted of the offenses; only that “sufficient evidence” exists to justify the suspension.

The Court noted that McKinney’s license had been suspended for a DUI offense, and that the DMV had sufficient evidence in its records to prove that McKinney had “committed” an offense requiring mandatory revocation.

Reversed.

PLEA AGREEMENTS – ACCEPTANCE/REJECTION BY COURT

State v. Waldron, No. 32693 – November 30, 2005 – Per Curiam (*McDowell County*)

The appellant was charged with murder in connection with a murder-for-hire scheme concocted by a co-defendant, Mullins, and a third party. Mullins shot and killed a woman and injured two other persons in connection with the plan; testimony from the injured persons indicated that the appellant functioned as a “lookout” for Mullins during the killing. After the appellant’s arrest, he agreed to cooperate with the authorities in the case against Mullins; this cooperation was secured by means of a plea agreement between the appellant and the prosecuting attorney, wherein the appellant was to be permitted to enter a plea to being an accessory after-the-fact and serve a period of time in the regional jail.

The circuit court refused, however, to accept the plea agreement. The court stated, in part, that it would only accept a felony plea in the matter. The appellant declined (primarily because of the potential of recidivist proceedings) and proceeded to trial. After his conviction and sentencing, the State initiated recidivist proceedings and the appellant received an additional five years imprisonment.

Held: The Court affirmed the appellant’s convictions. The Court held (1) that the trial judge was within his discretion in rejecting the plea agreement, which was not presented to the court prior to the appellant’s fulfillment of his portion of the agreement; (2) that the admission of certain photographs did not violate Rule 403, in that they were not gruesome and were not unfairly prejudicial; (3) that the appellant had not requested, during trial, to review notes made by a courtroom observer and confiscated by the court, and did not make a specific objection to their destruction; and (4) that the trial court did not err in providing a modified “Allen” charge to the jury after four hour of deliberation.

Affirmed.

IMPROPER CLOSING ARGUMENTS - COURTROOM DEMONSTRATIONS BY EXPERTS

State v. McCracken, No. 32665 – November 30, 2005 – Per Curiam (*Marshall County*)

The appellant was charged with three counts of first-degree murder in connection with a fire at a home in Marshall County that killed three persons, including her boyfriend's parents and his seven-year-old daughter. During the course of a statement at the police station, the appellant denied setting the fire, claiming that she had only heard of the incident over a police scanner. She subsequently altered this statement, asserting that she had been at the home on the night of the fire and had tripped over an object and dropped a cigarette butt on the back porch. The appellant denied intentionally starting the fire.

At trial, the State presented the testimony of a fire expert, who also conducted a demonstration in the courtroom designed to prove that a cigarette butt could not ignite gasoline. The defense objected to the demonstration, asserting that the conditions in the courtroom were not the same conditions present at the time of the fire.

The appellant also objected to an attempt by the prosecutor to offer evidence of the deceased child's bedtime prayer. The trial court denied this testimony, but permitted the State to recite the entire prayer during closing argument.

Held: The Court held that the fire expert's demonstration was admissible under Rule 702, and was of assistance to the jury in determining whether the appellant's version regarding an accidental origin of the fire was truthful. The Court also noted that the defense was given an opportunity to cross-examine the witness, and that the jury was provided a limiting instruction as to the purpose of the demonstration.

The Court also held that the appellant was not "in custody" at the time the statement was obtained, and that the statement was therefore not obtained in violation of *Miranda v. Arizona*. The Court further held, viewed in the light most favorable to the State, that the State had presented sufficient evidence to support the appellant's conviction.

The Court took a dim view of the prosecution's recitation of the deceased child's prayer during closing argument, holding that the recitation was an improper appeal to the sympathy and emotions of the jury. The Court determined, however, that even though the recitation was improper, it had not resulted in "manifest injustice" or "clear prejudice" and thus did not justify a reversal of the convictions.

Affirmed.

INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO CONDUCT INVESTIGATION

State ex rel. Quinones v. Rubenstein, No. 32661 – November 30, 2005 – Per Curiam (*Fayette County*)

The appellant was convicted of second-degree murder in August of 2000. The appellant filed his petition for habeas corpus relief, and an evidentiary hearing was conducted in May of 2003, resulting in the circuit's court denial of the petition in August of 2004.

On appeal from this ruling, the appellant's primary assertion centered on a claim of ineffective assistance of counsel on the part of trial counsel. The appellant alleged several errors in support of this argument, including (1) counsel's failure to conduct an adequate investigation, and (2) failing to properly prepare the appellant for his testimony.

Held: The Court held that counsel was deficient in not reviewing the prosecutor's file on the case, but determined that the information found therein would not have affected the outcome of the appellant's case.

The Court also found no merit to the appellant's claim that he had not been properly prepared for trial. The Court

criticized the short amount of time that counsel spent with the appellant preparing for trial (5.1 hours), but determined that the record did not reveal that the appellant could have benefited from further preparation with counsel.

Affirmed.

DUI ADMINISTRATIVE PROCEEDINGS – PREVIOUS SUSPENSIONS OR REVOCATIONS

McVey v. Pritt, Comm’r, No. 32581 – November 30, 2005 – Benjamin, J. (*Mercer County*)

The appellee’s driver’s license was suspended in 1998 under W. Va. Code §17C-5A-1(c) for operating a motor vehicle with a measurable amount of alcohol in his blood. The appellee was sixteen years old at the time of this suspension.

In 2002 the appellee was charged with DUI. Based upon this charge and upon the appellee’s 1998 suspension, the Commissioner revoked the appellee’s license for a period of ten years, based upon his interpretation of W. Va. Code §17C-5A-2(i), which requires the Commissioner to issue a ten-year revocation if the person’s license had been “previously suspended or revoked...under the provisions of this section or section one of this article...within ten years immediately preceding the date of arrest.”

The circuit court reversed this decision, citing (1) the ambiguity of the phrase “under the provisions of this section”, and (2) that the decision in *Carney v. Sidiropolis*, 183 W. Va. 194, 394 S.E. 2d 889 (1990) permitted such license revocation enhancements only in the event of a prior “revocation”, and not a prior “suspension”.

Held: The Court reversed this decision, holding that the plain, unambiguous language of §17C-5A-2(i) clearly authorized the ten-year revocation imposed on the appellant. The Court also held that the circuit court’s reliance on *Carney* was erroneous, in that there was no practical difference between a “revocation” and a “suspension” insofar as §17C-5A-2(i) is concerned.

Reversed and Remanded with Directions.

PRISON CONDITIONS – LEGALITY OF “DOUBLE-BUNKING”

State ex rel. Berry v. McBride, No. 30696 – November 30, 2005 – Starcher, J.

The petitioner, a disabled inmate at Mount Olive Correctional Complex (“MOCC”), challenged the “double-bunking” practice utilized at the facility. The petitioner’s initial *pro se* petition was accepted by the Court, which issued an opinion in 2002 which was subsequently withdrawn. The initial opinion had concluded, *inter alia*, that *West Virginia Code of State Regulations*, Title 95-2-8.7, prohibited the warden of MOCC from housing more than one inmate in a cell designed for single occupancy.

The respondent asserted in his request for rehearing that a 1998 amendment to W. Va. Code § 31-20-9(a)(2) exempted correctional facilities from the rule requiring single occupants in single-occupancy cells. After granting rehearing, the Court referred the matter to a special master, who subsequently submitted findings of fact and conclusions of law to the Court.

Held: The Court agreed with the respondent’s argument that the 1998 legislative enactment eliminated the standard set forth in W.Va. CSR 95-2-8.7. The Court held that the 1998 amendment to §31-20-9 was not an unconstitutional infringement enactment and did not violate the petitioner’s due process and equal protection rights.

The Court determined, however, that the respondent’s determinations as to whether to “double-bunk” a particular

inmate should take into account a number of factors particular to the inmate. The Court stated that such decisions “must be made pursuant to enforceable standards, policies, and procedures that are based on pertinent medical and other relevant criteria.”

Writ of Mandamus Granted as Moulded.

SENTENCING – KIDNAPPING – APPLICATION OF *BLAKELY V. WASHINGTON*

State v. Haught, No. 32583 – December 1, 2005 – Maynard, J. (*Monongalia County*)

The appellant was indicted for kidnapping, domestic battery and first degree robbery in connection with an incident with his girlfriend. The appellant was subsequently convicted of kidnapping and domestic battery, and the jury recommended mercy on the kidnapping charge. At sentencing, the trial judge found that the victim was not returned unharmed, a key factual finding necessary for the imposition of a reduced sentence under W. Va. Code § 61-2-14a (3) and (4), and sentenced the appellant to life with mercy.

On appeal, the appellant asserted that the trial court’s findings regarding the issue of whether the victim was returned unharmed and subsequent imposition of a life sentence violated the dictates of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), which prohibit the enhancement of a sentence based on facts not found by a jury or admitted by a defendant.

Held: The Court reviewed the provisions of §61-2-14a and determined that there was no *Blakely* violation. The Court held that the life sentence authorized in this section is the “statutory maximum” discussed in *Blakely*, and that only an enhancement to this maximum sentence would fall under the *Blakely* guidelines. (In essence, the Court determined that the life sentence was the “default” sentence under §61-2-14a, and that the only sentencing departures authorized under this section are downward departures, based on specific findings by the trial court.)

Affirmed.

ABUSE AND NEGLECT – JURISDICTION TO ORDER CHILD SUPPORT PAYMENTS

West Virginia Department of Health and Human Resources v. Smith, No. 32697 – December 2, 2005) – Starcher, J. (*Cabell County*)

The DHHR filed an abuse and neglect petition against the respondent regarding her four children. The children were removed from the respondent’s home and placed in foster care. Prior to adjudication, the DHHR filed a petition in the family court of Cabell County seeking an order compelling payment of child support by the respondent. The family court denied this petition, holding that it had no jurisdiction to order the payment given the pending abuse/neglect proceedings.

The WVDHHR appealed this order to the circuit court, citing inconsistencies in the manner in which different circuit judges in Cabell County were answering the jurisdiction issue. On the request of the WVDHHR, the circuit court certified three questions on the issue to the Supreme Court of Appeals, which reformulated the submitted questions into one certified question

Held: The Court, after reviewing various historical and jurisdictional issues, held that when an abuse or neglect petition has been filed, the family courts are divested of jurisdiction to establish a support obligation for the child and that the duty to establish a support obligation lies solely with the circuit court. The Court also determined that such

mandatory support determinations must utilize the Guidelines for Child Support Awards found in W. Va. Code § 48-13-101, et. seq.

Certified Question Answered in the Affirmative.

INSTRUCTIONS – “DUTY-TO-RETREAT” AND SELF-DEFENSE

State v. Dinger, No. 32694 – December 1, 2005 – Per Curiam (*Monroe County*)

The appellant was at his girlfriend’s home in Summers County when a large group of people arrived to challenge the appellant over a dispute the previous evening. The appellant confronted the individuals on the front porch, but one of the persons blocked the front door of the home with a chair, preventing the appellant’s retreat. The confrontation escalated and the appellant shot and killed one of the individuals.

The appellant was indicted and tried for first-degree murder. At trial, the court provided a general self-defense instruction, but refused the appellant’s requested “duty-to-retreat” instructions. The appellant was convicted of voluntary manslaughter and sentenced to twelve years in the penitentiary.

Held: On appeal, the appellant asserted a number of errors. The Court determined, however, that the appellant’s assertion of error regarding the duty-to-retreat instruction was dispositive of the case.

The Court held that the trial judge erred in refusing the requested instruction. The Court noted (1) that there was sufficient evidence in the case to support the instruction, and (2) that the instruction was in accordance with the Court’s prior pronouncements on the duty-to-retreat as found in *State v. Greer*, 22 W. Va. 800 (1883) and *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 559 S.E. 2d 713 (2001).

Reversed and Remanded for New Trial.

CONFESSIONS – USE OF COERCIVE PRACTICES TO OBTAIN - VOLUNTARINESS

State v. Singleton, No. 32673 – November 30, 2005 – Per Curiam (*Raleigh County*)

Based on information, Raleigh County law enforcement officers seized ten pounds of marijuana in a package which had been shipped from California. The investigation led to the appellant, who the police confronted and interviewed at her home in an unmarked police car. During this discussion, the appellant was advised on several occasions that her failure to cooperate would lead to various problems, including the loss of family and federally subsidized housing. After these discussions, the appellant advised the police that she was involved in the transportation of the marijuana. Several hours after this statement, and after being permitted to return home, the appellant was arrested in connection with the marijuana shipment.

Held: The appellant asserted that the officer’s conduct during her statement, in threatening her with the loss of housing and other ramifications, rendered her statement invalid. The appellant also asserted that the statements were obtained while she was in custody and without the benefit of counsel.

The Court reviewed these assertions and affirmed the appellant’s convictions. While criticizing the officer’s comments during the interrogation (see footnote #6), the Court nonetheless held, utilizing a “totality-of-the-circumstances” test, that the trial court had not abused its discretion in admitting the statement.

The Court also determined that there had been no Miranda violation because the appellant was not in “custody” at the time of the statement. The Court pointed out that the appellant was not handcuffed, the interrogation was not lengthy and took place in an unlocked automobile, and that the appellant had been allowed to terminate the interview to prepare for work.

Affirmed.

INDICTMENTS – SUFFICIENCY OF LANGUAGE

State v. Flanders, No. 32290 – December 1, 2005 – Per Curiam (*Roane County*)

The appellant was arrested in connection with a number of B&E’s and larcenies in Roane County. The State alleged that the appellant, along with two other individuals, had broken into a veterinary clinic, a bowling alley, and a used car dealership and stolen three used cars, cash, and ketamine, a controlled substance.

The appellant initially challenged Count 4 of the indictment. Citing *State v. Criss*, 125 W. Va. 225, 23 S.E. 2d 613 (1942), the appellant asserted that the use of the word “approximately” in describing the value of the automobiles created an uncertainty resulting in a denial of the appellant’s right to be plainly informed of the charges against him.

Held: The Court affirmed the trial court’s denial of this challenge to the indictment. Reviewing the entire text of the relevant count, the Court held that the language utilized in the indictment substantially followed the provisions of W. Va. Code §61-3-13(a) (1994), and that the indictment “sufficiently set forth the elements of grand larceny, put the appellant on notice of the charges against him and did not violate his protections against double jeopardy.”

Affirmed.

SELF-REPRESENTATION – RIGHT OF DEFENDANT AND PROCEDURES

State v. Sandor, No. 32663 – December 1, 2005 – Starcher, J. (*Monongalia County*)

The appellant was charged with battery and waived his right to counsel and indicated his desire to represent himself at trial. He was subsequently convicted in magistrate court. As part of his *pro se* appeal process, the appellant executed a financial affidavit form for the appointment of counsel; however, the appellant later indicated to the circuit court that he had executed this document “just so I could get a [new trial] date.”

In the course of preparing for his *de novo* bench trial in circuit court, the appellant never indicated whether he desired the appointment or assistance of counsel, and the circuit court never discussed the issue with him prior to his trial. The appellant was convicted of the battery charge by the circuit court and sentenced to one year in jail.

After the conviction, the appellant requested appointment of counsel for assistance in preparing an appeal. Counsel also filed a post-trial motion alleging that the appellant had been denied his right to counsel. The circuit court subsequently denied this motion, finding that the appellant had knowingly, intelligently and voluntarily waived his right to counsel.

Held: The Court affirmed this ruling on appeal. The Court reviewed the relevant law on self-representation and the record of the case, which indicated (1) that the appellant had never affirmatively requested the assistance of counsel; (2) that the appellant had knowingly and voluntarily waived his right to counsel in the magistrate court proceedings; (3) that the appellant was not a novice to self-representation, having won an acquittal on a felony charge earlier in the year while representing himself; and (4) that the appellant had completed the financial affidavit only at the direction of the magistrate court clerk in order to file his appeal.

In consideration of these factors, the Court held that the appellant “understood his right to counsel, understood the difficulties of self-representation, and still knowingly and intelligently chose to exercise the right to self-representation[.]”

Affirmed.

All cases may be viewed online at: [http://www.state.wv.us.wvsca.docs/fall05/\(case#\).htm](http://www.state.wv.us.wvsca.docs/fall05/(case#).htm)

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