

THE DEFENDER



Volume 9, Issue 1

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

January 2008

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The Defender is a publication
of West Virginia Public Defender
Services, Criminal Law Resource
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Inquiries, articles and suggestions
are always welcome.

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FROM THE EXECUTIVE DIRECTOR'S CHAIR

by Jack Rogers

Governor Manchin has once more shown great confidence in the Public Defender system. For FY 2009, he has recommended an increase of \$3.5 million dollars for the opening of new Public Defender offices. These funds are in a separate line item in the Governor's budget bill (see www.wvbudget.gov) and cannot be used for the benefit of private counsel. In addition, the Governor will once more cause to be introduced a bill that would create a statewide Indigent Defense Commission with the authority to require Public Defender Corporations to open offices (technically, Corporations now exist in all Circuits but are not all functioning).

Further, to enable payment of private court-appointed counsel, the Governor intends to request \$6 million in supplementary funding for FY 2008. Given our limited staff (four persons) we will not be able to spend all that money in this fiscal year but "carry-over" authority (usually given to this agency) would allow expenditure to continue into FY 2009.

All of these actions, if approved, will greatly improve the delivery of indigent defense and will begin addressing the growing cash flow crisis which we face in private counsel funding. Historically, this agency has been under-funded such that we were without funds for periods of 2 to 5 months. In succeeding fiscal years, that backlog of payments would be reduced but funding would run out again for a period of several months. For the last two-and-one half years, however, we have never been short of funds, have paid more vouchers, sent out more money (\$16.4 and \$16.2 million dollars in FY 06 and 07, respectively) and still have a \$9 million deficit and are six months behind in payments.

The self-defeating refusal of a handful of persons to allow Public Defender offices to open has greatly exacerbated what was already a growing problem. Public Defender operations have saved well over \$100 million dollars over the last 18 years and opening offices in the remaining areas wherein they could be cost effective would have greatly diminished the current deficit. However, those few opponents won out and many dedicated and effective private attorneys and other providers have suffered accordingly.

I hope that 2008 will see progress in these areas. I suggest that you contact your legislators in support of the Governor's proposals.

WV SUPREME COURT UPDATE

Fall 2007 Term Updates

All cases may be viewed online at: [http://www.state.wv.us/wvsca/docs/fall07/\(case#\).htm](http://www.state.wv.us/wvsca/docs/fall07/(case#).htm)

State v. Jett, No. 33198 – May 17, 2007 – Per Curiam - (*Kanawha County*) (*Crystal Walden, Kanawha County Public Defenders Office, for Appellant*)

Appellant was charged with attempting to operate a clandestine methamphetamine laboratory. Convicted in January 2005, the appellant asserted on appeal that the circuit court erred in refusing to instruct the jury as to the specific meaning of “attempt”. The appellant alleged that the circuit court should have instructed the jury as to the common law requirement of (1) a specific intent to commit the underlying substantive offense, and (2) an overt act toward the commission of the crime, beyond the assembly of chemicals or equipment for the purposes of manufacturing methamphetamine.

Held: The Court held that the appellant was not entitled to a defining instruction for “attempt”. The Court held that “attempt” is a term “which is widely used and which is readily comprehensible to the average person without further definition or refinement.”

Affirmed.

State v. Murray, No. 33193 – June 5, 2007 – Per Curiam – (*Morgan County*)

Appellant was indicted and tried for failing to render aid at the scene of an accident involving death, obstructing, and failure to maintain control of a motor vehicle. The charges stemmed from an incident on the night of June 15, 2004, when the appellant’s automobile struck an unknown object in Morgan County. The following morning, the appellant examined the scene and found the body of an eighteen-year-old bicyclist.

During trial, the prosecuting attorney repeatedly stated that the case concerned the appellant’s “failure to accept responsibility” and erroneously referred to the “testimony” of the appellant, despite the appellant’s decision not to take the stand in his own defense. The appellant was subsequently convicted of failure to render aid and failure to maintain control.

Held: The Court reviewed numerous cases addressing comments by the prosecution as to a defendant’s failure to testify or put on evidence, and determined that the prosecutor’s remarks violated the four-part test set forth in *State v. Sugg*, 193 W. Va. 388, 456 S.E. 2d 469 (1995). The Court held (1) that the prosecutor’s references to forcing the appellant to accept responsibility “served to accentuate and highlight the fact that the appellant sat silently without taking the witness stand”; and (2) that remarks from the prosecution as to the state of the appellant’s mind at the time of the incident, coupled with the statements regarding the appellant’s “failure to accept responsibility”, clearly constituted an impermissible reference to the appellant’s decision not to testify.

Reversed and Remanded.

State ex rel. Sergeant v. Nibert, No. 33327 – June 6, 2007 – Albright, J. (*Roane County*) (*Teresa Monk, 5th Circuit Public Defender Corporation, Spencer, for Respondent Robert Sarver*)

Respondent, Robert Sarver, was arrested for operating an all-terrain vehicle (ATV) at a time when his privilege to operate a motor vehicle was revoked for a DUI offense. He was indicted for third-offense driving on a revoked license, DUI-related, under W. Va. Code §17B-4-3.

The respondent requested that the circuit court dismiss the indictment, arguing that because he was not required under W. Va. Code §17F-1-1, et. seq. to possess a driver’s license to operate an ATV, he could not be found to be in violation of the license revocation provisions of §17B-4-3. The circuit court agreed and dismissed the indictment.

The prosecuting attorney sought a writ of prohibition, arguing that the provisions of §17B-4-3 prohibit a person from operating *any* motor vehicle, including ATV's.

Held: The Court concurred with the prosecutor, and determined that there was no language in §17F-1-1, et. seq., which removed ATV operators from the provisions of the license revocation statutes. The Court stated that “[w]hile there are obvious reasons why the Legislature would exclude all-terrain vehicle operators from compliance with both licensing and road usage laws, there is no countervailing argument for shielding an operator of an all-terrain vehicle from prosecution for driving a motor vehicle while his or her operator's license has been suspended or revoked.”

Writ of Prohibition Granted.

State v. Mongold, No. 33222 – June 6, 2007 – Davis, C.J. (*Hampshire County*)

Appellant was indicted for child abuse resulting in the death of a child. The state presented evidence that the child died as a result of several blunt impact injuries to her head. The appellant contended that the child had died accidentally during a round of horseplay. The appellant was convicted and sentenced to forty years imprisonment.

On appeal, the appellant asserted (1) that the trial court had erroneously admitted evidence of a prior violent act against another child in violation of Rule 404(b); (2) that the trial court had improperly permitted the state to cross-examine two defense witnesses regarding the circumstances of the appellant's unemployment; and (3) that the trial court improperly admitted gruesome autopsy photographs of the victim.

Held: That (1) the State may provide notice of its intent to use 404(b) evidence during trial, if there is good cause shown for such late disclosure; (2) that the fact that a criminal charge against a defendant has been dismissed or has resulted in an acquittal does not prohibit the use of the facts of the incident under Rule 404(b); (3) that evidence elucidated from the defendant's witnesses concerning the reason for the appellant's unemployment was the result of proper cross-examination, based on questions directed to the witnesses during direct examination; and (4) that photos taken during the autopsy of the victim, while gruesome in nature, were not unduly prejudicial.

Affirmed.

State v. Cummings, No. 33223 – June 6, 2007 – Benjamin, J. (*Roane County*)

Appellant was convicted of the felony offenses of attempting to operate a clandestine methamphetamine lab and conspiracy. The charges stemmed from a traffic stop, when a police officer discovered methamphetamine in the appellant's pocket, searched the automobile which the appellant was driving (and in which a number of other persons were traveling), and located several boxes of pseudoephedrine and six boxes of matches.

Held: That the evidence presented at trial was insufficient to convict the appellant of the offenses. The Court noted that there was no evidence that the appellant actually or constructively possessed the materials, or exercised any dominion or control over the materials.

In a new syllabus point, the Court held that in methamphetamine cases under §60A-4-411(2003), the State must prove beyond a reasonable doubt (1) that the defendant had actual or constructive possession over the chemicals and/or equipment, and (2) that in order to establish constructive possession, the defendant had knowledge of the presence of the chemicals and/or equipment to be used for the purposes of manufacturing methamphetamine and that the items were subject to the defendant's dominion and control.

Reversed.

Moten v. Stump, Commissioner, DMV, No. 33220 – June 6, 2007 – Per Curiam (*Raleigh County*)

Appellant was charged with DUI in October 2003. Subsequent administrative proceedings resulted in an August 2004 order revoking the appellant's driving privileges. The circuit court affirmed the revocation in December 2004. No appeal was taken of this decision.

In April 2005, the appellant filed a motion requesting relief from the judgment, and cited, *inter alia*, that the criminal proceedings against him had been dismissed. The circuit court denied the motion in October 2005, and subsequently entered another order in March 2006 clarifying the denial of the appellant's motion.

Held: The appellant, having not appealed the circuit court's initial decision in December 2004, could not appeal the supplemental October 2005 and March 2006 orders.

Appeal Dismissed as Improvidently Awarded.

State v. Hosby, No. 33247 – June 7, 2007 – Per Curiam (Jefferson County)

Appellant was placed on probation in August 2004 upon his misdemeanor conviction of failure to pay child support. In May 2005, the appellant's probation was revoked for (1) failing to report to his probation officer; (2) failing to make regular child support payments; (3) failing to inform the probation officer of changes in his employment status, and (4) failing to make regular restitution payments.

Held: Noting the appellant's admissions to the alleged violations during the revocation hearing, and the lack of mitigating circumstances for the violations, the Court held that the circuit court did not abuse its discretion in revoking the appellant's probation.

Affirmed.

Davis v. McBride, No. 33199 – October 12, 2007 – Per Curiam (*Kanawha County – Bloom, J.*)

The petitioner/appellant, who is African-American, was charged with first-degree murder in 1999. During his trial in 2000, the State utilized a peremptory strike to remove Barbara Patterson, the sole African-American member of the jury panel. The petitioner's objection to the removal of the juror was overruled, and he was subsequently convicted and sentenced to life imprisonment, with a recommendation of mercy. The petitioner's direct appeal was refused in September 2001.

In his habeas corpus proceeding, the petitioner argued that the removal of juror Patterson violated the mandates of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986) and *State v. Marrs*, 180 W. Va. 693, 379 S.E. 2d 497 (1989), which prohibit the purposeful exclusion by the State of members of a cognizable racial group from jury panels. The circuit court denied habeas corpus relief, holding that the State had demonstrated a valid, non-discriminatory reason for the removal of juror Patterson from the panel.

Held: The Court affirmed the circuit court's holding. While noting that the petitioner had demonstrated a *prima facie* case of racial discrimination, the Court noted that the State had presented several nondiscriminatory reasons for the decision to remove the juror. These included (1) the juror's statement that she was socially acquainted with two defense witnesses, ministers who she described as credible "men of God", (2) that juror Patterson had indicated during voir dire that she would be unavailable for the second week of the trial due to a planned trip to Florida, (3) that she was observed approaching the petitioner's family and had patted one family member on the back, and (4) her conclusion that she could not be partial due to her relationship with the two defense witnesses.

Affirmed.

State v. MacPhee, No. 33297 – October 12, 2007 – Per Curiam (*McDowell County – Murensky, J.*) (*E. Taylor George and Rob Catlett, Kanawha County Appellate Division, for Appellant*)

The appellant was convicted in 2005 of first degree murder and conspiracy to commit murder. At trial, the appellant argued that while he was present at the location of the killing, and assisted in disposal of the victim's body, he had been unaware that his co-defendant had intended to kill the victim. The appellant was convicted of both charges.

On appeal, the appellant argued that due to his lack of knowledge of his co-defendant's intentions, there was insufficient evidence to establish premeditation and conspiracy. The appellant contended that he was, at most, an accessory after the fact.

Held: The Court disagreed and affirmed the convictions. The Court noted that sufficient evidence was presented to the jury to support both convictions, including (1) statements of a jailhouse informant that the appellant had told him that he and the codefendant had robbed and killed the victim; (2) the appellant's taped statements to the police regarding his involvement in the disposal of the victim's body and personal effects; (3) the testimony of a person to whom the appellant delivered the victim's car after the killing; and (4) the existence of physical evidence found at the appellant's home, including blood stains, a belt buckle and a license plate belonging to the victim.

Affirmed.

State v. Haines, No. 33304 – October 12, 2007 – Per Curiam (*Hampshire County – Cookman, J.*)

The appellant was indicted in 2005 for felony delivery of methamphetamine. The indictment described methamphetamine as a "Schedule I" controlled substance. After opening statements were made at trial, the State moved to amend the indictment to reflect the proper classification of methamphetamine as a Schedule II controlled substance. Over the appellant's objections, the court permitted the amendment, and the appellant was convicted of the offense.

On appeal, the appellant asserted that the trial court erred by permitting the state to amend the indictment. The appellant argued that the court did not have the power to amend the indictment, and that the indictment could only be amended by the grand jury.

Held: The Court disagreed and affirmed the conviction. Citing *State v. Adams*, 193 W. Va. 277, 456 S.E. 2d 4 (1995) and Rule 7(e) of the Rules of Criminal Procedure, the Court held that an indictment may be amended by the trial court if the amendment is not substantial. Citing *Adams*, the Court held that such "amendments of form" are permissible when the defendant "is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced."

The Court held that the appellant was not misled as to the charge filed against him; that the penalty for delivery of a Schedule I controlled substance is the same as that of delivery of a Schedule II controlled substance, and thus there was no additional burden of proof; and that the appellant was not prejudiced by the amendment, because the appellant was aware of the misclassification of the drug a few days prior to trial. (In this context, the Court noted that Rule 12(b)(2) of the Rules of Criminal Procedure require the defendant to raise challenges to the indictment prior to trial).

Affirmed.

State ex rel. Godfrey v. Rowe, No. 33444 – October 16, 2007 – Per Curiam (*Greenbrier County – Rowe, J.*)

WRIT OF PROHIBITION – SANCTIONS AGAINST DEFENSE COUNSEL

Petitioner was indicted for third degree sexual assault. During trial, the trial court determined that the petitioner had not received effective assistance of counsel (counsel had failed to respond to the State's request for discovery and had not provided a list of witnesses) and declared a mistrial, setting the matter for trial in the following term of court. The trial court also ordered defense counsel to pay court costs. The petitioner filed for a writ of prohibition to prohibit the new trial on double jeopardy grounds and to set aside the order of sanctions.

Held: That the record before the Court was insufficient to permit the Court to address the petitioner's double jeopardy claim, in that the petitioner failed to provide transcripts of the trial court proceedings with his petition. However, the Court partially granted the writ and set aside the trial court's order imposing costs against counsel, due

to an incomplete record and concerns about the chilling effect of such impositions upon the defense bar's willingness to accept criminal cases.

Writ Granted in Part.

State v. Mills, No. 33340 – October 25, 2007 – Per Curiam (*Kanawha County – Bloom, J*) (*E. Taylor George, Kanawha PD Office*)

JURY SELECTION - BIAS – ACQUAINTANCE OF JUROR WITH STATE WITNESS

During jury selection of appellant's trial, a prospective juror appeared in his EMS uniform and indicated that he was acquainted with a prospective state witness and served on volunteer fire department with the witness. The trial court denied a defense motion to strike for cause. The juror was eliminated with a peremptory strike, and following conviction the appellant assigned as error the trial court's refusal to strike the juror for cause.

Held: That the relationship between the juror and the witness (who did not testify at trial) did not require the juror to be struck for cause. The Court noted that the juror "was crystal clear in all of his answers that he would be fair and impartial and would not be swayed" because of his knowledge of the witness.

Affirmed.

In Re: Cesar L., No. 33317 – October 25, 2007 – Davis, C.J. (*Berkeley County – Silver, J.*)

ABUSE AND NEGLECT – EFFECT OF VOLUNTARY RELINQUISHMENT

While incarcerated, the mother of a child in an abuse /neglect action executed a voluntary relinquishment of parental rights. Following disposition and adoption of child, the mother sought to modify the disposition and moved to set aside the relinquishment on the grounds that it was obtained under duress. The circuit court denied each of these motions.

Held: (1) that the plain language of §49-6-6 states that a disposition may not be modified after a child has been adopted; (2) that a voluntary relinquishment completely severs the parent-child relationship; and (3) that a person who has voluntarily relinquished his or her parental rights does not have standing to request modification of a disposition order.

Affirmed.

State v. Bingman, No. 33299 – October 26, 2007 - Per Curiam (*Gilmer County – Facemire, J.*)

LESSER-INCLUDED OFFENSES – MISDEMEANOR STATUTE OF LIMITATIONS

Appellant was charged with grand larceny of farm equipment. The trial was conducted nearly four years after the alleged theft. At trial, counsel for the appellant offered an instruction on the lesser-included offense of petit larceny. The appellant was convicted of this offense, but on appeal asserted that he could not be convicted of the misdemeanor offense because it was time-barred under *State v. Leonard*, 209 W. Va. 98 (2000).

Held: That the failure of the appellant to object to the lesser-included offense instruction acted as a waiver of his right to assert the error.

Affirmed.

State v. Nelson, No. 33188 – October 30, 2007 – Per Curiam (*Mingo County – Thornsberry, J.*)

RULE 404(B) – PREJUDICIAL CHARACTER EVIDENCE

Appellant was charged with several other defendants in a 2002 kidnapping and murder case. He was convicted and sentenced to multiple life terms. On appeal, the appellant argued that the trial court improperly admitted testimony

regarding a 1987 report of unsubstantiated sexual acts between the appellant and his sister. The state argued that the appellant had opened the door for this evidence by his testimony that he was a “family man” who would not rape or sexually assault a woman.

Held: That the trial court’s admission of this report constituted reversible error. The Court held, in essence, that the trial court did not comply with the requirements of Rule 404(b) and *State v. McGinnis*, 193 W. Va. 147 (1994). The Court held that the State’s cross-examination of the appellant as to the 1987 report exceeded the scope of rebuttal character evidence.

Reversed and Remanded for New Trial.

State v. Collins, No. 33300 – October 30, 2007 – Per Curiam (Mingo County – Thornsby, J.)

BABYSITTER AS “CUSTODIAN” – QUESTION OF FACT FOR JURY

Appellant was convicted of 3rd degree sexual abuse and sexual abuse by a parent, guardian or custodian. The charges stemmed from allegations that the appellant had sexually abused a young girl who was living with her mother at the home of the appellant’s parents. On appeal, the appellant argued that his relationship with the alleged victim was insufficient for the jury to find that he was the “custodian” of the child.

Held: That the State presented sufficient evidence to show that the appellant had exercised sufficient temporary custody of the child so as to be a “custodian” under §61-8D-5. The Court noted that the appellant’s decision to take the child on four-wheeler rides in remote locations, with implicit parental permission, brought him under the scope of the statutory definition of “custodian”. (Note – the 2005 amendment to this section added the phrase “person in a position of trust” to this definition.).

Affirmed.

State ex rel. Baker v. Bolyard, No. 33303 – October 30, 2007 – Benjamin, J. (*Greenbrier – Rowe, J.*)

DRIVER’S LICENSE REVOCATION – EFFECT OF *NOLO CONTENDRE* PLEA

The appellant was arrested in July 2005 for 1st offense DUI. Upon receipt of the notice of revocation from the DMV, he requested an administrative hearing. Prior to the administrative hearing, the appellant entered a *nolo contendere* plea to the criminal charge. An abstract of this conviction was sent to the DMV, who notified the appellant that the conviction was sufficient evidence for revocation, and that he could request a hearing solely on the issue of identity. The appellant challenged this finding in circuit court, which denied his request for a full administrative hearing.

Held: That when a person enters a plea of *nolo contendere* to a DUI offense, the mandatory license revocation provisions of §17C-5A-1a(a) are triggered, and a driver is not entitled to a full evidentiary hearing on the revocation.

Affirmed.

State v. Bookheimer, No. 33289 (cons. with **State v. Tingler**, No. 33290) – November 8, 2007 – Per Curiam (*Braxton County – Facemire, J.*)

SEARCH AND SEIZURE – EXIGENT CIRCUMSTANCES/EMERGENCY DOCTRINE EXCEPTION TO WARRANT

The appellants resided together in a home in Braxton County. Based on an anonymous call, police arrived at the home to investigate an alleged domestic incident. Despite being told by Ms. Tingler that they were not needed, the police entered the home without a warrant to search for Mr. Bookheimer. While in the home, the police observed evidence of a drug laboratory, secured the scene, obtained a search warrant and arrested the appellants. The appellants

challenged the search, but their suppression motion was denied and each was convicted of conspiracy and attempting to operate a clandestine drug lab.

Held: That the police officers' initial warrantless search of the home was not justified under the emergency doctrine, in that the officers were advised by both appellants that there was no problem in the home; that there was no protective need for the officers to enter the home; and that the officers had not corroborated any of the information provided by the anonymous informant.

Search held to be illegal; Reversed and remanded for new trial.

State ex rel. Nelson v. Frye, No. 33499 – November 8, 2007 – Per Curiam (Mineral County – Frye, J.)

NEGLIGENT HOMICIDE – WHAT CONSTITUTES

The petitioner, the Prosecuting Attorney of Mineral County, sought to prohibit the circuit court from dismissing an indictment against James Butler. Mr. Butler was operating a log truck when the trailer rolled and ejected the logs, killing the driver of a passenger car. The circuit court dismissed the indictment under *State v. Green*, 220 W. Va. 300 (2007), determining that the facts alleged by the State were insufficient to establish, as a matter of law, that Mr. Butler had operated the vehicle with a reckless disregard for others, and with “negligence so gross, wanton and culpable to show a reckless disregard for human life.”

Held: That the trial court correctly applied the *Green* standard to the facts in this case. The Court held that while there may have been evidence that Butler was speeding shortly before the accident, this evidence was not sufficient to establish the gross negligence standard enunciated in *Green*.

Writ of Prohibition Denied.

State v. Ray, No. 33324 – November 8, 2007 – Benjamin, J. (Preston County – Miller, J.)

DOUBLE JEOPARDY – SEPARATE CONVICTIONS FOR INCEST AND SEXUAL ASSAULT

The appellant was convicted of several sexual offenses involving his brother's stepson. On appeal, the appellant argued (1) that his relationship to his brother's stepson did not fit within the statutory definition of incest under §61-8-12 because of the lack of a consanguineous relationship; and (2) that double jeopardy prohibits multiple convictions for incest and first degree sexual assault.

Held: (1) that under §61-8-12, incest can be committed against the stepson of a brother, because the statute defines “nephew” as the son of a brother or sister, and further defines “son” to include the son of a person's husband or wife (i.e., stepson); and (2) that under *Blockberger v. United States*, 284 U.S. 299 (1932), both incest and first degree sexual assault require proof of an additional fact which the other offense does not, and that therefore convictions for each offense does not violate double jeopardy.

Affirmed.

Lawyer Disciplinary Board v. Calhoun, No. 33067 – November 9, 2007 – Per Curiam

ATTORNEY DISCIPLINE – RECIPROCAL DISCIPLINARY PROCEEDINGS

The respondent attorney held law licenses in West Virginia, Maryland and Pennsylvania. In March 2006, the respondent's Maryland license was suspended indefinitely based upon a number of ethical violations during her representation of a client in a sexual harassment case. In April 2006, the West Virginia Office of Disciplinary Counsel filed a notice of reciprocal disciplinary action. The respondent filed a written response to the notice, but the Hearing Panel Subcommittee determined that the respondent had failed to establish that any of the exceptions to reciprocal discipline applied in her case and recommended an indefinite suspension.

Held: The Court concurred with the recommendation of the Hearing Panel Subcommittee and indefinitely suspended the respondent's law license. The Court reviewed the Maryland disciplinary proceedings and determined that there was no violation of the respondent's due process rights; that the Maryland Court had made sufficient findings of material fact; and that indefinite suspension would not constitute a "grave injustice".

Indefinite Suspension of Law License.

State ex rel. Hatcher v. McBride, No. 33244 – November 9, 2007 – Per Curiam (Cabell County – O'Hanlon, J.)

SENTENCING – PROPORTIONATE TO OFFENSE

The appellant was convicted of aggravated robbery. Based upon the court's determination of future dangerousness, the court imposed a 212-year sentence upon the appellant. The appellant's direct appeal was refused, and his petition for habeas corpus was denied by the circuit court. On appeal, the appellant asserted that the 212-year sentence was disproportionate to the robbery offense and constituted a violation of Article III, § 5 of the West Virginia Constitution.

Held: That the trial judge did not err in imposing the 212-year sentence, which was within the statutory guidelines and was based upon a review of the appellant's lengthy criminal history.

Affirmed.

State v. Farris, No. 33323 – November 19, 2007 – Per Curiam (Nicholas County – Johnson, J.)

SUFFICIENCY OF EVIDENCE – CONCERTED ACTION – JUROR BIAS

Appellant was convicted of two counts of second degree murder, and assigned numerous errors on appeal, including (1) evidentiary insufficiency; (2) instructional error; (3) juror bias; (4) ineffective assistance of trial counsel; (5) unconstitutionally disproportionate sentencing; and (6) cumulative error.

Held: (1) that the evidence was sufficient, under the "concerted action" principle, to support the guilty verdicts, despite the lack of evidence that the appellant had fired the fatal shot or incited the killings of the two victims; (2) that the jury was properly instructed as to the theory of "concerted action" and as to the distinctions between principals in the first and second degree; (3) that a juror whose husband had been prosecuted for domestic battery against the juror by the prosecutor in the appellant's case did not demonstrate bias requiring her removal from the panel; (4) that trial counsel was not *per se* ineffective in trial actions; (5) that the appellant's sentence (two consecutive forty-year sentences) did not shock the conscience and therefore was not disproportionate to the offenses; and (6) that the record did not reflect "numerous errors", and therefore the cumulative error argument was inapplicable.

Affirmed.

State ex rel. Shelton v. Painter, No. 33322 – November 21, 2007 – Per Curiam (Ohio County – Recht, J.)

INEFFECTIVE ASSISTANCE OF COUNSEL – CLOSING ARGUMENTS

Appellant was convicted in 1998 of first degree murder and was sentenced to life imprisonment with no recommendation of mercy. His direct appeal was refused, as was the appeal of his first *habeas corpus* petition. In 2001, he filed a second *habeas* petition, counsel was appointed, and an omnibus *habeas* hearing was held in April 2006. The trial court denied relief as to the appellant's claim that his original trial counsel was ineffective, and the appellant appealed this issue.

Held: that trial counsel's performance during closing argument of the appellant's trial amounted to ineffective assistance of counsel under *Strickland v. Washington* and *State v. Miller*. The Court noted that counsel's "repeated and unnecessary references" to his client's guilt, combined with counsel's statements as to whether his client

deserved mercy from the jury (and his admonishment to the jury that they did not have to grant mercy), was deficient under the *Strickland* and *Miller* standards. The Court determined, however, that due to the overwhelming evidence of the appellant's guilt, a new trial on the issue of guilt was not required. Instead, the Court ordered that a new "penalty phase" be conducted and remanded the matter.

(Note – the Court suggested in footnote #3 that in the event an attorney intends to acknowledge or concede his or her client's guilt, the attorney should obtain a written consent from the client).

Affirmed in part, reversed in part, and remanded.

State v. Farris, No. 33314 – November 21, 2007 – Per Curiam (Mingo County – Thornsby, J.)

BRADY AND YOUNGBLOOD VIOLATIONS – DUTY TO DISCLOSE EXCULPATORY EVIDENCE

Appellant was convicted of two counts of sexual abuse and two counts of sexual assault after his first trial ended in a mistrial. After the second trial, the appellant's attorney discovered that a forensic examination report prepared by a psychologist had not been provided to the defense. The report indicated that a minor cousin of the appellant, who had been named as a potential "victim" by the other alleged victims, had in fact denied any contact and had indicated that she had been told to "go along with the story". The trial court denied the appellant's motion for a new trial.

Held: that the State's failure to disclose the report constituted a violation of *Brady v. Maryland* and *State v. Youngblood*. The Court noted that the appellant had filed a motion for disclosure of *Brady* materials; that the report was not disclosed; that the report was prepared by a forensic psychologist who had been brought into the case by the State; that the knowledge of the report could be imputed to the prosecutor; and that the three components of *Brady* and *Youngblood* were met (the evidence was favorable as exculpatory or impeachment evidence; the evidence was suppressed, either willfully or inadvertently; and that the evidence was material and could have put the case in such a different light as to undermine the confidence of the verdict).

Reversed and remanded.

State v. Cecil, No. 33298 – November 21, 2007 – Per Curiam (Putnam County – Spaulding, J.)

JUROR MISCONDUCT – LIMITATION OF EXPERT TESTIMONY – JUROR DISQUALIFICATION

After being convicted of a single count of sexual abuse in the first degree and two counts of sexual abuse by a custodian, the appellant asserted several errors on appeal. They included: (1) improper limitation of expert testimony; (2) that the appellant was not a "custodian" so as to fall within the statute; (3) juror disqualification, in that one of the jurors did not reside in Putnam County; and (4) juror misconduct on the part of several jurors.

Held: that (1) the expert witness offered by the defense was not improperly limited, because her proffered testimony as to the statistics of false reporting of child sexual offenses would have violated Rule 608 of the Rules of Evidence; (2) the question of whether the appellant was a "custodian" of the minor children was a question of fact for the jury, and that there was sufficient evidence to support the state's contention; and (3) the appellant had failed to properly raise the issue of a juror who resided outside of Putnam County at the time of the trial.

However, the Court determined that juror misconduct required a new trial. The Court noted that two jurors had apparently undertaken their own investigation of the website "MySpace.com" after one of the alleged victims had indicated that she maintained an account on the website. Further, the Court noted that another juror, an employee of the state DHHR, had advised the jurors that "her experience required that the jurors place more weight on the children's testimony than that of the adults." The Court determined that the cumulative effect of these instances of juror misconduct deprived the appellant of a fair trial.

Reversed and remanded.

UPCOMING CLE EVENT

WEST VIRGINIA PUBLIC DEFENDER SERVICES

Presents:

THE ETHICAL DIMENSIONS OF DEALING WITH DIFFICULT CLIENTS

or . . .

How to Do the Right Thing for Your Client, Stay Out of Trouble, and Get Your Ethics CLE Credit

Wednesday, March 19, 2008

Oglebay Resort & Conference Center

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

9:00 a.m. to 12:00 p.m.

3.4 Ethics CLE Credits

This training program will address one of the most common (and difficult) problems we face as public defenders & how do we effectively deal with difficult clients, and simultaneously make sure that we are adhering to all legal/ethical rules and principles.

Among the subjects we will cover are: Dealing with mentally ill clients; Dealing with incompetent clients; Dealing with non-adult clients; Working with the client's family; Dealing with the client who refuses to take advice; Our ethical duty to communicate with the client; Understanding what strategies and tactics the client gets to decide, and what we get to decide; Our ethical duty to zealously represent the client; Avoiding conflicts of interest; Fulfilling our ethical obligations to the client and to the court; How to make a record that will protect yourself in case of trouble; How to pre-empt and prevent ethical problems before they start; How to get help from people who really know what to do.

This will not be a theoretical discussion of ethics and philosophy. The entire session will be devoted to learning practical approaches to fulfilling our ethical responsibilities at the same time as we are zealously representing our client. Everyone is encouraged to bring their real cases and experiences to the program, so we can learn (and perhaps get some good advice) about this touchy subject in the most realistic and practical way possible.

_____ @ \$50.00 Total Enclosed _____

Mail registration and fee to: WV Public Defender Services, 1900 Kanawha Blvd. E, Building 3, Room 330, Charleston, West Virginia 25305, Attn: Erin Fink

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

_____ I will be attending the Wednesday, March 19, 2008 Ethics Seminar at Oglebay Resort and Conference Center, Wheeling, West Virginia (Registration deadline is Wed., March 12, 2008)

Name: _____ E-mail: _____

Mailing Address: _____

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