

THE DEFENDER



Volume 8, Issue 2

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

May 2007

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Inquiries, articles and suggestions are always welcome.

Available in large print upon request.

FROM THE EXECUTIVE DIRECTOR'S CHAIR

by Jack Rogers

Senate Bill 152 (caused to be introduced by the Governor, Regular Session, 2007) would have allowed an Indigent Defense Commission to initiate funding for new Public Defender offices. In his budget, the Governor further expressed his support for new offices by specifically recommending that \$4.5 million of a requested \$5 million increase be spent for new Public Defender offices.

As has happened so many times the bill was passed by the Senate but never put on a House committee agenda (in this case, House Government Organization). Noting the dim prospect for new Public Defender offices, the House then reduced the Governor's recommended PDS budget by \$4 million, which reduction became part of the final budget bill (Enrolled H.B. 2007). Failure of S.B. 152 also prevented the possible amendment of the 17 year old hourly rate paid to private attorneys.

Following the 2007 Regular Session, the Legislature gave PDS a supplemental appropriation of \$2.9 million dollars. However, the current FY 2007 deficit is an estimated \$6.5 million. In June, 2006, the Legislature had added supplemental funds to Public Defender operations with the intent of opening new offices. That money carried over to FY 2007. Because separate line items were enacted for Public Defenders and private counsel over the last several years (stripping me of much of my discretion), we currently have excess funds in the Public Defender account (because no new Public Defender offices opened this year) but I cannot transfer those funds for the benefit of private counsel.

For FY 2008, a single line item was reinstated which will allow for effective management of the funds. With that authority, the amount in the Governor's original request, coupled with the current supplemental appropriation would almost surely have wiped out the private attorney fund deficit. Realistically, Public Defender offices would not have opened until April-May, 2008 so the majority of the Governor's requested increase in FY 2008 funds could have been spent on private counsel. Both missions could have been accomplished:

Public Defender offices could have been opened, saving approximately \$650,000 by FY 2009, and the private counsel deficit could have been eliminated. All of that is now impossible due to the successful opposition to S.B. 152.

In lieu of S.B. 152 a study resolution was originated by House Government Organization which would create the fifteenth study of this agency since 1990. The rationale expressed in the resolution was that counties needed help in paying for indigent defense. Counties have never paid one penny for indigent defense and are under no obligation to do so. There is no need for a study. The Legislature's own Performance Review recommended more Public Defender offices in 1999 (echoing the American Bar Association's general recommendation of 1978).

For those private providers who do honest work, who bill accurately and correctly and who uphold the rights of the accused, it is a sad day. Not only will funds be insufficient yet again next year (FY 2008) but the last reasonable chance of increasing the hourly rate in the near future has been lost. Opponents of S.B. 152 who thought they were protecting their own interests have hurt themselves and everyone else who does appointed work.

MINGO PUBLIC DEFENDER
NAMED STATE BAR PRESIDENT

West Virginia Public Defender Services would like to congratulate Steven J. Knopp of the Mingo County Public Defender Office on his appointment as president of the West Virginia State Bar. Steve's appointment marks the first time in the history of the State Bar that a full-time public defender has been appointed to this prestigious position. Steve was sworn in on April 27, 2007 at the Annual Meeting of the State Bar at the Greenbrier Hotel in White Sulphur Springs.

2006 ANNUAL REPORT

Fiscal Year 2006 Annual Report for WV Public Defender Services is now posted in PDF format on our website! Please visit www.wvpds.org and click on Fiscal Year Reports to view this one and previous reports.

UNITED STATES CONGRESS CONSIDERS LEGISLATION
TO PROVIDE FOR LOAN REPAYMENT
FOR PUBLIC DEFENDERS

The United States Congress is considering legislation to provide for student loan repayment for public defenders and prosecuting attorneys. The legislation, titled the "John R. Justice Prosecutors and Defenders Incentive Act of 2007," (H.R. 916), is designed "to encourage qualified individuals to enter and continue employment as prosecutors and public defenders." The bill provides (subject to the availability of appropriations) that full-time public defenders or prosecuting attorneys could receive repayment of various federal student loans.

The bill is reported to have passed the House of Representatives by a vote of 341-73 on May 15, 2007. All members of the House from West Virginia voted in favor of the bill, which was reported to the Senate on May 16, 2007.

The text of the bill can be found at:

<http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00916:@@@L&summ2=m&#summary>

WEST VIRGINIA LEGISLATURE
REGULAR SESSION 2007
SUMMARY OF SELECTED BILLS

SB 70 – provides criminal penalties for employing unauthorized workers – EFFECTIVE DATE - 6/18/07

SB 76 – establishing underage drinking as an unlawful act rather than a status offense – EFFECTIVE DATE - 7/1/07

SB 82 – creates the Eyewitness Identification Reform Act - EFFECTIVE DATE – 4/3/07

SB 117 – relating to determining a defendant’s competency to stand trial - EFFECTIVE DATE – 6/10/07

SB 142 – penalty for possessing, distributing or possessing with intent to distribute an iodine matrix - EFFECTIVE DATE – 5/16/07

SB 196 - relating to the responsibility of placing juveniles into the custody of the Division of Juvenile Services; requiring arresting agency to be responsible for transporting juveniles to Division of Juvenile Services' facilities; and authorizing juvenile facility to refuse admittance to juveniles who are in need of medical attention until written clearance is received from a physician - EFFECTIVE DATE – 6/10/07

SB 204 – regarding assessment of jury costs in magistrate court - EFFECTIVE DATE – 6/10/07

SB 205 - relating to clarifying that continuing to threaten or harass a petitioner, by whatever means, is a violation of a domestic violence protective order - EFFECTIVE DATE – 5/13/07

SB 206 - relating to assessing court costs for participants in pretrial diversion programs - EFFECTIVE DATE – 6/02/07

SB 361 - relating to authorizing the Executive Director of the West Virginia Regional Jail and Correctional Facility Authority to establish a work program for qualified inmates in regional jail facilities - EFFECTIVE DATE – 6/10/07

SB 411 – Creating the Correctional Center Nursery Act - EFFECTIVE DATE – 6/07/07

SB 412 - relating to providing penalties for violation of prohibited use of a handheld wireless communication device while driving by a minor holding a level one instruction permit or a level two intermediate driver's license - EFFECTIVE DATE – 5/27/007

SB 415 – Authorizing magistrate court to assess fees for criminal record checks - EFFECTIVE DATE – 6/07/07

SB 416 - relating to creating misdemeanor offenses for adulterating or defeating or attempting to adulterate or defeat bodily fluid test results and drug and alcohol tests - EFFECTIVE DATE – 6/05/07

SB 447 – Regulating opioid treatment centers - EFFECTIVE DATE – 6/10/07

SB 512 - prohibiting law-enforcement officers or prosecutors from asking or requiring an adult, youth or child victim of an alleged sexual offense to submit to a polygraph examination - EFFECTIVE DATE – 6/06/07

SB 529 - prohibiting any requirement that an alleged victim of a sexual offense must pay for the costs of a forensic

medical examination - EFFECTIVE DATE – 6/10/07

SB 557 - relating to judicial review of juvenile proceedings; requiring court to make finding whether department made reasonable efforts to finalize a permanency plan; requiring judicial review at least quarterly; permanency hearings when a court determines reasonable efforts to preserve families are not required; foster care review; and annual reports to the court - EFFECTIVE DATE – 6/09/07

SB 612 - relating to increasing the criminal penalties for violation of certain hunting and fishing laws by nonresidents - EFFECTIVE DATE – 6/10/07

SB 707 – Increasing jail processing fee amount - EFFECTIVE DATE – 6/10/07

SB 709 - relating to authorizing circuit courts to grant both custodial and noncustodial improvement periods to juvenile respondents in delinquency proceedings - EFFECTIVE DATE – 6/09/07

HB 2051 - relating to including lasers as a method of proving the speed of vehicles - EFFECTIVE DATE – 6/10/07

HB 2206 - relating to protection of registered dogs; prohibiting a person not the owner of a registered dog from removing tags, collars or apparel from a registered dog, or turning off a radio transmitting collar without the permission of the owner; providing for limited exceptions thereto; and establishing related penalties – EFFECTIVE DATE - 6/10/07

HB 2498 - relating to sexual offenses generally; increasing penalties for second and subsequent convictions for indecent exposure; clarifying that breast feeding an infant in public is not indecent exposure; and expanding the definition of sexual contact to include the touching of the buttocks or breasts – EFFECTIVE DATE - 6/18/07

HB 2544 - relating to increasing the penalty for conviction of the offense of driving under the influence causing death to 3 to 15 years - EFFECTIVE DATE – 6/10/07

HB 2568 – Extending the sunset provisions regarding racial profiling analysis - EFFECTIVE DATE – 6/10/07

HB 2745 - increasing the fine for furnishing alcohol to persons under 21 years of age - EFFECTIVE DATE – 6/10/07

HB 2770 - relating to court security personnel; enhancing penalties for certain acts against court security personnel; and defining "court security personnel" - EFFECTIVE DATE – 6/10/07

HB 3074 - relating to the carrying of concealed weapons; clarifying the scope of a concealed weapons permit; amending reciprocity requirements; authorizing the Attorney General to investigate and execute reciprocity agreements with other states pertaining to the mutual recognition of permits or licenses to carry concealed handguns; setting forth minimum standards which must be met before such reciprocity agreements may be executed; clarifying the scope of valid out-of-state permits that may be recognized in West Virginia; establishing a registry of states with which West Virginia has entered into reciprocal agreements; and requiring the State Police to provide the public with a list of the states which have entered into reciprocity agreements - EFFECTIVE DATE – 6/09/07

WV SUPREME COURT UPDATE

State v. Waugh, No. 32773 – February 16, 2007 – Per Curiam (*Circuit Court of Mason County*)

Held: (1) That a deputy sheriff, who was a witness for the State in the appellant’s trial, did not have improper contact with the jury during the trial, and (2) that while a trial judge’s questions of a witness had exceeded the permissible scope of questioning permitted under Rule 614(b), counsel had not objected to the questions and the questions did not rise to the level of plain error.

Affirmed.

Lawyer Disciplinary Board v. King, No. 32974 – February 16, 2007 – Per Curiam

Held: That the respondent attorney improperly solicited a loan from a client that the attorney had represented for a number of years without (1) fully disclosing all of the terms of the transaction and transmitting the terms in writing to the client; (2) providing the client a reasonable opportunity to seek the advice of independent counsel; and (3) obtaining the client’s consent to the transaction in writing.

The Court affirmed the Board’s findings and addressed the issue of appropriate sanctions. While noting that the respondent had been previously admonished in 2001 for the same conduct, and had failed to report the loan in his bankruptcy proceedings, the Court noted the client’s expressed desire for leniency for the respondent as well as the continuing attorney–client relationship between the parties. The Court therefore rejected the Board’s recommendation of a six month license suspension and instead imposed a sixty-day suspension, with requirements for additional ethics education and supervision of his practice upon reinstatement.

License Suspended.

State ex rel. Gibson v. Hrko, No. 33203 – February 15, 2007 – Per Curiam (*Circuit Court of Wyoming County*)

Held: That petitioner, who prior to her husband/codefendant’s trial reached an oral agreement with the prosecution where the petitioner agreed to testify against her husband if he did not assert the spousal privilege, had not entered into an enforceable plea agreement, and was therefore not entitled to performance of the agreement. Noting the provisions of Rule 11(e), which require the entry “of a plea of guilty of nolo contendere”, the Court stated that “[t]he intent of any agreement with Mrs. Gibson was to elicit incriminating evidence against her husband, and then to offer her immunity for any testimony implicating herself, subject to circuit court approval. Thus, there was no plea agreement, *per se*, for the circuit court to enforce.”

The Court also noted that pursuant to W. Va. Code, § 57-5-2 (1923), immunity cannot be granted by a prosecutor, but offers for immunity must be presented to and approved by the circuit court. Because the proposal for immunity for the petitioner was never presented to the circuit court, the circuit court was not obligated to enforce the offer.

Writ of Prohibition Denied.

State v. Green, No. 33200 – February 21, 2007 – Albright, J. (*Circuit Court of Hampshire County*)

Held: That the State had failed to provide sufficient evidence to sustain the appellant’s convictions for negligent homicide because the evidence did not demonstrate that she had operated her vehicle in “reckless disregard for the safety of others”, as required under W. Va. Code, § 17C-5-1(a) (1979). The Court noted, in defining the elements of negligent homicide, that something more than the violation of a motor vehicle statute or an act of ordinary negligence is necessary to sustain a conviction for involuntary manslaughter or negligent homicide, and that the State must prove that the appellant’s demonstrated “a negligence so gross, wanton and culpable as to show a reckless disregard

for human life.”

Concluding that such evidence was not present in the appellant’s case, and noting the State’s concession that driver inattentiveness, standing alone, does not constitute reckless disregard, the Court reversed the appellant’s conviction.

Reversed.

In Re: Austin G. and Breona R., No. 33134 – February 21, 2007 – Per Curiam (*Circuit Court of Mingo County*)

Held: The Court affirmed the termination of the appellant’s parental rights, noting that the appellant had failed to participate in any services offered by the DHHR. The Court also noted that while the appellant was incarcerated during the adjudicatory hearing, he had made no request to appear at the hearing. The Court also held that the appellant had failed to demonstrate a sufficient bond with the children to entitle him to post-termination visitation. The Court noted that the appellant had not visited with the children during the course of the period of improvement, despite his knowledge that his parental rights were in jeopardy.

Affirmed.

State ex rel. McCourt v. Alsop, No. 33213 – February 22, 2007 – Per Curiam (*Circuit Court of Webster County*)

Held: That the petitioner, who was indicted in September 1994 for the felony offense of second-degree sexual assault but was not arrested and arraigned on the charge until early 2006, was not denied his rights under the three-term rule. The petitioner asserted that the State had violated West Virginia Code, § 62-3-21 (1959) by its failure to bring him to trial within three regular terms of court. The petitioner claimed that he had been in custody in Virginia for several years after the 1994 indictment, and that law enforcement authorities had not acted with sufficient diligence to determine his whereabouts. The state countered this argument by noting its attempts to contact the petitioner after his indictment and by the issuance of numerous bench warrants by the circuit court.

The Court noted (1) that the record contained no evidence as to the petitioner’s custodial status in Virginia, apart from the petitioner’s assertion in his petition, and that therefore the petitioner had not made a clear case for relief in prohibition, and (2) that while the state has a duty to seek the return of a prisoner known to be incarcerated out-of-state, such was not the case with the petitioner. The Court noted that there was nothing in the record to indicate that the State had any knowledge of the petitioner’s whereabouts between 1994 and 2006. The Court concluded by noting that under § 62-3-21, the three-term rule does not begin to run until a person is *arraigned* on an indictment. Since the petitioner had been arraigned in May 2006, and a trial was promptly scheduled, there was no violation of the three-term rule.

Writ of Prohibition Denied.

State v. Mullens, No. 33073 – February 28, 2007 – Davis, C.J. (*Circuit Court of Boone County*)

Held: That the West Virginia Constitution was violated where an informant went inside the appellant’s home and conducted an electronically wired purchase of marijuana from the appellant without a court order.

The Court emphasized the expectation of privacy enjoyed by all persons in their private home, and noted that prior decisions of the court, chiefly *State v. Thompson*, 176 W. Va. 300, 342 S.E. 2d 268 (1986), had failed to properly analyze the wiretapping issue in the context of the “bright line this Court has historically drawn between searches and seizures in the home, versus searches and seizures outside the home.”

The Court therefore limited the one-party consent provision of the Wiretapping Act (W. Va. Code, § 62-1D-1, et. seq.) to prohibit the police from sending an informant into the home of a suspect to record communications without having obtained a search warrant.

Noting that the police had failed to obtain the requisite judicial authorization prior to sending the informant into the appellant's home, the Court determined that the trial court should have suppressed the electronic recordings.

Reversed and Remanded.

Office of Disciplinary Counsel v. Niggemyer, No. 33098 – March 20, 2007 – Per Curiam

Held: That the respondent attorney, who had failed to comply with two prior orders of the Court in a disciplinary matter, had acted in contempt of the Court's prior orders. Citing the respondent's disregard of the Court's prior orders, and his "half-hearted, untimely, and . . . desperate attempts to mitigate the damage", the Court ordered that the respondent's law license be suspended indefinitely until the respondent demonstrated full compliance with the Court's prior orders. The Court also imposed a number of other sanctions, including the previously-ordered financial accountings and payment of costs of all proceedings.

License Suspended Indefinitely.

State v. Davis, No. 33191 – April 5, 2007 – Per Curiam (*Kanawha County*) (*Crystal Walden and Greg Ayers, Kanawha County Public Defenders Office, for Appellant*)

The appellant was indicted for first degree murder in connection with the stabbing death of a man during an altercation at a Sissonville gas station. During deliberations, the jury sent the following question to the trial court:

"Can you please verify the following: Is 2nd degree murder with malice and unlawful but without intent and voluntary manslaughter without malice and with intent in the heat of passion. Please verify the with and without intent."

The trial court responded to this inquiry by re-reading its initial instructions on the elements of second degree murder and voluntary manslaughter. The instructions on second degree murder did not include the element of intent, but did specify that malice was a necessary element of the offense.

The appellant was convicted of second degree murder. On appeal, the appellant alleged that the trial court had failed to instruct the jury that "intent" is an element of second degree murder.

Held: The Court first observed that the initial charge to the jury contained the element of "malice", and that under existing case law malice and intent may be used interchangeably. The Court therefore reviewed the matter to determine whether the trial court's response to the jury's question was erroneous.

The Court reviewed the assignment of error under a plain error analysis, and concluded that the trial court's response to the jury's question was nonresponsive and misleading. The Court noted that the jury clearly did not understand the trial court's initial charge (which defined malice as including the element of intent), and that the jury's question indicated their continuing failure to understand that malice was defined as including intent. The Court held that simply re-reading the initial elements instruction did not clarify the issue, but merely supported the jury's belief that "intent" was not a necessary element of second degree murder.

Reversed and Remanded.

State v. Whittaker, No. 33037 – April 5, 2007 – Per Curiam (*Mercer County*)

Following a long and violent relationship, the appellant shot and killed her longtime boyfriend. The appellant was indicted for first degree murder and was convicted of voluntary manslaughter in September 2004. The appellant assigned numerous errors on appeal.

The appellant first contended that the circuit court had erred by denying her motion for judgment of acquittal. The appellant argued that the evidence presented by the State at trial was not sufficient to disprove her claim of self-defense, and that the weight of the evidence overwhelmingly supported her claim that she had acted in self-defense.

Held: Viewing the evidence in the light most favorable to the prosecution, the Court ruled that the circuit court had properly denied the appellant's motion. The Court cited a number of factors, including numerous contradictory accounts of the shooting made by the appellant, and evidence indicating that the appellant had placed a firearm in the decedent's hands after the shooting to bolster her self-defense claim. The Court also concluded that the State's evidence was sufficient to support the conviction, noting that while the events leading up to the shooting could suggest that the appellant was acting in self-defense, the evidence was subject to numerous interpretations.

The Court also determined (1) that the circuit court properly limited the testimony from three defense witnesses because the statements consisted of hearsay statements made by the appellant prior to the shooting; (2) that the trial court had not erred by refusing to provide to the jury cockfighting paraphernalia owned by the decedent, which had been marked utilized solely as demonstrative exhibits; and (3) that statements obtained from the appellant were voluntary and were admissible despite the fact that the statements were not recorded.

Affirmed.

State v. Whitt, No. 33039 – April 6, 2007 – Albright, J. (*McDowell County*) (*Greg Ayers, Kanawha County Public Defenders Office, for Appellant*)

The appellant was indicted for first degree murder in connection with the death of Dorothy Mitchell, a long-time acquaintance of the appellant's father. At trial, the appellant sought to call his co-defendant, Lori Day, to the witness stand. At the time of the appellant's trial, Ms. Day had been acquitted of the murder of Ms. Mitchell.

The appellant sought Ms. Day's testimony to demonstrate that Ms. Day was the actual killer of Ms. Mitchell. The appellant provided evidence indicating a long and bitter history between Ms. Day and the decedent, including specific threats made by Ms. Day prior to the killing. The appellant also offered testimony from several witnesses indicating that Ms. Day had admitted to bludgeoning Ms. Mitchell to death and that she had convinced the appellant to assist her in disposing of the decedent's body.

After being subpoenaed, Ms. Day indicated that she intended to invoke the Fifth Amendment. After being advised by the trial court that her acquittal rendered such a claim invalid and after being granted immunity, Ms. Day persisted in refusing to testify. She was found in contempt of court and jailed for the duration of the trial. The trial court refused the appellant's request to put Ms. Day on the witness stand, citing that such an action would only lead to speculation on the jury's part.

The Court determined that the trial court's refusal to allow the appellant to put Ms. Day on the witness stand violated his right to compulsory process. The Court determined that in order to demonstrate a violation of the right to compulsory process, a defendant must demonstrate (1) that the witness' testimony would have been material and favorable to the defendant, and (2) that to establish the denial of the right to compulsory process, a proffer regarding the materiality, favorability and relevance of the testimony may be made.

The Court also addressed the general rule against allowing a witness to take to stand solely to invoke the Fifth Amendment. The Court agreed with the appellant's contention that it was precipitous for the trial court to assume that Ms. Day would refuse to testify in open court. The Court noted that an exception to the general rule is warranted in cases where the testimony sought by the defendant is exculpatory in nature, and that in such instances the court has the discretion to compel the witness to invoke the privilege in the presence of the jury.

Concluding that the trial court's refusal to permit the appellant to call Ms. Day to the stand was prejudicial to the appellant, the Court reversed the appellant's conviction and remanded the case for a new trial.

Reversed and Remanded.

State v. Merritt, No. 33105 – April 19, 2007 – Per Curiam (*Wood County*)

The appellant was arrested for several misdemeanor offenses. Pursuant to a plea agreement, the appellant entered a plea of guilty to one misdemeanor count of obstructing an officer. The appellant was sentenced to 45 days in jail, which was suspended in lieu of a six month period of probation and supervision through a day reporting center.

The State subsequently filed a motion to revoke the appellant's probation, asserting, among other violations, that the appellant had failed to report to the day reporting center as directed. The appellant's probation was revoked, but the sentence was stayed to permit the appellant to appeal the ruling. The stay was revoked following a hearing at which evidence was presented that the appellant was continuing to abuse drugs. The appellant reported to jail on October 6, 2005.

Held: On appeal, the appellant's argued that he was wrongly denied a stay of his sentence. The Court declined, however, to address the issue. The Court noted that the appellant had long completed the 45-day sentence, and that the issue of the propriety of the stay of the appellant's sentence was moot.

Dismissed as Moot.

State ex rel. Humphries v. McBride, No. 33103 – April 19, 2007 – Per Curiam (*Greenbrier County*)

The petitioner/appellant, Carroll Humphries, was convicted in 1999 of accessory before the fact to first degree murder in connection with the death of Billy Abshire. The State argued at the appellant's trial that the appellant had aided and abetted several other persons, including Mr. Abshire's wife, Kitty Abshire, in the construction of a bomb which killed Mr. Abshire on February 5, 1976. The State alleged that the plot was devised to allow Mrs. Abshire to end her marriage to Mr. Abshire, who just prior to his death had consulted with attorney John Detch regarding a divorce.

The appellant presented six issues on appeal, and the State conceded error to three of the issues. The Court examined each of the conceded points, agreed with the appellant and the State, and reversed the appellant's conviction.

Held: The Court discussed several of the appellant's allegations of ineffective assistance of counsel, but focused on the argument that defense counsel had a conflict of interest. The Court noted that the appellant's trial attorney, Paul Detch, had worked for his father on the original divorce action between the Abshire's and was, by his description, the "last attorney to see Mr. Abshire alive." The Court noted that Paul Detch could have been a material witness for the defense and, according to the Rules of Professional Conduct, should have removed himself from the case.

The Court also determined (1) that trial counsel had permitted the appellant's Fifth Amendment rights to be violated by permitting numerous references during the trial to the appellant's invocation of his right to remain silent and his decision to retain an attorney; and (2) that counsel's failure to object to a number of hearsay statements amounted to a violation of the appellant's Sixth Amendment right to confront the witnesses against him.

Reversed and Remanded.

State v. Youngblood, No. 31765 – May 10, 2007 – Davis, C.J. (*Morgan County*)

Following the affirmation of his convictions by the West Virginia Supreme Court of Appeals in *State v. Youngblood*, 217 W. Va. 535, 618 S.E. 2d 544 (2005), the appellant filed a petition for a writ of certiorari with the United States

Supreme Court. The Supreme Court granted certiorari, vacated the majority decision of the West Virginia court, and remanded the case for further consideration by the Court. (*Youngblood v. West Virginia*, ___ U.S. ___, 126 S. Ct. 2188, 165 L. Ed. 2d 269 (2006)).

The appellant asserted that a note discovered at the scene of the alleged sexual assault, which indicated that the alleged sexual assault was consensual in nature, constituted exculpatory evidence under *Brady v. Maryland* and its progeny. The note had been presented to a police officer upon its discovery, who advised that the note be destroyed.

Held: (1) that a police officer’s knowledge of evidence in a criminal case is imputed to the prosecutor; (2) that impeachment evidence is subject to full disclosure under the due process clause of the West Virginia Constitution, as well as under the provisions of *Brady*; and (3) that suppressed evidence, i.e., a note purportedly written by the alleged victim’s following the incident, violated the disclosure requirements of *Brady* and *Hatfield*.

Reversed and Remanded.

State v. Thompson, No. 33206 – May 11, 2007 – Per Curiam (*Kanawha County*)

The appellant was convicted of child neglect resulting in death. The indictment resulted from an incident where the appellant left his 2-year old son in a car while he entered his home to change clothing. The appellant fell asleep while in the home, and his child died of hyperthermia after being left in the car for over four hours.

On appeal, the appellant asserted two primary assignments of error: (1) the failure of the circuit court to instruct the jury as to the defense of unconsciousness or automatism, and as to the definition of “neglect”, and (2) that the evidence presented at trial was insufficient to support his conviction.

Held: (1) that the trial court’s failure to instruct the jury as to the defense of unconsciousness/automatism did not constitute plain error; (2) that the appellant was not entitled to a refined instruction as to the meaning of “neglect”; and (3) that the evidence was sufficient to support the appellant’s conviction.

Affirmed.

State v. Gerald Thompson, Jr., No. 33097 – May 15, 2007 – Starcher, J. (*Clay County*)

The appellant was convicted of operating a clandestine methamphetamine laboratory. On appeal, the appellant asserted, *inter alia*, that the trial judge had engaged in improper extended questioning of witnesses.

Held: That the trial judge’s extensive inquiries of both state and defense witnesses was improper and constituted reversible error. The Court noted that the trial judge had asked approximately 180 questions of the witnesses appearing at trial. The Court noted, in examining the content and tenor of the questions, that the trial judge had “abandoned his role of impartiality and neutrality and that his role in both questioning witnesses and making comments to aid the prosecuting attorney seriously effected the fairness, integrity and public reputation of the judicial proceedings.”

Reversed and Remanded.

All cases may be viewed online at: [http://www.state.wv.us/wvsc/docs/spring07/\(case#\).htm](http://www.state.wv.us/wvsc/docs/spring07/(case#).htm)

UPCOMING CLE EVENT

WEST VIRGINIA PUBLIC DEFENDER SERVICES ANNUAL PUBLIC DEFENDER CONFERENCE

JUNE 22 & 23, 2007
Snowshoe Mountain Resort
Snowshoe, West Virginia
(877) 441-4386

West Virginia Public Defender Services will be sponsoring its annual Public Defender Conference on June 22-23, 2007 at Snowshoe Mountain Resort in Snowshoe, West Virginia. The Conference will be open to both public defenders and criminal defense counsel.

This Conference will feature a number of speakers and address a wide variety of topics pertinent to the criminal defense practitioner.

This year, there will be a **\$ 90.00 non-refundable registration fee for private bar counsel members**. Please register as soon as possible, as the number of participants is limited.

Continuing Legal Education Certification: The Conference has been submitted to the West Virginia State Bar for CLE certification. The Conference will average approximately 10 total hours of CLE credit, including approximately 1.5 hours in ethics/law office management. A detailed agenda will be mailed upon registration.

Make checks payable to **West Virginia Public Defender Services** and mail along with your registration form.

2007 Annual Public Defender Conference at Snowshoe Resort, Snowshoe, West Virginia June 22 & 23, 2007

of Persons Attending _____ at \$90.00 each

Amount Enclosed \$ _____

Name

Mailing Address

City/State/Zip

Phone and Fax numbers

E-mail address

Mail no later than June 15, 2007 to:

West Virginia Public Defender Services
Criminal Law Research Center
Attention: Erin Akers
1900 Kanawha Boulevard East
Bldg. 3, Room 330
Charleston, West Virginia 25305-0730
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