WEST VIRGINIA SEXUAL VIOLENCE BENCHBOOK

Supreme Court of Appeals of West Virginia

2021 Edition

PREFACE – ACKNOWLEDGMENTS

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The statutes, rules, and cases contained and discussed in this *Benchbook* are current through May 2021. All relevant statutory amendments and new legislation enacted through the 2021 Regular Legislative Session are included.

This *Benchbook* is intended primarily as a resource for West Virginia magistrates and judges. Information contained in this publication may also be useful for other court personnel, law enforcement officers, legal professionals, and sexual assault service providers. All readers are advised that discussions and suggestions regarding these legal issues represent the collective professional judgment of the *Benchbook* authors and are not to be considered as authoritative statements or interpretations of the law by the Supreme Court of Appeals of West Virginia.

Questions concerning local sexual assault procedures should be directed to the local court with jurisdiction over the case in question.

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Chapter 1

SEXUAL VIOLENCE: A REVIEW OF CONCEPTS AND STATISTICS

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I. Definition of Sexual Violence

A. Definitions Established by the Centers for Disease Control and Prevention

Recognizing that sexual violence is a profound social and public health problem, the Centers for Disease Control and Prevention have adopted definitions of sexual violence that include seven categories or types of sexual violence. Kathleen C. Basile, Linda Saltzman, Matthew Breiding, Michaele Black & Reshma Mahendra, Centers for Disease Control and Prevention, *Sexual Violence Surveillance*, *Version 2.0,* 11 (2014). These categories and defined terms were developed to study sexual violence in terms of the number of incidents and trends, to

determine the scope of the problem, and to examine sexual violence across jurisdictions. These seven categories cover the following *completed* or *attempted* acts of sexual violence: 1) forced penetration of a victim; 2) alcohol/drug-facilitated penetration of a victim; 3) acts in which a victim is made to penetrate a perpetrator or someone else; 4) alcohol/drug-facilitated acts in which a victim is made to penetrate a perpetrator or someone else; 5) non-physically forced penetration which occurs after a person is pressured verbally or through intimidation or misuse of authority to consent or acquiesce; 6) unwanted sexual contact; and 7) non-contact unwanted sexual experiences. *Sexual Violence Surveillance* at 11.[1] Although the categories were primarily developed to study the problem of sexual violence from a public health perspective, these categories provide insight into the different aspects of sexual violence.

B. Definitions Established by the National Incident-Based Reporting System

As part of its mission to provide better data about crime, the Uniform Crime Reporting Program, a program of the Federal Bureau of Investigation, developed and implemented the National Incident-Based Reporting System ("NIBRS") to collect information from law enforcement agencies throughout the United States. Federal Bureau of Investigation, https://www.bjs.gov/index.cfm?ty=dcdetail&iid=301 (accessed May 27, 2021). As the name of the reporting system implies, the concept of an incident is central to the information that is reported. An incident is defined as "one or more offenses committed by the same offender, or group of offenders *acting in concert*, at the *same time or place*." Criminal Justice Information Services Division, Uniform Crime Reporting Program, 2019.2.1 National Incident-Based Reporting System User Manual, 5 (2020), https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8.xls. Information about incidents is collected and analyzed regarding many different aspects, such as the types of offenses, characteristics of victims, characteristics of offenders, and other relevant information. Federal Bureau of Investigation, https://www.bjs.gov/index.cfm?ty=dcdetail&iid=301 (accessed May 27, 2021).

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[1] The term "non-contact sexual abuse" is defined as: "Sexual abuse that does not include physical contact of a sexual nature between the perpetrator and the victim. This occurs against a person without his or her consent, or against a person who is unable to consent or refuse. Some acts of non-contact unwanted sexual experience occur without the victim's knowledge. This type of sexual violence can occur in many different venues (e.g., school, workplace, in public, or through technology)." Basile at 12. Non-contact unwanted sexual experiences include but are not limited to (1) unwanted exposure to sexual situations such as exposure to pornography; (2) verbal or behavioral sexual harassment; (3) threats of sexual violence to accomplish some other end; or (4) unwanted filming, taking or disseminating photographs of a sexual nature of another person. *Id.*

For the NIBRS, sexual offenses are divided into two general categories: forcible and non-forcible sexual offenses. Data is collected for the following types of offenses: rape, sodomy, sexual assault with an object, fondling, incest, and statutory rape. *National Incident-Based Reporting System User Manual. An offense is classified as rape if the victim did not consent or was incapable of giving consent. Offenses of statutory rape include facts in which a victim consented, was not forced, but was under the age of consent. Id.*

In addition to sexual offenses, data on human trafficking offenses is collected. A subcategory of human trafficking involves commercial sex acts as opposed to involuntary servitude. *Reporting System User Manual*. Further, information about the offenses associated with prostitution is collected. *National Incident-Based Reporting System User Manual*.

The definitions for offenses reported to the NIBRS are broad definitions that are used to categorize similar crimes that occur throughout the United States. They should not be used to charge a crime. The NIBRS has based its definitions of offenses on common law definitions included in *Black's Law Dictionary*, the *Uniform Crime Reporting Handbook*, and the NCIC Uniform Offense Classifications, https://ucr.fbi.gov/nibrs/2012/resources/nibrs-offense-definitions (accessed May 27, 2021).

The common law definition of rape was limited to: "The unlawful carnal knowledge of a woman by a man forcibly and against her will." *Black's Law Dictionary*, 1427 (4th ed. 1968). In contrast, the concept of sexual violence as defined by the NIBRS involves situations in which physical force or the threat of force is absent, including situations where the victim is incapable of consent because of a mental or physical condition. Also, the concept of sexual violence includes other acts of sexual contact in addition to sexual intercourse. Further, it indicates that a victim of sexual violence can either be a male or a female. As demonstrated by the NIBRS definitions, the concept of criminal sexual violence encompasses situations that would not have met the narrow elements outlined in the common law definition of rape.

II. Sexual Assault and Sexual Abuse in West Virginia Statutes

The NIBRS definitions were developed to study crime across jurisdictions, not to charge defendants with specific crimes. The following discussion outlines the characteristics of the crimes of sexual assault, sexual abuse, and sex trafficking as established by West Virginia statutes.

Article 8B of Chapter 61 of the West Virginia Code is the primary source of statutory authority for criminal acts of sexual violence in West

Virginia. Article 8B divides criminal sexual acts into two general categories: 1) acts that involve sexual intercourse or sexual intrusion and are denoted as crimes of "sexual assault" (W. Va. Code §§ 61-8B-3 through -5); and 2) acts that involve non-intrusive sexual contact and are denoted as crimes of "sexual abuse" (W. Va. Code §§ 61-8B-7 through -9). The acts are gender neutral. The crimes are also distinguished by whether the perpetrator used a deadly weapon, inflicted serious bodily injury, or used forcible compulsion. The mental and physical state or condition of the victim is also a factor in crimes of sexual assault or abuse. Specifically, it is unlawful for a person to engage in sexual acts when a victim meets the following statutorily defined terms: "physically helpless," "mentally defective," or "mentally incapacitated." Finally, the relative ages of the perpetrator and the victim can determine whether criminal sexual conduct has occurred. These statutes, therefore, take into account the specific actions of the defendant and certain characteristics of a victim, including the victim's mental or physical state and age.

In addition to the elements outlined above, the victim's lack of consent is an element of every offense established by Article 8B. W. Va. Code § 61-8B-2(a). Lack of consent may be proven by facts that show forcible compulsion. The term "forcible compulsion" means the defendant used physical force that overcame the victim's earnest resistance. W. Va. Code § 61-8B-1(1)(a). By the statute's terms, resistance includes physical resistance. However, it also includes "any clear communication of the victim's lack of consent." *Id.* The State is not, therefore, required to show that the victim engaged in acts that would constitute physical resistance to the crime. Lack of consent may also be proven when the defendant places the victim in fear of death or bodily injury through threats or intimidation. W. Va. Code § 61-8B-1(1)(b). The term "forcible compulsion" is further expanded when the victim is under 16 years of age and the defendant is at least four years older. W. Va. Code § 61-8B-1(1)(c). If the ages of the victim and the perpetrator fall within the circumstances established by West Virginia Code § 61-8B-1(1)(c), any intimidation may be sufficient to constitute forcible compulsion.

Not only addressing crimes that involve forcible compulsion, West Virginia Code § 61-8B-2 establishes that certain victims are legally incapable of consent. These victims include persons under 16 years old; persons who meet the definition of the term "mentally defective;" persons who meet the definition of the term "mentally incapacitated;" persons who meet the definition of the term "physically helpless;" or persons who are subject to confinement or supervision by a State or local government entity and the actor is a person prohibited from having sexual intercourse or causing sexual intrusion or contact pursuant to West Virginia Code § 61-8B-10. W. Va. Code § 61-8B-2(c).

Defining sexual assault in terms of a victim's lack of consent, as West Virginia Code § 61-8B-2 has done, was part of a general trend to expand the traditional definition of rape and otherwise revise statutes that established criminal penalties for sexual assault. It was recognized that the common law definition of rape that required a showing of physical resistance was "ill-advised and unrealistic" for several reasons. John H. Biebel, *I Thought She Said Yes: Sexual Assault in England and America,* 19 Suffolk Transnat. Rev. 153, 180 (1995). First, a victim's physical resistance would often result in more severe physical injuries. Secondly, the victim could be too surprised or frightened to fight back. Third, some aggressors who knew that the victim had not consented to sexual activity could escape prosecution because the facts would not fit neatly into the traditional set of facts commonly considered as rape. For a detailed discussion concerning the development of sexual assault law, see Cheryl A. Whitney, *Non-Stranger, Non-Consensual Sexual Assaults: Changing Legislation to Ensure that Acts are Criminally Punished,* 27 Rutger L. J. 417 (1996); Stacey Fulter and Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing,* 16 Berkeley Women's Law Journal 72, 111 (2001).

Two other statutes, West Virginia Code § 61-8-12 which criminalizes incest, and West Virginia Code § 61-8D-5 which criminalizes sexual abuse by a parent, guardian, custodian, or person in position of trust to a child, are also primary sources of statutory authority for criminal acts of sexual misconduct. West Virginia Code § 61-8-12 criminalizes sexual intercourse or sexual intrusion with certain relatives, including incest within step-families. A victim's consent is immaterial to the offense because the statute proscribes sexual intercourse or intrusion based solely upon the relationship between the defendant and victim. Similarly, West Virginia Code § 61-8D-5 prohibits sexual contact with a child if a person meets one of the relationships identified in the statute. As is the case with incest, consent is immaterial. These two statutes criminalize sexual acts because of the relationship between the defendant and victim, not because of forcible compulsion or because of the victim's lack of consent. These two statutes, along with offenses established by Article 8B, are the core of statutory authority that criminalize sexually violent and abusive acts in West Virginia.

Article 8C of Chapter 61 of the West Virginia Code has established criminal offenses associated with child pornography. Specifically, West Virginia Code § 61-8C-2 criminalizes acts related to the photographing or filming of minors engaged in sexually explicit conduct. In addition, West Virginia Code § 61-8C-3 prohibits the distribution of material that depicts minors engaging in sexually explicit conduct. Similarly, West Virginia Code § 61-8D-6 prohibits the distribution of material by a parent, guardian, or custodian when the material portrays a child engaging in sexually

explicit conduct and the child is under the adult's care, custody, and control.

Provisions in the West Virginia Computer Crime and Abuse Act, Article 3C of Chapter 61 prohibit the transmission of obscene material to a person if the recipient requests that the sender desist from sending them this material. W. Va. Code § 61-3C-14a. Another section of Article 3C criminalizes the solicitation of a minor by a computer to engage in illegal sexual activity. W. Va. Code § 61-3C-14b. Since the term "computer" is broadly defined to include a wide range of electronic devices, including cell phones, the statute provides redress when an adult solicits a minor by using a variety of electronic devices. W. Va. Code § 61-3C-3(c).

In addition to criminalizing forced labor, Article 14 of Chapter 61 establishes criminal penalties for human trafficking that include penalties for trafficking minors or adults for commercial sexual activity. More severe penalties are established when the victim is a minor. Also, this article establishes criminal penalties for debt bondage, which may involve commercial sexual activity for a debt, either real or purported. W. Va. Code § 61-14-4. Further, this article establishes criminal penalties for using coercion to force an adult to engage in commercial sexual activity or making a minor available for commercial sexual activity. W. Va. Code § 61-14-5. Finally, it is a criminal offense to knowingly patronize an individual who is subject to sexual servitude. W. Va. Code § 61-14-6.

Not only does this article establish criminal penalties for trafficking offenses, it has also provided immunity from juvenile prosecutions for prostitution when the charged individual is a victim of human trafficking. W. Va. Code § 61-14-18. Presumptively, a minor should be considered a victim of human trafficking. Further, a victim of human trafficking may be eligible for expungement of convictions or juvenile adjudications for prostitution when the offense was the direct result of human trafficking. W. Va. Code § 61-9-14. These provisions, therefore, provide relief to human trafficking victims who have been coerced into prostitution.

III. Overview of National Statistics

According to the results of the 2019 National Crime Victimization Survey, there were 459,310 rapes or sexual assaults that involved victims age 12 or older in 2019. Bureau of Justice Statistics, U.S. Dept. of Justice*, Criminal Victimization, 2019*, 3 (2020). The 2019 statistics indicate that reported rate of rape or sexual assault decreased from 2.7 victimizations per 1,000 persons in 2018 to1.7 victimizations per 1,000 persons in 2019. *Id.*

The Bureau of Justice Statistics released a special report with data regarding female victims of sexual violence from 1994 to 2010. See Bureau of Justice Statistics, U.S. Dept. of Justice, *Female Victims of Sexual Violence, 1994-2010* (2016). The special report was first published in 2013, and the revised version was published in 2016. According to the report, the victims of sexual violence were predominantly female, and only 9% of the cases involved a male victim. *Female Victims of Sexual Violence* at 3. From 2005 to 2010, females who were 34 years old or younger, lived in lower income households, and who lived in rural areas experienced the highest rates of sexual violence. *Female Victims of Sexual Violence* at 1. The rate of sexual assault and rape victimizations among females declined with age, and females aged 12 to 34 years old experienced the highest rate of victimization, about 4 victimizations per 1,000. *Female Victims of Sexual Violence* at 3. However, the rates for sexual violence were lower in the period of 2005 to 2010 than 1994 to 1998 for all racial and ethnic groups. *Id*. Women who have never married or have been divorced also had higher rates of sexual violence. *Id*.

About 55% of rape or sexual assault cases occurred at or near the victim's home, and 12% occurred at or near the home of a friend, relative, or acquaintance. *Female Victims of Sexual Violence* at 4. In most cases (78%), the victim knew the offender. The statistics indicate that about 3 in 4 victims knew the offender. An intimate partner committed about 34% of all of the offenses, 6% were committed by a relative or family member, and 38% were committed by a friend or acquaintance. The percentage of cases committed by a stranger remained unchanged from 1994 to 2010 at 22%. *Female Victims of Sexual Violence* at 4.

Approximately, one-half of the victimizations were committed by an offender who was 30 years old or over. White males committed the majority of crimes of sexual violence; however, this percentage has decreased over time from 70% in 1994 to 1998 to 57% from 2005 to 2010. From 1994 to 2010, about 40% of the victims believed the offender had been drinking or using drugs prior to the incident. In the majority of the cases, the offender did not have a weapon. From 2005 to 2010, 11% of offenders possessed or used a weapon. Of these cases, 6% had a firearm and about 4% had a knife. *Female Victims of Sexual Violence* at 5.

These general statistics indicate that in most sexual assault cases, the victim will typically be female, the offender will be someone she knows, and the offender will most likely not use a weapon. Therefore, the statistics indicate that cases involving sexual assault by a stranger, the stereotypical rape case, occur much less frequently than cases involving sexual assault by someone the victim knows.

Although the National Criminal Victimization Survey is fairly comprehensive, it only includes data for rape and sexual assault victims age 12 and older. It, therefore, provides no data concerning crimes of sexual violence against young victims and crimes against victims of any age involving sexual violence other than sexual assault. In a study published in 2000 based upon data from the NIBRS, forcible fondling[2] was the most prevalent type of sexual offense among all age groups, and amounted to 45% of the total sexual assault crimes. Bureau of Justice Statistics, U.S. Dept. of Justice, *Sexual Assault of Young Children as Reported to Law Enforcement*, 2 (2000). Forcible rapes, which were 42% of the reported sexual assault crimes, were the second most prevalent crime. According to this study, 67% of all victims of sexual assault were under the age of 18 at the time of the crime. *Id.*

In 2018, the Bureau of Justice Statistics released a special report on federal human trafficking prosecutions. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Prosecutions of Human-Trafficking Cases*, 2015 (2018). Human trafficking involves forced labor, but it also encompasses offenses of sex trafficking and child pornography. The report noted that sex trafficking is facilitated through internet transactions and may take place in massage parlors, through escort services, and through street prostitution. *Federal Prosecutions of Human-Trafficking Cases* at 2. The report indicates that 1,923 suspects were investigated for trafficking offenses, and 39% of the suspects were charged with peonage, forced labor, or sex trafficking. In turn, 32% of the suspects were charged with child pornography, and 29% were charged with transportation for illegal sexual activity. *Federal Prosecutions of Human-Trafficking Cases* at 4.

IV. Statistics Concerning Sexual Offenses in West Virginia

According to information available on the website for the Federal Bureau of Investigation, 238 of 436 West Virginia law enforcement agencies provided data to the Uniform Crime Reporting Program. Federal Bureau of Investigation, https://crime-data-explorer.fr.cloud.gov/explorer/state/west-virginia/crime (accessed May 27, 2021). The website indicates that there were 582 rape incidents and 600 offenses reported for 2019. *Id.* It was noted that these statistics covered 87% of the population. Further statistics and information can be derived from data sets available through the Crime Data Explorer.

[2] Forcible fondling is defined as: "The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity." *Sexual Assault of Young Children* at 13.

According to these reports, 408 sexual offenses occurred in a residence. In 150 of the offenses, the victim was acquainted with the offender. The second highest category describing the relationship between offender and victim was "otherwise known," and this relationship was noted in 81 of the offenses. In 254 of the cases, a "personal weapon" (hands, fist, feet, etc.)[3] was used, and in 194 of the cases, no weapons were used.

V. Statistics Concerning Sex Trafficking in West Virginia

According to the National Human Trafficking Hotline, there were 38 reports of human trafficking through the end of the 2019 calendar year. National Human Trafficking Hotline, https://humantraffickinghotline.org/state/west-virginia (accessed May 27, 2021).

VI. Underreporting of Sexual Offenses

It is important to note that instances of rape and other sexual offenses are usually undercounted in police reports because victims often fail to report. From 2006 to 2010, 52% of all violent victimizations went unreported. Bureau of Justice Statistics, U.S. Dept. of Justice, *Victimizations Not Reported to the Police, 2006-2010,* 1 (2012). Of these victimizations, 211,200 were rape and sexual assault offenses, and 65% of all rape and sexual assaults were unreported. *Victimizations Not Reported* at 4. Victims gave various reasons for their failure to report, but the most prominent reason was the fear of reprisal or getting the offender into trouble. *Id.* This line of reasoning is not surprising because, as discussed earlier, most sexual offenses are committed by a nonstranger. With regard to all violent crime victims, women are more likely to fail to report because the victim was afraid of reprisal or getting the offender in trouble. *Victimizations Not Reported* at 7. It can be concluded that a greater number of sexual offenses will be unreported because these offenses are typically against women and committed by a nonstranger.

VII. False Reporting of Sexual Offenses

An "Overview of False Reporting" in cases involving sexual violence examines this issue and misconceptions about it. National Sexual Violence Resource Center, *False Reporting*, https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf (accessed May 27, 2021). As discussed in the article, a source of confusion often arises because of imprecise terminology

[3]Personal weapons are described as hands, fist, feet, etc. https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8.xls.

describing "false" reporting. In the article, a distinction is made between a "false report," one in which an investigation proves that the allegations did not occur, and a "baseless report," one in which determines that an incident did not meet the elements of a crime, but the incident nonetheless occurred. After reviewing scholarly literature examining this issue, it was concluded that false reporting occurs in between 2 and 10 percent of cases reported.

Similarly, a review of research indicates that false allegations of rape occur in less than approximately 5% of all rape cases reported. Lisa Avalos, *The Chilling Effect: The Politics of Charging Rape Complainants with False Reporting*, 83 Brooklyn L. Rev. 807, 817 (2018).[4] As noted by Professor Avalos, law enforcement officers, however, believe that more than half of the complaints received are false. *Id.* Although the focus of the article involves prosecution of rape victims for false reporting. Professor Avalos notes that generally rapes are not properly investigated, that law enforcement are skeptical of sexual assault victims, and there is pressure on law enforcement to resolve reports without the investment of adequate time or resources. *Id.* at 813. Recommendations include legislation to strengthen rape investigation practices, legislation shielding rape complainants from prosecution and legislation that mandates improved data collection. *Id*. at 868-871. An awareness of these issues provides insight when sexual assault cases are prosecuted.

VIII. National Statistics on the Incarceration of Sex Offenders

Based upon national statistics, it was estimated that there were 233,636 offenders convicted of rape and sexual assault that were on probation, on parole or incarcerated in 1994, and they represented 4.7% of all convicted offenders. Lawrence A. Greenfeld, Bureau of Justice Statistics, *Sex Offenses and Offenders*, 17 (1997). Approximately, 88,100 sex offenders were incarcerated in state prisons, and 875 sex offenders were incarcerated in federal prisons. Sex offenders represented 9.7% of all persons incarcerated in state prisons. In addition, 3.4% or 10,345 convicted sex offenders were incarcerated in jails. Of all convicted sex offenders, 106,710 were on probation. As a percentage, sex offenders represented only 3.6% of all convicted criminals who had been placed on probation. There were 27,606 convicted sex offenders on parole, and they represented 4.0% of all offenders on parole.

Sex Offenses and Offenders by Lawrence Greenfield was a comprehensive study that has not been updated. Statistics that provide total numbers or percentages of incarcerated sex offenders on a

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[4] Professor Avalos has published an earlier article on similar research. Lisa Avalos, *Policing Rape Complainants: When Reporting Rape Becomes a Crime*, 20 J. Gender Race & Just. 459 (2017).

nationwide basis are not readily available. However, statistics the Federal Bureau of Prisons provide information about the incarceration of sex offenders in federal prisons. As of October 24, 2020, 15,994 (11.2%) of all inmates incarcerated in federal prisons were convicted of a sex offense. Federal Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (accessed May 27, 2021).

XI. West Virginia Statistics on the Incarceration of Sex Offenders

The West Virginia statistics concerning the supervision and incarceration of sex offenders include persons convicted of a crime that a judge found to be sexually motivated and persons who admitted to committing a sex offense but were convicted of other offenses because of a plea bargain. Laura Hutzel, Erica Turley, West Virginia Department of Military Affairs and Public Safety, *West Virginia Sex Offender Study*, 12 (2001). Therefore, the West Virginia statistics for incarcerated sex offenders take into account more offenders than the national statistics. In late 2000, there were 920 convicted sexual offenders in West Virginia who were either incarcerated, on parole or on probation. Hutzel at 13. The majority of these convicted sex offenders, 73.2%, were incarcerated in a Division of Corrections and Rehabilitation Facility. At the time of this 2000 study, 17.7% of convicted sex offenders were on probation, and 8.4% were on parole. Less than one percent, or 0.8%, were housed in juvenile facilities. Hutzel at 12.

With regard to punishment imposed upon sex offenders in West Virginia, a prison sentence (75.3% of all cases) was the most common sentence. Only 10.9% of the sex offenders were placed on probation. Further, 6.1% of the sex offenders were sentenced to both prison and probation. Hutzel at 14.

This study pointed out that the majority of sex offenders discharged their full sentence without being found eligible for release on parole. In fact, only 37% of all sex offenders released in 1999 were released on parole. Hutzel at 17. Therefore, sex offenders were more likely to be released without supervision or assistance from parole officers, and consequently, could not be compelled to participate in further sex offender treatment. Certainly, the supervised release statute (West Virginia Code § 62-12-26), originally enacted in 2003, is intended to address this issue.

As of June 30, 2019, 1,032 of all inmates in the custody of the West Virginia Division of Corrections and Rehabilitation were convicted of a forcible sex offense. *West Virginia Division of Corrections and Rehabilitation Annual Report, 2019* at 39 (January 2020). Additionally, 254 inmates were convicted of a non-forcible sex offense. *Id.* 73 inmates

had been convicted of offenses involving pornography or obscene material. West Virginia Division of Corrections and Rehabilitation Annual Report. It should be noted that each inmate is only represented once by their most serious crime.

X. Conclusions

The definitions of sexual violence that were developed for public health and criminal reporting purposes indicate that sexual violence encompasses crimes that are much broader than the stereotypical stranger rape case. Sexual violence, although primarily a crime of violence against females, may involve male victims, especially juveniles. Also, sexual violence crimes commonly involve situations in which the victim knows the perpetrator. Further, sexual violence includes situations in which a victim is unable to consent to sexual activity either because of his or her age or mental or physical condition. Finally, the frequency of false reports of rape is fairly low. The concepts and statistics discussed in this chapter illustrate the wide variety of factual scenarios that a circuit court will face in cases involving crimes of sexual violence.

Chapter 2

SEXUAL OFFENSES IN WEST VIRGINIA

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I. Legal Definitions Generally Applied in Sexual Crimes

Article 8B, Chapter 61 of the West Virginia Code is the primary source of statutory authority for sexual offenses. West Virginia Code § 61-8B-1 defines a set of terms included in Article 8B. In addition, statutory sections in Article 8D, Chapter 61, "Child Abuse," establish definitions for sexual crimes against children. Further, West Virginia Code § 61-8-12 establishes definitions included in the crime of incest. These various definitions govern the determination of the type of offense or offenses to be charged.

Bodily Injury: This term is defined as substantial physical pain, illness, or any impairment of a physical condition. W. Va. Code § 61-8B-1(9). The scope of the term is fairly broad and could be applied to a range of physical conditions that occur as a result of a sexual crime. It does not, however, include emotional or psychological injuries. This term is included in the definition of forcible compulsion.

Child: A child is a person who is under age 18 and who has not been emancipated by law. W. Va. Code § 61-8D-1(2). Emancipation occurs when a child is over age 16, and a court orders the emancipation. Secondly, a child can be emancipated by operation of law if he or she is over age 16 and he or she marries. W. Va. Code § 49-4-115.

Custodian: This term is included in the offense of sexual abuse by a parent, guardian, custodian, or person in position of trust to a child. W. Va. Code § 61-8D-5. A custodian of a child must be over age 14 and must have actual physical possession or care and custody of a child on either a full-time or temporary basis. W. Va. Code § 61-8D-1(4). A person may be considered a "custodian" even if he or she has not been granted custody of a child by a contract, agreement, or legal proceeding.

The definition of a "custodian" also expressly includes the spouse of a parent, guardian or custodian, or a person who cohabits with a parent, guardian, or custodian in the relationship of husband and wife. This definition, therefore, includes step-parents of a child or a significant other of a parent, guardian, or custodian. To be considered a custodian, a spouse or significant other must share actual physical possession or care and custody of a child with the parent, guardian, or custodian of a child.

As established by West Virginia Code § 61-8D-1(4), a person can be considered a custodian in situations when a person has physical custody on a temporary basis.

The West Virginia Supreme Court has recognized that whether an individual qualifies as a custodian "has always been an issue for the jury to determine." Syl. Pt. 4, *State ex rel. Harris v. Hatcher,* 236 W. Va. 599, 605, 760 S.E.2d 847, 853 (2014) (holding that whether a school bus driver who assaulted a 14 year-old student in her home was a custodian or person of interest is a jury question). See also *State v. Chic-Colbert*, 231 W. Va. 749, 749 S.E.2d 642 (2013); *State v. Edmonds*, 226 W. Va. 464, 702 S.E.2d 408 (2010); *State ex rel. Bowers v. Scott*, 226 W. Va. 130, 697 S.E.2d 722 (2010); *State v. Cecil,* 221 W. Va. 495, 655 S.E.2d 517 (2007); *State v. Collins,* 221 W. Va. 229, 654 S.E.2d 115 (2007); Syl. Pt. 1, *State v. Stephens*, 206 W. Va. 420, 525 S.E.2d 301 (1999).

The Court has further noted that these cases are "fact-intensive by nature." *Harris*, 760 S.E.2d at 853. Therefore, the specific facts of a case will determine whether a person who either resides in a household or cares for a child meets the definition of a "custodian." In a case in which a defendant sexually assaulted a girl during four-wheeler rides, the Supreme Court held that there was sufficient evidence to conclude that the defendant was a "custodian" because he had temporary physical possession of the girl during four-wheeler rides. *State v. Collins*, 221 W. Va. 229, 654 S.E.2d 115 (2007); *State v. Cecil*, 221 W. Va. 495, 655 S.E.2d 517 (2007) (holding that there was sufficient evidence to find that the defendant was a custodian when the victims spent the night at the defendant's home).

In a case in which a defendant was convicted of sexual abuse by a custodian or person in a position of trust, he challenged the sufficiency of the evidence as it related to his status as a custodian for a minor who was a neighbor. *State v. Timothy C.*, 237 W. Va. 435, 787 S.E.2d 888 (2016).[1] At trial, the evidence showed that the defendant was a neighbor to one of the victims, A.O., and her family. Apparently, A.O. was playing outside and fell asleep with her younger siblings. The defendant picked her up and carried her into the house while she was sleeping, and the defendant placed her on a bed and lifted her hand and placed it on his penis. During the incident, she awoke and ran out of the house. Analyzing the evidence, the Supreme Court noted the testimony that indicated the familiarity between the defendant and the neighbor's family and with the victim in particular. With regard to the night in question, the Court noted that the

[1] The defendant's convictions against his daughter were reversed because the trial court excluded DNA evidence that showed that the semen on his daughter's shirt came from another person. The trial court had excluded the DNA evidence under Rule of Evidence 412(b)(1).

defendant voluntarily picked up A.O. and assumed supervisory responsibility by doing so. Accordingly, the Court concluded that the defendant took temporary physical control of A.O. and, therefore, met the definition of a custodian.

Contrastingly, in a case in which the appellant, who was the victim's uncle, sexually assaulted a 12-year-old girl on her living room couch, the Supreme Court held that the defendant was not custodian although he was the only adult in the room. *State v. Longerbeam*, 226 W. Va. 535, 703 S.E.2d 307 (2010). The Court concluded that he was not a custodian because the victim's 16-year-old sister was present in the home, she had been charged with supervisory responsibility, and the presence of the appellant and his wife, who were older, did not displace her caregiver status. 226 W. Va. at 540, 703 S.E.2d at 312.

Deadly Weapon: This term is not limited to any specific type of weapon. Rather, it refers to any instrument, device, or thing that could inflict either death or a substantial physical injury. W. Va. Code § 61-8B-1(11). The term is further broadened to include things that are designed or specially adapted to be used as weapons. It also includes anything that is possessed, carried, or used as weapons. Under this definition, objects that would not ordinarily be considered weapons, such as a baseball bat or scissors, could meet the definition of a deadly weapon, provided that the object was intended or used as a weapon. This term is included in the offense of first degree sexual assault. W. Va. Code § 61-8B-3.

Forcible Compulsion: The term "forcible compulsion" is defined as "physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances." W. Va. Code § 61-8B-1(1)(a). It is included as an element in the offense of second degree sexual assault (W. Va. Code § 61-8B-4) and first degree sexual abuse (W. Va. Code § 61-8B-7). As established by the statute, resistance includes the victim's physical resistance or struggles against the perpetrator. It is, however, not limited to a physical struggle. Rather, any clear communication from the victim that indicates that the victim is not consenting to the perpetrator's actions may constitute "earnest resistance." W. Va. Code § 61-8B-1(1).

Within the context of the definition of "forcible compulsion," what constitutes "earnest resistance" is not specified. Rather, the definition indicates that the "physical force" must overcome the victim's earnest resistance "as might *reasonably be expected under the circumstances.*" W. Va. Code § 61-8B-1(1) (emphasis added). The term "earnest resistance" must, therefore, be considered in light of the specific facts of each case.

Forcible compulsion also includes threats or intimidation, which can either be expressed or implied. W. Va. Code § 61-8B-1(1)(b). The threat or intimidation must place a person in fear of immediate death, bodily injury, or kidnapping. When these threats are directed at a third person rather than the victim of the sexual offense, these types of threats can also constitute forcible compulsion.

The statutory definition of forcible compulsion is expanded for victims who are under 16 years of age and the perpetrator is at least four years older than the victim. W. Va. Code § 61-8B-1(1)(c). When the relative ages of the victim and perpetrator meet the elements of this statutory subsection, *any* intimidation, whether expressed or implied, may constitute forcible compulsion. The definition of intimidation in these circumstances is not limited to threats of death, bodily injury, or kidnapping. This definition, therefore, recognizes that a victim under the age of 16 may be more readily coerced through intimidation than other victims, provided that the perpetrator is at least four years older.

Guardian: This term is included in the offense of sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child. W. Va. Code § 61-8D-5. A guardian of a child is any person who has care and custody of a child as the result of any contract, agreement, or legal proceeding. W. Va. Code § 61-8D-1(5). This term refers to an arrangement in which a person's relationship to a child has been formally established. If there is a significant factual dispute about whether a person is a guardian or not, the person could most likely also be identified as a "custodian," one of the other types of persons in control of a child specifically identified by West Virginia Code § 61-8D-5.

Married: The term "married" includes persons who are legally married. It also includes persons "who live together as husband and wife regardless of the legal status of their relationship." W. Va. Code § 61-8B-1(2). Although this phrase seems somewhat vague, there are no cases that explain or more precisely define it. At the very least, it would require some period of regular cohabitation.

First degree (W. Va. Code § 61-8B-3(a)(2)) and third degree sexual assault (W. Va. Code § 61-8B-5(a)(2)) criminalize certain sexual acts between persons based upon the relative ages of the victim and perpetrator. However, the express language of the statutes indicates that if the persons are married, the sexual acts would not constitute a crime. Given the age of the victims -- under 12 in cases of first degree sexual assault and under 16 in cases of third degree sexual assault -- such a defense would only be raised in highly unusual circumstances.

Mentally Defective: The term mentally defective involves a person who has a mental disease or defect that causes him or her to be incapable of appraising the nature of his or her conduct. W. Va. Code § 61-8B-1(3). The term is, by design, fairly broad so that a range of conditions could fall within it. This definition would typically involve persons who suffer from mental retardation or other similar mental defects. It also could include persons who suffer from some type of dementia. A person who is considered to be "mentally defective" is incapable of consent to sexual activity. W. Va. Code § 61-8B-2(c)(2). Therefore, consent could not be raised as a defense to sexual offenses when the victim's disability meets this definition. This term is included as an element for third degree sexual assault (W. Va. Code § 61-8B-5) or second degree sexual abuse (W. Va. Code § 61-8B-8).

Mentally Incapacitated: The term "mentally incapacitated" is a temporary condition caused by a controlled or intoxicating substance that is administered without the person's consent. W. Va. Code § 61-8B-1(4). Certainly, this definition involves substances used in drug-facilitated sexual assaults. A person can also be rendered "mentally incapacitated" by any act committed upon the victim without his or her consent. A person who is mentally incapacitated is deemed incapable of consent. W. Va. Code § 61-8B-2(c)(3). This term establishes an element for third degree sexual assault (W. Va. Code § 61-8B-5) or second degree sexual abuse (W. Va. Code § 61-8B-8).

By its express language, this term would not typically include self-induced intoxication because the substance must be administered without the person's consent. However, depending on the factual circumstances, a person, after voluntarily becoming intoxicated, could be considered "physically helpless" if he or she could not communicate an unwillingness to act. See *State v. Kirk N.,* 214 W. Va. 730, 591 S.E.2d 288 (2003); *State v. McFarland*, 228 W. Va. 492, 721 S.E.2d 62 (2011) (finding that the evidence for a conviction for second degree sexual assault because of physical helplessness due to voluntary intoxication was sufficient, but reversing the conviction based upon the improper admission of Rule 404(b) evidence). The term "physically helpless" is one of the elements for second degree sexual assault. W. Va. Code § 61-8B-4.

Parent: By definition, a parent of a child can be either a biological or adoptive parent. W. Va. Code § 61-8D-1(8). A step-parent, however, would be included in the definition of the term "custodian." This term is included in the offense of sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child. W. Va. Code § 61-8D-5.

Physically Helpless: The term includes circumstances in which a victim is unconscious. W. Va. Code § 61-8B-1(5). Although the term

implies that the victim would ordinarily be "physically disabled," the definition is not limited to those circumstances. It also includes any circumstances in which a person cannot communicate an unwillingness to act. A person is considered incapable of consent if he or she is physically helpless. W. Va. Code § 61-8B-2(c)(4). This term establishes elements for the offenses of second degree sexual assault (W. Va. Code § 61-8B-4) and first degree sexual abuse (W. Va. Code § 61-8B-7).

In a case in which a juvenile victim was severely intoxicated and at times unconscious because of alcohol consumption, the West Virginia Supreme Court held that the evidence was sufficient to adjudicate the juvenile respondent for the offense of second degree sexual assault. *State v. Kirk N.*, 214 W. Va. 730, 591 S.E.2d 288 (2003). In footnote 7, the Court noted that the victim was close to passing out and that she drifted in and out of consciousness during the assault.

In a case in which a victim was voluntarily intoxicated and had used drugs, the Supreme Court found that evidence was sufficient to support a second degree assault conviction, but reversed the conviction based on the improper admission of Rule 404(b) evidence. *State v. McFarland*, 228 W. Va. 492, 721 S.E.2d 62 (2011). On appeal, the defendant had argued that he did not know or recognize that the victim had been mentally incapacitated to the point of physical helplessness, one of the elements in the statute. The Court, however, noted that the victim testified that she had passed out and had awoken with her pants on inside out and that she had never consented to sexual contact with the defendant. Also, the nurse who examined the victim testified that the victim's injuries were consistent with sexual assault. Further, the defendant's semen was found on the victim's pants. For these reasons, the Court concluded that there was sufficient evidence for a reasonable trier of fact to convict the defendant of second degree sexual assault. 228 W. Va. at 498, 721 S.E.2d at 68.

Person in a Position of Trust in Relation to a Child: This definition expands criminal liability to broad categories of persons who generally provide care or supervision for children. W. Va. Code § 61-8D-1(13). It includes any person who acts in the place of a parent and is charged with a parent's rights, duties, or responsibilities. This definition also includes someone who is responsible for the general supervision of a child's welfare. Further, it includes someone who, because of his or her occupation or position, is charged with duties relating to the health, education, welfare, or supervision of the child. This term would, therefore, include persons such as teachers, coaches, or counselors. No definitive list is, however, established by this statutory definition.

Similar to the analysis of whether an individual is a "custodian," the determination of whether an individual is a "person in position of trust" is also a question for the jury. *State ex rel. Harris v. Hatcher,* 236 W. Va. 599, 605, 760 S.E.2d 847, 853 (2014) (holding that an individual's status under West Virginia Code § 61-8D-5 is a question of fact). Accordingly, this conclusion is very fact-specific. See *Longerbeam*, 226 W. Va. 535, 703 S.E.2d 307 (2010) (holding that defendant, who was the victim's uncle and the only adult present during the assault, was not a person in a position of trust); *State v. Edmonds*, 226 W. Va. 464, 702 S.E.2d 408 (2010) (holding that the defendant, a custodian who worked at the child's church and school, was a "person of trust"); *State v. Gary A.*, 237 W. Va. 762, 791 S.E.2d 392 (2016) (holding that a person may be found to be a person in a position of trust to a child when a sexual assault occurs at the defendant's residence and he or she is supervising the child).

In *Longerbeam,* the Court held that where the child was not under the supervision of the appellant *when* the abuse occurred, the appellant was not a person in a position of trust. 226 W. Va. at 541, 703 S.E.2d at 313. However, later cases have called into question the proposition that the defendant be acting as a person of trust at the *time* of the incident. See, e.g., *Ballard v. Thomas*, 233 W. Va. 488, 759 S.E.2d 231, n. 14 (2014). Instead, in *Ballard,* the Court suggested that the "'care, custody, and control' element may *derive* from the statutorily-defined relationship" (citing cases). Although this definition is fairly broad, a person cannot be subject to criminal liability as a person in a position of trust to a child unless he or she is at least four years older than the child. W. Va. Code § 61-8D-5(d).

Serious Bodily Injury: This definition includes a bodily injury that creates a substantial risk of death or serious or prolonged disfigurement. W. Va. Code § 61-8B-1(10). This definition also includes any prolonged impairment of health. Further, serious bodily injury includes the prolonged loss or impairment of the function of any bodily function. This term is referenced in the definition of the term "deadly weapon." W. Va. Code § 61-8B-1(11). It is also included in the offense of first degree sexual assault. W. Va. Code § 61-8B-3.

Sexual Contact: Sexual contact occurs when the victim's breasts, buttocks, anus, or any part of his or her sex organs are intentionally touched. W. Va. Code § 61-8B-1(6). It can also occur when the perpetrator intentionally touches any part of the victim's body with his or her sex organs. By the terms of this definition, the touching must be intentional. It, however, can occur either directly or through clothing. For the purposes of Article 8B, sexual contact is limited to situations where the victim and perpetrator are not married. It should be noted, however, that the term "married" would include adults who live together as husband and

wife. W. Va. Code § 61-8B-1(2). The term "sexual contact" is limited by one last element. The purpose for the intentional touching must be done to gratify the sexual desire of either the actor or the victim.

This term is included in the statutes that criminalize first, second, and third degree sexual abuse. W. Va. Code §§ 61-8B-7 through -9. Additionally, this term is included in the offense established by West Virginia Code § 61-8D-5, namely sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child. W. Va. Code § 61-8D-1(9).

Sexual Exploitation: This term refers to the sexual exploitation of children only. W. Va. Code § 61-8D-1(10). This act occurs when a parent, guardian, custodian, or other person in a position of trust convinces a child, whether by persuasion, inducement, enticement, or coercion, to engage in sexually explicit conduct. It does not matter whether financial gain is used to motivate the child to engage in the conduct. Sexual exploitation may also occur when a parent, guardian, custodian, or other person in a position of trust causes a child to display his or her sex organs for the person's sexual gratification. Further, it occurs when a child is motivated to display his or her sex organs, and the display would likely be observed by others who would be affronted or alarmed. It is included in the offenses established by West Virginia Code § 61-8D-5.

Sexual Intercourse: This term includes any act involving penetration of the female sex organ by the male sex organ. W. Va. Code §§ 61-8B-1(7); 61-8D-1(11). Although penetration is an essential element, any penetration, "however slight," constitutes sexual intercourse. Sexual intercourse also includes contact between the mouth of one person and the sex organs of another. It further includes contact between the sex organs of one person and the anus of another person. This term establishes an element for first through third degree sexual assault. W. Va. Code §§ 61-8B-3 through -5. Additionally, this definition applies to the offenses of sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child and to incest. W. Va. Code §§ 61-8-12; 61-8D-5.

Sexual Intrusion: This term is defined as any act that involves penetration of the female sex organ or the anus of the victim by an object. W. Va. Code § 61-8B-1(8). Similar to sexual intercourse, even slight penetration constitutes sexual intrusion. Since the word "object" is not more specifically defined, it certainly could involve digital penetration, as well as penetration with any object. The purpose of the penetration could be to humiliate or degrade the victim. The purpose could also be to gratify the sexual desire of either party. In addition to sexual assault offenses

established by Article 8B, this definition applies to the offenses of incest and to sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child. W. Va. Code §§ 61-8-12(13); 61-8D-1(12).

II. Joinder and Severance of Offenses

Rule 8(a) of the West Virginia Rules of Criminal Procedure governs both permissive and mandatory joinder of criminal offenses. Rule 13 of the West Virginia Rules of Criminal Procedure governs the consolidation of indictments or informations for trial. Addressing severance, Rule 14 of the West Virginia Rules of Criminal Procedure determines when separate trials should be conducted for separate offenses or different defendants. Although these joinder and severance rules apply to all criminal offenses, they are often used in cases involving sexual offenses.

A. Permissive Joinder

Rule 8(a)(1) governs permissive joinder of offenses and establishes that two or more offenses may be charged in separate counts of a charging instrument, provided that the offenses are of the same or similar character. The charged offenses may be felonies, misdemeanors, or both. This permissive joinder rule is similar to the provisions of Rule 8(a)(1) of the Federal Rules of Criminal Procedure.

Rule 13 of the West Virginia Rules of Criminal Procedure allows a court to consolidate two or more informations or indictments for trial, provided the offenses could have been joined in a single indictment or information. To be subject to joinder, multiple offenses must, at a minimum, meet the requirements for permissive joinder established by Rule 8(a)(1).

With regard to whether indictments could be consolidated because they are same or similar offenses, the West Virginia Supreme Court has recognized that same or similar offenses may "arise out of wholly separate, unconnected transactions." *State v. Hatfield*, 181 W. Va. 106, 109, 380 S.E.2d 670, 673 (1988) (citing cases). The Court also recognized that the offenses need not be identical in nature. *Id.* Further, a "[m]ere lapse of time between the commission of the offenses does not render joinder improper." *Id.* Speaking to the propriety of joinder of same or similar offenses under either Rule 8 or Rule 13, the Court explained further that "the government should not be put to the task of proving what is essentially the same set of facts more than once, and the defendant should be spared the task of defending more than once against what are essentially the same, or at least connected, charges." *Hatfield*, 181 W. Va. at 110, 380 S.E.2d at 674 (citing *United States v. McGrath*, 558 F.2d 1102, 1106 (2d Cir. 1977)). Under permissive joinder and consolidation

principles, a defendant can be subject to one trial when several different offenses were committed, provided that they are of the same or similar character. W. Va. R. Crim. P. 8(a).

B. Mandatory Joinder

Rule 8(a)(2) governs the mandatory joinder of offenses and establishes two preliminary conditions regarding when multiple offenses must be joined in a single prosecution. To be subject to mandatory joinder, the offenses must have been committed in the same county that has jurisdiction and venue over the offenses. Secondly, the prosecuting attorney must have known or should have known of the offenses at the commencement of the prosecution. Provided these two prerequisites are met, offenses are subject to mandatory joinder when they are based on the same act or transaction, or when they are based on two or more acts or transactions, so long as they are connected together or constitute a common scheme or plan. W. Va. R. Crim. P. 8(a)(2). However, the West Virginia Supreme Court has recognized that a prosecutor may bring an additional misdemeanor charge after an indictment as long as the facts for the new charge were not known at the time of indictment. Syl. Pt. 2, *State v. Hartman*, 229 W. Va. 749, 735 S.E.2d 898 (2012).

The West Virginia Supreme Court has recognized that Rule 8(a) is a procedural, as opposed to constitutional, rule. *State v. Johnson*, 197 W. Va. 575, 586, 476 S.E.2d 522, 533 (1996) (superseded by rule on other grounds in *State v. Rogers*, 231 W. Va. 205, 215, 744 S.E.2d 315, 325 (2013) and *State v. Larry A.H.,* 230 W. Va. 709, 742 S.E.2d 125 (2013)). Its purpose is "to avoid the harassment and anxiety of multiple trials for defendants and to promote efficiency and fiscal economy within our judicial system by holding a unitary trial." Syl. Pt. 2, *State ex rel. Blaney v. Reed*, 215 W. Va. 220, 599 S.E.2d 643 (2004). However, it "is not intended to afford a defendant with a procedural expedient to avoid a prosecution." *Johnson*, 197 W. Va. at 587, 476 S.E.2d at 534 (quoting *Commonwealth v. Bartley*, 396 A.2d 810, 813 (Pa. 1979)).

Rule 8(a)(2) provides that a subsequent prosecution is barred if the offenses should have been prosecuted as separate counts in a single indictment. When multiple offenses are subject to the mandatory joinder provisions of Rule 8(a)(2) and the State has initiated a subsequent prosecution, then the charging document (indictment, information, or complaint) must be dismissed. Syl. Pt. 5, *State ex rel. Forbes v. Canady*, 197 W. Va. 37, 475 S.E.2d 37 (1996) (But see *Hartman*, 229 W. Va. 749, 754, 735 S.E.2d 898, 903). Dismissal of the subsequent criminal charges that should have been joined with the earlier case, however, is only proper "if jeopardy attached to any of the offenses in the initial prosecution." Syl. Pt. 3, in part, *State ex rel. Blaney v. Reed*, 215 W. Va. 220, 599 S.E.2d

643 (2004). A defendant is considered to be in jeopardy "when he has been placed on trial on a valid indictment, before a court of competent jurisdiction, has been arraigned, has pleaded and a jury has been impaneled and sworn." Syl. Pt. 1, in part, *Adkins v. Leverette*, 164 W. Va. 377, 264 S.E.2d 154 (1980) (quoting *Brooks v. Boles*, 151 W. Va. 576, 153 S.E.2d 526 (1967)). These offenses may also be subsequently prosecuted if the defendant waives his right to mandatory joinder. W. Va. R. Crim. P. 8(a)(2).

C. Severance of Offenses

Although Rules 8 and 13 govern the joinder of offenses in a charging document and for trial, Rule 14(a) allows a court to conduct separate trials if the joinder of the offenses is prejudicial to either the State or a defendant. It is within the trial court's sound discretion to determine whether to grant a motion for severance. Syl. Pt. 3, *State v. Hatfield*, 181 W. Va. 106, 380 S.E.2d 670 (1988). In *Hatfield*, the Supreme Court found an abuse of that discretion and reversed the convictions of a defendant for two different abductions in the same trial because the defendant was unfairly prejudiced by the introduction of evidence of separate and distinct offenses. Nevertheless, even with separate and distinct offenses, "A defendant is not entitled to relief from prejudicial joinder pursuant to Rule 14 of the West Virginia Rules of Criminal Procedures when evidence of each of the crimes charged would be admissible in a separate trial for the other." Syl. Pt. 2, *State v. Milburn*, 204 W. Va. 203, 511 S.E.2d 828 (1998).

The West Virginia Supreme Court has addressed a case in which a defendant was found guilty of 20 charges of sexual offenses against his two daughters and his two stepdaughters. *State v. Frank S.*, 236 W. Va. 761, 783 S.E.2d 881 (2016). Before trial, the defendant had moved for severance of the charges pursuant to Rule 14(a) of the West Virginia Rules of Criminal Procedure. On appeal, the defendant claimed that the joinder of the offenses was prejudicial and, therefore, the trial court lacked jurisdiction to deny the severance motion. He claimed that the joinder of the offenses might have led to conclude that he was guilty on the accumulation of the evidence, as opposed to the facts of each charge.

Rejecting this argument, the Supreme Court noted this type of alleged prejudice does not provide a basis to sever the charges. See *State v. Milburn*, 204 W. Va. 203, 511 S.E.2d 828 (1998). The Court further noted that a defendant's claim that he would have a better chance at acquittal does not warrant separate proceedings. See 1A Charles Alan Wright et al., *Federal Practice and Procedures: Criminal*, § 222 (4th ed. 2015); *State v. Rash*, 226 W. Va. 35, 697 S.E.2d 71 (2010).

In *Frank S.*, the Court went on to discuss the principle that it is not appropriate to grant a severance motion when evidence of each crime would be admissible in a separate proceeding. See Syl. Pt. 2, *Milburn*, 204 W. Va. 203, 511 S.E.2d 828. The Court went on to conclude that evidence of the other crimes would be admissible at trial had the court granted the severance motion. See Syl. Pt. 2, *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990); *Rash*, 226 W. Va. 35, 697 S.E.2d 71. The Court further concluded that a court, may, but is not required to conduct a *McGinnis* hearing when it conducts a hearing on a severance motion. The Court cited to *State v. Ludwick*, 197 W. Va. 70, 475 S.E.2d 70 (1996) and referred to the requirement to consider a severance motion in depth. 236 W. Va. at 767, 783 S.E.2d at 887. For these reasons, the Court affirmed the denial of the defendant's severance motion.

III. Joinder and Severance of Defendants

Rule 8(b) of the West Virginia Rules of Criminal Procedure allows two or more defendants to be charged in the same indictment or information when the defendants allegedly participated in the same act or transaction or in the same series of acts or transactions. The defendants may be charged in the same count or counts, or they may be charged in separate counts. It is not necessary for all of the joined defendants to be charged in each count.

When a charging instrument could have named two or more defendants, a trial court may order a joint trial for multiple defendants. W. Va. R. Crim. P. 13. However, Rule 13 further states that a court in felony cases involving multiple defendants may not order a joint trial if either a defendant or the State objects. *Id.*

When multiple defendants have been charged with a felony in the same instrument or their trials have been subject to consolidation, Rule 14(b) of the West Virginia Rules of Criminal Procedure indicates that a trial court has the discretion to order separate trials. Prior to the adoption of the West Virginia Rules of Criminal Procedure, the West Virginia Supreme Court held that a defendant charged with a felony had a right to elect to be tried separately. Syl. Pt. 1, *State ex rel. Zirk v. Muntzing*, 146 W. Va. 349, 120 S.E.2d 260 (1961); *State ex rel. Whitman v. Fox*, 160 W. Va. 633, 236 S.E.2d 565 (1977). Subsequent to the adoption of the West Virginia Rules of Criminal Procedure, the West Virginia Supreme Court again observed that any defendant jointly indicted for a felony could obtain a separate trial. *Cole v. White*, 180 W. Va. 393, 376 S.E.2d 599, n. 10 (1988).

However, the West Virginia Supreme Court has provided guidance on the joinder and severance of defendants under Rules 8(b) and 14(b) of the West Virginia Rules of Criminal Procedure. *State v. Boyd*, 238 W. Va.

420, 796 S.E.2d 207 (2017). In *Boyd*, two defendants were charged with murder during an altercation that took place outside of a bar. One defendant (Mr. Boyd) was convicted of attempted murder, wanton endangerment, and possession of a firearm by a prohibited person, and the second defendant (Mr. Wyche) was convicted of voluntary manslaughter, wanton endangerment, and possession of a firearm. On appeal, Mr. Wyche raised an error, that his motion to sever his trial should have been granted.

As an initial matter, the Court noted that the severance of charges requires a showing of prejudice. Syl. Pt. 3, *State v. Hatfield*, 181 W. Va. 106, 380 S.E.2d 670 (1989). Relying on federal case law, the Court held that in cases where defendants are jointly tried: "This Court will not reverse a denial of a motion to sever properly joined defendants unless the appellant demonstrates an abuse of discretion resulting in clear prejudice." Syl. Pt. 3, *Boyd*, *supra*.

With regard to the discretion afforded to a trial court to try defendants jointly, the Court noted the preference for unitary trials because it avoids inconsistent verdicts, promotes judicial economy, and conserves prosecutorial resources. See *U.S. v. DeCologera*, 530 F.3d 36 (1st Cir. 2008); *U.S. v. Lewis*, 557 F.3d 601 (8th Cir. 2009). For these reasons, the Court adopted a syllabus point which reads as follows:

> Under Rule 14(b) of the West Virginia Rules of Criminal Procedure, if the joinder of defendants for trial appears to prejudice a defendant or the State, the court has discretion to sever the defendants' trials or provide whatever other relief that justice requires. Syl. Pt. 4, *Boyd, supra.*

The Court provided further guidance as to the type of prejudice that would warrant severance based upon *Zafiro v. United States*, 506 U.S. 534, 113 S. Ct. 933 (1993). Based upon the holding of *Zafiro*, the Court adopted a syllabus point as to when severance should be granted that states as follows:

> A trial court should grant a severance under Rule 14(b) of the West Virginia Rules of Criminal Procedure only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. Syl. Pt. 5, *Boyd*.

Defendants who have been jointly charged with a misdemeanor do not have the right to be tried separately. In these cases, the trial court has the discretion whether to grant separate trials. W. Va. R. Crim. P. 14(b); Franklin D. Cleckley*, Handbook on West Virginia Criminal Procedure*, I-698 (2d ed. 1998). The court may require an attorney for the state to produce evidence when it is considering whether to sever trials for defendants charged with a misdemeanor.

IV. Same Act or Transaction/Multiple Punishments

A. Sexual Offense Cases

In sexual violence cases, defendants are often charged, tried, and sentenced for different offenses that arise from the same act or transaction. For example, a defendant may be charged with incest and also with sexual abuse by a parent. A common challenge to convictions for similar offenses arising from the same act is that it violates the prohibition against multiple punishments contained in the double jeopardy clauses of the Fifth Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution. These challenges are raised when the same act constitutes the factual basis for multiple offenses or when a transaction or criminal episode results in multiple charges for the same or similar offenses.

When the same act serves as the factual basis for multiple punishments, the West Virginia Supreme Court has established that a trial court must initially determine the legislative intent concerning punishment. Syl. Pt. 7, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992). In such cases, the trial court should first examine the language of the applicable statutes and when necessary, the legislative history, to determine whether the Legislature clearly intended to allow aggregate sentences for related crimes arising from the same act. Syl. Pt. 8, *Gill*, *supra*; Syl. Pt. 2, *State ex rel. Games-Neely v. Silver*, 226 W. Va. 11, 697 S.E.2d 47 (2010); Syl. Pt. 5, *Mirandy v. Smith*, 237 W. Va. 363, 787 S.E.2d 634 (2016). If there is no clear legislative intent, the trial court then must apply the test established by *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932). Syl. Pt. 8, *Gill, supra.*

Under *Blockburger*, "The test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Syl. Pt. 4, in part, *Gill*, *supra* (quoting *Blockburger, supra*). It should be noted that the *Blockburger* test is considered a rule of statutory construction. However, "the rule is not controlling where there is a clear indication of contrary legislative intent." Syl. Pt. 5, in part, *Gill, supra.* This recognition -- that *Blockburger* is a rule

of statutory construction -- indicates that the trial court must first determine the legislative intent with regard to multiple punishments. If statutory language or legislative history make it clear that the Legislature intended that the same act can be the subject of two criminal offenses, no further analysis is needed and the double jeopardy claim fails. The court only applies the *Blockburger* test if the legislative intent is unclear.

Applying the analysis set forth in *Gill*, the West Virginia Supreme Court held that the offense of sexual abuse by a parent, guardian, or custodian is a separate and distinct offense from general sexual assault and sexual abuse offenses. Syl. Pt. 9, *Gill*, *supra.* As the basis for this conclusion, the Supreme Court noted that West Virginia Code § 61-8D-5(a) purposely states that: "In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection[.]" *Id.* Under this same analysis, the West Virginia Supreme Court held the following year that dual convictions for incest and sexual abuse by a parent, guardian, or custodian did not violate the double jeopardy provision barring multiple punishments for the same offense. *State v. George W.H.*, 190 W. Va. 558, 439 S.E.2d 423 (1993).

In a case involving the *Blockburger* test, the Court held that the same act may support convictions for both second and third degree sexual assault. *State v. Sayre*, 183 W. Va. 376, 395 S.E.2d 799 (1990). See also *State v. Barnes,* No. 12-0684 (W. Va. Supreme Court, May 24, 2013) (memorandum decision). The Court has also held that "[s]eparate convictions for first degree sexual assault and incest, although they arise from the same act, do not violate the Double Jeopardy Clause of the West Virginia Constitution." Syl. Pt. 12, in part, *State v. Ray*, 221 W. Va. 364, 655 S.E.2d 110 (2007). In *Ray*, the Court first noted that neither the first degree sexual assault statute nor the incest statute gave any indication whether the Legislature intended to permit multiple sentences from the same act. Employing the *Blockburger* analysis, however, the Court found that each statute required proof of an additional fact that the other statute did not.

The Supreme Court has decided a case in which a defendant challenged his convictions for both two counts of second degree sexual assault and two counts of third degree sexual assault. *State v. Wakefield*, 236 W. Va. 445, 781 S.E.2d 222 (2015). The facts of the case involved a drug-facilitated sexual assault, and the defendant claimed that the victim met the definition of "mentally incapacitated" found in the third degree sexual assault statute, as opposed to the definition of "physically helpless," found in the second degree sexual assault statute. Applying *Blockburger* analysis, the Court, rejected the defendant's claim and affirmed the conviction.

Apart from the analysis to be applied in determining whether multiple punishments may be imposed for the same act, the West Virginia Supreme Court has similarly determined that multiple offenses may arise from a single episode or transaction. *State v. Rummer*, 189 W. Va. 369, 432 S.E.2d 39 (1993). In *Rummer*, the defendant was convicted of two counts of first degree sexual abuse arising from allegations of accosting a woman on the street and first grabbing her between her legs and then grabbing her breasts. The defendant argued that he should have only been convicted of one count of sexual abuse because his actions occurred during a brief period of time. The Court, however, reasoned that the language of the relevant statutory definition for sexual contact established alternative methods or actions that constitute "sexual contact." The Court also examined case law from other jurisdictions that allowed separate convictions for each specific act during a sexual episode that constituted a violation of a statute. The Court easily concluded that the defendant could be convicted for each separate act that constituted sexual contact, even though the acts occurred during a single criminal episode. In *Rummer*, the Court observed that this same analysis would apply to different acts that constituted "sexual intercourse" or "sexual intrusion." *Rummer*, 189 W. Va. 369, 432 S.E.2d 39, n. 13. See also *State v. Carter*, 168 W. Va. 90, 282 S.E.2d 277 (1981). Therefore, where separately defined acts are committed, a defendant may be charged and convicted for multiple offenses that occur during a criminal episode.

B. Child Pornography Cases

A defendant raised a double jeopardy challenge involving multiple punishments for the same offense in a case involving possession of child pornography. *State v. Shingleton*, 237 W. Va. 669, 790 S.E.2d 505 (2016) (superseded by statute). In this case, the defendant was tried and convicted of possession of 20 counts of child pornography as prohibited by West Virginia Code § 61-8C-3.[2] On the same day that he was convicted, the State filed a recidivist information against the defendant. At the defendant's initial sentencing, he was sentenced to serve two years of incarceration for counts one through five, with sentences to run consecutively. For counts six through 20, the sentences would run concurrently. On the recidivist enhancement, the defendant was sentenced for an additional 10 years.

A second sentencing hearing was conducted on the defendant's claim that the recidivist enhancement could only be imposed on one of the pornography offenses. In turn, the trial court entered an amended sentencing order that imposed a seven year determinate sentence for the recidivist information. The sentencing order did not address whether the

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[2] The statute was amended in 2014, and it significantly changed the elements for this offense.

sentence for counts six through 20 would run concurrently with or consecutively to the sentences imposed on counts one through five.

After the defendant had again challenged his sentence, the trial court indicated it would impose an aggregate period of 17 years of incarceration, the same period that it had imposed in the first amended sentencing order. The court reduced the recidivist sentence to five years, but imposed consecutive sentences for counts one through six, and counts seven through 20 would be served concurrently.

On appeal, the defendant challenged the sentence on double jeopardy grounds because the original sentencing order had only imposed consecutive sentences for counts one through five, and he claimed that his sentence should be reduced by two years. Relying on *U.S. v. Scott*, 437 U.S. 82, 98 S. Ct. 2187 (1977), the Supreme Court, however, rejected this argument and held that the sentence did not violate the double jeopardy clause because the unlawful portions of the sentence had been corrected, the total sentence was within the statutory limits, and the total sentence did not increase.

On double jeopardy grounds, the defendant further challenged the charges for possession of 20 images as 20 different counts. He argued that he should only have been charged with one count of possession of child pornography. Relying on *Gill*, the Court rejected the defendant's argument and found that the plain language of the statute supported the 20 different charges. It should be noted that the applicable statute, West Virginia Code § 61-8C-3, was amended in 2014, and the amendments require a defendant to be charged based upon the aggregate number of images. The case of *State v. Dubuque*, 239 W. Va. 660, 805 S.E.2d 421 (2017) provides guidance on charging and sentencing a defendant for these types of offenses under the current version of the statute. See Section X.

V. Sexual Assault/Sexual Abuse

Note: This discussion outlines the elements of each offense established by Article 8B, Chapter 61 of the West Virginia Code.

Lack of Consent: As established by West Virginia Code § 61-8B-2, lack of consent is an element of every offense included in Article 8B, Chapter 61 of the West Virginia Code, even if a particular section does not specifically state that lack of consent is an element of the offense. The Article 8B offenses include first through third degree sexual assault and first through third degree sexual abuse. Lack of consent, however, is not an element of the Article 8 offense of incest or the Article 8D offense of sexual abuse by a parent, guardian, custodian, or person in a position of

trust to a child. *State v. Peyatt*, 173 W. Va. 317, 321, 315 S.E.2d 574, 578 (1983); see W. Va. Code §§ 61-8-12; 61-8D-5. These particular offenses do not arise because of lack of consent; rather, these offenses occur when there is sexual activity between persons in certain proscribed relationships.

1. Forcible Compulsion

Lack of consent to a sexual act may result from forcible compulsion. A careful consideration of the definition of forcible compulsion is key to a determination as to whether lack of consent is presented under a given set of circumstances. Forcible compulsion is statutorily defined as "physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances." W. Va. Code § 61-8B-1(1)(a). The West Virginia Supreme Court has recognized that: "In determining whether the victim of a sexual assault exercised 'earnest resistance' as defined in W. Va. Code, 61-8B-1(1), the following factors should be considered: the age and mental and physical conditions of the complainant as well as those of the defendant, together with the circumstances leading up to and surrounding the assault." Syl. Pt. 4, *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985).

In *Miller*, the victim was kidnapped at knifepoint and was driven to a remote area. Subsequently, the defendant disrobed and ordered the girl to disrobe and then sexually assaulted her. The victim testified that she was afraid and complied with his demands. On appeal, the defendant argued that the State had failed to prove that he had engaged in forcible compulsion. The Court, however, disagreed because "the remote area where the assault occurred suggests the futility if not the danger of the victim making an outcry. Certainly, the defendant's age contrasted with the immaturity of the victim is a significant factor in determining the degree of earnest resistance that might be expected. Finally, preceding the assault, the defendant had threatened the victim with a deadly weapon and had kidnapped her." *Miller*, 175 W. Va. at 623-24, 336 S.E.2d at 918.

Although the victim in *Miller* was an 11-year-old girl, Syllabus Point 4 of *Miller* applies to all cases involving the issue of forcible compulsion, not simply to victims of young age. *Miller* recognizes that specific circumstances can be critical; allowing a jury to consider the victim's age, physical condition, and mental condition. A jury may, therefore, properly consider the factual circumstances of a crime, such as a victim who is elderly or physically frail, when determining whether forcible compulsion occurred. As expounded upon in *Miller*, the statutory definition of "forcible compulsion" expects a jury to consider the specific facts of a case because it indicates that the physical force must overcome the victim's earnest resistance "as might *reasonably be expected under the*

circumstances." W. Va. Code § 61-8B-1(1) (emphasis added). The term "earnest resistance" must, therefore, be considered in view of the specific facts of each case.

Forcible compulsion may also occur when a defendant threatens or intimidates a victim such that the victim is placed in fear of immediate death, bodily injury, or kidnapping. W. Va. Code § 61-8B-1(1)(b). The threats may be either expressed or implied. Additionally, the threats may be directed at third parties. Although there are no reported cases that directly address threats to third parties as the basis to establish "forcible compulsion," such threats are easily imaginable. For example, an assailant could threaten a victim's companion, children, or other family members. For examples of actions towards third parties in sexual assault or kidnapping cases, *see State v. Pancake*, 170 W. Va. 690, 296 S.E.2d 37 (1982) (noting that a defendant's previous violent acts towards the victim's sister, in part, established forcible compulsion); *State v. Hanna*, 180 W. Va. 598, 378 S.E.2d 640 (1989) (noting that the element of force or compulsion was established, in part, by threats towards the victim's companion); *State v. Cox*, 175 W. Va. 747, 338 S.E.2d 227 (1985) (noting that forcible compulsion was established when the defendant threatened to shoot the second victim if she tried to run away while he was assaulting the first victim).

With regard to lack of consent, the statutory definition of forcible compulsion is expanded for victims who are under 16 years of age and the perpetrator is at least four years older than the victim. W. Va. Code § 61-8B-1(1)(c). When the relative ages of the victim and perpetrator meet the elements of this statutory subsection, *any intimidation*, whether expressed or implied, may constitute forcible compulsion. The definition of intimidation in these circumstances is not limited to threats of death, bodily injury, or kidnapping. The Legislature recognized that a victim under the age of 16 may be more readily coerced through intimidation, provided that the perpetrator is at least four years older.

2. Lack of Capacity to Consent

In addition to situations involving forcible compulsion, lack of consent may occur when the victim lacks the capacity to consent. W. Va. Code § 61-8B-2(b)(2). By operation of law, a person is incapable of consent when the person is less than 16 years old. A person is also incapable of consent if he or she is mentally defective. This term "means that a person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his or her conduct." W. Va. Code § 61-8B-1(4). The term is, by design, fairly broad so that a range of conditions, such as dementia or developmental delays, may fall within this definition.

Further, a person is incapable of consent when he or she is "mentally incapacitated." This term is a temporary condition in which a person is "incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to that person without his or her consent or as the result of any other act committed upon that person without his or her consent." W. Va. Code § 61-8B-1(4). Finally, a person is incapable of consent when he or she is "physically helpless." A person is physically helpless if he or she is "unconscious or for any reason is physically unable to communicate unwillingness to an act." W. Va. Code § 61-8B-1(5). Depending on the factual circumstances, a victim who voluntarily became drunk may meet the definition of "physically helpless." See *State v. Kirk N.*, 214 W. Va. 730, 591 S.E.2d 288 (2003); see also *State v. McFarland*, 228 W. Va. 492, 721 S.E.2d 62 (2011) (finding that the evidence was sufficient to support a second degree sexual assault conviction, but reversing the conviction because of improper admission of Rule 404(b) evidence).

A person who is subject to confinement or supervision by the State, county, or a local government entity is deemed incapable of consent when the actor is prohibited from engaging in sexual activity with the person. W. Va. Code § 61-8B-2(c)(5). A person subject to confinement includes persons incarcerated in a prison, jail, or facility operated by the Division of Corrections and Rehabilitation. W. Va. Code § 61-8B-10(a). A person subject to confinement includes those persons on home confinement. A person subject to supervision includes a person on parole or probation. W. Va. Code § 61-8B-10(b). A person who either is employed by or volunteers in a community corrections program may not engage in sexual conduct with a person he or she supervises. W. Va. Code §§ 62-11C-1, *et seq.*

Actors who are prohibited from sexual activity with persons they supervise include employees of the Division of Corrections and Rehabilitation or other persons working at a correctional facility. W. Va. Code § 61-8B-10(a). This same prohibition applies to parole officers, probation officers, home confinement officers, and persons working for or volunteering with community corrections programs. W. Va. Code § 61-8B-10(b) and (c).

3. Other Factors Indicating Lack of Consent

If the offense is sexual abuse, lack of consent may also be established by any additional facts, other than forcible compulsion or incapacity to consent, that indicate that the victim does not expressly or impliedly acquiesce in the defendant's conduct. W. Va. Code § 61-8B-2(b)(3). No cases in West Virginia have interpreted this statutory

provision. It is evident, however, that this provision allows a jury to consider a broad range of facts that show that a victim did not agree or acquiesce to the defendant's actions.

First Degree Sexual Assault: This felony offense occurs when a person engages in sexual intercourse or sexual intrusion and either inflicts serious bodily injury on the victim or uses a deadly weapon in the commission of the act. This offense also occurs when a person is 14 years old or more and he or she engages in either sexual intercourse or sexual intrusion with another person who is younger than 12 years, and they are not married to each other. W. Va. Code § 61-8B-3. Given the age of the victim, less than 12 years, it is highly unlikely that a person could avoid prosecution for this offense because he or she was married to the victim.

Second Degree Sexual Assault: To be guilty of this felony offense, a defendant must engage in sexual intercourse or sexual intrusion without the victim's consent. W. Va. Code § 61-8B-4. The lack of consent must result from forcible compulsion. A defendant is also guilty of this offense when he or she engages in sexual intercourse or sexual intrusion with a person who is physically helpless, which means a person is unconscious or is physically unable to communicate an unwillingness to act. W. Va. Code § 61-8B-1(5). In a case in which a juvenile victim was severely intoxicated and at times unconscious because of alcohol consumption, the West Virginia Supreme Court held that the evidence was sufficient to adjudicate the juvenile respondent for the offense of second degree sexual assault. *State v. Kirk N.*, 214 W. Va. 730, 591 S.E.2d 288 (2003). In footnote 7, the Court noted that the victim initially was close to passing out and that she drifted in and out of consciousness during the assault. See *State v. McFarland*, 228 W. Va. 492, 721 S.E.2d 62 (2011) (finding that the evidence would support a second degree sexual assault conviction for physical helplessness after voluntary intoxication, but reversing because of the improper admission of Rule 404(b) evidence).

Third Degree Sexual Assault: The elements of this felony offense include sexual intercourse or sexual intrusion with a person who is mentally defective or mentally incapacitated. W. Va. Code § 61-8B-5. Since one definition of "mentally incapacitated" involves a temporary condition caused by a controlled or intoxicating substance, third degree sexual assault could be an appropriate charge for a drug-facilitated sexual assault.

This offense also occurs when a perpetrator is 16 years or older, he or she engages in sexual intercourse or sexual intrusion with a person who is at least four years younger than the perpetrator and they are not

married. This series of elements is commonly referred to as "statutory rape."

As established by West Virginia Code § 61-8B-2, victims of third degree sexual assault (mentally defective, mentally incapacitated, or less than 16 years old), indicate that these victims are statutorily considered to be incapable of consent. Therefore, consent could not serve as a defense to this offense.

First Degree Sexual Abuse: This felony offense occurs when a person subjects another to sexual contact without the victim's consent, and the lack of consent arises from forcible compulsion. W. Va. Code § 61-8B-7. This offense also occurs when a defendant subjects a physically helpless person to sexual contact. Further, it occurs when a defendant, age 14 years or more, subjects a victim who is less than 12 years to sexual contact.

Second Degree Sexual Abuse: When a defendant subjects a victim who is mentally defective or mentally incapacitated to sexual contact, he or she is guilty of second degree sexual abuse. W. Va. Code § 61-8B-8. This offense is a misdemeanor. It is elevated to a felony if the offender was previously convicted of a sexually violent offense (as defined in West Virginia Code § 15-12-2) against a victim under 12 years old. W. Va. Code § 61-8B-9b(5).

Third Degree Sexual Abuse: This misdemeanor offense occurs when a person subjects another person to sexual contact, and the victim is incapable of consent because he or she is less than 16 years old. W. Va. Code § 61-8B-9. As established by this code section, a defendant who is less than 16 years old cannot be found guilty of this offense. Secondly, a defendant who is less than four years older than the victim cannot be found guilty of this crime.

VI. Enhanced Penalties for Offenses Established by Article 8B and Recidivist Offenses

A. Mandatory Sentencing for Certain Sexual Offenses Against Children

Targeting persons who have committed violent sexual offenses against children, West Virginia Code § 61-8B-9a prohibits a court from placing a defendant on probation, home incarceration, or other alternative sentence if the State proves that certain statutory conditions have been met and at least one of the aggravating circumstances listed in the statute occurred during the commission of the crime. To be subject to this code section, a defendant must have been convicted of one of the following

offenses: 1) first degree sexual assault; 2) second degree sexual assault; 3) third degree sexual assault; 4) first degree sexual abuse; 5) second degree sexual abuse; or 6) third degree sexual abuse. Additionally, the defendant must have been 18 years or older, and the victim must have been younger than 12 years of age.

In addition to those facts, the State must prove ***one*** of the following aggravating circumstances applied. First, the person used forcible compulsion to commit the offense. Second, the act constituted a "predatory act" which is defined as "an act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization." W. Va. Code § 15-12-2(m). Third, the defendant used a weapon or any article that caused the victim to reasonably believe it was a dangerous weapon and used it to cause the victim to submit. Fourth, the defendant moved the victim "from one place to another and did not release the victim in a safe place." W. Va. Code § 61-8B-9a(a)(4). For the purposes of this subsection, a victim is considered to have been released in a safe place if the victim was released "in a place and manner which realistically conveys to the victim that he or she is free from captivity in circumstances and surroundings wherein aid is relatively available." *Id.*

The fact that the State is seeking this type of sentence enhancement must be included in the indictment or other charging document. W. Va. Code § 61-8B-9a(b)(1). In cases of a conviction resulting from a plea, including a no contest plea, or trial to the court, the court must make a finding of the facts supporting the sentence enhancement. If the case is tried by a jury, the jury shall, by a special interrogatory, make findings concerning this type of sentence enhancement. The facts supporting the sentence enhancement must be proven beyond a reasonable doubt. W. Va. Code § 61-8B-9a(b)(2).

B. Enhanced Penalties for Subsequent Offenses

Note: For a complete discussion of trial procedures for cases involving prior convictions, see Chapter 4.

West Virginia Code § 61-8B-9b establishes enhanced penalties for subsequent convictions of sexually violent offenses, provided that the statutory conditions discussed below are established. To be subject to an enhanced penalty under this provision, the defendant must have a previous conviction for a "sexually violent offense" and the victim in the earlier case must have been under 12 years old. Sexually violent offenses are: 1) first degree sexual assault; 2) second degree sexual assault; 3) sexual assault of a spouse as established by the former provisions of § 61-8B-6; or 4) first degree sexual abuse. W. Va. Code §§ 15-12-2(i); 61-8B-9b. To be subject to this enhanced penalty, a defendant may have

been convicted in West Virginia or may have been convicted of a similar offense in another state, federal, or military jurisdiction.

For the enhanced penalty to apply to the present crime, the defendant must be convicted of certain offenses. W. Va. Code § 61-8B-9b. These offenses include: 1) first degree sexual assault; 2) second degree sexual assault; 3) third degree sexual assault; 4) first degree sexual abuse; or 5) second degree sexual abuse. It should be noted that this statute does not place an age limitation on the victim in the present offense. In other words, even though the prior conviction must have involved a victim under 12 years old, the subsequent offense does not have to involve a child-victim for this sentence enhancement. If a defendant is subject to the enhanced penalties established by West Virginia Code § 62-8B-9b, the defendant is not eligible for probation, home incarceration, or other alternative sentence. W. Va. Code § 61-8B-9b(b) and (c).

C. Enhanced Penalties for Recidivism

Not limited to sex offenses, West Virginia Code § 61-11-18 establishes enhanced penalties for a person who has a prior felony conviction for a qualifying offense and is subsequently convicted of a felony. A defendant who has the same or substantially similar qualifying conviction from another state or U.S. jurisdiction is also subject to this type of enhanced penalty. If the subsequent offense is subject to a definite term of years, the court shall add five years to the sentence. If the person is subject to an indeterminate sentence, then the court shall double the minimum term as the enhanced penalty.

West Virginia Code § 61-11-18(c) establishes an enhanced penalty of lifetime confinement without parole eligibility when a person has a prior conviction for one of the following offenses: first degree murder, second degree murder, or first degree sexual assault. This penalty is applied when a person is convicted of one of the following offenses: first degree murder, second degree murder, or first degree sexual assault.

A person may be subject to lifetime imprisonment without parole eligibility if he or she has two prior felony convictions. W. Va. Code § 61-11-18(d).

West Virginia Code § 61-11-19 establishes the procedures for the imposition of the enhanced penalties established by West Virginia Code § 61-11-18.

VII. Incest

The offense of incest occurs when a person engages in either sexual intercourse or sexual intrusion with specifically identified relatives. W. Va. Code § 61-8-12(b). Lack of consent is not an element of incest because the offense occurs when there is sexual activity between certain proscribed relationships. *State v. Peyatt*, 173 W. Va. 317, 321, 315 S.E.2d 574, 578 (1983). The definitions of sexual intercourse and sexual intrusion included in this statute are identical to the definitions of the terms set forth in West Virginia Code § 61-8B-1.

The relatives expressly identified in West Virginia Code § 61-8-12 are a person's father, mother, brother, sister, daughter, son, grandfather, grandmother, grandson, granddaughter, nephew, niece, uncle, or aunt. West Virginia Code § 61-8-12(a) specifically defines each type of relative.

When a defendant challenged a conviction for incest because the victim was his brother's step-child, not his brother's biological child, the Court held that West Virginia Code § 61-8-12(b) does not require a showing of consanguinity. Syl. Pt. 7, *State v. Ray*, 221 W. Va. 364, 655 S.E.2d 110 (2007). To reach its conclusion, the Court examined the statutory definition of the term "son" and found it included a person's biological son, an adoptive son and step-son. Since the term "son" was included in the definition of "nephew," the Court concluded that a nephew by marriage was included in the class of relatives protected by West Virginia Code § 61-8-12. With regard to step-family relationships, the Court observed that:

> Our society is rapidly changing, and stepfamily relationships are an increasing aspect of this society. We believe that West Virginia Code § 61-8-12 acknowledges this evolution within our society, is intended to extend to such stepfamily relationships, and is not limited to crimes committed within the biological family. As such, our incest statute properly protects stepfamily members, especially during childhood. 221 W. Va. at 370, 655 S.E.2d at 116.

VIII. Sexual Abuse By a Parent, Guardian, Custodian, or Person in a Position of Trust

As previously discussed, many of the statutory provisions in Article 8B include specific offense elements aimed at protecting children, as well as sentence enhancements for offenses involving child victims. Article 8D

of Chapter 61 of the West Virginia Code is titled "Child Abuse," and it provides additional statutory authority for criminal offenses committed against children. In addition to offenses such as child abuse, it includes the offense of sexual abuse by a parent, guardian, custodian, or person in position of trust to a child. W. Va. Code § 61-8D-5.

West Virginia Code § 61-8D-5 establishes the elements for sexual offenses that are committed by a parent, guardian, custodian, or person in a position of trust to a child. The definitions for each of these defendants is set forth in West Virginia Code § 61-8D-1. Unlike most offenses established by Article 8B, lack of consent is not considered an element of these offenses.

The terms "parent" and "guardian" have specific statutory definitions, but the terms "custodian" or "person in a position of trust to a child" are broadly defined and could apply to persons in a wide variety of factual circumstances. Whether a specific defendant could be considered a "custodian" or "person in a position of trust to a child" is a jury question. Syl. Pt. 1, *State v. Stephens*, 206 W. Va. 420, 525 S.E.2d 301 (1999) (holding that whether a babysitter is a custodian is a jury question); *State v. Collins*, 221 W. Va. 229, 654 S.E.2d 115 (2007) (holding that a jury could properly conclude that a defendant who sexually abused a child on a four wheeler ride was a custodian). It should be noted, however, that a person cannot be considered a custodian or person in a position of trust to a child if he or she is less than four years older than the child. W. Va. Code § 61-8D-5(d).

The first phrase of subsection (a) states that: "The Legislature hereby declares a separate and distinct offense under this subsection..." W. Va. Code § 61-8D-5(a). Based upon this express language, the Court has concluded that: "The Legislature has clearly and unequivocally declared its intention that sexual abuse involving parents, custodians or guardians, W. Va. Code § 61-8D-5, is a separate and distinct crime from general sexual offenses, W. Va. Code §§ 61-8B-7, *et seq.*, for the purposes of punishment." Syl. Pt. 9, in part, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992). Based upon this clear legislative intent, the Court has concluded that convictions under West Virginia Code § 61-8D-5(a) along with other general sexual offenses do not violate the prohibition against multiple punishments for the same offense set forth in the double jeopardy clauses of the United States and West Virginia Constitutions. Syl. Pt. 9, *Gill*, *supra*; *State v. George W. H.*, 190 W. Va. 558, 439 S.E.2d 423 (1993).

The first type of offense established by this statute occurs when a person who is a parent, guardian, custodian, or person in position of trust either engages in or attempts to engage in sexual intercourse, sexual

intrusion, or sexual contact with a child in his or her care, custody or control. W. Va. Code § 61-8D-5(a). The definitions for the different types of sexual conduct (sexual intercourse, intrusion, or contact) are established by West Virginia Code §§ 61-8B-1 and 61-8D-1. A defendant may also be charged with an offense under this subsection if he or she engages in or attempts to engage in sexual exploitation of a child. This act occurs when a person induces or forces a child to engage in sexually explicit conduct. The specific acts that constitute "sexually explicit conduct" are set forth in West Virginia Code § 61-8C-1(c). Sexual exploitation generally occurs when a person causes a child to perform actual or simulated sexual conduct or causes a child to display his or her sex organs. W. Va. Code § 61-8D-1(10). Both of the offenses provided by this subsection occur even if a child willingly participated in the sexual conduct or suffered no physical, mental or emotional injury as a result of the conduct.

The second type of offense established by this statute occurs when one of the identified defendants (parent, guardian, custodian, or person in a position of trust to a child) either knowingly procures or induces another person to engage in or attempt to engage in sexual intercourse, sexual intrusion, or sexual contact with a child or sexual exploitation of a child who is less than 16 years of age. W. Va. Code § 61-8D-5(b). The word "procure" is not specifically defined by statute and its "common, ordinary and accepted meaning" would be applied. See *In re Clifford K.*, 217 W. Va. 625, 640, 619 S.E.2d 138, 153 (2005). The word "procure" could, therefore, refer to circumstances involving prostitution.[3] However, it could also refer to situations in which a defendant uses special means or efforts to cause another person to either sexually exploit or engage in sexual intercourse, intrusion, or contact with a child. Similar to the first offense established by this code section, it is immaterial whether the child willingly participated in or consented to the conduct. It is also immaterial whether the child suffered no apparent physical, mental, or emotional injury.

The third offense established by West Virginia Code § 61-8D-5, under subsection (c), is similar to the offense discussed in the immediately preceding paragraph. It occurs when one of the identified defendants knowingly procures another person to engage in or attempt to engage in sexual intercourse, intrusion, or contact with a child who is 16 years of age or older. It also occurs when a person engages in or attempts to engage in sexual exploitation of a child. While subsection (b) involves victims under age 16, under subsection (c) the age of the victim must be 16 years or older. As with other offenses established by this code section, it is immaterial whether the child willingly participated in or consented to the

[3] The word procure is defined as: "1: to get possession of: to obtain by particular care and effort 2: . . . 3: to obtain to be employed for sex." Merriam Webster, < www.merriam-webster.com> (accessed April 1, 2021).

conduct. It is also immaterial that a child may have suffered no apparent, physical, mental, or emotional injury.

IX. Legal Definitions Applied in Child Pornography Offenses

Article 8A of Chapter 61, titled "Preparation, Distribution or Exhibition of Obscene Matters to Minors," establishes criminal penalties associated with displaying obscene matter to minors and using obscene matter with the intent to seduce minors. In addition, Article 8C of Chapter 61 establishes criminal penalties for filming the sexually explicit conduct of minors. Further, West Virginia Code § 61-8D-6 establishes criminal penalties when a parent, guardian, or custodian possesses or transmits any material visually portraying a child who is in their care and the child is engaged in sexually explicit conduct. Relevant definitions are set forth below.

Adult: For the purposes of the child pornography offenses, an adult means a person who is 18 years of age or older. W. Va. Code § 61-8A-1(a).

Computer: The term "computer" is defined broadly and includes an electronic, magnetic, optical, electrochemical, or other high-speed data processing device. It also includes any data storage or communication facility that is directly related to or operated in conjunction with the computer. Designed to apply broadly, the following devices are identified as falling within this definition: file servers, mainframe systems, desktop, laptop and tablet computers, cell phones, game consoles, and any electronic data storage device or equipment. The term also includes: any connected or directly related device which enables the computer to store, retrieve or communicate programs, data or the results of computer operations to or from a person, another computer, or another device. Expressly excluded from the definition are the following devices: an automated typewriter or typesetter, a portable hand-held calculator, or other similar device. W. Va. Code § 61-8A-1(b).

Display: This term is defined as showing, exhibiting, or exposing matter in a manner that is visible to either the general or invited public, including minors. The subsection indicates that this term includes placing matter on a billboard, viewing screen, theater, marquee, newsstand, display rack, window, showcase, display case, or other similar public place. W. Va. Code § 61-8A-1(d).

Matter: This term is defined broadly and includes visual images, written material, and audio. It applies to computer-generated images, as well as graphics and drawings. It includes physical items, statues, and other figures. It includes live performances and the production

transmission, publication, exhibition or live performances, or reproduction of live performances. It applies to any type of recording. Further, it applies to any public or commercial live exhibition performed for consideration or before an audience of one or more. W. Va. Code § 61-8A-1(i). The wording of this definition indicates that it is intended to be applied inclusively and broadly.

Minor: A minor is an unemancipated person under the age of 18. W. Va. Code § 61-8A-1(j).

Obscene Matter: Material can meet this definition if an average person would find or conclude that the material appeals to, intends to appeal to, or panders to a prurient interest. In addition, matter may fulfill this definition if the average person would find that the medium depicts sexually explicit conduct in a patently offensive way. Further, the matter must lack serious literary, artistic, political, or scientific value. W. Va. Code § 61-8A-1(k).

Parent: A parent includes a biological or adoptive parent, a legal guardian, or a legal custodian. W. Va. Code § 61-8A-1(l).

Sexually Explicit Conduct: This term is defined in Articles 8A and 8C. The definitions in each of the relevant sections, West Virginia Code §§ 61-8A-1(n) and 61-8C-1(c), are substantially similar. The term applies to the following sexual acts, whether or not the acts are performed or simulated: sexual intercourse (genital to genital); anal intercourse (sodomy); oral copulation (fellatio or cunninglingus); bestiality; masturbation; sexual sadism and masochism; excretory functions in a sexual context; and exhibition of the genitals.

X. Child Pornography Offenses

Distribution/Display of Obscene Matter to Minors: This felony offense occurs when an adult knowingly and intentionally distributes to, offers to distribute to, or displays to a minor any obscene matter. W. Va. Code § 61-8A-2. The statute also establishes the following defenses to this offense: the obscene matter is displayed in an area that physically excludes minors; the material is covered by a "blinder rack;" the material is enclosed in an opaque wrapper; or the material was only displayed after a person takes reasonable steps to check an adult identification card. Another defense is that a parent had taken reasonable steps to limit access to the obscene material. W. Va. Code § 61-8A-2(c).

Use of Obscene Matter to Seduce a Minor: It is unlawful for any adult to knowingly distribute or to offer to distribute any obscene matter to a minor, provided that the minor is at least four years younger than the

adult or the adult believes that the minor is at least four years younger than him or her. The acts must be taken with the intent or purpose of facilitating the sexual seduction of a minor. There are enhanced penalties for subsequent offenses. W. Va. Code § 61-8A-4.

Employment or Use of a Minor to Produce Obscene Matter: It is a felony offense for a person to use a minor to produce obscene matter or to assist the minor in engaging in sexually explicit conduct. This offense occurs when a defendant knows he or she is using a minor to produce obscene material or fails to use reasonable care to determine that the person is not a minor. W. Va. Code § 61-8A-5.

Possession, Distribution or Display of Material Depicting a Child Engaged in Sexually Explicit Conduct by a Parent, Guardian or Custodian: This statute criminalizes the possession or distribution of material by a parent, guardian, or custodian that visually portrays a child under his or her care engaged in sexually explicit conduct. W. Va. Code § 61-8D-6. Unlike West Virginia Code § 61-8D-5, it does not identify a defendant as a "person in a position of trust to a child" as a possible defendant. Although the term "sexually explicit conduct" is not defined either by West Virginia Code §§ 61-8D-1 or -6, it is reasonable to conclude that the definitions established by West Virginia Code § 61-8C-1, titled "Filming of Sexually Explicit Conduct of Minors," would provide the necessary elements for this type of conduct. A parent, guardian, or custodian must knowingly possess the visual material, and the child must be in the care, custody, or control of the parent or guardian. In addition to criminalizing the possession of this type of material, West Virginia Code § 61-8D-6 makes it illegal for a parent, guardian, or custodian to send, cause to be sent, distribute, exhibit, display, or transport this material.

Filming of Minors Engaged in Sexually Explicit Conduct: It is a felony offense for any person to cause a minor to engage in sexually explicit conduct when the person knows that the conduct is being photographed or filmed. W. Va. Code § 61-8C-2(a). As set forth in this subsection, this offense occurs when a person causes, knowingly permits, uses, persuades, induces, entices, or coerces a minor to engage in sexually explicit conduct when the person knows that the conduct is being photographed or filmed.

It is also a felony offense for any person to film or photograph a minor who is engaged in sexually explicit conduct. W. Va. Code § 61-8C-2(b). Therefore, a person who actually photographs or films a child is subject to the same penalty as a person who causes a minor to be photographed or filmed.

Similar to the two offenses noted above, West Virginia Code § 61-8C-2(c) establishes criminal penalties for a parent, legal guardian, or person who has custody or control of a minor and who photographs or films the minor engaging in sexually explicit conduct. This offense also occurs when one of the identified defendants (parent, legal guardian, or custodian) causes a minor to be photographed or filmed while the minor is engaging in sexually explicit conduct.

Distribution, Exhibition, or Possession of Material Depicting Minors Engaged in Sexually Explicit Conduct:

1. Elements

West Virginia Code § 61-8C-3 establishes the elements for the sending, distribution, exhibition, possession, display, or transport of any visual material that depicts a minor engaged in sexually explicit conduct. It also applies when a person electronically accesses material with the intent to view this type of material. The possession of any amount of material that portrays a minor engaging in sexually explicit conduct is a felony. Syl. Pt. 4, *State v. Dubuque*, 239 W. Va. 660, 805 S.E.2d 421 (2017).

Statutory penalties relate to the number of images and the content of the images. If the material involves a video clip, the penalty relates to the duration of the video. If the conduct involves 50 or fewer images, a defendant is subject to imprisonment for not more than two years. A fine not to exceed $2,000 may also be imposed. W. Va. Code § 61-8C-3(b); Syl. Pt. 5, *Dubuque*. If the conduct involves more than 50 images but less than 600 images, the defendant is subject to incarceration for not less than two, nor more than 10 years. The defendant may also be subject to a fine of $5,000 or less. W. Va. Code § 61-8C-3(c); Syl. Pt. 6, *Dubuque*.

If the conduct involves 600 or more images, the defendant may be subject to incarceration for not less than five, nor more than 15 years, and a fine not to exceed $25,000. If the content of the images shows violence against a minor or a minor engaging in bestiality, then the defendant is also subject to the same term of incarceration of not less than five nor more than 15 years. This penalty is imposed without respect to the number of images that a defendant distributes, exhibits, or possesses. W. Va. Code § 61-8C-2(d); Syl. Pt. 7, *Dubuque*.

When the content involves a video clip, movie, or similar recording of five minutes or less, the material is considered to be the equivalent of 75 images. If the recording is more than five minutes in length, then the recording is deemed to constitute 75 images for every two minutes in length that it exceeds five minutes. W. Va. Code § 61-8C-3(e).

In *Dubuque*, the West Virginia Supreme Court provided guidance on the application of the penalty provisions set forth in West Virginia Code § 61-8C-3. This case involved a situation in which a defendant had in his possession five VHS tapes that depicted child pornography.[4] During the criminal case, the State argued that the defendant could be charged with separate violations of West Virginia Code § 61-8C-3 for each of the five VHS tapes. In contrast, the defendant argued that the imposition of the penalties violated the double jeopardy provisions of the federal and state constitutions. Ultimately, the defendant pled guilty to five counts of possession of child pornography, but reserved his right to appeal the multiplicity of punishments for the same offense.

Addressing the issues raised on appeal, the Court first noted that the case involved a situation in which a defendant possessed child pornography on separate physical media storage devices. Secondly, the Court noted that the 2014 version of West Virginia Code § 61-8C-3 was not ambiguous. Under the provisions of the statute, the Court found that each pornographic image of a child is not a separate act. Rather, the Court concluded that the statute requires an aggregation of images to determine the statutorily allowable punishment.

Providing further explanation, the Court found that the unit of prosecution is not dependent upon whether the images are still photographs or are stored on a physical media storage device. The Court found that imposing punishments based on the type of physical storage device could lead to absurd results. As an example, the Court noted that, under the State's reasoning, an individual who stored 20,000 images of child pornography on a single computer would be subject to a lesser penalty that a defendant who had the same number of images that were stored on five computers. Finally, the Court noted that the statute could have addressed situations involving individual media storage devices, but did not. Based upon this reasoning, the Court adopted four syllabus points that addressed the aggregation of images. In a fifth syllabus point, the Court found that images of a minor possessed by a person, "at the same time and place" should be aggregated to determine the statutorily allowable punishment.

2. Act of Violence Against a Person

The West Virginia Supreme Court has held that the child pornography offenses established by West Virginia Code § 61-8C-3 constitute "an act of violence" against a person. Syl. Pt. 5, *State v. Riggleman*, 238 W. Va. 720, 798 S.E.2d 846 (2017). Therefore, a person

[4] The defendant was also charged with and pled guilty to a second degree sexual assault. No issues with regard to the sexual assault conviction were raised on appeal.

who is charged with such an offense but has been found to be incompetent to stand trial may be subject to commitment in a mental health facility under West Virginia Code § 27-6A-3(h).

Prohibiting Child Erotica: It is a misdemeanor offense for any person over 18 to knowingly and intentionally produce, possess, display, or distribute "visual portrayals of minors who are partially clothed where the visual portrayals are (1) unrelated to the sale of a commercially available legal product; and (2) used for purely prurient purposes." W. Va. Code § 61-8C-3a. For the purposes of this code section, a minor is a child under the age of 16 or a child who is at least 16, but is less than 18 years old and is also mentally defective or mentally incapacitated. Although the terms "mentally defective" and "mentally incapacitated" are not defined in Article 8C, it is reasonable to conclude that the definitions established by West Virginia Code § 61-8B-1 would be applicable to this code section.

Visual portrayals are used for "purely prurient purposes" when they are viewed specifically for sexual gratification or sexual arousal. W. Va. Code § 61-8C-3a(b)(1). Further, the code section provides that "'commercially available' means for sale to the general public." W. Va. Code § 61-8C-3a(b)(2).

Manufacturing, Possession, and Distribution of Nude and Partially Nude Images by Juveniles: West Virginia Code § 61-8C-3b was enacted to address the ongoing problem of sexting among juveniles. "Sexting" is considered "the practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular telephones or over the Internet." Reid, McEllrath, *Keeping Up With Technology: Why a Flexible Juvenile Sexting Statute Is Needed in Washington State*, 89 Wash. L. Rev. 1009, 1010 (2014).

Enacted in 2013 and amended in 2018, West Virginia Code § 61-8C-3b establishes a juvenile offense for the dissemination of the visual portrayal of a juvenile who is posing in an inappropriate sexual manner. This offense applies to circumstances when a minor disseminates such a visual portrayal of another juvenile or of himself or herself.

To be subject to this code section the visual portrayal must be of a minor who is posing in a sexually inappropriate manner. As defined in the statute, the term "posing in an inappropriate sexual manner" means "the exhibition of a bare female breast, female or male genitalia, or pubic or rectal areas of a minor for the purposes of sexual titillation."

The term "visual portrayal" is broadly defined as: photographs, motion pictures, digital images, or digital video recordings. The term also includes any mechanical or electronic recording process or device that

can preserve a visual image for later viewing. The statute expressly identified the following types of devices that fall within the subsection: computers, cellphones, personal digital assistants, or any other type of digital storage or transmitting device.

The proscribed conduct includes the possession, creation, production, distribution, presentation, transmission, posting, exchange, or any other type of dissemination of these identified images.

As indicated in the statute, the minor must intentionally engage in the prohibited conduct, the production and dissemination of visual portrayals of a minor posing in an inappropriate sexual manner. As expressly indicated in subsection (c), a minor may assert an affirmative defense -- that he or she did not solicit the receipt of the material, or did not dispute, transmit, or present the material to another person by any means.

The statute identifies this offense as a delinquency offense. If a juvenile is adjudicated of this offense, the statute indicates that the court may impose a disposition established by Chapter 49 of the West Virginia Code. No specific disposition is, however, established by the statute, such as confinement in a secure facility not to exceed a specified period of time. The applicable types of dispositions could include an improvement period or the types of dispositions established by West Virginia Code §§ 49-4-714 and -715. However, it is questionable whether a juvenile could be placed in a secure facility for this offense because placement in a secure facility cannot exceed the maximum time period for which an adult could be incarcerated for such an offense. This statute does not, however, establish any allowable time periods for incarceration. It should be further noted that an adjudication for an offense under this section does not subject a juvenile to sex offender registration.

Sexting Diversion Program: The court or prosecuting attorney may direct or allow a minor who engaged in the activity proscribed in Articles 8A ("Preparation, Distribution or Exhibition of Obscene Matter to Minors") and 8C ("Filming of Sexually Explicit Conduct of Minors") of Chapter 61 to engage in a sexting educational diversion program. W. Va. Code § 49-4-717. This program may be completed before a petition is filed or after a preliminary hearing. However, it must be completed before an adjudicatory hearing takes place.

Under this statute, the West Virginia Supreme Court has been authorized to establish an educational diversion program to address "sexting" by juveniles. The diversion program should focus on the impact of sharing sexually suggestive or explicit materials and address certain topics. Specifically, the program should include topics such as: 1) the

legal penalties and consequences of sharing sexually suggestive or explicit materials; 2) the nonlegal penalties and consequences of sharing sexually suggestive or explicit materials; 3) the long-term and unforeseen consequences of sharing sexually suggestive or explicit materials; and 4) the connection between bullying and cyberbullying and minors sharing sexually suggestive or explicit materials.

Once the minor successfully completes the program, the prosecutor or the court may consider the completion when deciding whether to file or dismiss a juvenile petition. If the minor has not been previously adjudicated as a delinquent, if this is the juvenile's first offense for a violation of West Virginia Code § 61-8C-3b or "sexting," and the program has been completed, then the juvenile should not be subject to the requirements of West Virginia Code § 61-8C-3b. W. Va. Code § 49-4-717(c)(1). Presumably, this means the juvenile should not be adjudicated for the delinquency offense established by West Virginia Code § 61-8C-3b. However, if this is a juvenile's second or subsequent violation of Articles 8B or 8C of Chapter 61, then his or her successful completion of the diversion program may be considered as a factor when deciding to file or dismiss a juvenile petition. W. Va. Code § 49-4-717(c)(2).

XI. Legal Definitions Applied in Sex Trafficking Cases

Note: Article 14 of Chapter 61 criminalizes labor trafficking, as well as sex trafficking. The following discussion is, however, limited to sex trafficking.

Human Trafficking: The term, "human trafficking" as well as "trafficking" or "traffics" includes a broad spectrum of actions for the purposes of engaging an individual to engage in debt bondage, forced labor, or sexual servitude. The actions include: recruiting, transporting, transferring, harboring, receiving, providing, obtaining, isolating, maintaining, or enticing an individual. W. Va. Code § 61-14-1(6). It is a felony offense to engage in human trafficking. W. Va. Code § 61-14-2.

Adult: This term is the commonly understood definition, a person who is 18 years or older. W. Va. Code § 61-14-1(1).

Minor: This term is also the commonly understood definition, a person who is less than 18 years old. This article generally increases penalties for human trafficking that involves a minor. W. Va. Code § 61-14-1(9).

Coercion: The term coercion includes threats of physical harm as well as threats of other types of harm. The first definition involves the more commonly understood meaning and includes the use or threat of force, abduction, serious harm to, or physical restraint of an individual.

The term also includes the use of a plan, pattern, or statement that is intended to make an individual believe that a failure to do or perform a particular act will result in the use of force against the individual, the individual's abduction, serious harm to the individual, physical restraint of the individual, or deportation of the individual. W. Va. Code § 61-14-1(2).

Coercion may include the abuse or threatened abuse of the legal process or the law. It also includes the destruction or taking of an individual's identification document or other property or the threat to destroy or take an individual's identification document or property. Finally, the term includes situations when a person uses an individual's physical or mental impairment if the impairment has a substantial adverse effect on the individual's cognitive or volitional function.

Although the definition of "coercion" is broad, statements or actions by law enforcement as part of an investigation or undercover action are excluded from the definition. The exclusion applies to state or federal law enforcement officials and the investigation or undercover action must be lawful.

Commercial Sexual Activity: This term involves sexual activity when anything of value is given, promised, or received by a person. W. Va. Code § 61-14-1(3). Therefore, the term is not limited to facts involving an exchange of money for sexual activity. This term is used in the statute that establishes criminal penalties for sexual servitude. W. Va. Code § 61-14-5.

Debt Bondage: The term involves situations when an individual is induced to engage in commercial sexual activity towards satisfaction of a real or purported debt. W. Va. Code § 61-14-1(4). This term is included in the offenses established by West Virginia Code § 61-14-4. It also includes nonsexual labor, but this aspect is not discussed in this section. It is a felony offense to use an individual in debt bondage. W. Va. Code § 61-14-4.

Identification Document: This term includes a passport, drivers license, immigration document, travel document, or other government-issued document. The term applies to documents issued by a foreign government, as well as documents issued by state or federal government. W. Va. Code § 61-14-1(7).

Patronize: This term applies when a person gives, agrees to give, or offers to give anything of value in exchange for commercial sexual activity. W. Va. Code § 61-14-1(10).

Person: The term person includes an individual, estate, business, or nonprofit entity. However, the definition excludes public corporations, governmental subdivisions, agencies, or instrumentalities. W. Va. Code § 61-14-1(11).

Serious Harm: This term is broadly defined to include both physical and nonphysical harm. In turn, nonphysical harm includes psychological harm, economic harm, or reputational harm. Although the term is broad, there is a component of reasonableness in that the circumstances would compel a reasonable person of the same background and circumstances to perform sexual activity (or labor and services) to avoid the harm. W. Va. Code § 61-14-1(12).

Sexual Activity: This term includes sexual contact, sexual intercourse, or sexual intrusion as is defined in Article 8B of Chapter 61. It also includes sexually explicit conduct as defined in Article 8C of Chapter 61. W. Va. Code § 61-14-1(13). The term sexually explicit conduct applies to the following sexual acts, whether the acts are performed or simulated: sexual intercourse (genital to genital); anal intercourse (sodomy); oral copulation (fellatio or cunnlingus); bestiality; masturbation; sexual sadism and masochism; excretory functions in a sexual context; and the exhibition of genitals.

Sexual Servitude: This term includes situations when a minor is maintained or made available for the purposes of having the minor engage in commercial sexual activity. It also includes situations when an individual uses coercion to force or compel an adult to engage in commercial sexual activity. The term "sexual servitude" is included in the offense of human trafficking and patronizing a victim of sexual servitude. W. Va. Code § 61-14-1(14).

Victim: The term applies to any individual who is subject to human trafficking whether or not a perpetrator is prosecuted or convicted. W. Va. Code § 61-14-1(15).

XII. Human Trafficking Offenses Involving Commercial Sexual Activity and Related Provisions

A. Offenses, Aggravating Circumstances and Immunity

Human Trafficking: It is a felony offense for any person to traffic an adult or to aid, assist or abet in trafficking an adult. It is also a felony offense to traffic a minor or to aid, assist or abet in the trafficking of a minor. An increased penalty applies when a minor is trafficked. W. Va. Code § 61-14-2. A defendant who is convicted of human trafficking may be subject to an increased penalty if specified aggravated circumstances,

discussed in this section, are proven. W. Va. Code § 61-14-7(b). It should also be noted that the trafficking of each victim will constitute a separate offense. W. Va. Code § 61-14-7(a).

Debt Bondage: it is a felony offense to use an adult in debt bondage, which involves situations when an individual is induced to engage in commercial sexual activity towards satisfaction of real or purported debt. An offense under this statute may also involve labor that is nonsexual in nature. It is also a felony offense to use a minor in debt bondage, and this offense involves an increased penalty. W. Va. Code § 61-14-4. A defendant convicted of debt bondage may also be subject to an increased penalty if aggravated circumstances are proven. W. Va. Code § 61-14-7.

Sexual Servitude: It is a felony offense when a person uses coercion to compel or force an adult to engage in commercial sexual activity. W. Va. Code § 61-14-5(b). When the offense involves a minor, a person may not defend himself or herself based upon a minor's consent. Similarly, a defendant may not assert that he or she believed that the minor was an adult as a defense. W. Va. Code § 61-14-5(c).

Patronizing a Victim of Sexual Servitude: It is a felony offense to patronize another person in commercial sexual activity when the defendant knows that the person is a victim of sexual servitude. W. Va. Code § 61-14-6(a). Unlike situations involving a minor, the defendant must have knowledge that the person is a victim of sexual servitude.

It is also a felony offense to patronize a minor in commercial sexual activity when the defendant knows or has reason to know that the minor is a victim of sexual servitude. Therefore, the element involving knowledge is expanded to cover situations in which the defendant has reason to know that the victim is a minor. W. Va. Code § 61-14-6(b).

Aggravating Circumstances: For the purposes of Article 14, it is an aggravating circumstance for a person to recruit, entice, or obtain a victim from a shelter or facility that serves the following: runaway youths, children in foster care, homeless persons, victims of human trafficking, domestic violence, or sexual assault. W. Va. Code § 61-14-7(b)(1). If the trier of fact finds that the crime involved an aggravated circumstance, the defendant shall not be eligible for parole until he or she has served a minimum of three years in a correctional institution. W. Va. Code § 61-14-7(b)(1).

Immunity: In a juvenile proceeding for the offense of engaging in prostitution as established by West Virginia Code § 61-8-5(b), a minor shall not be held liable if the court finds that the minor has been a victim of

any of the offenses established by Article 14 of Chapter 61. W. Va. Code § 61-14-8. Further, a minor who is charged under West Virginia Code § 61-8-5(b) shall be rebuttably presumed to be a victim of trafficking. However, some type of evidence or proof will have to be submitted to establish the juvenile as a victim. W. Va. Code § 61-14-8(a).

Although a juvenile may have be immune for engaging in prostitution, a juvenile is not immune for the acts of soliciting, inducing, or enticing another person to commit prosecution. However, if a juvenile was coerced into these actions, he or she may be immune from prosecution for a human trafficking offenses. W. Va. Code § 61-14-8(b).

If a juvenile is immune from criminal liability or criminal prosecution for prostitution or soliciting another person to engage in prostitution, the juvenile should be presumed to be an abused child under West Virginia Code § 49-1-201. Such a person may be eligible for appropriate child welfare services, including trauma-informed services that are specialized for child victims of sex abuse and exploitation or human trafficking.

B. Petition to Vacate and Expunge Convictions for Prostitution Offenses

West Virginia Code § 61-14-9 establishes a procedure through which a victim of human trafficking may petition the circuit court to vacate and expunge a juvenile adjudication or a conviction for prostitution under West Virginia Code § 61-8-5. To be eligible for this type of expungement, the person's engagement in prostitution must be the "direct result" of human trafficking. Presumably, this terms means that the juvenile adjudication or conviction was related to the trafficking, not some earlier or subsequent offense. To grant this type of expungement petition, the court must find that the person's juvenile adjudication or conviction arose as a direct result of being a victim of trafficking.

This type of petition should be filed pursuant to the procedures established by West Virginia Code § 61-11-26. As stated in the statute, the age and criminal history limitations of West Virginia Code § 61-11-26[5] does not apply to this type of petition. W. Va. Code § 61-14-9(c). Similarly, the provisions of West Virginia Code § 49-4-103 do not apply to victims of human trafficking.[6]The other requirements of this expungement statute apply, which include pertinent identifying information and the

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[5] It should be noted that the age limit was deleted from West Virginia Code § 61-11-26 in 2019. Similarly, criminal history limitations were changed as part of the 2019 amendments to the statute. Further, an additional statute on expungements was enacted in 2019. W. Va. Code § 61-11-26a.

[6] This statute generally bars the publication of any evidence introduced in a juvenile proceeding. It also indicates that a juvenile adjudication is not considered a conviction. W. Va. Code § 49-4-103.

procedures for service on law enforcement. This type of expungement petition should be filed in the county where the conviction occurred. A person who seeks to have his or her conviction expunged because he or she was a victim of human trafficking is not required to show that he or she has completed some type of rehabilitation.

C. Request for Records by Juvenile Victim

A juvenile victim of sex trafficking may obtain his or her juvenile records that relate to the trafficking. W. Va. Code § 49-5-104(g). To obtain such records, a juvenile victim must submit a written request to the circuit court in which a juvenile proceeding was or is pending.

D. Lifetime Ban on Commercial Driver's License

A person who uses a commercial motor vehicle to commit a felony offense involving human trafficking is subject to a lifetime ban on operation of a commercial motor vehicle. W. Va. Code § 17E-1-13(n)(2). The statute indicates that a person is subject to a ban if he or she commits any of the acts set forth in 22 U.S.C. § 7102(9). These acts are described as recruitment, harboring, transportation, provision or obtaining a person for sex trafficking. *Id.* Although the statute subjects a person to this penalty when they commit acts set forth in 22 U.S.C. § 7102(9), the statute does not provide that such a person must have been convicted of a federal or state trafficking offense

XIII. Violations of Protective Orders

A. Criminal Offense for West Virginia Protective Order Violations

Note: This section only addresses the criminal offense that arises when a defendant violates a condition of bail, probation, or parole that is intended to protect the personal safety of a particular person. However, this offense may also occur when a person violates a protective order issued in a domestic violence protective order proceeding (W. Va. Code §§ 48-27-101, et seq.) or in a divorce case (W. Va. Code §§ 48-5-509, -608).

A defendant may be subject to misdemeanor criminal charges for violating a term or condition of bail, probation, or parole that is designed to protect the safety of a particular individual. W. Va. Code § 48-27-903(a)(2). Although all criminal offenses for West Virginia protective order violations are misdemeanors, a person convicted of a second or subsequent offense is subject to enhanced penalties. W. Va. Code § 48-27-903(b) and (c).

B. Criminal Offense for Violation of a Foreign Protective Order

Note: This section only addresses criminal offenses that arise when a defendant violates conditions of bail, probation or parole, or an order entered pursuant to a foreign state's anti-stalking laws. However, this offense may also occur when a person violates a protective order issued in a domestic or family violence proceeding or in a foreign divorce proceeding.

A defendant may be subject to criminal charges if he or she violates the terms of a foreign protection order in West Virginia. W. Va. Code § 48-28-7. A foreign protection order that may be enforced through criminal penalties include conditions of bail, probation, or parole imposed in another state that are designed to protect specific person(s), or protection orders entered pursuant to a foreign state's anti-stalking laws. The foreign protection order can be violated when a defendant abuses a protected person and the acts constituting the abuse meet the statutory definition for domestic violence set forth in West Virginia Code § 48-27-202. A foreign protection order can also be violated when a respondent is physically present at any location in a knowing and willful violation of the terms of the foreign protection orders noted above. Although all criminal offenses for violations of foreign protective orders are misdemeanors, a person who is convicted of a second or subsequent offense is subject to an enhanced penalty. W. Va. Code § 48-28-7(b).

XIV. Violations of Personal Safety Orders

A. Misdemeanor

West Virginia Code § 53-8-11 establishes misdemeanor penalties for violation of a temporary or final personal safety order. A first offense is a lesser penalty, and a second or subsequent offense, although still a misdemeanor, results in an enhanced penalty.

B. Felony

A person is guilty of a felony if he or she commits harassment as set forth in West Virginia Code § 61-2-9a(f) while a personal safety order is in effect and the victim of the harassment was protected by the personal safety order. The personal safety order must have been issued after a final hearing. In addition, the defendant must have been served with a copy of the personal safety order.

XV. Attempted Criminal Offenses

As with other attempted criminal offenses, an attempt to commit a sexual offense is considered a crime. West Virginia Code § 61-11-8, a general statute that criminalizes an action that constitutes an attempt to commit a crime, applies to all attempts "where it is not otherwise provided." The West Virginia Supreme Court has recognized that where a specific criminal statute establishes that an attempted offense is a crime, the general provisions of West Virginia Code § 61-11-8 must be disregarded, and the specific criminal statute must be applied. *State v. Runnion*, 122 W. Va. 134, 7 S.E.2d 648 (1940) (holding that an attempt to commit a forgery is subject to the increased penalty in West Virginia Code § 61-4-5, not to the lesser penalty in West Virginia Code § 61-11-8). Therefore, West Virginia Code § 61-11-8 only applies to attempted sexual offenses when a specific criminal statute does not criminalize an attempt.

The statutes that criminalize sexual assault and sexual abuse do not criminalize attempts to commit these offenses (W. Va. Code §§ 61-8B-3 through -9). Similarly, the statute that criminalizes incest (W. Va. Code § 61-8-12) does not criminalize attempts. However, West Virginia Code § 61-8D-5, sexual abuse by a parent, guardian, custodian, or person in a position of trust, expressly criminalizes attempts to commit the offenses covered by this statute.

To determine when the actions of a person constitute an attempted crime, the West Virginia Supreme Court has established that:

> [T]wo requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime. Syl. Pt. 2, in part, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978) (overruled on other grounds by *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995)).

With specific reference to the crime of rape, the West Virginia Supreme Court held that: "To sustain a conviction for attempted rape two things must be proven beyond a reasonable doubt—the specific intent to at once accomplish the crime, and an overt act in pursuant of such intent." Syl. Pt. 2, *State v. Franklin*, 139 W. Va. 43, 79 S.E.2d 692 (1953) (citing *State v. Gill*, 101 W. Va. 242, 132 S.E. 490 (1926)). An attempt to commit a sexual offense, therefore, involves the specific intent to commit a certain crime and an overt act toward the commission of the crime. The intent to

commit the crime of rape may be proven with circumstantial evidence. Syl. Pt. 2, *State v. Tomblin*, 124 W. Va. 264, 20 S.E.2d 122 (1942).

In addition to criminalizing attempted crimes, West Virginia Code § 61-11-8 establishes sentences for attempted crimes. If the underlying offense is a felony and is punishable for a term of less than life imprisonment, then the court has the discretion to impose one of the following two sentences: 1) confinement in the penitentiary for not less than one nor more than three years; or 2) confinement in jail for not less than six months nor more than 12 months and fined not more than five hundred dollars. W. Va. Code § 61-11-8(2). Even though the court may choose the more lenient sentence, the defendant, by the terms of the statute, is still considered to be guilty of a felony. When the underlying offense is a misdemeanor, the defendant cannot be confined in jail more than six months and cannot be fined more than one hundred dollars. W. Va. Code § 61-11-8(3). He or she is considered to be guilty of a misdemeanor.

XVI. Accomplice Liability

The common law created distinctions between parties to a felony according to their type of participation in the crime. *State v. Petry*, 166 W. Va. 153, 273 S.E.2d 346 (1980). The actual perpetrator of the crime is considered a principal in the first degree. Syl. Pt. 5, *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 (1989). Principals in the second degree include accessories before the fact or aiders and abettors. *Petry*, 166 W. Va. at 156, 273 S.E.2d at 349; Syl. Pt. 5, *State v. Fortner*, *supra*. A person can also be subject to criminal liability as an accessory after the fact. *Petry*, 166 W. Va. at 156, 273 S.E.2d at 349. Such a person is subject to criminal liability for assisting a felon after a crime has been committed.

A. Accessory Before the Fact, Principal in the Second Degree, Aider and Abettor

To be considered an accessory before the fact, a person must have procured, counseled, commanded, incited, assisted, or abetted another person to commit the crime. Syl. Pt. 6, *Fortner, supra*. However, such a person must not have been present during the commission of the crime. Syl. Pt. 7, *Fortner, supra.* The person's absence is considered "an essential element of the status of an accessory before the fact." Syl. Pt. 2, in part, *State ex rel. Brown v. Thompson*, 149 W. Va. 649, 142 S.E.2d 711 (1965) (overruled by *Petry* on other grounds).

A person can be subject to criminal liability for aiding and abetting the actual perpetrator. Such a person can be referred to as an aider or

abettor or as a principal in the second degree. The West Virginia Supreme Court has recognized that: "The chief difference between a principal in the second degree and an accessory before the fact is that the former is actually or constructively present at the time and place of the commission of the crime, while the latter is absent." Syl. Pt. 7, *Fortner, supra.* A person's "mere presence at the scene of the crime, even with knowledge of the criminal purpose of the principal in the first degree is not, alone, sufficient to make the accused guilty as a principal in the second degree." *Fortner*, 182 W. Va. at 356, 387 S.E.2d at 823. Rather, the State is required to prove that the defendant shared the criminal intent of the actual perpetrator. *Id.* However, "the intent element is relaxed where there is evidence of substantial physical participation in the crime by the accused." *State v. Mullins*, 193 W. Va. 315, 319, 456 S.E.2d 42, 46 (1995).

In addition to relaxing the intent element, the West Virginia Supreme Court has recognized the "concerted action principle" that imposes criminal liability upon a defendant who is both present at the scene of the crime and who, acting with another defendant, contributes to the criminal act. *Fortner*, 182 W. Va. at 358, 387 S.E.2d at 825. Under this principle, the State does not have to prove that the defendant did any act that constituted part of the crime; rather, the State simply must show that the defendant was present and acted together or in concert with the principal in the first degree. *Fortner, supra* (citing *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979)). In *Fortner*, a case in which five defendants were charged with repeated sexual assaults of a victim, the Court noted that the following facts were sufficient to support a defendant's convictions for aiding and abetting a sexual assault: removal of the victim's clothing; taunting the victim; and ridiculing one of the other defendants for his inability to maintain an erection.

With regard to indicting an accessory, it is not necessary to specifically indict a defendant as a principal in the first or second degree. Rather, "A general indictment as a principal in the first degree shall be sufficient to sustain a conviction as an aider or abettor or as an accessory before the fact." Syl. Pt. 1, *State v. Ashcraft*, 172 W. Va. 640, 309 S.E.2d 600 (1983) (quoting Syl. Pt. 1, in part, *Petry, supra*). The West Virginia Supreme Court has recognized that: "[W]hether a defendant acted as a principal in the first degree or second degree is a question of fact that should be determined by the jury." *State v. Legg*, 218 W. Va. 519, 524, 625 S.E.2d 281, 286 (2005).

A defendant who has been convicted as either an aider or abettor or as an accessory before the fact is subject to the same criminal liability as the actual perpetrator. W. Va. Code § 61-11-6. Therefore, a person

may be convicted of a crime provided that he or she acted as a principal in the first degree, as an aider or abettor, or as an accessory before the fact.

B. Accessory After the Fact

An accessory after the fact is "a person who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon." *State v. Bradford*, 199 W. Va. 338, 346, 484 S.E.2d 221, 229 (1997) (quoting 1A *M.J. Accomplices and Accessories* § 5 (1993)). An accessory after the fact must know that the principal has committed a felony. Criminal liability is imposed upon an accessory after the fact because he or she has obstructed justice, not because he or she participated in the actual crime. *Petry*, 166 W. Va. at 157, 273 S.E.2d at 349. Although criminal penalties may be imposed upon persons considered to be "accessories after the fact," West Virginia Code § 61-11-6 excludes persons in specific relationships to a defendant from being punished as such an accessory. These relationships include the following: husband, wife, parent, grandparent, child, grandchild, brother, sister, or servant to the defendant. These relationships can be based on consanguinity or affinity. A person who is convicted as an accessory after the fact is guilty of a misdemeanor. W. Va. Code § 61-11-6.

XVII. Dangerousness Assessment Review Board

In 2021, the West Virginia Legislature established the Dangerousness Assessment Advisory Board (hereinafter "Board'). W. Va. Code § 27-6A-13. The purpose of the Board is to provide guidance to a circuit court about the appropriate level of custody or supervision for any defendant found to be incompetent to stand trial and not restorable or any defendant found to be not guilty by reason of mental illness. The provisions apply to all criminal offenses and would necessarily include defendants charged with sexual offenses.

When reviewing a proposed lesser restrictive placement, the circuit court may request the assistance of the Board when it is reviewing this type of issue. The statute does not outline any procedure for this type of request. Nor does it allow any other party to directly request assistance from the Board.

XVIII. Other Related State Offenses

A. Abduction of Any Person with Intent to Marry or Defile

As established by West Virginia Code § 61-2-14(a), it is unlawful for anyone to take away or detain another person against such person's will with the intent to marry or defile such person or with the intent to cause a

third person to marry or to defile the person. As recognized by the West Virginia Supreme Court: "A sexual purpose or motivation is an essential element of the offense of abduction with intent to defile contained in W. Va. Code § 61-2-14." Syl. Pt. 6, *State v. Hanna*, 180 W. Va. 598, 378 S.E.2d 640 (1989). Although this specific intent is an essential element, "the State does not have to show that the accused actually committed the underlying substantive crime." *State v. Williams*, 215 W. Va. 201, 206, 599 S.E.2d 624, 629 (2004). In other words, a defendant who detains a victim with the intent to commit a sexual assault but does not commit the sexual assault can be found guilty of abduction.

In cases involving abduction with intent to marry or defile or kidnapping, it has been recognized that force or compulsion would be a required element. *Hanna*, 180 W. Va. at 605, 378 S.E.2d at 646. However, it is not necessary that the State prove actual physical force or threats of violence. Rather, force or compulsion may be proven if the State shows that the victim submitted because he or she was in reasonable fear of harm or injury. Syl. Pt. 4, *Hanna*, *supra.* In *Hanna*, the Court noted the following facts were sufficient to establish force or compulsion: the defendant's violent history; his use of force to enter the home; verbal threats; the defendant's production of a weapon; and his threatened use against another party.

The offenses of kidnapping and abduction have been subject to double jeopardy challenges on the theory that the actions that constitute the kidnapping or abduction are incidental to another offense. *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985); *State v. Trail*, 174 W. Va. 656, 328 S.E.2d 671 (1985); *State v. Weaver*, 181 W. Va. 274, 382 S.E.2d 327 (1989). In other words, defendants have argued that the acts that constitute abduction or kidnapping are part of another offense, such as sexual assault, and would not constitute a separate offense. Based on this reasoning, defendants have argued that separate convictions for multiple offenses, such as sexual assault and abduction, constitute a violation of the multiple punishments clause found in the Fifth Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

Analyzing this issue, the West Virginia Supreme Court held that: "In interpreting and applying a generally worded kidnapping statute, such as W. Va. Code § 61-2-14*a*, in a situation where another offense was committed, some reasonable limitations on the broad scope of kidnapping must be developed. The general rule is that a kidnapping has not been committed when it is incidental to another crime." Syl. Pt. 2, *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985). This same rule applies to the offense of abduction of a child in violation of West Virginia Code § 61-

2-14(b). Syl. Pt. 2, *State v. Weaver*, 181 W. Va. 274, 382 S.E.2d 327 (1989).

The Court has adopted four factors that must be analyzed to determine whether the acts can constitute two separate offenses. *Weaver*, 181 W. Va. 274, 382 S.E.2d 327; Syl. Pt. 5, *State v. Lewis*, 235 W. Va. 694, 776 S.E.2d 591 (2015). The following factors must be analyzed to determine whether the alleged acts would constitute a separate offense:

1. The length of time the victim was held or moved;
2. The distance the victim was forced to move;
3. The location and environment of the place the victim was detained; and
4. The exposure of the victim to an increased risk of harm. Syl. Pt. 2, *Miller, supra*; Syl. Pt. 5, *Lewis, supra.*

In general, it is more likely that the acts will constitute a separate offense as the period of time increases during which the victim was held or moved. Similarly, it is likely that the acts will constitute a separate offense if the victim is forced to move a significant distance. The location and environment of the place the victim is detained also is considered. For example, in *Miller*, the Court found that the acts constituted a separate offense when the victim was taken to an isolated, unfamiliar area. Finally, if the victim is subject to increased risk of harm, it is more likely that the acts will constitute a separate offense. In *Lewis*, the Court affirmed a defendant's convictions for two separate offenses when he moved a victim to a second apartment where no one else was present and when the victim was away from her home for approximately two hours.

B. Abduction of Child Under Age 16 for the Purpose of Prostitution or Concubinage

Abduction may also occur when a person takes away a child who is under age 16 from a person who has lawful charge of the child, and the purpose is for prostitution or concubinage.[7] W. Va. Code § 61-2-14(a).

[7] Concubinage is defined as: "The act or practice of cohabiting, in sexual commerce, without the authority of law or a legal marriage." *Black's Law Dictionary*, 363 (4th ed. 1968).

C. Abduction of a Child Under Age 16 for Improper or Immoral Purpose

In addition to the other types of abduction set forth above, abduction occurs when a person who is not the parent of a child, illegally or for any unlawful, improper, or immoral purpose seizes, takes, or secretes a child under 16 years of age from a person who has lawful charge of a child. W. Va. Code § 61-2-14(b). With regard to the purpose for taking the child, this subsection limits the purpose to those other than the purposes identified in West Virginia Code §§ 61-2-14(a) (abduction with intent to marry or defile, or prostitution or concubinage); 61-2-14a (kidnapping for ransom or other concession); or 61-2-14c (threats to kidnap or demand ransom). This statute, therefore, allows prosecution for seizing or taking a child when the offender's purpose or intent does not meet the intent of any of the offenses established by the above-referenced statutes.

The offenses of kidnapping and abduction have been subject to double jeopardy challenges on the theory that the actions that constitute the offense of kidnapping or abduction are incidental to another offense. *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985); *State v. Trail*, 174 W. Va. 656, 328 S.E.2d 671 (1985); *State v. Weaver*, 181 W. Va. 274, 382 S.E.2d 327 (1989). In other words, defendants have argued that the acts that constitute the abduction are part of or incidental to another offense, such as sexual assault, and would not constitute a separate offense. Therefore, defendants have argued that separate convictions for multiple offenses constitute a violation of the multiple punishments clause found in the Fifth Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

Similar to kidnapping, a person cannot be found guilty of abduction if the acts, the movement, or detainment of the victim, is merely incidental to another crime. Syl. Pt. 2, *Weaver*, *supra*. To determine whether abduction has occurred, the trial court must consider the following factors:

> 1. The length of time the victim was held or moved;
> 2. The distance the victim was forced to move;
> 3. The location and environment of the place the victim was detained; and
> 4. The exposure of the victim to an increased risk of harm. *Id.*

In general, it is more likely that the acts will constitute a separate offense as the period of time increases during which the victim was held or moved. In *Weaver*, the Court noted that the victim was held for over an

hour. Similarly, it is likely that the acts will constitute a separate offense if the victim is forced to move a significant distance. The Court in *Weaver* pointed out that the victim was moved 150 yards. The location and environment of the place the victim is detained also is considered. For example, in *Weaver*, the Court found that the acts constituted a separate offense when the victim was taken into an area with thick underbrush that decreased the chance of detection. Finally, if the victim is subject to increased risk of harm, it is more likely that the acts will constitute a separate offense. The Court in *Weaver* observed that the movement of the victim to a place that could not easily be detected increased the risk of harm to the victim. Based on an analysis of these factors, the Court affirmed the defendant's convictions for first-degree sexual assault and abduction of a child for immoral purposes.

D. Abduction of a Child Near a School

When a person commits an abduction of a child who is 16 years or under and the abduction occurs within one thousand feet of a school, the person is guilty of a felony. W. Va. Code § 61-2-14f. This code section is an attempt to protect children from becoming a target either when they are attending or traveling to and from school.

E. Kidnapping[8]

Kidnapping occurs when any person takes custody of, conceals, confides, or restrains another person with the intent to accomplish the following actions against that person. W. Va. Code § 61-2-14a. These actions include: 1) holding the person for ransom, reward or concession; 2) transporting the person with the intent to inflict bodily injury or to terrorize the victim or another person; or 3) using the person as a shield or hostage. These actions also include taking a person hostage which is statutorily defined as seizing, detaining, and threatening to kill or injure a person so that a third person or a governmental organization, such as a law enforcement agency, is compelled to act or to abstain from acting as a condition for the release of the victim. W. Va. Code § 61-2-14a(c). For a case in which the Supreme Court affirmed a kidnapping conviction after a defendant challenged the sufficiency of the evidence, see *State v. Vilela*, 238 W. Va. 11, 792 S.E.2d 22 (2016).

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[8] West Virginia Code § 61-2-14a(d) establishes a separate offense when a family member "kidnaps" a minor to prevent the minor's return to the lawful guardian. The defendant's actions must be motivated by a belief that it is the minor's best interests that he or she should not be returned to the lawful guardian. Similarly, West Virginia Code § 61-2-14d establishes an offense when a person conceals or takes a minor with the intent to deprive another person of lawful custody or visitations rights. A discussion of these offenses is not included because they are not crimes of sexual violence.

The penalty for the offense of kidnapping is dependent upon the circumstances of the crime and upon specific findings made by the trier of fact, either a jury or the court, if the defendant entered a guilty plea. According to subsection (a) of West Virginia Code § 61-2-14a, the penalty for kidnapping is confinement by the Division of Corrections and Rehabilitation for life. However, subsection (b) allows a defendant to be eligible for parole when a jury recommends mercy or if the court, upon the defendant's guilty plea, finds that the defendant is entitled to mercy. If a victim is released or returned alive, without bodily harm, but after ransom has been paid or other concession granted, the defendant is subject to a definite term of confinement, from not less than 20 years, nor more than 50. If the victim is released without bodily harm and no ransom has been paid or other concession granted, then the defendant is subject to incarceration for not less than 10 years, nor more than 30.

The West Virginia Supreme Court has provided guidance on whether the trial court or jury should make the findings that determine the length of a defendant's sentence for the offense of kidnapping. *State v. Scruggs*, 242 W. Va. 499, 836 S.E.2d 466 (2019). Upon the submission of a certified question concerning this issue, the West Virginia Supreme Court noted that it would address this issue because of the decision in *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151 (2013), a case in which the United States Supreme Court held that a jury must make any factual finding that increases a defendant's sentence from the mandatory minimum. The United States Supreme Court found that any fact that increases a minimum sentence is, in fact, an element of the crime. *Scruggs*, 836 S.E.2d at 471 (quoting *Alleyne*, 507 U.S. at 103). Further the United States Supreme Court found that any fact that increases the minimum or maximum sentence is an element of the crime and must be found by the jury. *Scruggs*, 836 S.E.2d at 471, (quoting *Alleyne*, 507 U.S. at 108).

In its review of the kidnapping statute, West Virginia Code § 61-2-14a, the West Virginia Supreme Court found that the "default sentence" was life without the possibility of parole as set for4th in subsection (a)(3). Next, the West Virginia Supreme Court reasoned that the trial judge can only reduce a defendant's maximum and minimum sentence. Based upon this reasoning, the West Virginia Supreme Court held that the holding of *Alleyne* would not apply. Therefore, the West Virginia Supreme Court concluded that the trial judge, not a jury, has the authority to determine any facts that reduce a defendant's maximum or minimum sentence for kidnapping.

The West Virginia Supreme Court also addressed a second certified question concerning the submission of special interrogatories to a jury in a kidnapping case. The Court noted that the kidnapping statute

does not authorize a trial court to submit special interrogatories to a jury, and a trial court should not submit a special interrogatory to a jury if the relevant statute does not authorize one. Syl. Pt. 2, *State v. Dilliner*, 212 W. Va. 135, 569 S.E.2de 211 (2002). Therefore, the Supreme Court, in answering the certified question, held that a trial court would exceed its legitimate authority and abuse its discretion if it submitted a special interrogatory to a jury in a kidnapping case.

The offense of kidnapping has been subject to double jeopardy challenges on the theory that the actions are incidental to another offense. *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985). In other words, defendants have argued that the acts that constitute kidnapping are part of or incidental to another offense, such as sexual assault. Based on this reasoning, defendants have argued that separate convictions for multiple offenses constitutes a violation of the multiple punishments clause found in the Fifth Amendment of the United States Constitution and Article III, Section 5 of the West Virginia Constitution.

A kidnapping has not occurred if the actions that constitute a kidnapping are incidental to another crime. Syl. Pt. 2, *Miller*, *supra*. To determine whether a kidnapping has occurred, the following factors must be considered:

> 1. The length of time the victim was held or moved;
> 2. The distance the victim was forced to move;
> 3. The location and environment of the place the victim was detained; and
> 4. The exposure of the victim to an increased risk of harm. *Id.*

In general, it is more likely that the acts will constitute a separate offense as the period of time increases during which the victim was held or moved. In *Miller*, the victim was in the defendant's control for an hour and a half. Similarly, it is likely that the acts will constitute a separate offense if the victim is forced to move a significant distance. The location and environment of the place the victim is detained is also considered. For example, in *Miller*, the Court found that the acts constituted a separate offense when the victim was taken to an isolated unfamiliar area. Finally, if the victim is subject to increased risk of harm, it is more likely that the acts will constitute a separate offense. The Court in *Miller* noted that the victim was subject to an increased risk of harm because she was taken to an unfamiliar isolated location that decreased the chance that she would be discovered or could escape.

Although all factors should be considered, every factor does not need to be determinative. For example, holding a victim for an extended length of time could, by itself, support kidnapping. Additionally, the Court has noted that courts have generally, if not universally, recognized that a kidnapping is not incidental to another offense when an offender demands ransom, uses a victim to prevent capture or arrest and the victim has also been sexually abused, robbed, or killed. *Miller*, 175 W. Va. 616, 336 S.E.2d 910, n. 6 (citing cases).

Although a demand for money or other type of ransom or using a hostage to evade capture are typical reasons an offender may kidnap someone, the language of the statute indicates that a kidnapping occurs when the offender seeks any type of concession or advantage. A sexual motivation or purpose has been generally accepted as sufficient to satisfy this element for kidnapping statutes. *State v. Hanna*, 180 W. Va. 598, 605, 378 S.E.2d 640, 647 (1989) (citing cases). In *Hanna*, the Court additionally noted that the intent to obtain other benefits is fairly broad. Based upon this recognition, the Court held that a defendant's actions constituted kidnapping when he forced his former girlfriend to leave her home in the hopes that he could talk with her and attempt to reconcile their relationship.

F. Threats of Kidnapping

It is also a crime to threaten to kidnap someone. W. Va. Code § 61-2-14c. This offense occurs when a person has the intent to extort ransom, money, or other thing or the intent to obtain any concession or advantage. When the offender has this intent and he or she uses any method of communication to threaten to kidnap, a crime has occurred. As indicated by the statute, the communication can be by any speech, writing, printing, drawing, or any other method. The communication can be oral or written, and the threat can be made either directly or indirectly. The substance of the threat must include a threat to forcibly take a person away or otherwise kidnap them. Alternatively, it could occur when an offender threatens to kidnap someone to obtain ransom, money, other thing, or a concession or advantage. As with an actual kidnapping, a person who threatens to kidnap someone for the purpose of engaging in sexual activity could be charged with a violation of West Virginia Code § 61-2-14c.

G. Venue for Abduction and Kidnapping

Because abduction and kidnapping generally involve moving or transporting a victim, acts that constitute the elements of the crimes may occur in different counties or even in different states. Because different elements of these crimes may occur in different jurisdictions, West Virginia

Code § 61-2-14b has established three permissible venues in which these offenses may be prosecuted. First, venue lies in the county where the person was taken, kidnapped, or induced to go away. Secondly, it may lie in the county where the person was held or detained. Third, it may lie in a county through which a victim was transported. Venue is proper in any of these counties without regard to whether the offense originated in West Virginia or in another state.

H. Aiding or Abetting in an Abduction or Kidnapping

As established by West Virginia Code § 61-2-14e, it is unlawful for a person to aid or abet another person to commit abduction, kidnapping, or threaten to kidnap another person. A person is guilty of this offense when he or she acts as either an accessory before or an accessory after the fact. By reference to West Virginia Code § 61-11-7, the general statute establishing criminal liability for accessories, venue for this type of offense lies in the county in which the offender became an accessory or in the county in which the principal could be indicted.

I. Harassment

West Virginia Code § 61-2-9a establishes criminal penalties for different types of harassing conduct.

1. Harassment I

The first offense occurs when a person engages in a course of conduct which he or she directs at another person and has the intent to cause the other person to fear for his or her own safety or the safety of others. It also occurs when a person engages in this type of conduct with the intent to cause the person to suffer substantial emotional distress. Further, this offense occurs when a person causes a third person to undertake such actions. W. Va. Code § 61-2-9a(a).

The term "course of conduct" is defined as a pattern of conduct that involves at least two or more acts. A person may be charged with this offense if he or she undertakes a course of conduct either directly or indirectly, or through a third person. A person may be guilty of this offense when he or she uses any action, method, device or other means to engage in a prohibited course of conduct. W. Va. Code § 61-2-9a(h)(2). Specific acts identified in the statute include following, monitoring, observing, surveilling, or threatening a specific person or persons.

The second unlawful action involves nonconsensual contact or communications, including contact through electronic communication, with a specific person or persons. The third unlawful action involves a person interfering or damaging a person's property or pets. W. Va. Code § 61-2-

9a(h)(2). The statute no longer identifies this behavior as "stalking." However, the statute criminalizes the types of behavior that are commonly associated with "stalking" or "cyberstalking."

2. Harassment II

The second type of harassment occurs when a person engages in willful conduct that would cause a reasonable person mental injury or emotional distress, and the conduct serves no legitimate or lawful purpose. The second type of harassment also occurs when a person repeatedly makes credible threats against another person. The term "repeatedly" is defined as two or more occasions. W. Va. Code §§ 61-2-9a(b) and (h)(3), (4), and (6). The term "credible threat" is defined as a threat of bodily injury that the offender has an apparent ability to carry out.

The West Virginia Supreme Court has provided guidance concerning the type of evidence that is sufficient to constitute the elements of "harassment." *State v. Malfregeot*, 224 W. Va. 264, 685 S.E.2d 237 (2009).[9] In *Malfregeot*, the defendant was a 50 year old teacher and coach at a middle school, and the victim was a 13 year old student at the school. On appeal, the defendant argued that his actions did not meet the statutorily defined terms of "following" or "harassing." However, the West Virginia Supreme Court held that the defendant's actions of repeatedly going to the victim's locker, initiating contact with the victim in various parts of the school, and calling her on her personal cell phone were sufficient to be considered "following." Additionally, the Court held that the defendant's actions of putting his arm around the student's shoulders, rubbing her shoulders, and flipping her hair were sufficient to constitute "harassment." The Court also noted an incident in which the defendant had called the victim on her personal cell phone and attempted to lure her to school on a non-school day.

3. Penalties and Conditions

All types of "harassment" are misdemeanors, and the penalties include a jail sentence of not more than six months and/or a fine that cannot exceed $1,000.00.

If a person is convicted of this offense and is granted probation or the sentence of incarceration is suspended, the court shall require the offender to engage in counseling or medical treatment.

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[9] It should be noted that an earlier version of West Virginia Code § 61-2-9a was in effect at the time the offense in *Malfregeot* was committed. However, the discussion of acts that can be considered "harassing" are relevant to the current statute.

4. Harassment that Violates a Protective Order

A person is guilty of a misdemeanor offense if a person commits harassment, and the acts would also constitute a violation of a protective order in effect that was entered by a magistrate, family, or circuit court. W. Va. Code § 61-2-9a(c). The following types of domestic violence protective orders serve as an element of this offense: 1) an emergency protective order (EPO) entered by a magistrate; 2) a temporary emergency protective order (TEPO) entered by a magistrate; 3) a domestic violence protective order entered after a final hearing in family court or after an appeal in circuit court; 4) a temporary restraining order entered in a divorce case; or 5) a permanent restraining order entered in a divorce case.

5. Harassment While Protective Order is in Effect

A person who is convicted of harassment may be subject to an enhanced penalty when a protective order entered against him or her is in effect and the victim of the offense was the subject of the protective order. W. Va. Code § 61-2-9a (e). As established by references to West Virginia Code §§ 48-27-501 and 48-5-608, the only types of protective orders that constitute an element of this offense are protective orders entered after a final hearing in family court or a permanent protective order included as relief in a divorce proceeding. A protective order entered by a magistrate (EPO or TEPO) would not constitute an element of this offense. To be subject to this provision, the defendant must have been served with a copy of a protective order. It should be noted that the acts that constitute the offense established by West Virginia Code § 61-2-9a (e) are not required to violate the protective order. This offense is a felony.

6. Harassment While Person Safety Order Is In effect

A person is guilty of a felony if he or she commits harassment when a personal safety order is in effect and the victim of the harassment was protected by the personal safety order. By reference to West Virginia Code § 53-8-7, the personal safety order must have been issued after a final hearing. In addition, the defendant must have been served with a copy of the personal safety order. W. Va. Code § 61-2-9a (f).

7. Subsequent Offenses of Harassment

If a defendant has a previous conviction for a violation of West Virginia Code § 61-2-9a and he or she is subsequently convicted for harassment, he or she is guilty of a felony. W. Va. Code § 61-2-9a(d). The Legislature has, therefore, recognized that harassment involves repetitive behavior and has enhanced the penalty for repeat offenses.

8. Harassment With Intent To Cause Victim to Harm Himself or Herself

If a person harasses another person with the intent to cause the other person to physically harm or to kill himself or herself, he or she is guilty of a felony. This offense also occurs when a person continues to harass another person when the defendant either knows or has reason to know that the person is likely to physically injure or kill himself or herself based, in whole or in part, on the harassment. W. Va. Code § 61-2-9a (g).

J. Obscene, Anonymous, Harassing, and Threatening Communications by Computer, Cell Phones, and Electronic Communication Devices

Originally enacted in 1989, the West Virginia Computer Crime and Abuse Act (W. Va. Code §§ 61-3C-1, *et seq.*) establishes civil and criminal penalties related to the use of computers. Although Article 3C establishes criminal penalties for crimes that are unrelated to sexual violence or pornography, such as "hacking," it also establishes criminal penalties for harassment or other behavior associated with crimes of sexual violence.

West Virginia Code § 61-3C-14a criminalizes certain communications made through any computer or other electronic communication device. This term, "electronic communication device," includes a telephone, wireless phone, computer, pager, or any electronic or wireless device that can transmit documents, images, voice, e-mail, or text message so the "communication" may be received or viewed by a person at a different location. W. Va. Code § 61-3C-14a (b) (1).

The statute also defines the term "use of a computer, mobile phone, personal digital assistant or other electronic device" as the transmission of "text messages, electronic mail, photographs, videos, images or other nonvoice data." W. Va. Code § 61-3C-14a (b)(2). It includes the transmission of this type of material to another person's computer, e-mail account, mobile phone, personal digital assistant, or other electronic communication device. These provisions demonstrate an intent by the Legislature address the many different types of electronic communications devices that are in use.

West Virginia Code § 61-3C-14a criminalizes obscene, anonymous, harassing, and threatening communications by computer, mobile phone, personal digital assistant, or other electronic communication device. This offense occurs when a person uses an electronic communication device with the intent to harass or abuse another person without disclosing his or her identity. W. Va. Code § 61-3C-14a (a)(1). This offense also occurs

when a person, with the intent to harass or abuse another person, uses an electronic communication device to contact another person, and the contacted person has requested that there be no further contact. W. Va. Code § 61-3C-14a (a)(2).[10] This offense also occurs when a person, with the intent to harass or abuse another person, uses an electronic communication device to threaten to commit a crime against any person or property. W. Va. Code § 61-3C-14a (a)(3).

In addition to the types of communications already noted, this offense occurs when a person uses an electronic communication device to deliver or transmit obscene material to a specific person after being requested not to send this material. W. Va. Code § 61-3C-14a (4). To be subject to criminal charges, the person who received the obscene material must have requested that the defendant desist from sending such material to him or her. The term "obscene material" is defined as material that:

> (A) An average person, applying contemporary adult community standards, would find, taken as a whole, appeals to the prurient interest, is intended to appeal to the prurient interest, or is pandered to a prurient interest;
> (B) An average person, applying contemporary adult community standards, would find depicts or describes, in a patently offensive way, sexually explicit conduct consisting of an ultimate sexual act, normal or perverted, actual or simulated, an excretory function, masturbation, lewd exhibition of the genitals, or sadomasochistic sexual abuse; and
> (C) A reasonable person would find, taken as a whole, lacks literary, artistic, political or scientific value. W. Va. Code § 61-3C-14a (a)(4).

In addition to the offenses discussed above, a person may be guilty of any of these offenses noted above if he or she knowingly permits an electronic communication device under his or her control to be used for any of the prohibited purposes. This offense is a misdemeanor. W. Va. Code § 61-3C-14a(c).

K. Soliciting a Minor Via Computer

Also part of the West Virginia Computer Crime and Abuse Act, this felony offense occurs when a person is over the age of 18, and he or she uses a computer, broadly defined, to solicit a minor to engage in specified

[10] Under this statute, a communication made by a lender or debt collector about a past due debt does not constitute harassment. W. Va. Code § 61-3C-14a (a)(2).

illegal acts. W. Va. Code § 61-3C-14b. The minor must be at least four years younger than the defendant, or the defendant must believe that the minor is at least four years younger than him or her. The acts specified by this section include acts proscribed by Article 8 (Crimes Against Chastity, Morality and Decency), Article 8B (Sexual Offenses), Article 8C (Filming of Sexually Explicit Conduct of Minors), and Article 8D (Child Abuse). In addition, it is unlawful to solicit a minor to engage in felony offenses established by West Virginia Code § 60A-4-401, offenses associated with controlled substances.

It is also an offense for an adult to use a computer to solicit or entice a minor to engage in illegal acts proscribed by Articles 8, 8B, 8C or 8D and to engage in an overt act to bring himself or herself into the minor's physical presence. The adult must have the intent to engage in unlawful sexual activity or conduct with the minor. W. Va. Code § 61-3C-14b(b).

L. Cyberbullying

The West Virginia Computer Crime and Abuse Act criminalizes the use of a computer or computer network to post or to encourage others to post personal, private, or sexual information about a minor on the internet. The defendant must have the intent to harass or bully a minor. This offense is a misdemeanor. W. Va. Code § 61-3C-14c.

M. Burglary[11]

There are two common elements to all offenses established by West Virginia Code § 61-3-11: 1) the defendant must enter a dwelling house;[12] and 2) the defendant must intend to commit a criminal violation. A "dwelling house" is essentially any structure used as residence, at least periodically. W. Va. Code § 61-3-11(b). Examples of structures that meet this definition are: a mobile home, house trailer, modular home, factory-built home, or self-propelled motor home. This list, however, is not exhaustive. Although the dwelling house must be used or designed for human habitation, it is not necessary that the structure be a permanent residence. Rather, it is only necessary that the structure be used periodically for human habitation. Whether a particular structure meets the definition of the term is a jury question. *State v. Stone*, 127 W. Va. 429, 33 S.E.2d 144, 148 (1945).

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[11] The 2018 amendments to this statute eliminated the distinction between nighttime and daytime burglary and also eliminated the element that the defendant had the intent to commit a felony. Rather, the intent to commit any criminal violation will support a burglary charge.

[12] A person is also guilty of burglary if he or she enters an building adjoining a home with the intent to commit a felony once inside.

In a case in which a defendant was convicted of burglary and second degree sexual assault, the defendant argued that there was insufficient evidence to convict him of burglary because he had not entered the dwelling of "another" as required by the burglary statute. *State v. Lewis*, 235 W. Va. 694, 776 S.E.2d 591 (2015). His basis for this argument was that his name was on the lease and the domestic violence protective order that gave possession of the apartment to his former girlfriend could not change title to real property. See W. Va. Code § 48-27-506. In response to this argument, the State argued that burglary addresses possession or occupancy, not title to or ownership of real property. Finding that the defendant had kicked open the victim's door and entered the apartment forcibly, the Court affirmed the defendant's burglary conviction. *Lewis*, 235 W. Va. at 703-04, 776 S.E.2d at 600-01. The Court also affirmed the defendant's convictions for abduction with intent to defile and second degree sexual assault.

The next element common to all burglaries is the defendant's intent -- he or she must enter the dwelling house with the intent to commit a criminal violation. A defendant who unlawfully enters a residence with the intent to commit a sexual offense can, therefore, be found guilty of the offense of burglary. Provided that the other elements have been met, the crime of burglary is committed once the unauthorized entry has been completed. *State v. Louk*, 169 W. Va. 24, 285 S.E.2d 432 (1981) (overruled on other grounds by *State v. Jenkins*, 191 W. Va. 87, 443 S.E.2d 244 (1994)).

N. Imposition of Sexual Intercourse or Sexual Intrusion on Incarcerated Persons or Persons Under Supervision

This felony offense occurs when a person is incarcerated and certain identified officials or employees in a correctional facility engage in either sexual intercourse, sexual intrusion, or sexual contact with the incarcerated person. W. Va. Code § 61-8B-10(a). These terms are defined in West Virginia Code § 61-8B-1, and prohibited acts include vaginal or anal penetration with any object.

The following persons may be criminally charged with engaging in sexual intercourse, intrusion, or sexual contact with an incarcerated person: any employee of the Division of Corrections and Rehabilitation; or any person working at a facility managed by the Commissioner of Corrections and Rehabilitation, whether a contract basis or as an employee of a state agency. W. Va. Code § 61-8B-10(a). Additionally, a person who works as a home incarceration officer, whether the employer is the sheriff, county commission, or court, is also prohibited from engaging in sexual intercourse, sexual intrusion, or sexual contact with an

incarcerated person. Further, a person who volunteers in a home incarceration program is prohibited from engaging in sexual activities with an incarcerated person.

An incarcerated person, of course, includes the common understanding or meaning of the term. It also includes persons who are serving a sentence on home confinement. W. Va. Code § 61-8B-10(d).

Not only are there criminal penalties for sexual intercourse, sexual intrusion, or sexual conduct with an incarcerated person, there are also criminal penalties when a parole officer or a probation officer engages in sexual intercourse, sexual intrusion, or sexual contact with a person who is subject to his or her supervision. W. Va. Code § 61-8B-10(b). Similarly, a person who is working or volunteering in a community corrections program may not engage in sexual intercourse, sexual intrusion, or sexual contact with a participant in the program. W. Va. Code § 61-8B-10(c). These offenses are felonies. Although the statute criminalizes sexual contact between the identified defendants and incarcerated persons, probationers, parolees, or participants in a community corrections program, the statute expressly excludes authorized pat-downs, strip searches, or other security-related tasks from the definition of sexual contact.

A person who is incarcerated, including home incarceration, or who is on probation, parole, or who participates in a community corrections program is deemed incapable of consent to sexual activity with the defendants identified above. W. Va. Code § 61-8B-2(c)(5). Therefore, a defendant charged with an offense established by this statute would not be able to raise consent as a defense.

XIX. Federal Offenses Involving Sexual Violence

Note: This section is intended to briefly outline federal criminal offenses involving sexual violence. It is not, however, intended to be a complete explanation of the elements of the federal offenses or issues that arise when a defendant is charged with a federal sexual offense.

A. Sex Abuse

Chapter 109A of Title 18 of the United States Code (titled "Sexual Abuse") establishes the elements, definitions, and penalties for federal offenses involving sexual violence. The common element for these offenses involves the location where the offense occurred. First, a defendant can be charged with a federal sexual offense if the acts occurred in the special maritime and territorial jurisdiction of the United States. A national park is considered to lie within the territorial jurisdiction

of the United States. Secondly, a defendant can be charged with a federal sexual offense if the offense occurred in a federal prison or in any facility in which persons are in custody pursuant to an agreement with the head of any federal department or agency. It should be noted that 18 U.S.C. § 2241(c) also establishes a federal offense that occurs when a person crosses a state line with the intent to engage in a sexual act with a person who has not attained the age of 12 years. A defendant may also be charged with a Chapter 109A offense if the offense occurred in Indian country. 18 U.S.C. § 1153.

Section 2246 establishes the definitions for the offenses included in Chapter 109A of Title 18. Although not identical, the definitions in this section are similar to the definitions established by Article 8B of the West Virginia Code. Section 2247 establishes enhanced penalties for offenses included in Chapter 109A when a defendant has a prior sexual offense conviction. A prior conviction may include a conviction under either Chapter 109A or 110, titled "Sexual Exploitation of Children." 18 U.S.C. § 2426. It may include a prior conviction for sex trafficking of children. 18 U.S.C. § 1591. A prior conviction could also be a state court conviction, provided that the prior offense would have constituted an offense under Chapters 109A or 110 if the conduct had occurred in the special maritime and territorial jurisdiction of the United States. *Id.* The offenses established by Chapter 109A include: 1) aggravated sexual abuse (18 U.S.C. § 2241); 2) sexual abuse (18 U.S.C. § 2242); 3) sexual abuse of a minor or ward (18 U.S.C. § 2243); 4) abusive sexual contact (18 U.S.C. § 2244); and 5) offenses resulting in death (18 U.S.C. § 2245).

B. Sexual Exploitation of Children

In addition to sex abuse offenses, Chapter 110 of Title 18 of the United States Code establishes offenses associated with the sexual exploitation of children. Section 2251 establishes the elements for the offense of the sexual exploitation of children. To be subject to this code section, the offense must have occurred in the territory or possession of the United States or the minor must have been transported in interstate or foreign commerce. An offense established by Section 2251 also occurs when a person engages in the production or distribution of material that visually depicts a child engaging in sexually explicit conduct and that either the material or notice of it is transported in foreign or interstate commerce. Other offenses include: 1) the selling or buying of children (18 U.S.C. § 2251A); 2) conducting certain activities relating to material involving the sexual exploitation of minors (18 U.S.C. § 2252); 3) conducting certain activities relating to material constituting or containing child pornography (18 U.S.C. § 2252A); 4) the use of misleading domain names on the internet (18 U.S.C. § 2252B); and 5) the use of misleading words or digital images on the internet (18 U.S.C. § 2252C).

C. Interstate Stalking

Similar to interstate domestic violence, interstate stalking occurs when a person travels in interstate or foreign commerce, enters or leaves Indian country or acts within the special maritime and territorial jurisdiction of the United States. The defendant must have the intent to kill, injure, harass, or place a second person under surveillance with the intent to kill, injure, harass, or intimidate that person. 18 U.S.C. § 2261A(1). Additionally, the defendant must, in the course of or as a result of the travel or presence engage in conduct that places the person in reasonable fear of the death of, or serious bodily injury or causes substantial emotional distress to, that person. Other stalking victims may include an immediate family member, a spouse or intimate partner of the person targeted by the stalker, a pet, service animal, emotional support animal, or horse of the person targeted by the stalker.

Interstate stalking may also occur when the defendant uses the mail, any interactive computer system, an electronic communication service, an electronic communication system of interstate commerce, or any facility of interstate or foreign commerce to engage in a course of conduct that affects the stalking target as follows. If the defendant uses any of the mediums noted above and places a person in the reasonable fear of death or serious bodily injury for himself or herself, an immediate family member or a spouse or intimate partner, or pet, service animal, emotional support animal, or a horse, then the defendant is guilty of stalking. 18 U.S.C. § 2261A(2). Further, the offense of stalking occurs when a defendant causes, attempts to cause or would be reasonably expected to cause substantial emotional injury to a person, immediate family member, or a spouse or intimate partner of the person.

The Fourth Circuit has held that the stalking statute is not unconstitutionally vague. *U.S. v. Shrader*, 675 F.3d 300 (4th Cir. 2002). The facts of *Shrader* involved a defendant who began a relationship with a woman named D.S. when she was in high school in 1973. D.S. eventually broke off the relationship because of the defendant's demanding, possessive behavior. However, he continued his threatening behavior against her and her family members. In 1975, he killed D.S.'s mother and a close friend of hers, and was sentenced to life with a recommendation of mercy of those murders.

Once the defendant was released, he tracked down D.S., who had married and moved to Texas. He began contacting D.S. and her husband and making threats towards them. He later sent a package to D.S.'s husband in their Texas home and included a letter that threatened D.S. and her family.

After he was convicted for two counts of stalking under 18 U.S.C. § 2261A(2)(A), the defendant challenged his conviction on the grounds that the terms "harass" and "intimidate" were not explicitly defined in the statute and were, therefore, unconstitutionally vague. He also argued that the second element, "a course of conduct" was vague because the statute did not specify whether all of the acts in the "course of conduct" must be committed with the intent to cause fear.

With regard to the challenge to the terms "harass" and "intimidate," the Fourth Circuit noted the words "harass" and "intimidate" are not obscure and have commonly accepted meaning. The Court also noted that the terms were not vague because the government, as required by the statute, had to prove that the defendant intended harm and the victim suffered substantial emotional harm. Given these requirements, the Court stated that it "need not worry that the statute sets an unclear trap for the unwary." *Shrader*, 675 F.3d at 311.

With regard to the second challenge to the statute, the Fourth Circuit noted that the statute defines a "course of conduct" as "a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose." 18 U.S.C. § 2266(2). The Court went on to note that the government is not required to prove that each act caused serious distress or fear of bodily injury, but that the cumulative effect of the conduct did so. The Court observed that requiring the government to prove intent with regard to each act would undo the protection for victims from the persistent or repetitive conduct of a harasser. The Court went on to explain that a defendant could argue that certain acts were "innocent or mistaken" as a means to challenge the government's proof. The Court, however, pointed out that this type of argument would go to the sufficiency of the evidence, not to the alleged vagueness of the statute. *Shrader*, 675 F.3d at 312. For these reasons, the Fourth Circuit upheld the constitutionality of the stalking statute.

This federal stalking statute can be used to prosecute what is referred to as "cyberstalking." 18 U.S.C. § 2261A (2). Cyberstalking may include the use of threatening e-mails or other electronic communications, such as instant messaging or text messaging. The statute is broadly written to include the use of the mail, interactive computer services, any electronic communication services, or electronic communication services of interstate commerce. Cyberstalking has become more prevalent in recent years and one in four stalking victims report some form of cyberstalking. Eighty-three percent of these victims reported cyberstalking through unwanted e-mails and thirty-five percent reported cyberstalking through instant messaging. Bureau of Justice Statistics, *Stalking,*

https://www.bjs.gov/content/pub/press/svuspr.pdf (accessed May 27, 2021).[13]

D. Human Trafficking

Human trafficking, both for labor and commercial sexual activity, is illegal under federal law. The primary offenses that criminalize sex trafficking of minors and coerced commercial sexual activity of adults are found in Chapter 77 of Title 18 of the United States Code. Specifically, 18 U.S. § 1591 criminalizes the sex trafficking of minors or the use of coercion to cause an adult to engage in criminal activity.

[13] This information can be obtained by searching the BJS website for the term "stalking."

Chapter 3

PRE-TRIAL PROCEDURES

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I. Forensic Medical Examinations

A. Components of Forensic Medical Examinations

A forensic medical examination is an examination of a possible sexual assault victim by qualified medical personnel to gather evidence that may be used in court. W. Va. Code § 61-8B-1(12). Components of such an exam include an examination of the victim for physical trauma, for possible evidence of penetration, and for evidence that may indicate the assailant's use of force. An interview of the victim is also a component of the examination.[1] Finally, such an examination includes the collection and

[1] Regarding the admissibility of statements to a forensic nurse, the West Virginia Supreme Court held that: "When a child sexual abuse or assault victim is examined by a forensic nurse trained in sexual assault examination, the nurse's testimony regarding statements made by the child during the examination is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, *West Virginia Rule of Evidence* 803(4), if the declarant's motive for making the statement was consistent with the purposes of promoting treatment and the content of the statement was reasonably

evaluation of any other evidence that may be possibly relevant to whether a sexual offense occurred and to the identity of the assailant.

Although the term "forensic medical examination" refers to medical personnel who are "qualified to gather evidence of the violation in a matter suitable for use in a court of law," the statute does not identify specific qualifications for medical personnel who conduct these examinations. W. Va. Code § 61-8B-1(12). One type of medical professional who conducts these exams is a sexual assault nurse examiner or ("SANE"). A SANE is a registered nurse who has been specifically trained to conduct a forensic medical examination and to provide both physical and emotional care to victims of sexual violence. As part of his or her training, a SANE is required to complete clinical requirements. A SANE may be trained to examine adult victims, child victims, or both. West Virginia Foundation for Rape Information and Services http://www.fris.org (accessed April 28, 2021).

B. A Victim's Rights with Regard to a Forensic Medical Examination

The victim has the right to have the examination conducted by a qualified medical provider. However, as discussed above, the statute does not delineate the qualifications for such a provider. Sexual assault nurse examiners (SANE) are medical providers who can perform such an exam.

A sexual assault victim has rights once he or she undergoes a forensic medical examination. W. Va. Code § 61-11A-9. The first right involves the right to have the evidence collection kit tested and preserved by law enforcement. Secondly, a victim has the right to obtain written policies that govern a forensic medical examination and the preservation of evidence gathered from the examination. Further, the victim has the right to be informed of the results of the examination, provided that the disclosure would not impede an investigation.

The statute also establishes rights associated with the preservation of evidence. A victim may request, in writing, that he or she be notified of the intended destruction of evidence from a forensic examination no less than 60 days before the evidence is destroyed. The notice must be provided to a victim via U.S. Mail, restricted delivery to the victim's last

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relied upon by the nurse for treatment. In determining whether the statement was made for purposes of promoting treatment, such testimony is admissible if the evidence was gathered for a dual medical and forensic purpose, but it is inadmissible if the evidence was gathered strictly for investigative or forensic purposes." Syl. Pt. 6, *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010). See Chapter 6 for a discussion of the admission of statements made for purposes of medical diagnosis or treatment.

known address. The statute, however, does not require actual receipt of the notice by the victim. Rather, the custodian of evidence will fulfill the duty to provide notice when the notice is sent to the victim's last known address.

In turn, a victim may request, in writing, that the evidence be preserved for an additional period of time. However, the custodian is not required to preserve the evidence beyond an additional ten years.

C. Prohibition on Court-Ordered Forensic Medical Examinations

West Virginia Code § 61-8B-11(e) prohibits courts from ordering alleged victims of sexual offenses, whether children or adults, to undergo physical or gynecological examinations of the breast, buttocks, anus, or any part of the sex organs. The term "sexual offense" includes any offense in which sexual intercourse, sexual contact or sexual intrusion is an element of the offense. See W. Va. Code § 61-8B-1. In addition to prosecutions pursuant to Article 8B of Chapter 61, the prohibition applies to prosecutions involving incest (W. Va. Code § 61-8-12) or sexual abuse by a parent, guardian, custodian, or person in position of trust (W. Va. Code § 61-8D-5).

If an alleged victim refuses to undergo a physical examination, that refusal may not provide a basis to exclude evidence obtained from other examinations of an alleged victim. W. Va. Code § 61-8B-11(e)(2). However, this limitation on the admissibility of evidence is subject to constitutional requirements. This subsection, therefore, allows the admission of evidence regarding an initial physical and/or gynecological examination, but prevents courts from ordering such an examination if a defendant or other party requests that the alleged victim undergo an additional examination.

Given the prohibition on court-ordered forensic medical examinations of a sexual assault victim, it can be concluded that the case, *State v. Delaney*, 187 W. Va. 212, 417 S.E.2d 903 (1982) has been superseded insofar as it allowed, in specified circumstances, that a defendant or other party could move for an additional physical examination. It should be noted that *Delaney* had limited, rather than expanded, the right of a party to seek a court-ordered examination. Similarly, the statute also supersedes the holding of *State ex rel. J.W. v. Knight*, 223 W. Va. 785, 679 S.E.2d 617, *cert denied*, 130 S. Ct. 461 (2009) which had allowed a limited medical examination of an alleged sexual assault victim.

D. Payment Provisions

The West Virginia Prosecuting Attorneys Institute ("PAI") is responsible for the payment for a forensic medical examination, W. Va. Code § 61-8B-16(a), and the Legislature has established a forensic medical examination fund for these examinations. W. Va. Code § 61-8B-15. Although the PAI must pay for the examination, it is not responsible for nonforensic procedures such as prophylactic treatment, pregnancy testing, testing for sexually transmitted disease, and treatment for other injuries. A defendant at sentencing, however, shall be ordered to pay restitution for the victim's physical, psychological, or economic injuries to "the greatest extent economically practicable when considering the financial circumstances" of the defendant. W. Va. Code § 61-11A-4(a). Pursuant to West Virginia Code § 61-8B-13, a court may also order a defendant to pay a victim's costs for any medical, psychological, or psychiatric treatment. A defendant can be ordered to pay these costs whether or not the victim sustained a physical injury. Alternatively, a victim may request compensation from the crime victim's compensation fund. W. Va. Code §§ 14-2A-1, *et seq*. For a discussion of the prosecutor's duty concerning this fund, see Chapter 3, VI. Pretrial Notification to Victims and Witnesses of Criminal Proceedings.

II. Mandatory HIV-Related Testing

When an individual is charged with specific sexual offenses, the court is required to order the individual to undergo HIV-related testing.[2] W. Va. Code § 16-3C-2(h). The following offenses are subject to the mandatory testing requirements: prostitution, sexual abuse, sexual assault, incest, or sexual molestation.[3] The applicable regulations governing mandatory HIV testing indicate that the testing applies both to adults and to juveniles who are charged with specified sexual offenses. W. Va. C.S.R. Title 64, Section 4.3.b.

The applicable regulations have established a procedure for the testing of a defendant or juvenile respondent charged with one of the specified offenses. W. Va. C.S.R. Title 64, Series 64, Section 4.3b. The court with jurisdiction over the charged offense should require the defendant or juvenile respondent to undergo the testing within 48 hours of the initial appearance. W. Va. C.S.R. § 64-64-4.3.b.1. The court may delay the testing if the defendant or juvenile respondent requests a

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[2] For a discussion of mandatory HIV-related testing upon conviction, see Section I of Chapter 7.

[3] There is no West Virginia crime specifically denominated as "sexual molestation."

hearing, but the testing cannot be delayed beyond 48 hours of the issuance of an indictment or information for a defendant or the filing of a juvenile petition. W. Va. C.S.R. § 64-64-4.3.b.1.A. If the defendant or juvenile respondent is in custody, then the medical staff at the facility should perform the testing. If the defendant or juvenile respondent is released, then the designated local health board should conduct the testing. W. Va. Code § 16-3C-2(h)(3).

When the testing is completed, a copy of the test results must be transmitted to the court and must be maintained in the court file as a confidential record. W. Va. C.S.R. § 64-64-4.3.b.2. In turn, the clerk should provide a copy of the test results to counsel for the defendant or juvenile and the prosecuting attorney. The prosecutor is the official responsible for communicating the test results to the victim. W. Va. C.S.R. § 64-64-4.3.b.2.

If the test results are negative, the court, upon the State's request, may require the defendant to undergo further testing. W. Va. Code § 16-3C-2(h)(10). Any testing should comply with guidelines established by the United States Public Health Service. Unless a defendant is indigent, the court is required to order the defendant to pay restitution to the State for the costs of the testing and counseling for the defendant and the victim. W. Va. Code § 16-3C-2(h)(13).

III. Bail and Conditions Upon Release

Note: This section addresses pretrial release only. For a discussion of post-conviction bail, see Chapter 7.

A. General Principles for Bail

As an initial matter, a defendant who has been charged with a crime of sexual violence is subject to the general constitutional provisions, statutes, and case law that govern pretrial release in all criminal cases. A person who is charged with an offense that is *not* punishable by life imprisonment has the right to bail. W. Va. Code § 62-1C-1(a); *State ex rel. Hutzler v. Dostert*, 160 W. Va. 412, 236 S.E.2d 336 (1977). In cases involving a crime that can be punished by life imprisonment, the court has the discretion to determine whether the defendant may be admitted to bail. *Id*. When a defendant has been charged with an offense punishable by life imprisonment, the court should consider two factors: 1) whether the defendant will appear for trial; and 2) whether it is probable that the defendant will commit other crimes in the interim. Syl. Pt. 1, *State ex rel. Ghiz v. Johnson*, 155 W. Va. 186, 183 S.E.2d 703 (1971). In cases in which bail is discretionary, "[C]onsideration should be given to all facts and circumstances of each case and no absolute rule or policy should be

adopted, nor should one circumstance be considered to the exclusion of all facts which should be considered." Syl. Pt. 2, in part, *Ghiz*, *supra*.

The purpose of bail is to secure the appearance of the defendant for any pretrial proceedings and trial. W. Va. Code § 62-1C-2. When setting bail, the court should consider the following factors: the seriousness of the offense; the defendant's prior criminal record; the defendant's financial ability; and the probability that the defendant will appear at all required proceedings. W. Va. Code § 62-1C-3. With regard to the considerations regarding the terms and conditions of bail: "A case by case determination of the right to and amount of bail in criminal proceedings is consistent with the Bill of Rights provision that excessive bail shall not be required and with the discretion vested in the courts under provision of West Virginia Code § 62-1C-1." Syl. Pt. 1, *State ex rel. Hutzler, supra.*

West Virginia Code § 62-1C-1a(a) has established that a person charged with a misdemeanor should be released on his or her own recognizance, unless he or she is charged with certain specified misdemeanors. One of the identified misdemeanors includes any misdemeanor sexual abuse charge.[4] A person who is charged with a misdemeanor sexual abuse charge, as with the other specified misdemeanors, is entitled to be admitted to bail with the least restrictive bail conditions imposed. However, he or she is not entitled to a personal recognizance bond, and is not entitled to an automatic bail hearing five days after an initial appearance if he or she was not released at the initial appearance. The bail conditions should be designed to ensure the defendant's appearance, the safety of the community and the victim, and to ensure the safety and maintenance of evidence. W. Va. Code § 62-1C-1a(a)(2). The amount of cash bail for misdemeanor offenses may not exceed more than three times the maximum fine for the offense. If the defendant is charged with more than one misdemeanor, the amount of cash bail cannot exceed triple the highest maximum fine of the charged offense.

When bail is set by the magistrate court, a defendant may challenge the amount of bail or the denial of discretionary bail by summary petition to the circuit court. When the defendant is challenging a circuit court order concerning bail, he or she may file a summary petition in the West Virginia Supreme Court. W. Va. Code § 62-1C-1(c).

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[4] Sexual abuse in the second degree and the third degree are misdemeanor sexual abuse charges. W. Va. Code §§ 61-8B-8, -9.

B. Protection of Victim

When a court determines the conditions of release for a defendant, it should consider whether the defendant poses a threat to the victim or whether there are other reasons for prohibiting contact between the defendant and victim. See *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996). In appropriate cases, the court may safeguard a victim by prohibiting the defendant from contacting the victim. See W. Va. Code § 62-1C-17a(b). The violation of such a provision in a pretrial release order that is designed to protect a victim or other person may subject the defendant to further criminal charges. W. Va. Code §§ 48-27-903; 48-28-7.

C. Notice to Victim of Pretrial Release

West Virginia Code § 61-11A-8 has established procedures for the notification of victims of specified crimes when defendants are released on bail before trial, are placed on alternative sentencing, or are released from incarceration. However, the following discussion addresses pretrial release only.

The following sexual offenses trigger the statutory notification procedures: first degree sexual assault and any sexual offense against a minor. W. Va. Code § 61-11A-8(e).[5] The duty to notify a victim arises when a criminal complaint is filed. Specifically, the prosecuting attorney is required to notify a victim or family member, either by telephone or in writing, that the victim may request that he or she be notified either before or at the time of any release pending judicial proceedings, i.e., release on pre-trial or post-trial bail. The prosecutor should inform the victim or family member that their request should be made in writing. W. Va. Code § 61-11A-8(f).

So long as the victim is alive and is a competent adult, the prosecutor should provide notice of the release to the victim, even if another family requested the notification. A victim may also request that notification be provided to another adult, but must provide the person's contact information in writing. If the victim is not alive or is not competent, then the notice must be provided to the first family member who requests notification. If the victim is a minor, the notice must be provided to the custodial parent, guardian, or custodian. W. Va. Code § 61-11A-8(f).

The code section does not specify how notice must be provided, i.e., whether by phone or in writing. However, if notice is attempted by telephone, notice must be given to the victim or other person requesting

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[5] The other offenses include: murder, aggravated robbery, kidnapping, arson, or any violent crime against a person.

notification. The notice is insufficient if it is left on voicemail, on another recording device, or is given to another member of the household. W. Va. Code § 61-11A-8(h).

D. Bail Determination Hearings

By motion, a defendant who is taken into custody may seek release before trial, during trial, pending sentencing, and during an appeal. By motion, the defendant may also seek to reduce the amount of bail and challenge any other terms and conditions of release. W. Va. Code §§ 62-1C-1, -1a, and -17a. Rule 46 of the West Virginia Rules of Criminal Procedure establishes the procedures to challenge any of the terms and conditions of bail.[6]

Once a defendant requests admittance to bail or other relief related to bail, the court having jurisdiction over the defendant is immediately required to schedule a hearing. W. Va. R. Crim. P. 46(h). The hearing must be conducted no later than five days after the motion was filed unless the defendant consents and a party has shown cause for the delay. W. Va. R. Crim. P. 46(h)(1)(A). If the defendant is absent from the proceedings, the hearing may only be continued if a party shows "that extraordinary circumstances exist and that the delay is indispensable to the interests of justice." W. Va. R. Crim. P. 46(h)(1)(B).

Subsection (h)(2) of Rule 46 indicates that the parties may offer evidence concerning any issues associated with the defendant's bail. A defendant may testify at the bail hearing and later decline to testify at trial. If a defendant chooses not to testify at trial, testimony from the bail hearing is not admissible at trial. W. Va. R. Crim. P. 46(h)(3). If the defendant testifies at trial, his or her testimony from the bail hearing may be admitted, provided that there is a lawful basis for its admission. At a hearing addressing bail, hearsay testimony may be admitted provided: "(A) That the source of hearsay is credible; (B) That there is a factual basis for the information furnished; and (C) That it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing." W. Va. R. Crim. P. 46(h)(4). The court is required to rule expeditiously on the motion and is required to make written findings of fact and conclusions of law. Once the court has ruled on the motion, the defendant may seek relief by summary petition to the circuit court (assuming the magistrate

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[6] It should be noted that persons charged with misdemeanor sexual abuse charges are not entitled to be released on his or her own recognizance, and are not entitled to an automatic bail hearing five days after an initial appearance if he or she was not released at the initial appearance. W. Va. Code § 62-1C-1a.

court conducted the hearing), or by summary petition to the West Virginia Supreme Court. W. Va. Code §§ 62-1C-1(c) and -17a.

E. Child Abuse Cases

In all cases in which a defendant is charged with an offense established by Article 8D, Chapter 61 of the West Virginia Code ("Child Abuse"), the terms of any pretrial release order must prohibit the defendant from living in the same residence with the victim and must prohibit contact with the victim. W. Va. Code § 62-1C-17a(a). The crime of sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child, West Virginia Code § 61-8D-5, is the primary crime of sexual violence that would warrant this prohibition in a pretrial release order. Although these provisions include mandatory language, the statute indicates that such a provision in a specific case may be challenged by the filing of a summary petition.

F. Sexual Offense Cases

In any case in which a defendant is charged with a sexual offense, a court may impose any condition on a defendant concerning contact with a victim that it deems necessary. W. Va. Code § 62-1C-17a(b). Such a condition is not dependent on the age of the victim. Bail may also be required of a witness in certain circumstances. W. Va. Code § 62-1C-15. When a court imposes bail upon a witness, a court may also impose conditions on a witness concerning contact with the victim. W. Va. Code § 62-1C-17a(b).

G. Crimes Against Family or Household Members

When the victim in any criminal case is a family or household member of the defendant, the court may prohibit the defendant from having any type of contact with the victim. W. Va. Code § 62-1C-17c(a). The term "family or household member" is not more precisely defined in this statute. Presumably, the term includes those persons defined as "family or household members" for domestic violence crimes. W. Va. Code §§ 61-2-28; 48-27-204. However, it might also apply to a victim who does not fall within this statutory definition, since the court can impose any reasonable bail condition regarding contact with any victim.

When a court determines the conditions of release for a defendant, it should consider whether he or she poses a threat to the victim. If the court concludes that the defendant poses such a threat, it is required to impose conditions that prohibit contact with the victim. The statute expressly requires the court to impose the following conditions: "[T]hat the defendant refrain from entering the residence or household of the victim, the victim's school, and the victim's place of employment or otherwise

contacting the victim and/or minor child or household member in any manner whatsoever, and shall refrain from having any further contact with the victim." W. Va. Code § 62-1C-17c(b). A defendant who violates this type of bail condition may be subject to bail revocation proceedings, including the forfeiture of bail, and a bench warrant may be issued for his or her arrest. Additionally, a defendant who violates the no-contact provisions imposed as a condition of bail may be charged with a misdemeanor. W. Va. Code §§ 48-27-903; 48-28-7.

H. Harassment

When a defendant has been charged with harassment, the defendant must be prohibited from contacting the alleged victim when he or she is released on bond. W. Va. Code § 61-2-9a(k). The release order must prohibit all contact, including direct or indirect contact or verbal or physical contact. The violation of such a provision may result in additional criminal charges. W. Va. Code §§ 48-27-903; 48-28-7; and 53-8-10.

I. Enforcement Proceedings for Violations of Bail Conditions

1. Bail Revocation Proceedings

The West Virginia Supreme Court has recognized that: "[A]n accused, admitted to bail, has an interest in remaining free upon that bail." *Marshall v. Casey*, 174 W. Va. 204, 208, 324 S.E.2d 346, 350 (1984). The Court also recognized that due process principles apply to bail revocation proceedings. Based upon this recognition, the Court held that the procedure established by subdivision (h) of Rule 46 of the West Virginia Rules of Criminal Procedure satisfies the due process principles that apply to bail revocation proceedings. *Marshall*, 174 W. Va. at 209, 324 S.E.2d at 351-52.

A defendant who is admitted to bail may be subject to bail revocation proceedings for failing to appear as required or for the violation of any of the conditions of release. Bail revocation proceedings may be initiated by the prosecuting attorney, a law enforcement officer, surety or other appropriate person. The initial revocation of bail should be supported by credible evidence, such as, for example, a sworn affidavit. See Syl. Pt. 2, *Marshall*, *supra*. Once bail has been initially revoked, the defendant, by motion, may seek reinstatement of bail pursuant to the procedures established by subdivision (h) of Rule 46 of the West Virginia Rules of Civil Procedure. See Chapter 3, Section III. D. Bail Determination Hearings.

2. *Bond Forfeiture*

If a defendant acts as a surety for himself, bond may be forfeited when the defendant violates any of the terms or conditions of bail, such as contact with a victim, or a willful failure to appear. W. Va. Code § 62-1C-7(1). A person who acts as a surety for the defendant may only be subject to bond forfeiture proceedings for the defendant's willful failure to appear. W. Va. Code § 62-1C-7(2). Therefore, bail revocation proceedings, as opposed to bond forfeiture proceedings, would be the typical remedy when a defendant violates any terms or conditions associated with victim contact. (See West Virginia Code §§ 62-1C-7 through 62-1C-9 and Rule 46(e), W. Va. R. Crim. P., for the procedures for bond forfeiture.)

IV. Discovery In Sexual Offense Cases

A. General Discovery Principles

With regard to discovery in all criminal cases, not just cases involving prosecutions for sexual offenses, the West Virginia Supreme Court recognized that:

> [I]t is necessary in most criminal cases for the State to share its information with the defendant if a fair trial is to result. Furthermore, . . . complete and reasonable discovery is normally in the best interest of the public. *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 139, 454 S.E.2d 427, 433 (1994).

The Court's recognition of the importance of discovery provides a backdrop for the following discussion of the applicable discovery rules.

Enacted in 1965, West Virginia Code §§ 62-1B-1, *et seq.* generally identifies evidence that may be disclosed, and it cursorily outlines the procedure for disclosure of evidence. The West Virginia Rules of Criminal Procedure -- most notably Rule 12.1 (Notice of Alibi), Rule 12.2 (Notice of Insanity Defense), Rule 16 (Discovery and Inspection), and Rule 26.2 (Production of Statements of Witnesses) -- establish procedures for the disclosure of different types of evidence commonly used in criminal cases. Adopted in 1999, Trial Court Rule 32 established a detailed procedure for the disclosure of evidence between the State and defense counsel. It expressly provides that: "The purposes of this rule are to expedite the transfer of discoverable material contemplated by the West Virginia Rules of Criminal Procedure between opposing parties in criminal cases in circuit court . . ." W. Va. T.C.R. 32.01. Trial Court Rule 32.01 further states that: "It is the intent of this rule to encourage complete and open discovery

consistent with applicable statutes, case law, and rules of court at the earliest practicable time." *Id*.

B. Mandatory Discovery of Exculpatory Evidence

Rule 32.02(a) of the West Virginia Trial Court Rules establishes that the State has a duty to disclose exculpatory evidence within the scope of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). As stated in this rule, exculpatory evidence is "evidence favorable to the defendant on the issue of the defendant's guilt or punishment." W. Va. T.C.R. 32.02(a). This type of evidence includes: "[T]he existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *United States v. Giglio*, 405 U.S. 150 (1972)." W. Va. T.C.R. 32.02(a). Trial Court Rule 32.02, therefore, codified the due process protections afforded a defendant by *Brady* and *Giglio*. In addition, the West Virginia Supreme Court has held that: "A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution." Syl. Pt. 4, *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982).

The West Virginia Supreme Court has established the following test to determine whether a *Brady* violation has occurred:

> (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial. Syl. Pt. 2, in part, *State v. Youngblood,* 221 W. Va. 20, 650 S.E.2d 119 (2007).

All three of these factors must be satisfied to establish that exculpatory evidence should have been disclosed.

Notably, the express language of Trial Court Rule 32.02 requires the disclosure of exculpatory evidence without regard to whether or not the evidence is material to an issue in the case. However, the West Virginia Supreme Court has held that the evidence must be material and the failure to disclose it must have prejudiced the defendant. See Syl. Pt. 2, *Youngblood*, 221 W. Va. 20, 650 S.E.2d 119. Although there appears to be a conflict between the text of Rule 32.02 and the third factor of the test established by *Youngblood*, this apparent conflict is resolved by examining the timing of the disclosure. Before trial, a prosecutor has the

duty to disclose all exculpatory evidence without regard to its materiality. When a court examines whether a *Brady* violation actually occurred subsequent to trial, the court must consider whether the evidence was material or whether the failure to disclose the evidence prejudiced the defendant.

C. Applicability of *Brady* to Plea Negotiations

The West Virginia Supreme Court has upheld the applicability of *Brady* during plea negotiations. *Buffey v. Ballard*, 236 W. Va. 509, 782 S.E.2d 204 (2015). In this habeas corpus case, a defendant challenged his conviction after he had pled guilty to a burglary charge and two sexual assault charges. He had pled guilty to these offenses in response to a time-limited plea agreement from the State. During two habeas proceedings, it became clear that the defendant had pled guilty before he had received DNA test results that excluded him as the source of DNA evidence in the victim, an elderly woman. Holding that *Brady* applied to plea negotiations, the Supreme Court allowed the defendant to withdraw his guilty plea.

D. Discovery of Confidential, Exculpatory Evidence

The West Virginia Supreme Court has established an *in camera* review procedure for the discovery of evidence that is confidential, as established by West Virginia Code § 49-5-101, but is also exculpatory under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). *State of West Virginia ex rel. Lorenzetti v. Sanders*, 238 W. Va. 157, 792 S.E.2d 656 (2016). In a syllabus point, the Court held that:

> Before allowing a defendant to review records concerning a child that are confidential under West Virginia Code Section 49-5-101 but may contain exculpatory or impeachment evidence which is material to the defense, the circuit court should conduct an *in camera* review of the records to determine whether and to what extent they will be disclosed to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963). In conducting its *in camera* review, the circuit court must balance the Defendant's interest in a fair trial with the State's interest in protecting a child's confidentiality and determine whether an order limiting the examination and use of the records is necessary for the child's safety. Syl. Pt. 2, *Lorenzetti, supra.*

In this case, the defendant's eight-year-old daughter, S.F., accused her father, the defendant, of having sex with her. The defendant was also subject to an abuse and neglect case based on the same allegations. During the course of the abuse and neglect case, the defendant's lawyer discovered that the child may have recanted her allegations and that S.F.'s mother may have been advised to adopt a position against the defendant so that she could be reunified with her daughter. Based upon this information, the defendant requested discovery of S.F.'s DHHR files based upon *Brady v. Maryland*. In response to the request, the State maintained that the records were confidential according to West Virginia Code § 49-5-101 and also requested that the trial court review the records *in camera* to determine whether the records were relevant or material to the criminal case.

To resolve this issue, the trial court reviewed the records *in camera* and conducted a closed hearing. At the hearing, the defendant's lawyer requested that he be allowed to review the files briefly. At the hearing, the trial court initially found that the DHHR files appeared to be "highly relevant" because they included the victim's recantations of the allegations. The trial court also allowed the defendant's lawyer (but not the defendant) to review the files briefly in the jury room. After reviewing the prosecutor's file, the defendant's lawyer argued that the files indicated that S.F. had withdrawn her allegations many times and that the DHHR had improperly reinforced or "bolstered" S.F.'s accusations. He further argued that he would present expert testimony at trial to challenge the child's testimony and to show that the child's statements had been improperly influenced.

In a written order, the trial court found that the records included "potentially exculpatory" material and that the evidence would be material to impeachment of witnesses for the State. In addition, the trial court concluded that the defendant's lawyer and expert should have access to the DHHR files, but the defendant, his family and the general public would not be allowed to review the evidence. In turn, the State sought a writ of prohibition to prevent the enforcement of the order. In support of its position, the State argued that the defendant did not have a constitutional right to the requested files and the DHHR files are confidential under West Virginia Code § 49-5-101.

To determine whether the evidence was exculpatory, the Court applied the test it had previously established to determine whether a *Brady* violation has occurred. Syl. Pt. 2, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007). The three factor test states as follows:

> 1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment

> evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial. Syl. Pt. 2, in part, *Youngblood, supra.*

To begin its analysis, the Court noted that the parties did not dispute that the evidence had been suppressed, the second *Youngblood* element. Next, the Court proceeded to analyze whether the evidence was favorable to the defendant as exculpatory or impeachment evidence. The State argued that the evidence was "merely" impeachment evidence and did not constitute exculpatory evidence. The Court rejected the State's argument and concluded that the evidence satisfied the first *Youngblood* element. Further, the Supreme Court found that the evidence was material because the evidence could cast doubt on the alleged victim's testimony. The Court also found that the DHHR files included the victim's multiple recantations, the circumstances when she made the recantations and the DHHR's possible bolstering of the accusations. For these reasons, the Court held that all three *Youngblood* elements had been met. 238 W. Va. at 161-62, 792 S.E.2d at 660-61.

As an additional basis to shield the evidence from discovery, the State argued that the relevant statute, West Virginia Code § 49-5-101, established the records are confidential. The Supreme Court, however, found that the statute included exceptions to the general confidentiality provisions, including circumstances when a court finds that the evidence is relevant and material to issues in a proceeding. W. Va. Code § 49-5-101(b)(4).[7] To resolve this issue, the Supreme Court relied upon *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989 (1987), a United States Supreme Court opinion, that established that a trial court should conduct an *in camera* review of child welfare agency records before allowing discovery of them. Based upon the holding of *Pennsylvania v. Ritchie*, the West Virginia Supreme Court concluded that the trial court should conduct an *in camera* review of the DHHR records and balance the defendant's interest in a fair trial with the State's interest in protecting the confidentiality of a child victim. The Court further held that the trial court should determine whether it should enter an order limiting the disclosure and use of the evidence. Based upon this reasoning, the Supreme Court found the evidence in the DHHR files must be disclosed and declined to issue a writ of prohibition.

[7] This subsection allows disclosure of the records: "Pursuant to an order of a court of record. However, the court shall review the record or records for relevancy and materiality to the issues in the proceeding and safety, and may issue an order to limit the examination and use of the records or any part thereof." W. Va. Code § 49-5-101(b)(4).

E. Discovery of Rule 404(b) Evidence

Note: This section addresses only the discovery of Rule 404(b) evidence. For a discussion of the requirements for admitting such evidence, see Chapter 6.

In general, evidence of a person's character or other bad acts is not admissible to prove that the defendant committed the crime for which he is charged. W. Va. R. Evid. 404. However, evidence of other bad acts may be admissible to prove issues such as motive, opportunity, intent, or plan. In sexual offense cases involving victims who are children, the West Virginia Supreme Court has held that: "Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to evidence reasonably close in time to the incident(s) giving rising to the indictments." Syl. Pt. 2, in part, *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990). The introduction of this type of evidence at trial has resulted in challenges both to the admissibility and to the discovery of this evidence.

With regard to discovery, Rule 404(b) of the West Virginia Rules of Evidence requires any party seeking the admission of this type of evidence to provide notice to the opposing party.[8] See T.C.R. 32.02. The party must identify the specific purpose for the admission of such evidence and should do so before trial. The trial court may, however, excuse the lack of pretrial notice upon a showing of good cause. W. Va. R. Evid. 404(b). See Syl. Pt. 3, *State v. Mongold*, 220 W. Va. 259, 647 S.E.2d 539 (2007).

The case of *State v. Mongold*, 220 W. Va. 259, 647 S.E.2d 539 (2007) provides an analysis of a situation involving good cause to excuse lack of pretrial notice of the proposed admission of Rule 404(b) evidence. In this case, the defendant was convicted of the crime of death of a child by a parent, guardian, or custodian as a result of child abuse. Before trial, the prosecution had disclosed evidence of a situation in which Mr. Mongold had grabbed another child by the throat and pinned him against a wall. Although the information was disclosed before trial, the prosecutor, in a pretrial conference, had indicated at that time that he did not intend to present any 404(b) evidence. At trial, the defendant presented unanticipated evidence of his generally good relationships with children

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[8] Before the adoption of 2014 amendments to West Virginia Rule of Evidence 404(b), the State was only under a duty to disclose this evidence when a defendant requested disclosure. See Syl. Pt. 5, *State v. Mongold*, 220 W. Va. 259, 647 S.E.2d 539 (2007).

and expert testimony that the child's injuries could have been accidental. In response, the prosecutor sought and was allowed to cross-examine the defendant concerning this earlier incident of child abuse. Affirming the trial court, the Supreme Court held the State had shown good cause to excuse lack of pretrial notice. In footnote ten, the Court further observed that if it had found that the trial court had abused its discretion, it would have concluded that any error concerning the lack of pretrial notice was harmless.

In an earlier case involving discovery of 404(b) evidence, a defendant was convicted of the first degree sexual assault of an 11-year old girl. *State v. Graham*, 208 W. Va. 463, 541 S.E.2d 341 (2000). The defendant had a prior conviction for a sexual offense against a child, and the State disclosed its intent to introduce evidence of the conviction to show the defendant's lustful disposition toward children. The State disclosed the evidence prior to trial but after the time established by the trial court. The Supreme Court concluded that the defendant was not prejudiced by the untimely disclosure because the defendant was provided notice of the evidence approximately three months before trial. The Court also held that the notice was sufficient because it included the case style, date, and case number of the prior conviction. Additionally, the notice expressly stated that the purpose of presenting the evidence was to prove the defendant's lustful disposition towards children.

Another issue with regard to notice of Rule 404(b) evidence is whether the evidence is "intrinsic" or "extrinsic" evidence. *State v. Hutchison*, 215 W. Va. 313, 599 S.E.2d 736 (2004); *State v. Slaton*, 212 W. Va. 113, 569 S.E.2d 189 (2002); *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). In footnote 29 of *LaRock*, the Supreme Court explained that evidence is "intrinsic" if: the evidence of the other acts and evidence of the other crime are "inextricably intertwined," the acts are part of a "single criminal episode" or they are "necessary preliminaries" to the crime. *LaRock*, 196 W. Va. 294, 470 S.E.2d 613 n.29 (citations omitted). If the evidence is intrinsic to the crime that is charged, the State is not required to provide notice of intrinsic evidence prior to its introduction at trial. *Hutchison*, 215 W. Va. at 321, 599 S.E.2d at 744.

The *Slaton* case illustrates the type of evidence in a sexual offense case that may be considered "intrinsic" as opposed to "extrinsic." In *Slaton*, the defendant was charged with first degree sexual abuse and sexual abuse by a custodian of a five-year-old boy. The child and other witnesses testified that the defendant had sexually assaulted him more than once. At trial, the defendant sought to limit the testimony to one episode, but the trial court found that the instances were so close in time that they constituted a single criminal episode. Based upon this ruling, the trial court allowed the testimony regarding the other occurrences. On

appeal, the Supreme Court affirmed this ruling and the reasoning for it. Although *Slaton* does not address whether pretrial notice was given, it illustrates the type of evidence in a sexual offense case that can be considered "intrinsic" and, therefore, exempt from the notice requirement of Rule 404(b). See *State v. Harris*, 230 W. Va. 717, 742 S.E.2d 133 (2013) for another case finding that the defendant's multiple sexual acts against a child were "intrinsic" and were not Rule 404(b) evidence.

F. Initiation of Discovery

According to the applicable criminal discovery rules, discovery may only be initiated at the defendant's request. W. Va. R. Crim. P. 16(a)(1); W. Va. T.C.R. 32.03. After the defendant has requested discovery, the State may then request discovery. The defendant has the duty to respond to the State's request only after the State has produced the defendant's requested discovery. W. Va. R. Crim. P. 16(b)(1); W. Va. T.C.R. 32.03; Syl. Pt. 1, *Marano v. Holland*, 179 W. Va. 156, 366 S.E.2d 117 (1988). As established by Trial Court Rule 32.03, the defendant may request discovery as early as arraignment or at any other time established by the court. The parties, of course, may always agree to exchange discovery at an earlier date.

According to Trial Court Rule 32.03, once a defendant requests discovery, the parties are required to participate in a discovery conference within 14 days. Trial Court Rule 32.03 establishes a preference to conduct the conference in person; it does permit, however, telephonic conferences. The purpose of the conference is to facilitate compliance with Rule 16 of the West Virginia Rules of Criminal Procedure and for the parties to disclose and make available any items within their custody or control, or those that may become known to them.

G. Discovery from the State

1. Defendant's Statements

Through discovery, the defendant may request: a) a defendant's written or recorded statement, including a confession; b) the portion of a written record that contains any of the defendant's relevant oral statements; and c) the substance of any relevant oral statement made by the defendant that the State intends to introduce at trial. W. Va. R. Crim. P. 16(a)(1); W. Va. T.C.R. 32.03(a). Notably, the third category of statements -- *any* oral statement of the defendant that the State intends to introduce at trial -- is not limited to statements made to law enforcement officers. Rather, it includes any oral statement made by the defendant that will be introduced at trial. Syl. Pt. 3, *State v. Miller*, 178 W. Va. 618, 363 S.E.2d 504 (1987). In addition to the defendant's statements, the

State is required to disclose the defendant's criminal record. W. Va. R. Crim. P. 16(a)(1)(B).

2. Documents and Tangible Objects

As established by Rule 16(a)(1)(C), a defendant is entitled to inspect and copy books, papers, photographs and documents that are material to the preparation of the defense or that the State intends to use in its case in chief. A defendant is also entitled to inspect any tangible objects. The limits on the inspection of tangible objects and substances are important to sexual offense prosecutions because DNA evidence often plays a central role in these types of prosecutions.

The West Virginia Supreme Court has recognized that the right of inspection established by Rule 16(a)(1)(C) "includes the right to have the defendant's own expert examine the tangible evidence . . .." Syl. Pt. 7, in part, *State v. Crabtree*, 198 W. Va. 620, 482 S.E.2d 605 (1996). A criminal defendant who proposes such an inspection must file a motion that sets forth the circumstances of the proposed analysis, the identity of the expert who will conduct the analysis, and the expert's qualifications and scientific background. The trial court should, "in its discretion, provide for appropriate safeguards, including, where necessary, the performance of such tests at the State laboratory under the State's analyst." Syl. Pt. 8, in part, *Crabtree*, *supra*. This type of motion should ordinarily not be denied unless it was not timely made or was not made in good faith. 198 W. Va. at 632-33, 482 S.E.2d at 617-18.

Although a defendant should ordinarily be permitted to conduct an independent analysis of substantive evidence, circumstances arise when the State's testing will consume the sample so that independent analysis is impossible. In these circumstances, "the government must preserve as much documentation of the test as is reasonably possible to allow for a full and fair examination of the results by a defendant and his experts." Syl. Pt. 4, in part, *State v. Thomas*, 187 W. Va. 686, 421 S.E.2d 227 (1992). Explaining the type of documentation that should be provided, the Court noted that:

> [W]hen a test uses up an entire sample, photographic documentation of the test gives an independent expert a view of how the test was performed. In addition to photographs, the State should also provide the laboratory notes, reports, and any other records of the test in question. Such documentation is required to simulate, as closely as possible, the independent review that would have been

> conducted were there enough of a sample to provide to the defendant. 187 W. Va. at 693, 421 S.E.2d at 234.

In *Thomas*, the Court concluded that the trial court committed reversible error by not suppressing the results of specialized blood testing when the State both consumed the sample and did not photographically preserve the results of the testing.

Both the consumption of the evidence and the failure to preserve the testing results must be shown before the defendant can prove that the test results should be suppressed. When a defendant claimed that DNA results should have been excluded because the DNA sample was consumed, the Supreme Court rejected the argument because the defendant failed to show that there was inadequate documentation of test results for his experts to review. *State v. Jarvis*, 199 W. Va. 38, 483 S.E.2d 38 (1996). In a case involving a petition for a writ of prohibition, a criminal defendant sought an order requiring testing to be conducted at an independent laboratory rather than the West Virginia State Police Crime Laboratory. Apparently, it was expected that the proposed testing would destroy the DNA sample. *Holcomb v. Sadler*, 222 W. Va. 32, 658 S.E.2d 562 (2008). Relying on *Thomas*, the Supreme Court reasoned that: "Only when that alternative guarantee of inspection – documentary evidence of test results – is also unavailable can a criminal defendant argue that he has been denied the right to fully and fairly cross-examine the expert who produced the evidentiary analysis at issue." 222 W. Va. at 36, 658 S.E.2d at 566. Therefore, the Supreme Court declined to issue the writ of prohibition.

3. Test Results or Reports

Rule 16(a)(1)(D) expressly grants the defendant the right to inspect and copy or photograph any test results or reports, including results or reports of physical and mental examinations and of scientific tests or experiments. To be subject to discovery, the results or reports must be material to the preparation of the defense, or the State must intend to use them to present its case in chief. See Syl. Pt. 1, *State v. Roy*, 194 W. Va. 276, 460 S.E.2d 277 (1995).

Although the Supreme Court has recognized that a defendant generally has the right to obtain test results under Rule 16(a)(1)(D), the Court has placed limits on whether a defendant may obtain a sexual assault victim's counseling records. *State v. Roy*, *supra*. In *Roy*, a juvenile had disclosed sexual abuse allegations to her counselor. The defendant requested the counseling notes pursuant to Rule 16(a)(1) and also claimed that the records should be disclosed so that he could

impeach the victim's credibility based upon her mental disability. After reviewing the counseling notes *in camera*, the trial court found that the documents were not relevant and that some of the information would be suppressed pursuant to the rape shield statute. Affirming the trial court, the Supreme Court adopted two syllabus points that: (1) require the defendant to show relevancy and a legitimate need for the information before the trial court should even conduct an *in camera* review, and (2) permit the trial court to release the communications only if they are relevant. These syllabus points provide as follows:

> The public policy consideration which underlies the statutes preventing disclosure of confidential information held by counselors, social workers, psychologists, and/or psychiatrists is to enhance communications and effective treatment and diagnosis by protecting the patient/client from the embarrassment and humiliation that might be caused by the disclosure of information imparted during the course of consultation. Considering the existence and strength of these protections established by the Legislature, the only issue left for a trial court is whether a criminal defendant is entitled to judicial inspection of confidentially protected communications *in camera* and thereafter to their release if the inspection indicates their relevancy. Syl. Pt. 2, *Roy*, 194 W. Va. 276, 460 S.E.2d 277.
>
> Before any *in camera* inspection of statutorily protected communications can be justified, a defendant must show both relevancy and a legitimate need for access to the communications. This preliminary showing is not met by bald and unilluminating allegations that the protected communications *could* be relevant or that the very circumstances of the communications indicate they are *likely* to be relevant or material to the case. Similarly, an assertion that inspection of the communications is needed only for a possible attack on credibility is also rejected. On the other hand, if a defendant can establish by credible evidence that the protected communications are likely to be useful to his

> defense, the trial judge should review the communications *in camera.* Syl. Pt. 3, *Roy*, 194 W. Va. 276, 460 S.E.2d 277.

In *Roy*, the West Virginia Supreme Court relied upon an earlier United States Supreme Court decision involving the investigative records maintained by the State of Pennsylvania. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989 (1987). In *Ritchie*, the United States Supreme Court held that the defendant was entitled to have the trial court review the records *in camera* to determine whether they were material to the defense. Upon remand, if the trial court determined that any of the information is material to the defense, then the defendant would be entitled to a new trial. If the court concluded that the records were not material, or that their nondisclosure was harmless error, then the lower court could reinstate the defendant's conviction.

In a case decided after *Roy*, a defendant who was convicted of multiple counts of third-degree sexual assault argued that he should have been provided with records from the victim's treating psychiatrist because they could contain exculpatory evidence. *State v. Parsons*, 214 W. Va. 342, 589 S.E.2d 226 (2003). The trial judge had reviewed the records *in camera* and found that the records did not contain admissible evidence. Affirming the trial court, the West Virginia Supreme Court held:

> When the mental health records of a prospective witness are sought for the purpose of impeaching the witness' credibility, the circuit court should first examine the records *ex parte* to determine if the request is frivolous. If the court finds probable cause to believe that the mental health records contain material relevant to the credibility issue, counsel should be allowed to examine the records, after which an *in camera* hearing should be held in which the requesting party's counsel designates the parts of the records he believes relevant, and both sides present arguments on the relevancy of those parts. Syl. Pt. 7, *Parsons, supra* (quoting Syl. Pt. 3, *Nelson v. Ferguson*, 184 W. Va. 198, 399 S.E.2d 909 (1990)).

In another case following *Roy*, the Court decided a case in which a sexual assault defendant claimed that his right to obtain exculpatory evidence was violated when the trial court did not allow the defendant access to the victim's psychiatric records. *State v. Schlatman*, 233 W. Va. 84, 755 S.E.2d 1 (2014). However, the Court found that the trial court had

followed the procedure established by *Roy* and had concluded that the records did not contain any exculpatory or impeachment evidence. Based upon the State's and trial court review, the Court concluded that the State had no duty to disclose the records to the defendant and that they would not have assisted in his defense. See *State v. Robert Scott R.*, 233 W. Va. 12, 754 S.E.2d 588 (2014).

4. Expert Witness Disclosures

As part of discovery, a defendant may request expert witness disclosures. W. Va. R. Crim. P. 16(a)(1)(E); W. Va. T.C.R. 32.03(a)(11). An expert witness disclosure must both identify the expert and include a summary of his or her opinion and the basis for it.

In a case involving multiple sexual offenses, the defendant alleged error because the State did not disclose three witnesses as experts. *State v. Cyrus*, 222 W. Va. 214, 664 S.E.2d 99 (2008). One witness was the counselor of one of the victims; the second witness was a nurse practitioner who conducted a sexual assault examination of one of the victims; and the third witness was a child protective services worker. On appeal, the State argued that expert witness disclosures were not necessary because the witnesses' testimony was limited to their factual knowledge of the case. After reviewing the record, the Supreme Court found no error because the testimony on direct examination was limited to the witnesses' knowledge of the case, and the testimony that could be considered expert testimony was elicited by defense counsel on cross-examination. The Court, therefore, concluded that the defendant invited any error with respect to the testimony.

5. Witness Lists

In addition to requesting expert witness disclosures, a defendant may also request a written witness list that identifies the State's witnesses, including their addresses and criminal records. W. Va. R. Crim. P. 16(a)(1)(F); W. Va. T.C.R. 32.03(a)(10). Although Rule 16 indicates that the State is required to disclose witnesses that will be presented in its case in chief, the Supreme Court has recognized that "even rebuttal witnesses should be disclosed when the State has a reasonable anticipation that they will be used during trial." *State v. Roy*, 194 W. Va. 276, 286-87, 460 S.E.2d 277, 287-88 (1995). The Court has also recognized that "where the defendant claims unfair surprise due to late disclosure, . . . recent cases suggest that to preserve this issue for appellate review the complaining party at the very least must request a postponement to permit time to prepare." *Roy*, 194 W. Va. at 287, 460 S.E.2d at 288 (citing *McDougal v. McCammon*, 193 W. Va. 229, 239-40, 455 S.E.2d 788, 798-99 (1995)).

Once a defendant requests disclosure of a witness list, the State may, in some circumstances, preserve a witness's testimony by taking a deposition. Rule 15 of the West Virginia Rules of Criminal Procedure establishes the procedure for taking depositions in criminal cases. Although Rule 15 allows depositions in criminal cases, the Supreme Court has held that this rule narrowly limits the circumstances in which a deposition is allowed. *State ex rel. Spaulding v. Watt*, 186 W. Va. 125, 411 S.E.2d 450 (1991). For a discussion of depositions in criminal cases, see Chapter 3, Section V. H. For a discussion of the discovery of witness statements, see Chapter 3, Section IV. K.

6. Additional Subjects of Discovery

Providing more specificity than Rule 16, Trial Court Rule 32.03 identifies additional types of evidence that must be disclosed when the defendant makes a discovery request. In general, these additional types of evidence may be subject to pretrial motions, most notably suppression motions. The defendant's attorney may inspect and copy any photographs used in any identification proceedings. If the photographs cannot be produced, the State must indicate whether it conducted identification proceedings and the results of any such proceeding. The State must also disclose any physical evidence that it intends to present at trial that was in the possession of or belonged to the defendant or was seized without a warrant. Further, the State must indicate whether the defendant was the subject of any electronic eavesdrop, wiretap, or other interception of wire or oral communications while the case was investigated. The defendant may inspect any vehicle, vessel, or aircraft that was used in the commission of the offense, provided that the State has custody of it. Finally, a defendant is entitled to discover copies of any latent fingerprints or prints that have been identified as the defendant's. T.C.R. 32.03.

H. Discovery from the Defendant

As previously noted, discovery in a criminal case can only be initiated at the defendant's request. W. Va. R. Crim. P. 16(a)(1); W. Va. T.C.R. 32.03. Once a defendant requests discovery, the State may then request discovery from the defendant. The defendant is required to respond to the State's discovery request within ten days after the State has produced information or evidence responsive to the defendant's discovery request. Therefore, the defendant's obligation to disclose information is dependent upon whether he or she initiated discovery and whether the State produced evidence responsive to the defendant's discovery request. W. Va. R. Crim. P. 16(b); W. Va. T.C.R. 32.03(b); Syl. Pt. 6, *State v. Doonan*, 220 W. Va. 8, 640 S.E.2d 71 (2006); Syl. Pt. 1,

Marano v. Holland, 179 W. Va. 156, 366 S.E.2d 117 (1988). Additionally, the State's right to request discovery "is confined to the particular area in which the defendant has sought discovery." Syl. Pt. 1, in part, *Marano*, *supra*.

Although a defendant has the option of whether to initiate discovery, a defendant's right to withhold information is not absolute when other countervailing policy concerns arise. For example, the Supreme Court refused to issue a writ of prohibition when a trial judge required a defendant to disclose names and addresses of witnesses pursuant to Trial Court Rule 42.01 on the first day of a criminal trial so that *voir dire* could be conducted. *State ex rel. Hill v. Reed*, 199 W. Va. 89, 483 S.E.2d 89 (1996). In so ruling, the Court noted that Rule 16 of the West Virginia Rules of Criminal Procedure "does not limit the trial judge's authority to order disclosure necessary for proper and comprehensive *voir dire*." 199 W. Va. at 91, 483 S.E.2d at 91. Conversely, in a case decided five years after *Hill*, the Supreme Court issued a writ of prohibition when a trial judge ordered a defendant to disclose names and addresses of witnesses four days before trial for *voir dire*. *State ex rel. Sutton v. Mazzone*, 210 W. Va. 331, 557 S.E.2d 385 (2001). There, the Supreme Court reasoned that requiring disclosure for *voir dire* purposes was proper but that "the four-day window for possible use of the witness information for discovery is too broad and that the potential that information will be used for impermissible discovery outweighs the permissible and appropriate use of information for *voir dire* purposes." 210 W. Va. at 334, 557 S.E.2d at 388.

The Supreme Court has recognized another policy concern that outweighed a defendant's right to choose to engage in discovery. In *Sutton*, the defendant had not initiated discovery pursuant to Rule 16, but had requested an expert examination of the murder weapon. In response to the defendant's request, the trial court required him to disclose information concerning the testing. Recognizing that the trial court required disclosure of information necessary to maintain the integrity of the evidence, the Supreme Court held that the trial court could require disclosure of the identity of the expert witnesses, their backgrounds, or qualifications, and the tests that would be performed. Further, the trial court could place limitations on the testing. However, the trial court should not require the disclosure of the expert's findings because the defendant had not initiated discovery pursuant to Rule 16. 210 W. Va. at 336, 557 S.E.2d at 390. Therefore, a defendant's right to choose to initiate discovery does not outweigh other substantial policy considerations that allow a trial judge to order a defendant to make limited disclosures concerning evidence.

Provided that the conditions for discovery have been met, the provisions of Rule 16(b) establish allowable subjects of discovery by the

State. These subjects include the inspection and copying of documents and tangible objects (Rule 16(b)(1)(A)) and disclosure of reports of examination and tests (Rule 16(b)(1)(B)). In addition, the defendant is obligated to disclose expert witnesses and a written summary of their testimony under Rules 702, 703, and 705 of the Rules of Evidence. Further, the defendant is required to disclose names and addresses of witnesses. Once the State has requested a witness list, the defendant may, in some limited circumstances, perpetuate the testimony of a witness by a deposition. See W. Va. R. Crim. P. 15. In addition, Trial Court 32.03 requires the disclosure of information related to an alibi or insanity defense at the same time the defendant is required to make reciprocal disclosures pursuant to Rule 16. The Supreme Court has upheld the removal of defense counsel for failure to disclose evidence required by relevant discovery rules. *State v. Fields*, 225 W. Va. 753, 696 S.E.2d 269 (2010).

I. Notice of Alibi

As part of the reciprocal criminal discovery scheme, the State may request that the defendant serve written notice of an alibi defense. W. Va. R. Crim. P. 12.1; W. Va. T.C.R. 32.03(b)(3). The West Virginia Supreme Court has held that Rule 12.1 is constitutional. Syl. Pt. 5, *State v. Hall*, 172 W. Va. 138, 304 S.E.2d 43 (1983). Pursuant to Trial Court Rule 32.03(b), the State may serve the request after the State has disclosed evidence responsive to the defendant's discovery request.

When the State serves a request for a notice of alibi, the request must include the time, date, and place of the alleged offense. The defendant's response must indicate the specific place the defendant claims to have been when the offense occurred and any witnesses that support the defendant's alibi claim. It must be served on the State within ten days after the State has responded to the defendant's discovery request or at any other time established by the court. In response to the defendant's notice, the State must serve a written notice listing the names and addresses of the witnesses that the State will offer to prove the defendant's presence at the scene and any other witnesses that will rebut the alibi witness's testimony. This response must be served within ten days after service of the defendant's notice of alibi.

Throughout pretrial proceedings and during a trial, the parties have a continuing duty to disclose any alibi witnesses. W. Va. R. Crim. P. 12.1(c). If either party fails to disclose an alibi witness, the court may exclude the witness's testimony as it relates to the defendant's presence or absence from the scene. The Supreme Court has upheld the exclusion of an alibi witness for failure to timely disclose the witness. *State v. Schlatman*, 233 W. Va. 84, 755 S.E.2d 1 (2014). Affirming the trial court, the Court noted that the witness had no specific recollection of the day of

the sexual assault and that the defendant could have chosen to testify about the same topic that the alibi witness would have testified to. However, in an aggravated robbery case, the Supreme Court reversed a defendant's conviction when the State was allowed to present the testimony of an undisclosed rebuttal witness who testified contrary to the defendant's alibi. *State v. Smith*, 220 W. Va. 565, 648 S.E.2d 71 (2007).

If a defendant withdraws his or her intent to present an alibi defense, the evidence or any statement made in connection with the intent to present an alibi is not admissible in any civil or criminal proceeding against the person who indicated the intent to rely on an alibi as a defense. W. Va. R. Crim. P. 12.2(f).

J. Notice of Insanity Defense

Pursuant to Rule 12.2(a) of the West Virginia Rules of Criminal Procedure, a defendant is required to give written notice that he or she intends to rely on insanity as a defense. In addition, if a defendant intends to offer expert testimony relating to a mental disease, defect, or condition that is relevant to the issue of guilt, the defendant must file a written notice of the intent to do so. W. Va. R. Crim. P. 12.2(b). These types of notices must be filed at the time that pretrial motions are due or at any other time that the trial court establishes or allows. According to Trial Court Rule 32.03, the notices required by Rule 12.2 are part of the reciprocal discovery scheme for criminal cases.

If the insanity defense is raised, the State may request that the defendant undergo a mental examination by a psychiatrist or other appropriate expert. W. Va. R. Crim. P. 12.2(c). However, neither the defendant's statements, the expert's testimony based upon the statements, and other fruits of the statements may not be admitted into evidence except on an issue relating to the defendant's mental condition on which the defendant has introduced testimony.

K. Production of Witness Statements

West Virginia Rule of Criminal Procedure 26.2 and Trial Court Rule 32.07 govern the disclosure of statements by witnesses other than the defendant. A witness statement is defined as:

> 1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness; 2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral

> statement and that is contained in a stenographic, mechanical, electrical or other recording or a transcription thereof or; 3) A statement, however taken or recorded or a transcription thereof, made by the witness to a grand jury. W. Va. R. Crim. P. 26.2(f); Syl. Pt. 6, in part, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998); See Syl. Pt. 3, *State v. Watson*, 173 W. Va. 553, 318 S.E.2d 603 (1984).

In *Salmons*, the Supreme Court recognized that: "[t]he intent of Rule 26.2 is to permit a party to obtain actual statements made by a witness for the purpose of impeaching the testimony of that witness." 203 W. Va. at 578, 509 S.E.2d at 859. Based upon the intent of Rule 26.2 and the definition of the term "statement," the Supreme Court concluded that a defendant is not entitled to discovery of a compilation of evidence obtained by police officers under Rule 26.2. *Salmons, supra.* Again relying on the definition of the term "statement," the West Virginia Supreme Court held that: "A witness' notes which are abstracts from reports in the possession of a defendant in a criminal case do not constitute a 'statement' as defined in W. Va. R. Crim. P. 26.2(f)." Syl. Pt. 14, *State v. McFarland*, 175 W. Va. 205, 332 S.E.2d 217 (1985) (overruled on other grounds by *State v. Joseph*, 214 W. Va. 525, 590 S.E.2d 718 (2003)). Whether certain records are, in fact, "statements" will often determine whether the evidence should be disclosed pursuant to Rule 26.2.

Once a witness has testified on direct examination, Rule 26.2 provides that a party who did not present the witness (i.e., the adverse party) may make a motion for the production of a witness statement. Trial Court Rule 32.07 indicates that a witness statement may be exchanged pursuant to Rule 26.2 or "at any time if the parties agree or the court so orders for good cause shown." W. Va. T.C.R. 32.07. Trial Court Rule 32.07, therefore, allows a court to order disclosure of statements before a witness testifies in order to resolve disputes about statements before trial or to reduce the need for recesses during a trial.

L. Failure to Disclose Evidence

If a party fails to disclose evidence in response to a discovery request, the trial court may impose remedial sanctions. W. Va. R. Crim. P. 16(d)(2); W. Va. T.C.R. 32.06. As established by these rules and relevant case law, sanctions for non-disclosure may include a continuance, exclusion of the evidence, curative instructions, or even a mistrial. *Id.; State v. Miller*, 178 W. Va. 618, 363 S.E.2d 504 (1987). In cases that

warrant it, dismissal of the charges may be appropriate. Syl. Pt. 3, *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 454 S.E.2d 427 (1994).

With regard to imposing sanctions for late disclosures, including disclosures at trial, the Supreme Court has recognized that: "The critical question is the degree of prejudice suffered and whether this can be offset by appropriate remedial sanctions." *Miller*, 178 W. Va. at 626, 363 S.E.2d at 512. Elaborating on the issue of prejudice, the Court held that: "The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case." Syl. Pt. 2, in part, *State v. Grimm*, 165 W. Va. 547, 270 S.E.2d 173 (1980). Although *Grimm* was decided before the adoption of Rule 16, the West Virginia Supreme Court has recognized that the prejudice requirement established by *Grimm* applies to Rule 16 disclosures. Syl. Pt. 4, *Miller, supra.* However, the Supreme Court has recognized that: "Prejudice may be presumed from repeated discovery violations necessitating numerous continuances and delays." Syl. Pt. 3, in part, *Rusen*, 193 W. Va. 133, 454 S.E.2d 427 (1994). A discussion of several cases addressing sanctions follows.

In a case in which a defendant was convicted of the murder of his girlfriend, the State failed to disclose results of two experiments performed by Dr. Frost, the medical examiner. *State v. Myers*, 179 W. Va. 501, 370 S.E.2d 336 (1988). The Court found that the untimely disclosure did not prejudice the defendant because the trial judge granted a recess to allow defense counsel to review the results and confer with Dr. Frost. Additionally, the Court noted that a second expert had performed a test very similar to one of Dr. Frost's tests and that the test was admitted without objection. Therefore, the Court reasoned that the defendant could not have been surprised by the late disclosure of the test results.

In a case involving a first degree murder conviction, the defendant relied on the defenses of insanity and battered women's syndrome. *State v. Duell*, 175 W. Va. 233, 332 S.E.2d 246 (1985) (superseded on other grounds by rule as stated in *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995); see *State v. Stewart*, 228 W. Va. 406, 719 S.E.2d 876 (2011)). To rebut the insanity defense, the State presented the testimony of an expert who had conducted several psychological tests on the defendant. Although the defendant filed three discovery requests for the test results, the State failed to disclose all of the tests on which the expert relied. The circuit court allowed the expert to testify and did not require the disclosure of all the psychological tests on which the expert based his opinion. Reversing the trial court, the West Virginia Supreme Court held that the nondisclosure both surprised the defendant and significantly hampered the presentation of her defense. In other cases, the Court has also found that nondisclosure of test results warranted a new trial when

the State failed to disclose test results that were material to the defense. See *State ex rel. Justice v. Trent*, 209 W. Va. 614, 550 S.E.2d 404 (2001); *State v. Keenan*, 213 W. Va. 557, 584 S.E.2d 191 (2003).

In a case involving sexual assault and abuse convictions, a defendant, during an investigation, had taken and failed a polygraph. *State v. Wilson*, 190 W. Va. 583, 439 S.E.2d 448 (1993). After the officer informed him of the polygraph test results, the defendant admitted that he inappropriately touched the victim. Although polygraph test results are generally not admissible in a criminal trial, the results of the polygraph were introduced in this case because they were relevant to whether the defendant's confession was voluntary. See Syl. Pt. 2, *State v. Frazier*, 162 W. Va. 602, 252 S.E.2d 39 (1979). In the *Wilson* opinion, the Court primarily discussed the importance of limiting instructions when polygraph results are introduced. With regard to the discovery of polygraph results, the Court held that the results should have been disclosed in this case because they were "inexorably intertwined" with the issue of whether the defendant's confession was voluntary. 190 W. Va. at 589, 439 S.E.2d at 459.

V. Victim and Witness Interviews or Examinations

A. Prohibition on Victim Polygraphs

Sexual assault victims, whether they are adults or minors, may not be required to submit to a polygraph examination before a law-enforcement officer, prosecutor, or other government officer proceeding with an investigation of specified crimes involving sexual assault or abuse. W. Va. Code § 62-6-8. Under this statute, these officials may neither ask, nor require a victim to undergo a polygraph. Additionally, they may not refuse to perform the lawful duties because a victim refused to take a polygraph or other similar examination. This statute applies when the following offenses have been alleged:

1. Detention of a person in a house of prostitution (W. Va. Code § 61-8-6);
2. Child abuse by a parent, guardian, custodian or person in a position of trust to a child (W. Va. Code § 61-8D-5);
3. Sexual assault or sexual abuse (W. Va. Code §§ 61-8B-1, *et seq.*); and
4. Any other sexual offense defined by state or local law. W. Va. Code § 62-6-8.[9]

[9] The text of the statute refers to West Virginia Code § 61-12-6, a statute governing the chief medical examiner. Presumably, the statute should have referred to West Virginia Code § 61-8-12, the statute criminalizing incest.

B. Victim's Right to Personal Representative During Interviews

The West Virginia Legislature has established that a sexual assault victim has the right to choose a person to attend all proceedings concerning an alleged sexual assault. W. Va. Code § 61-11A-9(a)(1). The proceedings include any physical examination and/or treatment, as well as police interviews and court proceedings. Although a victim has this right, it shall not be interpreted or construed to violate established forensic interview protocols. The right applies whether a victim is a child or an adult.

C. Appointment of Guardian *Ad Litem* for Victims or Witnesses

Trial Court Rule 39 authorizes a judge to appoint a guardian *ad litem* for a witness or an alleged victim in a criminal case when it determines that good cause exists. W. Va. T.C.R. 39.01. The text of the rule does not specify any age limitations for the victim or the witness; and therefore, a guardian *ad litem* may be appointed for either an adult or a minor.

Any party may request the appointment of a guardian *ad litem*, or the court may do so *sua sponte*. In the order appointing the guardian *ad litem*, the court should specify the duties and the standing of the guardian *ad litem* with regard to disputed issues. The guardian *ad litem* has the duty to represent the best interests of his or her ward, subject to the court's direction.

Trial Court Rule 39.03 does not outline a procedure for paying a guardian *ad litem*, but it indicates that Trial Court Rule 21.06 governs compensation of a guardian *ad litem* when he or she is entitled to payment by the Supreme Court. A guardian *ad litem* could, therefore, be paid by the Supreme Court when the person for whom a guardian *ad litem* is appointed meets the eligibility standards listed in Trial Court Rule 21.05.

D. Interviews of a Child Victim

1. Reasons for Interview

In general, children who are alleged victims of sexual offenses may be interviewed for the following reasons. First, they may be subject to a forensic interview - an interview to establish the facts of an alleged sexual offense. An interview of a patient is considered part of a forensic medical examination. W. Va. Code § 61-8B-1(12). Secondly, children may be interviewed to determine whether they are competent to testify. A child's

competency to testify may be challenged in two ways. "The first, more traditional, challenge concerns the child's ability to perceive the distinction between truth and falsity as well as the consequences of falsely testifying under oath. The second challenge, approved in *Burdette*, concerns whether the child, due to various psychological factors, is so inherently incredible as to require an additional psychiatric evaluation to determine whether the child may testify." *State v. Ayers*, 179 W. Va. 365, 369, 369 S.E.2d 22, 26 (1988) (internal citations omitted). Third, a child victim may be interviewed by an expert to determine whether an alleged victim is showing objective signs of a sexual assault. See Syl. Pt. 7, *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

Forensic interviews of children who are alleged victims of abuse and neglect, including alleged sexual abuse, may be conducted at child advocacy centers. A child advocacy center is "a community-based organization that is a member in good standing with the West Virginia Child Abuse Network, Inc." W. Va. Code § 49-1-206. It should be noted that the West Virginia Supreme Court, in 1984, established that: "When a child's capacity to testify that she was the victim of a sexual abuse or neglect is present, the court should appoint a neutral child psychologist or psychiatrist to conduct a transcribed or otherwise recorded interview." *Burdette v. Loban*, 174 W. Va. 120, 323 S.E.2d 601 (1984).

2. Memorialization of Forensic Interviews[10]

When a child is an alleged victim of a sexual offense, forensic interviews are subject to certain requirements and limitations. As established by West Virginia Code § 62-6B-5, a law enforcement officer, physician, psychologist, social worker, or investigator who obtains a statement from an alleged child victim aged 13 or younger for certain Article 8B offenses, is required to make a contemporaneous written notation and recitation of the statement. If the statement is recorded, the person is not required to reduce the statement to writing. This statute expressly applies when the charged offense is one of the following: first, second, and third-degree sexual assault, as well as, first degree sexual abuse. Practically speaking, an official may not know what the charges will be when a statement is taken. Therefore, statements taken from children aged 13 or younger in all sexual offense cases will most likely be recorded.

West Virginia Code § 62-6B-5 provides that the failure to memorialize such a statement creates a presumption that it is inadmissible. However, it also provides that a court may find that the failure to memorialize the statement was a good faith omission. Although

[10] For a discussion of access to recorded interviews of children, see Section V.

this code section addresses the admissibility of such a statement, whether such a statement could, in fact, be admitted in a criminal trial would be subject to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), its progeny and other exceptions to the hearsay rule. However, a forensic interview may be admitted in a child abuse and neglect proceeding. See *In re J.S.*, 233 W. Va. 394, 758 S.E.2d 744 (2014).

Although West Virginia Code § 62-6B-5 requires recordings of certain statements, it also exempts certain statements from this requirement. This statute does not apply to persons who are conducting a child abuse and neglect investigation pursuant to Chapter 49 of the West Virginia Code. It also does not apply to medical personnel and other persons performing a forensic medical examination of an alleged child victim. Further, it does not apply to prosecuting attorneys who are preparing a child to testify in court.

3. Limitations on Interviews

Although the West Virginia Supreme Court has recognized the importance of recording interviews of children, it has also recognized that children who are sexual abuse victims should be protected from unnecessary interviews and should also be protected during any interviews that are conducted. *State v. Miller*, 195 W. Va. 656, 466 S.E.2d 507 (1995); *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); *State v. Delaney,* 187 W. Va. 212, 417 S.E.2d 903 (1992); *State v. Ayers*, 179 W. Va. 365, 369 S.E.2d 22 (1988); *Burdette v. Loban,* 174 W. Va. 120, 323 S.E.2d 601 (1984).

In *Burdette,* a father was accused of sexually abusing his daughter, and the trial court had ordered that defense counsel would be allowed to interview the child without anyone else present, including the guardian *ad litem*. In the opinion in which it issued a writ of prohibition, the Supreme Court stated that:

> A parent accused of sexual abuse by his minor child has a constitutional right to know of what his child accuses him in order to prepare his defense. But certainly the child victim has a concurrent right to be protected against unrestrained private examination by adverse interests. Child victims of sexual abuse doubtless have undergone a horrifying experience. For that reason it is necessary to assure the child a modicum of protection. *Burdette*, 174 W. Va. at 121-22, 323 S.E.2d at 603 (citing Parker, J., "The Rights of Child

> Witnesses: Is the Court a Protector or Perpetrator?" 17 New Eng. L.J. 3 (1982); Note, "Evidentiary Problems in Criminal Child Abuse Prosecutions," 63 Geo. L.J. 257 (1974)).

Although *Burdette* was a civil abuse and neglect case, the Supreme Court has relied on the reasoning of *Burdette* in criminal cases in which additional interviews were conducted. See *Miller, Delaney, and Ayers, supra*. Therefore, it is easily concluded that the protections set forth in *Burdette* would be applicable in criminal cases.

It should be noted that three code sections have authorized the Supreme Court to adopt a rule that would place reasonable limits on the number of interviews that a child who is 11-years old or younger must submit to for either law enforcement purposes or for discovery purposes. W. Va. Code §§ 61-8-13(a); 61-8B-14; 61-8C-5(a). To date, such a rule has not been promulgated. However, case law governing interviews of child sexual abuse victims has narrowly limited the circumstances in which additional interviews are permitted.

With regard to children older than 11, the Court has specifically observed that the section of West Virginia Code § 61-8B-14(a) that allows limiting interviews when a child is 11 or less does not indicate that an older child victim should not be protected from additional interviews. *State v. Miller*, 195 W. Va. 656, 668, 466 S.E.2d 507, 519 (1995). In *Miller*, the Court held that defense counsel could not interview a 15-year old sexual assault victim. The Court relied upon both the general principle that interviews of a child sexual assault victim should be limited and that pretrial discovery in a criminal case is subject to the court's discretion. Therefore, the Court has clearly established a policy of limiting multiple interviews of children in crimes involving sexual violence and of barring pretrial interviews of children by defense counsel.

E. Limitations on Additional Psychological Examinations of a Child Victim

It should be noted that West Virginia Code § 61-8B-11(e) prohibits courts from ordering victims of sexual assault to undergo any physical or gynecological examination. (See Chapter 3, Section I). Therefore, the statute has superseded the holding of *State v. Delaney*, 187 W. Va. 212, 417 S.E.2d 903 (1992), insofar as the case allowed additional physical examinations upon a showing of compelling need. However, *Delaney* also applies to psychological examinations, which are not barred by West Virginia Code § 61-8B-11(e). Therefore, the limits of additional psychological examinations are discussed below.

The party who requests an additional type of psychological examination has the burden of proving that there is a compelling need for such an examination. The Court has established six factors that a trial court should weigh when an additional psychological examination is requested. Syl. Pt. 3, *Delaney*, 187 W. Va. 212, 417 S.E.2d 903. In *Delaney*, the West Virginia Supreme Court held that:

> In order for a trial court to determine whether to grant a party's request for additional physical or psychological examinations, the requesting party must present the judge with evidence that he has a compelling need or reason for the additional examinations. In making the determination, the judge should consider: (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use. *Id.*

In *Delaney*, the defendant had requested that the children undergo another psychological examination, but the trial court denied this request. Affirming the trial court, the Supreme Court reasoned that the trauma and intrusive nature of the psychological examinations outweighed the defendant's need for them. The Court further noted that the defendant had not presented any compelling reason for the examinations, and he also had a psychologist that assisted him with the cross-examination of the State's expert when that expert testified about the children's competency.

The defendant in *Delaney* had also requested that the children undergo another physical examination. The Court noted that the alleged sexual abuse had occurred several years before the request for the additional physical examination and that the age of the victims, the intrusive nature of the exams and the remoteness in time outweighed the probative value of any evidence that the defendant could have obtained. After considering these factors, the Court held that the trial court did not err when it refused to order an additional physical examination of the victims. As noted above, West Virginia Code § 61-8B-11(e) bans court-ordered physical examinations of sexual assault victims.

F. Evaluation of a Child's Competency

When a child is a victim of a sexual crime, his or her competency to testify may be challenged. When the competency of any witness, including a child, is challenged, a determination of the witness's competency to testify should include an evaluation of the following factors:

> (1) the mental capacity, at the time of the occurrence concerning which he is to testify, to receive an accurate impression of the events; (2) a memory sufficient to retain an independent recollection of the occurrence; (3) the capacity to express in words his memory of the occurrence; (4) the capacity to understand simple questions about it; and (5) an understanding of the obligation to speak the truth on the witness stand. *State v. Jones*, 178 W. Va. 519, 362 S.E.2d 330, n. 2 (1987).

The first type of challenge to a child's competency involves "the child's ability to perceive the distinction between truth and falsity as well as the consequences of falsely testifying under oath." *State v. Ayers*, 179 W. Va. 365, 369, 369 S.E.2d 22, 26 (1988). When a defendant presents this type of challenge, it is not always necessary to require a psychological or psychiatric examination. *State v. McPherson*, 179 W. Va. 612, 618-19, 371 S.E.2d 333, 339-40 (1988). In *McPherson*, the Court affirmed the trial judge's finding that a 14-year old was competent to testify when the judge conducted an extensive *in camera* interview of the victim and concluded that she (1) knew the difference between truth and falsity and (2) recognized the consequences for lying under oath. See *State v. Slaton*, 212 W. Va. 113, 569 S.E.2d 189 (2002).

The second type of challenge recognized in *Burdette, supra,* "concerns whether the child, due to various psychological factors, is so inherently incredible as to require an additional psychiatric evaluation to determine whether the child may testify." *Ayers*, 179 W. Va. at 369, 369 S.E.2d at 26. The trial court has the discretion to determine whether such a psychiatric evaluation is necessary before determining whether a child is competent to testify. *Burdette*, *supra*. Should the defendant request an additional independent psychological examination, he or she must show a compelling need for such an examination. Syl. Pt. 3, *Delaney*, 187 W. Va. 212, 417 S.E.2d 903. When determining whether to grant a defendant's request, the trial court should consider the following factors:

> (1) the nature of the examination requested and the intrusiveness inherent in that

> examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use. *Id.*

G. Pretrial Taint Hearing

The Supreme Court has addressed a case in which a defendant argued that the pretrial statements of two child victims were the result of suggestive questioning and coaching by their mother. *State v. Smith*, 225 W. Va. 706, 696 S.E.2d 8 (2010). The facts of *Smith* involved a grandfather who was accused of sexually abusing his granddaughters. The victims were aged 11 and 14 when the abuse began, and the sexual abuse occurred over a period of approximately two years. After a jury trial, the defendant was convicted of five counts of sexual abuse by a custodian and two counts of first-degree sexual abuse.

In *Smith*, the defendant requested a pretrial taint hearing so that the trial court could assess the reliability of the victims' statements and testimony. On appeal, the defendant alleged that the trial court erred when it denied his motion for a pretrial taint hearing. As a basis for his argument, the defendant relied on *State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (1994), a case that established a pretrial procedure for evaluating the reliability of child witnesses.

At trial, the defendant's expert testified that improper interview techniques were used when the victims were questioned. Based upon the expert's opinion, the defendant advanced a claim that the victims' testimony was the result of leading or suggestive questions and that the improper questions may have "planted false memories in their subconscious." *Smith, supra*.

Affirming the trial court's refusal to conduct a pretrial taint hearing, the Supreme Court engaged in a detailed discussion of the facts of *Michaels*. The Court pointed out that the coercive interviewing techniques appearing in *Michaels* were simply not present in *Smith*.[11] The Court also

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[11] The Court noted that the victims' statements in *Michaels* were, by and large, not the result of spontaneous admissions. The Court also noted that the victims provided few details even though investigators had prompted them to do so. Further, the interviews were not recorded and original notes were destroyed in some cases. Finally, the Court noted that the interviewers were not objective and the children who implicated the defendant were, in some cases, given mock police badges. *Smith, supra.*

noted that, in the case at bar, the interviews had been recorded and original notes had been retained. This evidence indicated that the victims had not been subjected to improper interviewing techniques. The Court, therefore, concluded that the facts of *Michaels* were distinguishable from the case before it.

Providing further analysis, the Court engaged in an extensive review of opinions from other courts that had considered *Michaels*. The Court noted that the majority of jurisdictions that had considered *Michaels* had not adopted a procedure for a pretrial taint hearing. Those courts had determined that the challenges to the victims' testimony went to the victims' reliability or credibility, not to their competency to testify. See *People v. Montoya*, 149 Cal. App. 4th 1139, 57 Cal. Rptr. 3d 770 (2007); *State v. Karelas*, 28 So.3d 913 (Fla. App. 5 Dist. 2010); *State v. Bumgarner*, 219 Or. App. 617, 184 P.3d 1143 (2008); *United States v. Geiss*, 30 MJ 678 (1990).

Relying on the courts that had considered *Michaels*, the West Virginia Supreme Court determined that the defendant in *Smith* was not challenging the victims' competency, but rather their credibility or reliability. The Court also noted that the jury makes credibility determinations. The Court further explained that questions concerning interviewing techniques can be properly addressed during cross-examination. In a new syllabus point, the Court held that: "Assuming it otherwise meets the requirements of admissibility, the reliability of a child's testimony is properly a matter for assessment by the trier of fact who is charged with making determinations regarding the weight and credibility of such testimony." Syl. Pt. 3, *Smith, supra.*

Providing further analysis, the Court observed that: "[R]equiring circuit courts to hold pretrial taint hearings in every case involving a sexual abuse victim would necessarily lead to a host of new issues on appeal and would more than likely become an abused discovery tool for a defendant accused of such a crime." 225 W. Va. at 714, 696 S.E.2d at 16. The Court further observed that: "We see no reason to subject victims of sexual abuse to a new and unnecessary layer of interrogation that is unlikely to yield any positive results." *Id*. The Court, therefore, has provided parameters on challenges to a victim's statement because of improper interviewing techniques.

H. Interviews of Adult Victims and Witnesses

Note: For a discussion of the discovery of witness statements, see Chapter 3, Section IV. K.

Contrary to legal authority governing interviews of children in sexual offense cases, legal authority governing the interviews of an adult victim or other adult witness is extremely limited. An adult victim of an alleged sexual offense could be subject to a forensic interview or a forensic medical examination. In unusual circumstances, an adult victim could also be subject to a competency examination. Further, an adult victim could be subject to an interview to determine whether he or she is suffering from Rape Trauma Syndrome. See *State v. McCoy*, 179 W. Va. 223, 366 S.E.2d 731 (1988); *State v. Jackson*, 181 W. Va. 447, 383 S.E.2d 79 (1989). The following discussion addresses the limitations on interviews or examinations of adult victims.

1. Limitations on Interviews or Depositions

There is no authority that requires a victim to submit to a pretrial interview by defense counsel. In fact, the Supreme Court issued a writ of prohibition when a circuit judge ordered a witness for the State to be deposed when the witness had refused to speak with defense counsel or his private investigator. *State ex rel. Spaulding v. Watt*, 186 W. Va. 125, 411 S.E.2d 450 (1991). In *Spaulding*, the Court expressly held that: "The fact that a potential witness in a criminal proceeding is unwilling to talk with a defendant's attorney or investigator is not, alone, sufficient to authorize a court-ordered deposition under Rule 15 of the West Virginia Rules of Criminal Procedure and W. Va. Code § 62-3-1." Syl. Pt. 3, *Spaulding*, *supra*. Rather, the Court clarified that a trial court may only order a deposition in a criminal case "when the witness is unavailable for trial and the deposition is needed to preserve the testimony for trial." Syl. Pt. 2, in part, *Spaulding*, *supra*. Such a deposition can only be compelled "under very limited conditions, i.e., where, due to exceptional circumstances, the deposition is necessary, in the interest of justice, to preserve the deponent's testimony for use at trial." Syl. Pt. 1, *Spaulding*, *supra*. In an earlier case, the Court held that the fact that a witness lived out-of-state was an insufficient reason to justify a deposition in a criminal case. *State v. Ferrell*, 174 W. Va. 697, 329 S.E.2d 62 (1985).

2. Competency Evaluations

With regard to competency of a witness, Rule 601 of the West Virginia Rules of Evidence provides that: "Every person is competent to be a witness except as otherwise provided for by these rules." Likewise, West Virginia Code § 61-8B-11(c) states: "In any prosecution under this article, neither age nor mental capacity of the victim shall preclude the victim from testifying." The Supreme Court has recognized that "neither feeblemindedness nor insanity renders a witness incompetent or disqualified." *State v. Merritt*, 183 W. Va. 601, 608, 396 S.E.2d 871, 878 (1990). In Syllabus Point 5 of *State v. Harman*, 165 W. Va. 494, 270

S.E.2d 146 (1980), the Court, in reference to a defendant who challenged a witness's credibility because of a psychiatric condition (as opposed to the witness's competency), indicated that an expert who rendered an opinion would have had to have sufficient opportunity to evaluate the witness. This reference certainly raises a competency evaluation as a possibility. However, West Virginia case law provides little guidance on this issue.

In a case in which an adult sexual assault victim suffered from mental retardation and unspecified mental illness, the Supreme Court, in a footnote, indicated that defense counsel had originally requested that the sexual assault victim be required to undergo a competency evaluation. *State ex rel. Azeez v. Mangum*, 195 W. Va. 163, 465 S.E.2d 163 n.6 (1995).[12] Defense counsel, however, chose not to pursue the challenge to the witness's competency because he concluded that it would be more advantageous for the defendant if the victim testified. *Azeez*, therefore, merely illustrates a case involving a severely impaired victim. It does, however, provide some guidance concerning the circumstances in which a psychological or psychiatric examination of an adult victim or witness for competency purposes would be allowed. As previously noted, the general presumption of competency indicates that such an examination would be permitted only in unusual circumstances.

3. *Psychiatric Condition and Credibility*

Note: See Chapter 3, Section IV. G. 3 for a discussion of the procedure for obtaining the mental health records of a witness.

In some instances, a defendant may attempt to impeach a witness based upon a witness's psychiatric condition or disability. With regard to this issue, the West Virginia Supreme Court held that:

> Evidence of psychiatric disability may be introduced when it affects the credibility of a material witness' testimony in a criminal case. Before such psychiatric disorder can be shown to impeach a witness' testimony, there must be a showing that the disorder affects the credibility of the witness and that the expert has had a sufficient opportunity to make the diagnosis of psychiatric disorder. Syl. Pt. 5,

[12] This opinion involved a habeas corpus petition, not a direct appeal of a criminal conviction. The Supreme Court held that the defendant was not denied the effective assistance of counsel when defense counsel chose not to pursue a request for a competency evaluation of a victim.

> *State v. Harman*, 165 W. Va. 494, 270 S.E.2d 146 (1980).

This syllabus point indicates that a material witness may be subject to an examination by an expert. Although such an examination is a possibility, the Supreme Court has recognized that: "Because of the sensitive nature and the potential for abuse, we have required a showing that the psychiatric disorder affects the credibility [of the witness] and that an expert has had a sufficient opportunity to make the diagnosis of psychiatric disorder before the evidence can be used to impeach a witness." *State v. Allman*, 182 W. Va. 656, 658, 391 S.E.2d 103, 105 (1990). Based upon the limitations recognized in *Harman* and other cases, an examination of this nature would be permitted only in fairly unusual circumstances. If such an examination were ordered, the trial court would have the discretion to appoint the person who performed the evaluation. See *State v. Murray*, 180 W. Va. 41, 375 S.E.2d 405 n.7 (1988) (citing *Burdette v. Loban*, 174 W. Va. 120, 323 S.E.2d 601 (1984)). A defendant would not have the right to challenge an expert's opinion by having a witness undergo an additional examination by his or her own expert.

4. Examination for Rape Trauma Syndrome

As with a child victim, an adult victim may be subject to an interview by an expert for the State to address whether the victim's actions are consistent with those of a sexual assault victim. The parameters for this type of testimony are as follows:

> Qualified expert testimony regarding rape trauma syndrome is relevant and admissible in a prosecution for rape where the defense is consent. The expert may testify that the alleged victim exhibits behavior consistent with rape trauma syndrome, but the expert may not give an opinion, expressly or implicitly, as to whether or not the alleged victim was raped. Syl. Pt. 2, *State v. McCoy*, 179 W. Va. 223, 366 S.E.2d 731 (1988).

In a case decided one year later, the Court provided further guidance on the parameters of this type of evidence:

> Qualified expert testimony regarding rape trauma syndrome is admissible in a rape prosecution to explain the State's direct evidence in its case in chief. Before such

> evidence is introduced, the expert must be properly qualified. The jury should be admonished and instructed that the evidence is for the purpose of explaining the other evidence in the case and cannot serve as the ultimate basis of the jury's verdict. Additionally, the court must not permit the expert to give an opinion, explicitly or implicitly, as to whether the alleged victim was raped. Syl. Pt. 3*, State v. Jackson*, 181 W. Va. 447, 383 S.E.2d 79 (1989).

The Court provided further guidance on the presentation of this type of evidence when it addressed a case in which a police officer was allowed to testify, in general, about victims who fail to report sexual assaults. *State v. Varlas*, 237 W. Va. 399, 787 S.E.2d 670 (2016). Although the Court noted that it was not strictly necessary to address the error because the conviction was reversed for other reasons, it observed that the same issue could arise during a retrial. The Court stated that if the State wanted to show that the incident caused the victim to be reluctant to report it, then the evidence would have to be developed by an expert and it would have to relate in particular to the victim. 237 W. Va. at 408-09, 787 S.E.2d at 680-81.

VI. Access to Recorded Interviews of Children

Given the ease of publication of electronic or written material, it is necessary to guard against the unauthorized disclosure or publication of recorded interviews of children. As a general principle, recordings of forensic interviews of children are subject to the confidentiality provisions found in West Virginia Code § 62-6B-6 and Trial Court Rule 18, and access to and disclosure of recorded interviews is prohibited unless expressly allowed by the confidentiality provisions.

A. Definition of "Interviewed Child"

The confidentiality provisions govern disclosure of interviews of children that are electronically recorded when the topic of the interview involves alleged criminal behavior or abuse or neglect of *any* child who is under 18. Therefore, the protections apply whether or not the interviewed child is the direct victim of the alleged criminal behavior or abuse or neglect. W. Va. T.C.R. 18.02(a). For example, an older sibling of a victim could be interviewed, and his or her recorded interview would be confidential even though he or she was not the identified victim of the alleged criminal behavior or abuse or neglect.

B. Definition of "Recorded Interview"

The term "recorded interview" includes the electronic recording itself, any transcript of an electronic recording, and any written documentation of the recorded interview. W. Va. T.C.R. 18.02(b). For instance, a written summary of a recorded interview would be subject to the confidentiality provisions found in West Virginia Code § 62-6B-6 and Trial Court Rule 18. However, documents such as criminal complaints, police reports or other routine law enforcement documentation are **not** subject to these requirements. W. Va. T.C.R. 18.02(b).

The confidentiality provisions are broad and apply to almost any type of professional whose interview with a child is recorded electronically, so long as the topic of the interview involves alleged criminal behavior or abuse or neglect of a child. Of course, the provisions apply to a recorded interview conducted by an employee or representative of a child advocacy center. They also apply when a psychologist, psychiatrist, physician, nurse, or social worker interviews a child. They further apply to a recorded interview if a psychiatrist or licensed psychologist records an interview of a child to determine whether a child should be allowed to testify in a criminal case through live, closed-circuit television. W. Va. Code § 62-6B-3(d). Finally, the provisions apply to a recorded interview conducted by a child protective services worker, a law enforcement officer, a prosecuting attorney, or his or her representative. W. Va. T.C.R. 18.02(b).

Although Trial Court Rule 18.02(b) applies to broad categories of professionals, such as prosecuting attorneys, not all interviews of a child will necessarily be recorded. See W. Va. Code § 62-6B-5.[13] For example, a nurse may perform a physical examination of a child for alleged sexual abuse, but the nurse is not subject to the memorialization requirement set forth in West Virginia Code § 62-6B-5. Similarly, a prosecuting attorney is not required to record an interview when he or she prepares a child to testify in court. W. Va. Code § 62-6B-5.

C. Access During Investigation

Access to or disclosure of a recorded interview is dependent upon whether a court case has been initiated or whether a case is in the investigative phase. During an investigation, only specified professionals

[13] West Virginia Code § 62-6B-5 establishes circumstances when an interview of a child must be memorialized by audio, video, or note-taking. This code section applies only to criminal investigations involving sexual assault of a child when the alleged victim is under 13 years of age. The requirements to memorialize an interview of a child by this code section do not correspond to the confidentiality provisions of Trial Court Rule 18 and West Virginia Code § 62-6B-6.

may obtain copies or observe a recorded interview. These professionals include the same professionals who may conduct such an interview, and they are listed in Section B., above. Treating professionals, such as psychiatrists, psychologists, nurses, or social workers, should be afforded reasonable access to an interview, but should not be provided with copies of the interview. W. Va. Code § 62-6B-6(b).

Whether a parent, guardian, or custodian may review a recording depends upon whether he or she is considered a perpetrator of criminal behavior or abuse or neglect. During an investigation, a parent, guardian, or custodian can only be allowed to observe a recorded interview if he or she is *not* an alleged perpetrator of the criminal behavior or the abuse or neglect. The prohibition on review applies if the allegations *may* give rise to a judicial or administrative proceeding. Although the term "administrative" proceeding is not defined, the intent of the phrase is to prevent review of an interview during an investigation if the DHHR may open a case for services to address the allegations of abuse or neglect. W. Va. Code § 62-6B-6(b).

Another limit on access by a parent, guardian, or custodian also pertains to recorded interviews. A parent, guardian, or custodian should not be allowed to watch a recorded interview if it would frustrate or undermine an investigation. W. Va. Code § 62-6B-6(b). As an example, it may be beneficial for a "protective" parent to watch a child's recorded interview. Conversely, a parent who might attempt to influence a child's statement should not be allowed to view a recording.

D. Access During Court Proceeding

Once a court case has been initiated, Trial Court Rule 18 governs access to and disclosure of recorded interviews of children. Trial Court Rule 18 covers all West Virginia court cases, whether the proceeding is in circuit court, family court, or magistrate court. W. Va. T.C.R. 18.01. For example, Trial Court Rule 18 would govern disclosure if the evidence in a personal safety order case included a recorded interview of a child. Similarly, Trial Court Rule 18 would apply in a final protective order proceeding in family court if the evidence included this type of interview.

E. Required Protective Order Provisions

Before a recorded interview may be disclosed, a protective order must be established that controls access to, publication of, duplication of, or use of any recorded interview of a child. As explained above, "recorded interview" includes an electronic recording, a transcript, or written documentation of an interview, such as a summary. W. Va. T.C.R. 18.03(b). Any protective order must include the terms and conditions set

forth in Trial Court Rule 18.03(b). A discussion of the required terms follows.

First, all copies of a recorded interview must be marked as follows: "CONFIDENTIAL - PENALTIES FOR UNAUTHORIZED DISCLOSURE OR DUPLICATION." W. Va. T.C.R. 18.03(b)(1).

Secondly, access to and use of a recorded interview by counsel for the parties, any guardian *ad litem*, and their employees is limited to the use in the case and only as allowed by the protective order. W. Va. T.C.R. 18.03(b)(2). For example, an attorney who represents a parent in an abuse and neglect case in which a recorded interview was disclosed would not be allowed to use the recorded interview in a subsequent family court case, such as a divorce, without authorization by the court.

A third provision in a protective order involves review by parties. Only parties may review an interview, and their observation must be under the supervision of their counsel, the guardian *ad litem*, or their staff. This requirement expressly prohibits an attorney from providing copies of a recorded interview, transcript, or written documentation of an interview to a party, as might be done routinely with other types of discovery. If a party appears *pro se* in a case, he or she may watch a recording in the presence of court staff, but he or she may not obtain a copy of a recorded interview. W. Va. T.C.R. 18.03(b)(3).

A fourth provision in a protective order requires a protective order to prohibit review by non-party family members of a defendant, respondent, petitioner, or victim unless the presiding judicial officer finds that the disclosure is necessary to protect a party's rights or is in the best interests of the interviewed child. W. Va. T.C.R. 18.03(b)(3). This finding should be included in the protective order.

One example in which a family member could be allowed to watch a recorded interview would involve a juvenile case when a juvenile is charged with a sexual offense against a child. The juvenile, as a party, would be allowed to review a recording of an interview. Under a strict interpretation of Trial Court Rule 18, a juvenile's parent would not be able to watch a recording. However, in most cases, it would be helpful for a juvenile's parent to review a recorded interview in order to evaluate the allegations against his or her child. In such a case, the presiding judge should determine whether or not a parent of a juvenile would be allowed to observe a recorded interview and should indicate the finding in the protective order.

As another example, it would be helpful, in most cases, for a parent (a non-perpetrator) whose child is a victim of a sexual offense to be

allowed to watch a recording. In that instance, the protective order should simply specify that the parent would be allowed to do so because it is in the child's best interests.

Another required provision in a protective order addresses access to a recorded interview by a party's consultant, investigator, or expert. W. Va. T.C.R. 18.03(b)(4). A professional of this type may be allowed to receive a duplicate or watch a recorded interview, so long as the professional has signed a written agreement to be bound by the protective order. In most cases, it would be helpful to identify the consultant, investigator, or expert and any limitations on his or her review in the protective order or an amendment to it.

Further, a protective order should include a clause that requires counsel or a guardian *ad litem* to take reasonable and appropriate measures to prevent unauthorized access to a recorded interview. W. Va. T.C.R. 18.03(b)(5). Again, this provision applies to recordings, transcripts and related documentation, such as a summary of a recorded interview.

The protective order should include specific confidentiality provisions that a party should follow if the recorded interview is filed as an exhibit to a pleading or is discussed in a pleading. W. Va. T.C.R. 18.03(b)(6). For example, the protective order should require counsel to comply with the procedures found in Trial Court Rule 10.03 to obtain an order sealing a recorded interview if counsel files it as an exhibit or discusses it in detail in a pleading.

A protective order should include a provision governing the use of a recorded interview at a deposition. W. Va. T.C.R. 18.03(b)(7). If parties or attorneys use a recorded interview at a deposition, they shall have both the right and obligation to designate a recorded interview as confidential and subject to the terms of a protective order.

A protective order should include a provision that requires counsel to notify the court before a recorded interview is used at a hearing or trial in a case. W. Va. T.C.R. 18.03(b)(8). The type of notice is not specifically identified, but, in most cases, a written notice should be filed.

Any protective order should include the statutory criminal penalties for the knowing and willful duplication or publication of a recorded interview established by West Virginia Code § 62-6B-6(d). W. Va. T.C.R. 18.03(b)(9). The misdemeanor penalty includes a jail term of not less than 10 days nor more than one year or a fine of not less than $2,000.00 nor more than $10,000.00. W. Va. Code § 62-6B-6(d).

A court is further authorized to include any other appropriate measures in a protective order. W. Va. T.C.R. 18.03(b)(10). The judicial

officer is, therefore, authorized to tailor any protective order to the circumstances of a particular case.

F. Expedited Access

Although distribution of a recorded interview must be subject to a protective order, a judicial officer may allow a guardian *ad litem* or counsel to have expedited access to a recorded interview. W. Va. T.C.R. 18.03(c). In these circumstances, counsel or a guardian *ad litem* may review a recorded interview while it is in the custody or possession of an authorized individual. An example of an authorized individual is specified as a prosecuting attorney, but the rule does not limit the term to a prosecuting attorney. Therefore, counsel or a guardian *ad litem*, as allowed by a provisional court order, could review a recorded interview at a child advocacy center.

G. Production by Non-Parties

Trial Court Rule 18.04 governs the production of an interview by a person or entity who is not a party to a proceeding. A typical example would involve the production of a recorded interview by a child advocacy center. A third party, such as a child advocacy center, is not authorized or obligated to produce a recorded interview unless a party obtains a court order as described below. A subpoena, standing alone, does not authorize or obligate a third party to disclose this type of recorded interview.

A party to a proceeding who seeks production of a recorded interview must file a motion with the court that specifies the basis or grounds for the production. A copy of the subpoena to be served on the non-party must be filed with the motion.

The motion, subpoena, and a notice of hearing must be served on counsel and any unrepresented party. It must also be served on the prosecuting attorney in the county where the proceeding is pending and the prosecuting attorney where the recorded interview was conducted or used as part of an investigation. For example, a person might be seeking a divorce or other relief such as establishment of a parenting plan in a county other than the county where the interview was conducted. In those circumstances, the party must serve both the prosecutor where the family court case is pending and the county where the interview was conducted.

The presiding court is required to conduct a hearing on the motion. As part of its analysis, the court may conduct an *in camera* inspection of the records. Upon a finding of good cause, the court may order the disclosure of specified parts of the recorded interview or other records. If the court orders the disclosure of the records, the court is required to enter a protective order that includes the provisions found in Trial Court Rule

18.03(b). Absent a court order established through the above-referenced procedure, the third party is not authorized or obligated to disclose the recorded interview.

VII. Pretrial Notification to Victims and Witnesses of Criminal Proceedings

Note: A discussion of protection of the victim and notice to the victim concerning any pretrial release of a defendant is included in Section II. B. and C.

The Victim Protection Act of 1984, West Virginia Code §§ 61-11A-1, *et seq*., and its implementing regulations were enacted so that crime victims and witnesses would be assisted and protected throughout a criminal case. W. Va. Code § 61-11A-1. With regard to pretrial notification, this act imposes duties upon prosecutors and law enforcement to inform victims and witnesses about the criminal proceedings and about the process for obtaining compensation for injuries that occur as a result of a crime. Although the assistance and protection explained in this section apply to all types of crimes, the implementation of these procedures is especially important to victims of sexual violence crimes.

As established by West Virginia Code § 61-11A-2a, the prosecutor or assistant is required to notify a victim concerning the basic provisions and procedures for requesting compensation from the crime victims compensation fund which is governed by West Virginia Code §§ 14-2A-1, *et seq.* and 142 C.S.R. § 4-4.1. The prosecutor must notify a victim of this information when the prosecuting attorney presents a case to the grand jury or proceeds in circuit court on an information. Notification must be made to the victim within 30 days of the presentation of the case to the grand jury or the filing of the information. For a discussion of victim impact statements and restitution for victims, see Chapter 7.

In addition to informing a victim concerning financial compensation, the arresting law enforcement agency must inform victims about any community-based victim treatment programs, the role of the victim in the criminal justice process, and about the stages in the process which are significant to the victim and how a victim can obtain information concerning these stages. 142 C.S.R. § 4-1.1. In each county, the prosecutor is required to develop information, such as a pamphlet or brochure that lists services available for crime victims. 142 C.S.R. § 4-4.2. With regard to a particular case, the office of the prosecuting attorney is required to notify a victim or witness of any scheduling changes that affect their appearance. 142 C.S.R. § 4-4.4. Further, victims and witnesses should be notified of steps that law enforcement and prosecutors can take

to protect victims.[14] Victims should be notified, preferably in advance, of the defendant's arrest, his or her initial appearance, and any pre-trial release. 142 C.S.R. § 4-4.5. Additionally, a victim should be informed of the proceedings, including the entry of a guilty plea or the scheduling of a trial. A prosecutor should consult with the victim concerning the dismissal of a case, any pretrial release, plea negotiations, and a defendant's participation in a pretrial diversion program. 142 C.S.R. § 4.4-7. When it is practical, victims and other witnesses for the State should be provided a separate waiting area from other witnesses. 142 C.S.R. § 4.4-8. The implementation of these procedures in cases involving sexual offenses will enhance the role of and protect victims and witnesses throughout the criminal justice process.

[14] If the victim is a minor, the term "victim" means the minor's guardian or other immediate family member. If the victim is deceased, the term "victim" means the fiduciary of the victim's estate or a deceased victim's immediate family member.

Chapter 4

TRIAL PROCEDURES INVOLVING SEXUAL OFFENSES

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I. Victim Information in Court Files

In West Virginia, there are no statutes or rules specific to the filing of sensitive information of a sexual assault victim in criminal files that are presumptively open to public inspection. See Syl. Pt. 2, *Richardson v. Town of Kimball*, 176 W. Va. 24, 340 S.E.2d 582 (1986). However, there are some general methods that may be used to protect the privacy of a victim. A brief discussion of those methods follows.

As an initial matter, the West Virginia Supreme Court has recognized that a minor victim can be identified by his or her initials in an indictment in cases involving sexual offenses. *State ex rel. Blaney v. Reed*, 215 W. Va. 220, 599 S.E.2d 643 n.1 (2004). In the footnote in *Blaney*, the Supreme Court specifically acknowledged that the identification of the minor victims by their initials is "in accord with our own

practice of using the initials of parties in cases involving sensitive facts." *Id.* It is axiomatic to conclude that this practice could be used for other charging documents as well. Similarly, a criminal defendant, on appeal, may be referred to by the initial of his or her last name when victim is related to him or her. See *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 n.1 (1990).

Addressing appeals, Rule 40(e) of the West Virginia Rules of Appellate Procedure specifies when personal identifiers must be restricted in briefs or other documents filed on appeal. Specifically, initials or descriptive terms must be used if the crime is sexual in nature and the victim is referenced. W. Va. R. A. P. 40(e).

With regard to circuit court files, Trial Court Rule 32.09 provides, by default, that discovery does not have to be filed in a criminal case unless the judicial officer orders otherwise. Rather, according to Trial Court Rule 32.09, the attorney who discloses the evidence is responsible for filing a certificate of service that includes the name and the case number; that includes specific references to the type of materials disclosed as required by Trial Court Rules 32.01 through 32.09, and that indicates the number of pages of material that were disclosed with regard to each rule. This procedure would limit the filing of discovery unless documents were filed as a proposed exhibit or admitted into evidence either at a hearing or at trial. The certificate of service should provide sufficient detail to identify the evidence that was disclosed. For example, the certificate of service should identify the title of the document and the number of pages in the particular document. This practice will minimize claims, on appeal or in post-conviction habeas cases, that evidence was not properly disclosed during discovery.

Third, the mental health records of a sexual assault victim are not automatically subject to disclosure. Rather, the West Virginia Supreme Court has established a procedure for the *in camera* review of such records and only allows disclosure based upon a finding they are relevant. *Nelson v. Ferguson*, 184 W. Va. 198, 399 S.E.2d 909 (1990); *State v. Roy*, 194 W. Va. 276, 460 S.E.2d 277 (1995); *State v. Parsons*, 214 W. Va. 342, 589 S.E.2d 226 (2003); *State v. Schlatman*, 233 W. Va. 84, 755 S.E.2d 1 (2014). (See Chapter 3 for a complete discussion of this procedure.) Implicit in this procedure is the recognition that the mental health records of a sexual assault victim should be shielded from disclosure unless the court determines that they would be relevant either to the facts of the alleged offense or to the victim's credibility. When this type of record is disclosed, a party may request that the court seal the documents in the file pursuant to Trial Court Rule 10.03.

II. Courtroom Access by the Public and Media

The United States Supreme Court has recognized that the public, including the press, has a guaranteed right to attend criminal trials based upon the First and Fourteenth Amendments to the United States Constitution. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S. Ct. 2814 (1980). Relying on the right recognized in *Richmond Newspapers*, the United States Supreme Court struck down a Massachusetts' statute because it required trial judges to exclude the public and the press in all cases when minor victims of specified sexual offenses testified without regard to whether there were any case-specific findings that justified closure. *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 102 S. Ct. 2613 (1982). As a basis to defend the constitutionality of the statute, the state argued that it had a compelling interest in protecting the physical and psychological well-being of minors. Although the Supreme Court found that the state has such a compelling interest, it reasoned that mandatory closure in all cases was not a narrowly tailored method of protecting this compelling interest.

Approximately one month before *Richmond Newspapers* was decided, the West Virginia Supreme Court held that the open courts provision in the West Virginia Constitution established an independent right of the public and the press to attend criminal trials. *State ex rel. Herald Mail Co. v. Hamilton*, 165 W. Va. 103, 267 S.E.2d 544 (1980). In a new syllabus point, the Court held that:

> Article III, Section 14 of the West Virginia Constitution, when read in light of our open courts provision in Article III, Section 17, provides a clear basis for finding an independent right in the public and press to attend criminal proceedings. However, there are limits on access by the public and press to a criminal trial, since in this area a long-established constitutional right to a fair trial is accorded the defendant. Syl. Pt. 1, *Herald Mail Co., supra*.

The Court declined to address whether Article III, Section 7 of the West Virginia Constitution, the provision governing freedom of speech and the press, also established a right of access to criminal proceedings.

Although the West Virginia Court recognized an independent right of the press and the public to attend criminal trials, including pre-trial proceedings, it also recognized that there may be limits on access by the public and the press in specific circumstances. *Herald Mail*, 165 W. Va. at

113, 267 S.E.2d at 550. Providing guidance on this issue, the Court held that:

> On a closure motion, the ultimate question is whether, if the pretrial hearing is left open, there is a clear likelihood that there will be irreparable damage to the defendant's right to a fair trial. Factors bearing on the issue of irreparable damage include the extent of prior hostile publicity, the probability that the issues involved at the pretrial hearing will further aggravate the adverse publicity, and whether traditional judicial techniques to insulate the jury from the consequences of such publicity will ameliorate the problem. Syl. Pt. 2, *Herald Mail, supra.*

In addition to the constitutional provisions that provide that criminal proceedings are open proceedings, Rule 26 of the West Virginia Rules of Criminal Procedure establishes a presumption that testimony in criminal trials shall be taken in open court. This rule states that: "In all trials the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules, the West Virginia Rules of Evidence, or other rules adopted by the Supreme Court of Appeals." W. Va. R. Crim. P. 26. Therefore, unless an exception established by a rule or statute applies, criminal proceedings involving witness testimony should presumptively remain open.

Subsequent to *Herald Mail*, challenges associated with the attendance of specific groups of people arose. In 1982, the West Virginia Supreme Court addressed a case in which the defendant had requested that specific spectators, a group of teenagers, be excluded from his criminal trial. *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982). In *Richey*, the victim was a teenager, the defendant was a member of the West Virginia House of Delegates, and the alleged offense was third degree sexual assault. As a basis for arguing that the trial court should have excluded the teenagers, the defendant asserted that the group may have influenced the jury to find him guilty. Rejecting this argument, the Court concluded that: "We must assume that a jury has the fortitude to withstand this type of public scrutiny, and cannot presume irreparable harm to the defendant's right to a fair jury trial by the presence of spectators who may have some type of associational identity with the victim of the crime." 171 W. Va. at 352, 298 S.E.2d at 889. To provide guidance in future cases, the Court held that:

> Where a defendant moves to exclude members of the public from observing his jury trial, the ultimate question is whether, if the trial is left open, there is a clear likelihood that there will be irreparable damage to the defendant's right to a fair trial. Syl. Pt. 7, *Richey, supra.*

In another case addressing a group of spectators at a DUI felony trial, the Court held that the trial court erred when it took no action, other than excusing two potential jurors, to protect the defendant's right to a fair trial. *State v. Franklin*, 174 W. Va. 469, 327 S.E.2d 449 (1985). In *Franklin*, a group of spectators from Mothers Against Drunk Driving (MADD) wore buttons identifying themselves as members of MADD and sat directly in front of the jury as directed by the sheriff. The sheriff was the president of the local chapter of MADD. The Court noted that: "[T]he [trial] court's cardinal failure in this case was to take no action whatever against a predominant group of ordinary citizens who were tooth and nail opposed to any finding that the defendant was not guilty." 174 W. Va. at 475, 327 S.E.2d at 455. The Court did not, however, find that the spectators should have necessarily been excluded. Rather, the Court noted that the trial court should have taken some type of action to protect the defendant's right to a fair trial.

III. Jury Panel

A. Qualifications for Jurors

West Virginia Code § 52-1-8 establishes the qualifications for serving as a juror in either a criminal or civil case. Establishing the standard of review for challenges to juror qualifications, the West Virginia Supreme Court held that:

> In reviewing the qualifications of a jury to serve in a criminal case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court. Syl. Pt. 5, *State v. Benny W.*, 242 W. Va. 618, 837 S.E.2d 679 (2019).

With regard to juror qualification issues, a defendant may be entitled to a new trial if it is discovered that a disqualified juror voted on a

verdict. Syl. Pt. 3, *Proudfoot v. Dan's Marine Service, Inc.*, 210 W. Va. 498, 558 S.E.2d 298 (2001). However, a party must show that he or she made a timely objection or used ordinary diligence to discover the reason for the disqualification. Syl. Pt. 4, *Proudfoot*, *supra.* In *Proudfoot*, a juror did not disclose her prior felony conviction either on the juror qualification form or in response to the judge's questions during *voir dire*. During pre-trial motions the circuit court found that the defendant did not show that it was prejudiced by the juror. On appeal, the Supreme Court reversed this ruling because it found that the defendant had the right to rely on the juror's silence to the trial court's specific questions.

Although *Proudfoot* involved a juror who had concealed a felony conviction and would have been disqualified, the West Virginia Supreme Court has applied the holding of *Proudfoot* to other grounds for disqualification, such as residency. See *State v. Cecil*, 221 W. Va. 495, 655 S.E.2d 517 (2007). In *Cecil*, the juror had disclosed his residence on the juror questionnaire, but counsel did not discover the juror's residence. Therefore, the Court found that defense counsel had not made a timely objection to the juror's qualification, that the error was not raised in the trial court, and it did not order a new trial on these grounds. However, the Court observed that the holding in *Proudfoot* would also apply to a person who may have been disqualified for reasons associated with his residence.

B. *Voir Dire* of Jury Panel

Rule 24 of the West Virginia Rules of Criminal Procedure sets forth the procedure for *voir dire* of a panel of prospective jurors. Enacted prior to the adoption of Rule 24, West Virginia Code § 56-6-12 established guidelines for conducting *voir dire*.[1] The statute states that the purpose of *voir dire* is to determine whether prospective jurors are qualified, whether they are related to any of the parties, or whether they have any interest or bias in the matter. Both the statute and rule indicate that, in general, *voir dire* may be conducted by the court with input from the parties or by counsel. Individual *voir dire* has also been recognized as an effective

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[1] West Virginia Code § 56-6-12 provides that:

> Either party in any action or suit may, and the court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall appear to the court that such person is not a qualified juror or does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause. And in every case, unless it be otherwise specially provided by law, the plaintiff and defendant may each challenge four jurors peremptorily.

method for determining whether a potential juror is biased. See, e.g., Syl. Pt. 3, *State v. Pratt*, 161 W. Va. 530, 244 S.E.2d 227 (1978).

With regard to *voir dire*, the West Virginia Supreme Court has recognized that the right to an impartial jury in a criminal trial is a fundamental constitutional right. Syl. Pt. 4, in part, *State v. Peacher*, 167 W. Va. 540, 280 S.E.2d 559 (1981). Therefore, "[a] meaningful and effective voir dire of the jury panel is necessary to effectuate that fundamental right." *Id.* Although the trial court has discretion over the scope and manner of *voir dire*, it is an abuse of discretion for the trial court "to infringe upon a litigant's ability to determine whether the jurors are free from interest, bias or prejudice, or to effectively hinder the exercise of peremptory challenges." Syl. Pt. 5, in part, *Peacher, supra.* In *Peacher*, the Supreme Court concluded that the trial court committed reversible error when it prevented defense counsel from questioning the prospective jurors concerning any relationships between members of the jury panel and law enforcement personnel.

C. Claims of Juror Bias

As noted above, one of the purposes of *voir dire* is to determine whether a prospective juror is biased. Providing guidance concerning bias, the West Virginia Supreme held that:

> When individual voir dire reveals that a prospective juror feels prejudice against the defendant which the juror admits would make it difficult for him to be fair, and when the juror also expresses reluctance to serve on the jury, the defendant's motion to strike the juror from the panel for cause should ordinarily be granted. Syl. Pt. 1, *State v. Bennett*, 181 W. Va. 269, 382 S.E.2d 322 (1989).

If a prospective juror states that he has formed an opinion concerning the guilt or innocence of the defendant, such a person must be able "to say on his *voir dire* unequivocally and without hesitation that such opinion will not affect his judgment in arriving at a just verdict from the evidence alone . . .." *Bennett, supra* (quoting Syl. Pt. 2, *State v. Gargiliana*, 138 W. Va. 376, 76 S.E.2d 265 (1953)). Any doubt must be resolved in favor of the defendant. *State v. West*, 157 W. Va. 209, 200 S.E.2d 859 (1973).

Seven years after it decided *Bennett*, the West Virginia Supreme Court again addressed the issue of juror bias. *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996). With regard to bias, the Court held that:

> The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, *a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary*. Syl. Pt. 4, *Miller, supra* (emphasis added).

In *Miller*, the Court addressed the types of fact necessary to demonstrate bias by holding that: "Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed." Syl. Pt. 5, *Miller, supra.* The Court further held that: "The challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for cause." Syl. Pt. 6, in part, *Miller, supra.*

Subsequent to the *Miller* decision, the Supreme Court provided further guidance regarding juror bias. *State v. Newcomb*, 223 W. Va. 843, 679 S.E.2d 675 (2009). The Court held that:

> When a prospective juror makes a clear statement of bias during voir dire, the prospective juror is automatically disqualified and must be removed from the jury panel for cause. However, when a juror makes an inconclusive or vague statement that only indicates the possibility of bias or prejudice, the prospective juror must be questioned further by the trial court and/or counsel to determine if actual bias or prejudice exists. Likewise, an initial response by a prospective juror to a broad or general question during voir dire will not, in and of itself, be sufficient to determine whether a bias or prejudice exists. In such a situation, further inquiry by the trial court is required. Nonetheless, the trial court should exercise caution that such further voir dire questions to a prospective juror should be couched in neutral language intended to elicit the prospective juror's true feelings, beliefs, and thoughts—and not in language that

> suggests a specific response, or otherwise seeks to rehabilitate the juror. Thereafter, the totality of the circumstances must be considered, and where there is a probability of bias the prospective juror must be removed from the panel by the trial court for cause. Syl. Pt. 8, *Newcomb*, 223 W. Va. 843, 679 S.E.2d 675.

In *Newcomb*, a case involving a murder, two jurors answered questions on *voir dire* that defense counsel claimed were indicative of bias. One juror indicated that she might be prone to believe police officers over other witnesses, but also stated that she could follow the judge's instructions on this issue. The second juror indicated that she was sensitive and may be more judgmental, but also asserted that she could come to a decision. The defendant used two peremptory strikes to remove the jurors, and he claimed on appeal that they should have been struck for cause. After reviewing West Virginia case law, the Supreme Court found that the trial court did not err in refusing to strike the jurors for cause. Further, it noted that it has adopted Syllabus Point 8 for clarification purposes.

Providing further guidance on juror bias, the West Virginia Supreme Court addressed a situation in which the defendant argued that a juror should have been struck for cause. *State v. Hughes*, 225 W. Va. 218, 691 S.E.2d 813 (2010). In *Hughes*, the defense attorney asked the juror if she believed that a person is more likely than not to be guilty if the person was charged with a crime. The prospective juror answered, "yes." In response to follow up questions from the prosecutor, the juror agreed that she had made the statement because she was aware that a magistrate would have made a probable cause finding before issuing an arrest warrant. On appeal, the defendant alleged that the juror should have been struck for cause and relied upon *State v. Griffin*, 211 W. Va. 508, 566 S.E.2d 645 (2002), a *per curiam* opinion.

Analyzing this issue, the Court noted that the dissenting justices in *Griffin* reasoned that a response, such as the one in *Hughes*, did not indicate that the juror was biased against the defendant. Rather, it indicated that the juror, like an average person, did not believe that the majority of people who are indicted are, in fact, innocent. The Court concluded that this type of response must be evaluated in the context of additional answers to further questions by either the trial court or prosecutor. In support of its conclusion, the Court relied upon the following opinions: *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999); *State v. Newcomb*, 223 W. Va. 843, 859-60, 679 S.E.2d 675, 691-92 (2009); *State v. Williams*, 206 W. Va. 300, 524 S.E.2d 655 (1999); *State v.*

Miller, 197 W. Va. 588, 476 S.E.2d 535 (1996). Overruling *Griffin*, the Court held that:

> A prospective juror is not subject to removal for cause merely because he/she affirmatively answered a question which, in essence, asked whether the juror believes that a person is arrested or charged because there is probable cause that the person is guilty. To the extent that *State v. Griffin*, 211 W. Va. 508, 566 S.E.2d 645 (2002), holds otherwise, it is overruled. Syl. Pt. 5, *Hughes*, *supra*.

Subsequent to the decision in *Hughes*, the Supreme Court again addressed the issue of juror bias. *State v. Sutherland*, 231 W. Va. 410, 745 S.E.2d 448 (2013). In *Sutherland*, a prospective juror for a murder trial stated that he generally believed that someone convicted of murder should not be released from prison. Defense counsel did not ask further clarifying questions, and used a peremptory strike to remove the juror. On appeal, the defendant argued that he was automatically entitled to a new trial according to Syllabus Point 8 of *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995). The Court, however, disagreed and established that a defendant must show that he or she was prejudiced if the defendant has to remove an allegedly biased juror with a peremptory strike. In a new syllabus point, the Court held that:

> A trial court's failure to remove a biased juror from a jury panel, as required by W. Va. Code § 62-3-3, does not violate a criminal defendant's right to a trial by an impartial jury if the defendant removes the juror with a peremptory strike. In order to obtain a new trial for having used a peremptory strike to remove a biased juror from a jury panel, a criminal defendant must show prejudice. The holding in Syllabus point 8 of *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995), is expressly overruled. Syl. Pt. 3, *Sutherland*, 231 W. Va. 410, 745 S.E.2d 448.

D. Cases Involving Juror Bias

A discussion of the specific facts in cases involving juror bias follows. In *Bennett*, the defendant was charged with multiple counts of third degree sexual assault and incest. One juror indicated that he knew the defendant's children, had heard rumors about the offenses, and believed that the defendant was guilty. Although the juror stated that he

could be fair, the Supreme Court concluded that he had not indicated this "unequivocally and without hesitation." 181 W. Va. at 271, 382 S.E.2d at 324. When another juror indicated that his sister-in-law was the prosecuting attorney's secretary, the trial court found that this juror was also free from bias. The Supreme Court, however, recognized that: "[A] prospective juror may have a demonstrable prejudice or bias in a particular case without either acknowledging or admitting it." 181 W. Va. at 273, 382 S.E.2d at 326. Relying on Syllabus Points 4 and 6 of *State v. Beckett*, 172 W. Va. 817, 310 S.E.2d 883 (1983), the Court held that this juror should have been struck for cause. See also *State v. Nett*, 207 W. Va. 410, 533 S.E.2d 43 (2000) (holding that a juror who disclosed that two friends of his had been killed by drunk drivers should have been dismissed for cause). Based upon a review of these cases, it can be concluded that the dismissal of a juror for cause turns on the specific facts and statements of jurors that are elicited during *voir dire*.

In a case in which the defendant was found guilty of first degree murder, the defendant argued on appeal that one juror and two alternates should have been struck for cause. *Miller*, 197 W. Va. 588, 476 S.E.2d 535. Although the defendant asserted that one juror had made statements indicating a general bias against persons charged with crimes, the Court concluded that the transcript of this juror's individual *voir dire* failed to indicate that she was biased in the manner claimed by the defendant. The defendant also claimed that a prospective alternate juror was biased because she gave inconsistent answers about intoxication. Holding that the juror should not have been dismissed for cause, the Court noted that the juror had expressed some doubt about whether a drunk person's state of mind could negate premeditation, but she also indicated that she could follow the court's instruction on this matter. Another prospective alternate juror indicated that alcohol should not be used as an excuse for a crime and that he had a cousin who was in a wheelchair as a result of a stabbing by someone who was drunk. Finding that dismissal for cause was not warranted, the Court noted that the juror had indicated he could render an impartial verdict. Two other prospective jurors indicated that they had negative impressions of the defendant's homosexual orientation. Affirming the trial court's rulings with regard to these allegations of error, the Supreme Court held that an appellate court should only overturn such a ruling if "it is left with a clear and definite impression that a prospective juror would have been unable to faithfully and impartially apply the law." *Miller*, 197 W. Va. at 606, 476 S.E.2d at 553.

In *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981), the defendant was charged with several counts of sexual assault and sexual abuse of his step-daughter. One prospective juror initially was equivocal about whether she formed an initial opinion about the defendant's guilt, but

she also indicated that she could render a verdict based on the evidence. A second juror indicated that the defendant's counsel had previously represented another defendant who was convicted of murdering the juror's niece. Based upon a review of the transcript of *voir dire*, the Supreme Court held that the trial court did not err when it did not dismiss the jurors for cause.

The West Virginia Supreme Court has continued to use a fact-specific analysis for determining juror bias. In *State ex rel. Parker v. Keadle,* 235 W. Va. 631, 776 S.E.2d 133 (2015), the defendant was tried and convicted by a jury for 81 counts of sexual offenses involving a female relative under the age of 12. After the verdict was returned, the defendant moved for a new trial and argued that a juror should have been stricken for cause. The circuit court granted the motion and found that the juror should have been stricken. The State then filed a writ of prohibition with the Supreme Court to challenge the ruling.

During jury selection in the underlying case, the parties agreed to the use of a jury questionnaire. In her questionnaire, one juror stated that the fact that the defendant was charged and indicted by a grand jury for sexual offenses with his daughter led her to believe that there was a suspicion of guilt. She further stated that when she read about the numerous counts against the defendant, she thought "this person must have done something." 235 W. Va. at 635, 776 S.E.2d at 137. Lastly, the juror sent a thank you letter to the prosecuting attorney after the trial and complimented his performance.

In its analysis, the Court noted that, although defense counsel had originally moved to strike the juror for cause, after the motion was denied, counsel did not direct any additional questions towards the juror. Defense counsel also failed to make an objection at the time the juror was placed on the jury. The Supreme Court held that the circuit court erred in granting a new trial and finding that the juror should have been removed for cause because, although the juror's answers "may well have given rise to a need for further inquiry," they were not "enough, standing alone, to strike her for cause." 235 W. Va. 639, 776 S.E.2d at 141. Further, the "statements [did] not manifest a 'clear and definite impression' that [the juror] would not be able to fairly and impartially apply the law." *Id.*

In a federal habeas corpus case, a defendant convicted of criminal sexual penetration in New Mexico alleged that he was denied a fair trial because a juror who had been a victim of an acquaintance rape served on the jury. *Gonzales v. Thomas*, 99 F.3d 978 (10th Cir. 1996), *cert. denied*, 520 U.S. 1159 (1997). Only after the trial did the defendant become

aware that a juror had previously been a rape victim.[2] With regard to whether a rape victim could serve on a jury in a rape case, the Tenth Circuit did not adopt a rule that excludes all such persons from serving as jurors. Explaining its reasoning, the Tenth Circuit observed that: "To hold that no rape victim could ever be an impartial juror in a rape trial would, we think, insult not only all rape victims but also our entire jury system, which is built upon the assumption that jurors will honestly try 'to live up to the sanctity of [their] oath.'" 99 F.3d at 989-90 (quoting *Dennis v. United States*, 339 U.S. 162, 171, 70 S. Ct. 519, 523 (1950)).[3] Rather, the Tenth Circuit held that a court "should look for how the experience affected the juror and what similarities exist between the juror's experience and the case at trial." 99 F.3d at 990. Similar to the standard established by the West Virginia Supreme Court, the Tenth Circuit has adopted an approach that involves a case-by-case analysis of specific facts in cases in which a defendant alleges that a juror was biased.

In a case in which a defendant was convicted of sexually assaulting two juveniles who were friends of his daughter, the defendant claimed that three of the prospective jurors should have been struck for cause. *State v. Benny W.*,242 W. Va. 618, 837 S.E.2d 679 (2019. One juror had a friend who had been sexually assaulted and knew staff in the prosecutor's office. A second juror knew the prosecutor, had a daughter who had been sexually assaulted and was a former teacher of a witness. The third juror stated that she knew the victims and that she had been sexually assaulted as a child. The trial judge did not strike them for cause because they each said that they could impartially decide the case. The defendant used peremptory strikes to remove the jurors and appealed, in part, on this basis. Following the holding of *Sutherland*, the Supreme Court found that the defendant had failed to establish prejudice, had not shown that any juror or the panel was biased and affirmed the conviction. The Court adopted Syllabus Point 5 that established the standard of review for rulings involving juror qualifications. See Section III. A.

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[2] In *Gonzales*, the panel was questioned about whether they had been victims of a similar incident. The facts in *Gonzales* indicated that the defendant had knocked the victim out and then raped her. One juror who did not answer the question affirmatively but had been a victim of acquaintance rape later testified that she had done so because she believed that the crime for which the defendant was tried was different from the crime in which she was a victim.

[3] In a lengthy discussion concerning the federal standards for finding that a juror is biased, the Tenth Circuit affirmed the finding of the district court that the juror was not biased.

IV. Separate Waiting Areas

In the Victim Protection Act of 1984, the West Virginia Legislature generally recognized the difficulties that a victim faces when a criminal case is prosecuted. With regard to testimony of victims or witnesses for the State, the Legislature initially noted that: "[T]hey must often share the pretrial waiting room with the defendant or his family and friends." W. Va. Code § 61-11A-1. To address this difficulty, the Legislature expressly required that: "Victims and other prosecution witnesses should be provided a waiting area that is separate from all other witnesses prior to court appearances, if feasible." W. Va. Code § 61-11A-6(a)(6).

V. Victim and Witness Sequestration During Trial

Rule 615 of the West Virginia Rules of Evidence governs the sequestration of witnesses so that they cannot hear the testimony of other witnesses. Exceptions to a sequestration order include: 1) parties who are natural persons; 2) an officer or employee of a party which is not a natural person designated as its representative by its attorney; 3) a person whose presence is shown by a party to be essential to the presentation of the party's cause; or 4) a person the court believes should be permitted to be present. W. Va. R. Evid. 615. It is within the trial court's discretion to determine whether a witness is exempt from a sequestration order. Syl. Pt. 2, *State v. Steele*, 178 W. Va. 330, 359 S.E.2d 558 (1987) (quoting Syl. Pt. 4, *State v. Wilson*, 157 W. Va. 1036, 207 S.E.2d 174 (1974)).

The West Virginia Supreme Court has recognized that Rule 615 "makes the exclusion of witnesses a matter of right . . .." Syl. Pt. 1, in part, *State v. Omechinski*, 196 W. Va. 41, 468 S.E.2d 173 (1996). Its purpose "is to prevent the shaping of testimony by one witness to match that of another and to discourage fabrication and collusion." Syl. Pt. 2, in part, *Omechinski, supra.* However, the rights are not "self-executing" and the defendant must make a specific request for sequestration order. Syl. Pt. 5, *Omechinski, supra.* When sequestration is requested: "[T]he witnesses should be directed clearly that they must all leave the courtroom, with the exceptions the rule permits, and that they are not to discuss the case or what their testimony has been or will be or what occurs in the courtroom with anyone other than counsel for either side." Syl. Pt. 4, in part, *Omechinski, supra*. Prosecutions for sexual offenses are subject to the same general requirements regarding the sequestration of the witness.

Although the general rules regarding the sequestration of witnesses apply to cases involving sexual offenses, the West Virginia Supreme Court has recognized that a witness may be exempt from a sequestration order so that he or she may provide emotional support for a child sexual abuse victim. *State v. Barker*, 178 W. Va. 736, 364 S.E.2d 264 (1987). In

Barker, an expert witness was allowed to remain in the courtroom to provide emotional support to the child victim and was allowed to testify after the victim had done so. Although the defendant had objected to the presence of either the child's mother or expert witness, the defendant had indicated a preference for allowing the expert witness to remain in the courtroom, rather than the child's mother. Affirming the trial court's ruling, the Court noted that: "[A] child who is the victim of sexual abuse is a candidate for special attention in this regard." 178 W. Va. at 738, 364 S.E.2d at 266. The Court further concluded that the expert's testimony was not shaped by other testimony she heard; rather, it concerned the conclusions she had made as an expert.

VI. Testimony By Closed-Circuit Television

A. Federal Constitutional Framework

In 1990, the United States Supreme Court upheld a defendant's conviction for sexual offenses against a child victim when the trial court, pursuant to a state statute, allowed the child victim to testify via one-way closed-circuit television. *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990). In *Craig*, the defendant argued that his right to a face-to-face confrontation with an accuser as guaranteed by the Sixth Amendment of the United States Constitution was violated. Rejecting the defendant's argument, the Court held that: "[I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." 497 U.S. at 855, 110 S. Ct. at 3169. The Court further noted that the finding of necessity must be case-specific, that evidence must show that the child would be subject to trauma by the defendant's presence, not by the court proceeding in general, and that the trauma or emotional distress must be more than *de minimis.* 497 U.S. at 855-56, 110 S. Ct. at 3169.

According to the Maryland procedure, the child witness, the prosecutor, and defense counsel would be in a separate room, and the judge, jury, and defendant would remain in the courtroom. The child witness would testify and would be subject to cross-examination, and the video monitor would display the testimony to those in the courtroom. The witness would not be able to see the defendant, but the defendant would be able to observe the witness and communicate with his or her counsel concerning the testimony. During this procedure, objections could be made and the judge could rule on them, just as if the witness were in the courtroom. These facts led the Court to conclude that the Maryland

procedure was the functional equivalent of live, in-person testimony. 497 U.S. at 851, 110 S. Ct. at 3166.

In an earlier case, the United States Supreme Court overturned a defendant's convictions for lascivious acts with a child when a screen was placed between the defendant and the two child victims. *Coy v. Iowa,* 487 U.S. 1012, 108 S. Ct. 2798 (1988).[4] The Court held that the use of such a procedure violated the defendant's right to face-to-face confrontation as guaranteed by the Sixth Amendment to the United States Constitution. The Court, however, indicated that it would "leave for another day, however, the question whether any exceptions exist." 487 U.S. at 1021, 108 S. Ct. at 2803. When it decided *Craig*, the Court did not overturn *Coy*. In *Coy*, however, the defendant could not see the victim while testifying; in *Craig*, the video permitted visibility.

In a federal habeas corpus case, an inmate alleged that he was entitled to relief because a West Virginia circuit court had allowed a child sexual abuse victim to testify via closed-circuit television and because the court had deviated from the procedures established by West Virginia Code §§ 62-6B-1, *et seq*. *Ault v. Waid*, 654 F. Supp. 2d 465 (N.D.W. Va. 2009). Specifically, the petitioner alleged that victim's guardian *ad litem*, rather than the State, as contemplated by West Virginia Code § 62-6B-3(a), had requested that testimony be presented in this manner.[5] Second, he argued that the trial court had allowed a master's level psychologist to evaluate the child when the statute required the evaluation to be conducted by a doctoral-level psychologist.[6] Third, the petitioner argued that the victim's guardian *ad litem* improperly influenced the child's testimony when she was allowed to be present with the child during the testimony. See W. Va. Code § 62-6B-4(b)(1).

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[4] Relying on *Coy*, the West Virginia Supreme Court overturned a defendant's conviction when the defendant was seated so that the child victim could not see him while the victim testified. *State v. Murray*, 180 W. Va. 41, 375 S.E.2d 405 (1988). This case was decided approximately 13 years before the statute's original enactment and did not address closed circuit testimony by child victims. In addition, the primary basis for reversal was improper testimony by other witnesses about the child's statements.

[5] The version of the statute in effect at the time of the petitioner's trial referred only to the prosecutor filing the required motion. In 2013, the Legislature amended the statute to expressly refer to a child's attorney or guardian *ad litem* filing such a motion.

[6] The statute in effect at the time of the petitioner's trial required the evaluation to be performed by a doctoral-level licensed psychologist, a psychiatrist, or a licensed clinical social worker with at least five years of experience in both the evaluation and the treatment of children. The Legislature amended the statute in 2006 to allow a licensed psychologist with at least five years experience to conduct this type of examination. W. Va. Code § 62-6B-3(d).

In a thorough opinion, the Court, relying on *Maryland v. Craig*, initially concluded that the procedure established by West Virginia Code §§ 62-6B-1, *et seq*. did not violate the petitioner's right to confrontation. The Court also reviewed each alleged error. With regard to the fact that the child's guardian *ad litem* filed the required motion, the Court concluded that the trial court had appointed a guardian *ad litem* and that she had properly performed her duties by filing various motions, including the motion to present testimony via closed-circuit television. The Court further noted that it was convinced that the State would have filed the motion if the guardian *ad litem* had not done so and that the outcome would have been the same. Therefore, the Court concluded that this deviation did not warrant any habeas relief. 654 F. Supp. 2d at 488.

With regard to the evaluation of the child by a master's level psychologist, the Court reviewed the reasons that the trial court had allowed the evaluation by the psychologist. The trial court had concluded that the particular psychologist, although he did not hold a doctorate, had significantly more experience than a social worker with five years of clinical experience. A second psychologist with a master's degree also examined the victim. Based upon that reasoning, the petitioner's trial counsel had agreed to the evaluation by the master's level psychologist. Based upon counsel's agreement and a review of the record, the Court concluded that the petitioner's constitutional rights had not been violated.

With regard to the guardian *ad litem's* presence with the child during testimony, the Court concluded that the defense attorney had agreed to this arrangement and that he had not been ineffective in making this agreement. The Court also concluded that the guardian *ad litem's* presence did not affect the child's testimony. Further, the Court noted that the guardian *ad litem* would have been allowed to be present if the child had testified in the courtroom. Based on the review of the record, the Court concluded that the statutory procedure did not violate the inmate's right to confrontation and the deviations from the statutory procedure occurred because of defense counsel's agreement or, in the alternative, did not adversely affect the inmate's right to confrontation. For these reasons, the Court found that the petitioner was not entitled to habeas corpus relief.

B. West Virginia Constitutional Framework

In 2001, the West Virginia Legislature enacted Article 6B of Chapter 62 of the West Virginia Code, an article that established a procedure for the use of closed-circuit testimony for child victims of specified sexual offenses. Specific provisions have been amended since 2001. In turn, Trial Court Rule 14.03(b) authorizes trial courts to use the procedures established by West Virginia Code § 62-6B-1 through 4. Relying on

Maryland v. Craig, the West Virginia Supreme Court has examined the procedures established by West Virginia Code §§ 62-6B-1, *et seq.* and adopted five new syllabus points that adopt the applicable statutory procedures for presenting the testimony of a child witness in criminal cases for specified sex offenses via closed circuit testimony. *State v. David K.*, 238 W. Va. 33, 792 S.E.2d 44 (2016). The Court, therefore, has concluded that the relevant statutory procedures satisfy both the federal and West Virginia constitutional requirements found in the confrontation clauses. U.S. Const. Amend. 6; W. Va. Const. art. III, § 14. A discussion of the specific statutory procedures is included in Section C.

In *David K.*, the defendant was convicted of two counts of felony sexual assault and two counts of felony sexual abuse based upon an incident involving the defendant's stepdaughter, A.R. The victim was 14 at the time of the incident, and she was 15 at the time of trial. Several days before the trial, the prosecutor interviewed her, and she was able to recount what had happened.

As part of the investigation, the defendant admitted to having sex with his stepdaughter on one occasion, and he signed a written statement prepared by the investigator. The defendant also made incriminating statements while he was in a police cruiser. A video recording of the statements he made while in the cruiser was presented at trial. Another investigator had also interviewed the defendant, and he testified that the defendant had admitted to having sexual intercourse with his stepdaughter. Finally, the victim's mother, who was also the defendant's wife, testified that the defendant had admitted to sexually abusing the victim.

At trial, the victim began testifying at trial in the courtroom. However, she became unresponsive when the prosecutor asked her about the alleged sexual abuse. Given her lack of responsiveness, the trial judge conducted a bench conference and observed that the victim appeared traumatized by having to testify. He suggested that she be taken to magistrate court to testify by videoconference. He asked if either party objected, but neither party did. The victim then testified via videoconference. After the State rested, the trial judge dismissed two counts of the indictment because the victim's testimony failed to support the particular allegations. In his case-in-chief, the defendant testified on his behalf and claimed that he confessed to the allegations because he wanted to go home. However, he did not dispute that he had made incriminating statements while he was in the cruiser. After deliberating, the jury convicted him of the four remaining counts in the indictment.

On appeal, the defendant argued that his rights under the Confrontation Clause were violated when the trial court ordered the victim

to testify by closed-circuit television. He also argued that the State failed to follow the procedures mandated by West Virginia Code §§ 62-6B-1, *et seq.*

In response, the State argued the statutory procedures were not triggered because no pretrial motion was filed, and the trial court's decision did not fall under the statutory procedures. Rather, the State argued that decision fell within the trial court's inherent authority. The State further argued that any alleged error by the trial court was not plain error.

After discussing the procedural safeguards in detail, the Court found that it should analyze whether plain error had been committed. As previously established, the Court noted that the elements of the plain error doctrine occur when there is "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Under these elements, the Supreme Court concluded that error had been committed and that the error was clear because none of the statutory procedures were followed. The Court next analyzed the third and fourth elements of the plain error analysis. With regard to these elements, the Court initially noted that the defendant had confessed to sexually abusing the victim. Next, the Court concluded that the defendant was not prevented from confronting his accuser because counsel did not object, because defense counsel cross-examined the victim and because the jury was able to observe the victim during the cross-examination. Based upon these factors, the Court concluded that the defendant had not shown that the error affected the defendant's substantial rights. Finally, the Court concluded that the fourth element -- a fundamental miscarriage of justice -- could not be met because of the defendant's confessions and trial counsel's failure to object to the closed-circuit testimony. For these reasons, the Court affirmed the defendant's convictions.

Justice Workman and Justice Loughry each wrote separate opinions in which they concurred in part and also dissented. In her separate opinion, Justice Workman concurred with the decision to affirm the convictions. She, however, dissented from the majority's reasoning and noted that the majority "fail[ed] to reiterate the longstanding principle that it is the sole prerogative of the Supreme Court of Appeals to determine issues relating to the admissibility of evidence and substantive judicial powers." *David K.*, 238 W. Va. at 46, 792 S.E.2d at 57. She also decried the "incredible lack of sensitivity to child sexual assault victims . . .." 238 W. Va. at 47, 792 S.E.2d at 58.

C. Procedure for Testimony of Child Witnesses by Closed-Circuit Television

Note: For a discussion of the required jury instructions when this procedure is used, see Section IX. E.

As discussed previously, Article 6B of Chapter 62 has established a statutory procedure for presenting the testimony of child victims of specified sex offenses by two-way closed-circuit television. In addition, Trial Court Rule 14.03(b) expressly allows the use of videoconferencing for child testimony provided the court follows the statutory procedure established by West Virginia Code §§ 62-6B-1 through 4. A child victim must be under the age of 16 to have his or her testimony presented by closed-circuit television. To invoke the statutory procedure, a prosecutor, the child's attorney, or the child's guardian *ad litem* must file a written motion that requests this relief. W. Va. Code § 62-6B-3(a); Syl. Pt. 1, *David K., supra*. To assist with its determination, the court is required to appoint an expert to advise whether the child will suffer severe emotional harm, whether the child will be unable to testify solely because of the defendant's presence, and whether or not the child shows signs of undue influence or coercion. W. Va. Code § 62-6B-3(d); Syl. Pt. 3, *David K., supra*. The expert must be either a psychiatrist or a licensed psychologist with at least five years of clinical experience. *Id.* The expert's opinion must be submitted in writing at least 30 days before the hearing or trial. *Id.* The defendant must be allowed to review the opinion and present evidence, including expert testimony, concerning the proposed use of this procedure. *Id.;* Syl. Pt. 3, *David K., supra.*

The trial court is required to conduct an evidentiary hearing and to make case-specific findings based upon clear and convincing evidence before allowing the use of closed-circuit testimony. W. Va. Code § 62-6B-3(b); Syl. Pt. 2, *David K., supra.* These findings include the following:

1. the child is an otherwise competent witness;
2. the child would be unable to testify in the courtroom solely because of the defendant's presence;
3. the child can only testify if live two-way closed-circuit television is used; and
4. the State's ability to proceed without the child's live testimony would be substantially impaired or precluded. W. Va. Code § 62-6B-3(b); Syl. Pt. 2, *David K., supra.*

When determining whether or not to allow this procedure, the court should consider the child's age and maturity, the facts and circumstances of the alleged crime, the necessity of the child's testimony, or whether the facts involve the alleged infliction of bodily injury to the child or another person. W. Va. Code § 62-6B-3(c). The court should also consider any mental or physical handicap of the child witness. *Id.* If a court allows a child to testify by closed-circuit television, a defendant has the option to choose to be absent from the courtroom during the testimony. W. Va. Code § 62-6B-4(a); Syl. Pt. 4, *David K., supra*. The defendant may exercise this option at any time before the child witness is called. If the defendant chooses this option, the child will be required to testify in the courtroom.

To present the testimony of a child victim by closed-circuit television, the child may be in a separate room, but the testimony must be televised live by the closed-circuit equipment. W. Va. Code § 62-6B-4(b)(1). The defendant, any counsel not in the room where the child is testifying, the court and the jury, if applicable, must be able to see a full body view of the child. At the defendant's option, the defendant's image shall be visible to the child witness. The only persons allowed to be in the room with the child witness are: 1) the prosecuting attorney, 2) defense counsel, and 3) the equipment operator. However, there must be electronic means for the defendant and his or her counsel to communicate during the testimony.

Only the following persons may question the child: the trial judge, the prosecuting attorney, and defense counsel. If the defendant appears *pro se*, the statute authorizes the court to modify the procedure relating to the role of defense counsel so that the defendant may question the child in such a way that trauma to the child is minimized. Although the statute authorizes modifications of the procedure if the defendant appears *pro se*, the statute does not specify how the procedures should be modified. Any modification to the procedures should be analyzed to ensure that the defendant's right to confrontation is not violated. *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157.

If the defendant chooses to be absent from the courtroom, the defendant should be taken to the testimonial room before the child appears in the courtroom. W. Va. Code § 62-6B-4(b)(2); Syl. Pt. 4, *David K., supra*. However, the defendant must be televised live by two-way closed-circuit equipment so that the finder of fact, *i.e*. the jury, and others in the courtroom may see the defendant. The defendant shall be allowed to view the child witness contemporaneously with the child's testimony and any other persons in the courtroom that the court so determines. As with any other criminal case, the only persons permitted to question the child are the prosecuting attorney, defense counsel, or the trial judge. If the

defendant is appearing *pro se*, the court may modify the statutory procedure so that the defendant may question the child. However, the modification should be designed to cause the child as little emotional distress as possible under the circumstances. W. Va. Code § 62-6B-4(a). If defense counsel remains in the courtroom during the testimony, there shall be a method for defense counsel and the defendant to confer confidentially during the testimony. The court may not conduct any other proceedings while the defendant is absent from the courtroom. W. Va. Code § 62-6B-4(b).

When a child testifies via closed-circuit television, the court must instruct the jury, unless the defendant waives the instruction, that the procedure was used for the child's convenience. W. Va. Code § 62-6B-4(c). Additionally, the court must instruct the jury that the use of the medium cannot be considered as anything other than for the convenience of the child witness and to infer anything else would violate the oath taken by jurors. *Id.;* Syl. Pt. 5, *David K., supra.*

In a case in which a defendant elected to be absent from the courtroom, the trial court, with input from the defendant, instructed the jury as to the defendant's absence. *State v. Gary A.*, 237 W. Va. 762, 791 S.E.2d 392 (2016). The trial court, however, did not strictly follow the text of the instruction set forth in West Virginia Code § 62-6B-4(c). On appeal, the defendant challenged his conviction based upon alleged error with regard to the instruction. The Supreme Court, however, rejected the argument because counsel had agreed to the language used by the trial court to instruct the jury.

VII. Protections Afforded to Victims and Witnesses While Testifying

A. Rape Shield Law

Note: A complete discussion of West Virginia's rape shield law and the standards for excluding or admitting such evidence is found in Chapter 6. The following discussion addresses the procedural mechanism, a hearing outside the jury's presence, that must be conducted to determine whether evidence concerning a victim's past sexual conduct may be admitted.

West Virginia's rape shield law,[7] set forth in Rule 412 of the West Virginia Rules of Evidence and West Virginia Code § 61-8B-11, generally excludes the admission of evidence in a sexual offense case regarding the victim's sexual history, either with the defendant or with others, unless the defendant can demonstrate that the intended use of the evidence at trial

[7] As set forth in the 2014 Comment to Rule 412, Rule of Evidence 412 supersedes any provisions of West Virginia Code § 61-8B-11 that conflict with it.

meets one of the three narrowly tailored exceptions. When a defendant seeks to introduce evidence of the victim's past sexual conduct with the defendant or with third parties, he or she must first file a motion specifically describing the evidence and stating the purpose for which it is offered. W. Va. R. Evid. 412(c)(1). The motion must be filed at least 14 days before trial unless the court sets a different time based upon a showing of good cause. The victim or, if appropriate, the victim's guardian or other representative must be provided notice.

After the motion is filed, the trial court must conduct an *in camera* hearing to determine admissibility. The victim and the parties have the right to attend and be heard. W. Va. R. Evid. 412(c)(2). At the hearing, the defendant must identify the proposed evidence and the theory that justifies its admission. *State v. Calloway*, 207 W. Va. 43, 528 S.E.2d 490 n.12 (1999). The court will only admit the evidence if it is specifically related to the acts the defendant is charged with and is necessary to prevent manifest injustice. W. Va. R. Evid. 412(c)(2)(B). The records from these proceedings are sealed, and the procedural requirements protect the victim's privacy. They should also prevent defense counsel from even questioning the victim in the presence of the jury concerning the victim's sexual history unless the trial court has previously ruled that the evidence falls within a specific exception to the rape shield law.

B. Mental Health History

Note: For a discussion of the procedure for the discovery of records relating to the mental health history of victims or witnesses, see the discussion of State v. Roy, 194 W. Va. 276, 460 S.E.2d 277 (1995) in *Chapter 3.*

The West Virginia Supreme Court has limited the impeachment of a witness because of a psychiatric disability to situations in which the defendant demonstrates that the disability affects the credibility of a material witness. Syl. Pt. 5, *State v. Harman*, 165 W. Va. 494, 270 S.E.2d 146 (1980).[8] In this syllabus point, the Court also noted that any expert proposed to testify about the witness must have had "a sufficient opportunity to make the diagnosis of psychiatric disorder." *Id.* Therefore, a witness would not be subject to impeachment simply because he or she has a psychiatric condition. Rather, there must be a showing that the psychiatric condition affects his or her credibility.

In a later case involving convictions for third degree sexual assault, the defendant argued that the trial court erred when it prevented him from

[8] As the Court observed in footnote 7 of *Harman*, there is a distinction between a witness who is incompetent to testify because of a psychiatric disability and a witness whose credibility may be affected by a psychiatric disability.

cross-examining a victim concerning her mental health history. *State v. McIntosh*, 207 W. Va. 561, 534 S.E.2d 757 (2000). Information concerning this evidence was rather sketchy; the victim had visited a domestic violence center in the past and had participated in some counseling. The Supreme Court held that the trial court did not err because defense counsel did not adequately preserve the alleged error for appeal by either an offer of proof or *voir dire* of the victim outside of the presence of the jury. The Court went on to state that if the trial court erred, such error would have been harmless. The Court concluded that: "Given the extensive evidence of direct sexual transgressions against the victim of the crimes charged, as well as the testimony of numerous other victims which demonstrated a particularly probative history of similar transgressions, the exclusion of the mental health history of one witness could scarcely prejudice the substantial rights of the Appellant . . .." 207 W. Va. at 578, 534 S.E.2d at 774.

After a jury trial, a criminal defendant was found guilty of sexual assault of his granddaughter. On appeal, the West Virginia Supreme Court reversed the conviction because the defendant had not been provided with a copy of the victim's psychiatric records and directed the circuit court to provide the records and conduct a hearing on their relevancy. *State v. Allman*, 177 W. Va. 365, 352 S.E.2d 116 (1986).

On remand, the circuit court provided defense counsel with the records and directed counsel to designate potentially relevant evidence. After conducting an *in camera* hearing, the circuit court found that the designated evidence was not relevant. The Supreme Court affirmed the ruling because the defendant failed to show that the victim's psychiatric disorder affected her credibility as a witness. *State v. Allman*, 182 W. Va. 656, 391 S.E.2d 103 (1990).

VIII. Trial Procedures for Cases Involving Enhanced Penalties

A. Enhanced Penalties for Subsequent Offenses

West Virginia Code § 61-8B-9b establishes enhanced penalties when a defendant has a previous conviction for a "sexually violent" offense that involved a victim under 12 years old and is subsequently convicted of specified offenses. Sexually violent offenses include the following: 1) first degree sexual assault; 2) second degree sexual assault; 3) sexual assault of a spouse as established by the former provisions of West Virginia Code § 61-8B-6; or 4) first degree sexual abuse. W. Va. Code §§ 15-12-2(i); 61-8B-9b. To be subject to an enhanced penalty, a defendant's previous conviction may have been in West Virginia or may have been of a similar offense in another state, federal, or military jurisdiction. W. Va. Code § 15-12-2(i).

The conviction for the subsequent offense must be one of the following: 1) first degree sexual assault; 2) second degree sexual assault; 3) third degree sexual assault; 4) first degree sexual abuse; or 5) second degree sexual abuse. Although the predicate offense must involve a victim under age 12, there is no age established for the victim in the subsequent offense.

B. Prior Convictions as Status Elements of Current Crimes

The West Virginia Supreme Court has established procedures for the presentation of a prior conviction to a jury when the prior conviction serves as a status element of a current crime. *State v. Herbert*, 234 W. Va. 576, 767 S.E.2d 471 (2014). As an initial matter, the Court distinguished the two types of prior convictions: 1) a prior conviction which is an essential element of the current crime charged because it criminalizes conduct that would otherwise be legal (e.g. possession of a firearm by a felon), or 2) prior convictions that serve as penalty enhancers (e.g. subsequent DUI offenses). *Herbert*, 234 W. Va. at 592, 767 S.E.2d at 487. Given this guidance, the prior conditions referenced in West Virginia Code § 61-8B-9b are penalty enhancers, as opposed to essential elements of a current crime, because the prior convictions enumerated in the statute all involve unlawful conduct. It is important to recognize the distinctions between the two types of prior convictions because the Court, in *Herbert*, established different procedures involving stipulations to a prior offense or bifurcation of a trial, dependent upon the distinction between the two types of prior convictions.

If the prior conviction serves as a penalty enhancer and the defendant stipulates to the prior conviction, then the jury shall not be informed of the prior conviction. Syl. Pt. 7, *Herbert*, *supra*. In those circumstances, the defendant receives an enhanced penalty for the offense if he or she is found guilty of the current offense.

When the defendant does not stipulate to a prior offense that is a penalty enhancer, the defendant may request bifurcation of the issue of the prior conviction from the current charge. Syl. Pt. 6, *Herbert*, *supra*. However, *Herbert* expressly establishes that the decision to bifurcate falls within the trial court's discretion. In deciding whether to bifurcate a trial, the court should conduct a hearing and determine whether the defendant can make a *prima facie* challenge to the prior conviction. At the hearing, the defendant may proffer evidence that the predicate conviction does not exist or is invalid. Bifurcation should be permitted if the court determines that the defendant's challenge is meritorious. If the trial court determines that the challenge to the prior conviction "lacks any relevant and sufficient evidentiary support," then the court should deny the bifurcation motion and

conduct a unitary trial. Syl. Pt. 7, *Herbert*, *supra.* In Syllabus Point 7, the Court went on to expressly overrule *State v. McCraine*, 214 W. Va. 188, 588 S.E.2d 177 (2003) which had required a trial court to bifurcate a jury trial in all cases where the defendant was contesting the validity of a prior conviction.

In *Herbert*, the defendant had a prior felony conviction which, under West Virginia Code § 61-7-1(b)(1), made it illegal for him to possess a firearm. Before trial, the defendant had requested bifurcation of the two issues -- his status as a felon and possession of a firearm. The trial court denied his request for bifurcation and conducted a unitary trial. On appeal, the defendant challenged the conviction for being a felon in possession of a firearm.

Affirming the trial court ruling on this issue, the Supreme Court adopted Syllabus Points 4 and 5 which address trial procedures when a prior conviction is an essential element of the current charge. In those syllabus points, the Court held that if a defendant does not stipulate to a prior conviction, the trial court should not bifurcate the proceedings. If the defendant stipulates to the prior conviction, trial court should inform the jury that the defendant stipulated to a prior conviction and should inform the jury as to whether it was a felony or a misdemeanor. However, the jury should not be informed of the name or nature of the previous conviction. In Syllabus Point 4, the Court overruled *State v. McCraine*, 214 W. Va. 188, 588 S.E.2d 177 (2003). In Syllabus Point 5, the Court overruled *State v. Dews*, 209 W. Va. 500, 549 S.E.2d 694 (2001).

C. Proof of the Predicate Conviction

As established by the definition of "sexually violent offense" in West Virginia Code § 15-12-2, convictions from another state, federal, or military jurisdiction may serve as a predicate offense for an enhanced penalty pursuant to West Virginia Code § 61-8B-9b. Although this statute does not address the method of proof of a conviction from another jurisdiction, the West Virginia Supreme Court has established such procedures for domestic violence convictions. *State v. Hulbert*, 209 W. Va. 217, 544 S.E.2d 919 (2001). The procedures established by *Hulbert* could reasonably be applied to foreign convictions that serve as the predicate offense for subsequent sexual offenses covered by West Virginia Code § 61-8B-9b. See *State v. Evans*, 210 W. Va. 229, 557 S.E.2d 283 n.3 (2001) (noting that the procedures in *Hulbert* for proving the fact of an out-of-state conviction should apply in cases involving third offense DUI). See also *State v. Euman*, 210 W. Va. 519, 558 S.E.2d 319 n.1 (2001).

To prove that a defendant was convicted of an offense from another jurisdiction, the State may introduce an authenticated copy of the

judgment that identifies the defendant and the fact of the conviction. Syl. Pt. 4, *Hulbert, supra*. Other documents from the court record can be used to provide additional information about the offense and the conviction.

When a conviction from a foreign jurisdiction is used for enhancement purposes, questions will arise as to whether a particular foreign offense could serve as a predicate offense. If the offense has the same elements as the similar offense covered by the West Virginia statute, the foreign conviction may be used to support an enhanced penalty. Syl. Pt. 2, *Hulbert, supra.* If there are additional or different elements, the State must prove that the facts established by the prior conviction would have supported a conviction under the applicable West Virginia statute. *Id.* Whether an offense from another jurisdiction can serve as a predicate offense for sentence enhancement is a question of law. Syl. Pt. 3, *Hulbert, supra* (quoting *State v. Williams*, 200 W. Va. 466, 490 S.E.2d 285 (1997)).

IX. Jury Instructions

Note: The following section addresses general issues concerning jury instructions that arise in sexual offense cases. It does not, however, address jury instructions for specific offenses.

A. Lord Hale Instruction

In a case reversing a trial court because of the erroneous admission of hearsay statements, the West Virginia Supreme Court also decided that a jury instruction attributed to Sir Matthew Hale, a seventeenth century jurist, should not be given. Syl. Pt. 8, *State v. Murray*, 180 W. Va. 41, 375 S.E.2d 405 (1988). Providing guidance, the Court held that: "An instruction which cautions the jury that a charge of sexual assault or abuse is easy to make and difficult to defend should not be given." *Id.*

Explaining its rationale, the Court noted the majority of jurisdictions hold that such an instruction is improper. Relying on the reasoning in *People v. Rincon-Pineda*, 538 P.2d 247 (Cal. 1975), the Court recognized that procedural protections now afforded to a defendant, including the presumption of innocence, proof beyond a reasonable doubt and rights established by the Fifth and Sixth Amendments, make such an instruction unnecessary. Additionally, the Court noted that empirical data does not support the conclusion included in the instruction -- that a sexual assault charge is difficult to defend. Further, the Court noted that instructions which caution a jury about the uncorroborated testimony of a victim afford a defendant additional protection. For these reasons, the Court concluded that the trial court properly refused the proffered instruction.

B. Jury Instructions Regarding Rule 404(b) Evidence

Note: For a discussion of the admissibility of Rule 404(b) evidence, see Chapter 6.

When a trial court allows the admission of Rule 404(b) evidence, the proponent must identify the "specific and precise" purpose for the introduction of the evidence and the jury must be instructed that the evidence may only be considered for that purpose. Syl. Pt. 1, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). Simply listing the reasons included in the text of the rule for the introduction of the evidence is insufficient. To satisfy this requirement, "the proponent of the 404(b) evidence must not only identify the fact or issue to which the evidence is relevant but must also plainly articulate how the 404(b) evidence is probative of that fact or issue." Syl. Pt. 5, in part, *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 601 S.E.2d 75 (2004). The limiting instruction to the jury must be given when the evidence is admitted and when the trial court gives its general charge to the jury. See *State v. Zuccaro*, 239 W. Va. 128, 799 S.E.2d 559 (2017).

C. Uncorroborated Identification Testimony

If a victim's testimony regarding the identity of the assailant is uncorroborated and uncontradicted, the trial court must give a cautionary instruction to the jury. This type of instruction is referred to as a *Perry* instruction (from *State v. Perry*, 41 W. Va. 641, 24 S.E. 634 (1896)) or a *Payne* instruction. Failure to give such an instruction upon the request of the defendant is error. *State v. Payne*, 167 W. Va. 252, 280 S.E.2d 72 (1981). In *Payne*, the Court held:

> Where the State's case is based upon the uncorroborated and uncontradicted identification testimony of a prosecuting witness, it is error not to instruct the jury upon request that, if they believe from the evidence in the case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, then the jury should scrutinize such testimony with care and caution. Syl. Pt. 5, *State v. Payne*, 167 W. Va. 252, 280 S.E.2d 72 (1981);[9] Syl. Pt. 4, *State v.*

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[9] See *Ronnie R. v. Trent*, 194 W. Va. 364, 460 S.E.2d 499 (1995) and *State v. Williams*, 206 W. Va. 300, 524 S.E.2d 655 (1999) for further discussion of the *Payne* instruction in sexual offense cases. In *Williams,* the Supreme Court clarified that the

Maynard, 183 W. Va. 1, 393 S.E.2d 221 (1990).

The Court in *Payne* provided guidance on the use of this instruction by noting that "this type of instruction may be proper in cases where the *identification testimony* is uncorroborated." *Payne*, 167 W. Va. 252, 263, 280 S.E.2d 72, 79 (emphasis added). In a later case, the Court explained the application of a *Payne* instruction by noting that: "A *Payne* instruction concerns identification of the defendant. A *Payne* instruction does not concern the acts alleged to be perpetrated by the defendant." *State v. Williams*, 206 W. Va. 300, 305, 524 S.E.2d 655, 660 (1999).

In *Payne*, the Court discussed the facts in the record that warranted the proferred instruction. First, the Court noted that the victim was the only person who offered testimony with regard to the identity of the assailant. Secondly, the Court noted that the defendant was prevented from testifying because of other errors. Third, the Court noted that the victim did not see her assailant until they were in a secluded, shaded area. Further, the victim had given descriptions of her assailant before the identification that were inconsistent with the defendant's appearance. Finally, approximately two months had passed between the assault and the identification, and the victim's father and the police may have pressured the victim to identify the defendant as her assailant. Given these facts, the Court concluded that the proferred instruction should have been given.

In a later case, the Court again explained the type of facts which would warrant a *Payne* instruction. *State v. Watson*, 173 W. Va. 553, 318 S.E.2d 603 (1984). The facts of *Watson* involved a young identifying witness (age 11) who only observed the defendant for a short period of time. Additionally, the photographic array involved some degree of suggestiveness. The victim's father had identified the defendant, but his testimony did not contradict the defendant's testimony. The father testified to the defendant's presence in the neighborhood, but the defendant had testified that he was in the neighborhood because he was visiting his girlfriend. Given these facts, the Court concluded that a *Payne* instruction should have been given.

D. Instructions Regarding Uncorroborated Victim Testimony

1. Cautionary Instruction When Victim's Testimony Is Uncorroborated

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Payne instruction concerns identification and not the acts allegedly perpetrated by the defendant.

The West Virginia Supreme Court has recognized that: "A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. Pt. 5, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981). See also Syl. Pt. 4, *State v. Green*, 163 W. Va. 681, 260 S.E.2d 257 (1979). When a victim's testimony is not corroborated, the Supreme Court has recognized that the trial court should instruct the jury "to scrutinize the victim's testimony with care and caution." *State v. Haid*, 228 W. Va. 510, 521, 721 S.E.2d 529, 540 (2011); See *State v. McPherson*, 179 W. Va. 613, 371 S.E.2d 333 (1988).

In *Haid*, the defendant argued that the trial court should have included an additional instruction about evaluating the credibility of the testimony of the defendant and the victim. The Supreme Court, however, rejected the argument because the entire charge adequately instructed the jurors on the issue of credibility and the State's burden of proof. Although the Supreme Court affirmed the defendant's conviction, it also included the text of a proposed instruction that it described as a "better statement of the law" when the victim's testimony is not corroborated. 228 W. Va. at 522, 721 S.E.2d at 541. The text of this instruction reads as follows:

> The court instructs the jury that the defendant may be convicted on the uncorroborated testimony of the alleged victim in this case. However, you should scrutinize the alleged victim's testimony with care and caution. Although a conviction of a sexual offense may be obtained on the uncorroborated testimony of the alleged victim, you must be convinced beyond a reasonable doubt that the defendant is guilty. If you are not convinced beyond a reasonable doubt of the defendant's guilt, based upon the uncorroborated testimony of the alleged victim, then you shall find the defendant not guilty. *Haid*, 228 W. Va. at 522, 721 S.E.2d at 541.

2. Trial Court's Refusal of Cautionary Instruction

Issues have arisen with regard to whether a defendant is entitled to a cautionary instruction regarding the victim's testimony because of the defendant's claim that the testimony is uncorroborated. With regard to this issue, the West Virginia Supreme Court held that: "Where the testimony of the victim of a sexual offense is corroborated to some degree, it is not reversible error to refuse a cautionary instruction that informs the jury that

they should view such testimony with care and caution." Syl. Pt. 2, *State v. Ray*, 171 W. Va. 383, 298 S.E.2d 921 (1982).

In *Ray*, the defendant asserted that the jury should have been instructed to view the victim's testimony with care and caution because it was not corroborated. The Court, however, rejected this argument because other courts have generally refused to give such instructions, provided that the victim's testimony is corroborated to some degree. In *Ray*, the Court noted that testimony from other witnesses concerning the victim's initial involvement with the defendant and her demeanor after the sexual assault corroborated her testimony so that the proffered instruction was properly refused. 171 W. Va. at 387, 298 S.E.2d at 925.

In a later case, the Court also discussed facts that constituted sufficient corroboration to refuse a cautionary instruction. *State v. Davis*, 180 W. Va. 357, 376 S.E.2d 563 (1988). In *Davis*, the Court noted that the defendant admitted that the victim was at his residence at the time of the alleged assault. The Court also noted that the victim went to a witness's home after the rape, was visibly upset, and claimed that she had been raped. Additionally, reports from the police and medical providers confirmed the victim's mental state and physical injuries. Further, the Court pointed out that the victim's shoe and jacket were discovered at the defendant's home. 180 W. Va. at 362, 376 S.E.2d at 568. For further discussion of this issue, see *State v. Maynard*, 183 W. Va. 1, 393 S.E.2d 221 (1990). In general, the cases indicate that a cautionary instruction may be properly refused when other facts or witnesses corroborate the victim's testimony. See *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

E. Instruction Concerning Testimony By Closed-Circuit Television

West Virginia Code §§ 62-6B-1, *et seq.* established a procedure for presenting the testimony of child witnesses by two-way closed-circuit television. When this procedure is used, the trial court is required to instruct the jury that the procedure was used for the child's convenience, unless the defendant waives the instruction. W. Va. Code § 62-6B-4(c); Syl. Pt. 5, *State v. David K.*, 238 W. Va. 33, 792 S.E.2d 44 (2016). The court must instruct the jury that the use of the medium cannot be considered as anything other than for the convenience of the child witness and to infer anything else would violate the oath taken by jurors.

In a case in which the defendant was convicted of sexually assaulting his niece, the defendant claimed plain error on appeal because the trial court did not instruct the jury pursuant to West Virginia Code § 62-6B-4(c) when the defendant left the courtroom during the victim's testimony. *State v. Gary A.*, 237 W. Va. 762, 791 S.E.2d 392 (2016).

Reviewing the record, the Supreme Court noted that the circuit court instructed the jury about the defendant's absence in the manner requested by defense counsel. The Court, therefore, concluded that the defendant had waived his right to a jury instruction that followed the language of West Virginia Code § 62-6B-4(c) and that there was no plain error.

F. Erroneous Instruction Advanced by Defendant

In this *habeas corpus* case, a defendant had been indicted for kidnapping, burglary, and second-degree sexual assault in his underlying criminal case. *Lewis v. Ames*, 242W. Va.405, 836 S.E.2d 56 (2019). At trial, the defendant requested that the court instruct the jury on a lesser charge, abduction with the intent to defile, even though this offense is not a lesser included offense for kidnapping. See *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 (1989). The defendant was convicted of the lesser charge, as opposed to the kidnapping charge, and he later challenged the instruction in a *habeas corpus* case.

To reject the claim, the Supreme Court first noted that a defendant, may not offer a jury instruction at trial and then claim on a direct appeal that the instruction constituted error. See *State v. Tidwell*, 215 W. Va. 280, 599 S.E.2d 703 (2004); *State v. Boyd*, 209 W. Va. 90, 543 S.E.2d 647 (2000). The Court reasoned that this same rule should also apply in a *habeas corpus* case.

In addition, the Court discussed an opinion from the United States Supreme Court, *Currier v. Virginia*, 138 S. Ct. 2144, 201 L.Ed.2d 650 (2018), which involved a case where the State and the defendant agreed to conduct two separate trials, one on burglary and grand larceny charges and the second on possession of a firearm by a felon. The defendant was acquitted at the first trial but convicted at the second trial (possession of a firearm by a felon). On appeal, he claimed double jeopardy barred the second trial. The United States Supreme Court ultimately held that the second trial was not barred because the defendant had consented to the bifurcation of the charges into two trials.

After discussing the *Currier* opinion, the West Virginia Supreme Court applied its reasoning to Syllabus Point 7 of *State v. Corra*, 223 W. Va. 573, 678 S.E.2d 306 (2009), the primary case relied upon by the petitioner, and concluded that the petitioner was not prejudiced because he had offered the jury instruction that he now challenged. Therefore, the Court held that:

> A criminal defendant cannot invite the circuit court to give an erroneous instruction on a lesser included offense, benefit from that

instruction, and then complain on appeal, or in a collateral attack, that such instruction should not have been given. To the extent that Syllabus Point 7 of *State v. Corra,* 223 W. Va. 573, 678 S.E.2d 306 (2009), is inconsistent, it is hereby modified. Syl. Pt. 6, *Lewis*, 242W. Va.405, 836 S.E.2d 56.

Chapter 5

COMMON DEFENSES

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I. Consent Defense

The issue of consent is contested in many sexual offense cases. The defendant may raise the "consent defense" or claim the victim consented or acquiesced in some manner to the sexual act. The consent defense is a factual defense, and several factors can affect what, if any, evidence may be offered by the defendant on the issue of consent.

Relevant to the issue of consent, the Legislature has provided: "Whether or not specifically stated, it is an element of every offense defined in [Article 8B, Chapter 61] that the sexual act was committed without the consent of the victim." W. Va. Code § 61-8B-2(a). Generally, to satisfy this element, depending on the offense charged, the State must prove that the sexual act was completed due to forcible compulsion, or that it was committed against a victim who did not have the legal capacity to consent to the act.[1]

With regard to a victim's capacity to consent, it should be noted that in some cases the consent defense is simply an untenable position,

[1] This statement pertains to the offenses defined in Article 8B of Chapter 61. Lack of consent is not an element of incest (W. Va. Code § 61-8-12) or sexual abuse by a parent or other specified defendants (W. Va. Code § 61-8D-5). A conviction may be obtained for those offenses if the State proves sexual misconduct between persons in certain proscribed relationships.

especially when the victim or defendant fall into specified age categories. For example, if a defendant who is age 14 years or more is charged with first degree sexual assault or first degree sexual abuse, and the victim is younger than 12 years old and is not married to the defendant, the State only has to prove that penetration or sexual contact occurred. W. Va. Code §§ 61-8B-3; 61-8B-7. Similarly, the victim's consent is not an issue if a defendant is charged with third degree sexual assault. W. Va. Code § 61-8B-9. If a defendant is age 16 years or older and he or she engages in sexual intercourse or sexual intrusion with a victim who is less than 16 years old and is at least four years younger than the defendant, then the victim's consent is not relevant on the issue of the defendant's guilt or innocence. *State v. Sayre*, 183 W. Va. 376, 395 S.E.2d 799 (1990) ("Once the appellant admitted that he had sexual intercourse with the fifteen-year-old and their ages were established, the fact that he was guilty of statutory rape was beyond dispute."). Moreover, the rape shield law prohibits the admission of evidence pertaining to a child's previous sexual history with the defendant or any other person. W. Va. R. Evid. 412(a)(3); W. Va. Code § 61-8B-11.[2] Finally, it should be noted, that notwithstanding the fact that a person who is less than 16 years old is deemed incapable of consenting to a sexual act, his or her conduct may still be relevant to determine whether forcible compulsion was used to complete the act. See *State v. McPherson*, 179 W. Va. 612, 371 S.E.2d 333 (1988); *Sayre, supra.*

In addition to incapacity due to age, there may be other factual circumstances in which the victim is legally incapable of consenting to the act or acts in question. A person is deemed incapable of consenting to a sexual act if he or she is mentally defective,[3] mentally incapacitated,[4] or physically helpless.[5] W. Va. Code § 61-8B-2(c). Under West Virginia Rule of Evidence 412(a)(3), the prohibition on introducing evidence associated with the victim's sexual conduct, history, or reputation applies

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[2] See Chapter 6 for a discussion of evidentiary issues associated with the rape shield rule.

[3] For the purpose of Article 8B, Chapter 61, the term "mentally defective" means that a person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his or her conduct.

[4] For the purpose of Article 8B, Chapter 61, the term "mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to that person without his or her consent or as a result of any other act committed upon that person without his or her consent.

[5] For the purpose of Article 8B, Chapter 61, the term "physically helpless" means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.

when the victim's incapacity to consent arises from the conditions of mental defect, mental incapacity, or physical helplessness. Unlike Rule 412, West Virginia Code § 61-8B-11(a) does not expressly prohibit the introduction of this type of evidence. However, it has been established that Rule of Evidence 412 controls if the provisions of West Virginia Code § 61-8B-11 conflict with it. Syl. Pt. 3, *State v. Varlas*, 787 S.E.2d 670 (W. Va. 2016). Therefore, the provisions of Rule of Evidence 412 govern the introduction of this type of evidence when the victim's incapacity to consent arises from mental defect, mental incapacity, or physical helplessness.

Finally, a person who is incarcerated, confined, or supervised by personnel from specified governmental entities lacks the capacity to consent to sexual intrusion or sexual intercourse with certain persons, such as prison guards, parole officers, and probation officers.

II. Mistake-of-Fact Defense

The Legislature has made the mistake-of-fact defense available to defendants charged with a sexual offense under certain circumstances. West Virginia Code § 61-8B-12(a) states that:

> In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant at the time he or she engaged in the conduct constituting the offense did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

However, the Legislature has barred the mistake-of-fact defense in prosecutions for first degree sexual assault and first degree sexual abuse. West Virginia Code § 61-8B-12(b) expressly provides that:

> The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three [§ 61-8B-3], and under subdivision (3), subsection (a), section seven of this article [§ 61-8B-7].

The Legislature has defined the terms relating to incapacity to consent to a sexual act.[6] The term "'mentally defective' means that a person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his or her conduct." W. Va. Code § 61-8B-1(3). The term "'mentally incapacitated' means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to that person without his or her consent or as a result of any other act committed upon that person without his or her consent." W. Va. Code § 61-8B-1(4). The term "'physically helpless' means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act." W. Va. Code § 61-8B-1(5). Finally, with regard to incapacity to consent and age, the Legislature has stated that anyone who is "less than sixteen years old" is incapable of consenting to a sexual act. W. Va. Code § 61-8B-2(c)(1).

The mistake-of-fact defense provided in West Virginia Code § 61-8B-12 is an affirmative defense. Thus, as with other affirmative defenses, the defendant can be required "to present evidence which raises a reasonable doubt on the affirmative defense asserted as long as the prosecution is required to prove each element of the crime beyond a reasonable doubt." *State v. Daniel*, 182 W. Va. 643, 653, 391 S.E.2d 90, 100 (1990) (citing *State v. Kirtley*, 162 W. Va. 249, 252 S.E.2d 374 (1978)). The defendant is not required to disprove an element of the State's case; however, he or she can be required to provide evidence that is credible. *Id.* If the defendant offers sufficient evidence as to his or her mistaken belief regarding the victim's capacity to consent then he or she is entitled to an appropriate jury instruction. With regard to jury instructions in criminal cases, the Supreme Court has held: "In this jurisdiction where there is competent evidence tending to support a pertinent theory of a case, it is error for the trial court to refuse a proper instruction, presenting such theory, when requested." Syl. Pt. 4, *State v. Hayes*, 136 W. Va. 199, 67 S.E.2d 9 (1951); *Proudfoot v. Dan's Marine Service, Inc.*, 210 W. Va. 498, 558 S.E.2d 298 (2001); Syl. Pt. 2, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972).

The Supreme Court has addressed a mistake-of-fact defense raised pursuant to West Virginia Code § 61-8B-12 in one reported case. In *State v. Hottinger*, 194 W. Va. 716, 461 S.E.2d 462 (1995), the defendant was convicted of second and third degree sexual assault of a 15-year old girl. With regard to the third degree sexual assault, the defendant claimed that he did not know she was 15 when the act occurred. In support of this defense, he claimed that the girl appeared to be of age and that he had heard she was getting married. The jury saw the victim at trial, as well as a photograph of her at the time of the incident.

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[6] A more complete discussion of these terms is included in Chapter 2.

The trial court instructed the jury on the affirmative defense, and the jury found him guilty.

On appeal, the defendant claimed that there was insufficient evidence to convict him of second degree sexual assault and that he had an affirmative defense to the third degree sexual assault. The Supreme Court found that, based on the evidence presented, the jury could reject the defendant's defense and find guilt beyond a reasonable doubt. *Hottinger*, 194 W. Va. at 724, 461 S.E.2d at 470.

Although West Virginia Code § 61-8B-12 has established a mistake-of-fact defense, it does not apply if the defendant was reckless in failing to know the facts or conditions concerning the victim's age, mental condition, or physical condition. The Supreme Court has not addressed what constitutes reckless conduct by a defendant pursuant to West Virginia Code § 61-8B-12. Generally, the term reckless has been determined to mean "proceeding without heed or concern for consequences." *White v. Hall*, 118 W. Va. 85, 188 S.E. 768, 769 (1936). Recklessness is more than mere negligence; rather, it rises to the level of gross negligence. As noted by the South Carolina Supreme Court: "Recklessness implies the doing of a negligent act knowingly." *Yaun v. Baldridge*, 134 S.E.2d 248, 251 (S.C. 1964). Therefore, whether a defendant could be considered reckless would depend on the specific facts of a case.

III. Delays in Prosecution

A. Statute of Limitations

As a threshold matter, "West Virginia has no statute of limitations affecting felony prosecutions." *State v. Carrico*, 189 W. Va. 40, 43, 427 S.E.2d 474, 477 (1993). Therefore, as discussed below, a delay between the commission and prosecution of a felony offense is only of consequence if there are other facts present that give rise to a statutory or a constitutional claim arising from the delay in prosecution.

There is a one-year statute of limitation on the prosecution of misdemeanor offenses. W. Va. Code § 61-11-9; see Syl. Pt. 3, *State ex rel. Stiltner v. Harshbarger*, 170 W. Va. 739, 296 S.E.2d 861 (1982). However, if the defendant is charged with a felony offense, "[t]he statute of limitations does not bar conviction of a lesser included offense when the prosecution has earlier commenced by filing a criminal complaint within the statute of limitations." Syl. Pt. 2, in part, *State v. Boyd*, 209 W. Va. 90, 543 S.E.2d 647 (2000). In other words, if the prosecution files a felony charge against a defendant, the statute of limitations on any lesser included offense that is a misdemeanor is tolled, if the felony charge was

filed within the one year period. *Id*. Further, "[w]hen a defendant is not indicted within one year of the date on which an offense is committed but requests the circuit court to instruct the jury on a time-barred lesser included offense, the defendant by that act waives the statute of limitations defense contained in W. Va. Code § 61-11-9." Syl. Pt. 3, *Boyd, supra.* See *State v. Bingman*, 221 W. Va. 289, 654 S.E.2d 611 (2007).

Another exception to the one-year statute of limitations for misdemeanors arises if a defendant voluntarily waives his or her right to trial in magistrate court and requests transfer of the misdemeanor charges to circuit court. *State ex rel. Sorsaia v. Stowers*, 236 W. Va. 747, 783 S.E.2d 867 (2016). In *Sorsaia*, the defendant was originally charged with felony unlawful assault and two misdemeanors, domestic assault and domestic battery. At a preliminary hearing in magistrate court, the magistrate found probable cause for the felony offense, and the defendant moved to transfer the misdemeanor charges to circuit court. Ultimately, the State did not pursue the felony charge but later filed an information on the two misdemeanor charges. The case remained pending until more than one year had elapsed since the warrant was executed. On this basis, the defendant moved to dismiss the information, and the circuit court agreed that the information should be dismissed. In turn, the State filed a petition for a writ of prohibition to challenge the dismissal.

Reviewing the record, the Supreme Court found that the defendant had waived his right to have his misdemeanor charges tried within one year of the issuance of the warrant when he voluntarily requested transfer of the charges to circuit court. The Court distinguished the circumstances of a voluntary transfer of misdemeanor charges from those in *State ex rel. Johnson v. Zakaib*, 184 W. Va. 346, 400 S.E.2d 590 (1990), a case which was dismissed after the State's witness had failed to appear for a magistrate court trial. To pursue the charges, the State obtained an indictment in circuit court approximately one year later. In *Johnson*, the Supreme Court had issued a writ of prohibition because the State was not permitted to renew the charges more than one year after the original warrant was executed.

In *Sorsaia*, the Court distinguished the circumstances from those in *Johnson* and found that once the case was transferred to circuit court, the magistrate court rules no longer governed the timing of the trial. Rather, the Court found that the defendant's right to a speedy trial would be governed by the three-term rule of West Virginia Code § 62-3-21. Further, the Court held that: "The three-term rule set forth in West Virginia Code § 62-3-21 is triggered by the return of a valid indictment, presentment, or information." Syl. Pt. 5, *Sorsaia, supra.*

B. Post-accusatory Delays and a Defendant's Right to a Speedy Trial

"The right to a trial without unreasonable delay is basic in the administration of criminal justice and is guaranteed by both the state and federal constitution. U.S. Const. Amend. VI; W. Va. Const., Art. 3, § 14." Syl. Pt. 1, *State v. Foddrell*, 171 W. Va. 54, 297 S.E.2d 829 (1982). "The Sixth Amendment speedy trial right begins with the actual arrest of the defendant and will also be initiated where there has been no arrest, but formal charges have been brought by way of an indictment or information." Syl. Pt. 1, *State v. Drachman*, 178 W. Va. 207, 358 S.E.2d 603 (1987). If a criminal defendant challenges a post-accusatory delay of prosecuting a criminal offense, two inquiries are relevant. First, it should be determined whether the prosecution of the defendant is barred by West Virginia Code § 62-3-21 (commonly referred to as the "three-term rule"). If this statutory provision is not controlling, then a Sixth Amendment analysis may be used to determine whether the defendant has been denied his or her right to a speedy trial.

1. West Virginia Code § 62-3-21 or the Three-Term Rule

The West Virginia Supreme Court has held that the Legislature's pronouncement of West Virginia's speedy trial standard under the Sixth Amendment of the United States Constitution and Article III, Section 14 of the West Virginia Constitution is contained in West Virginia Code § 62-3-21. Syl. Pt. 1, *Good v. Handlan*, 176 W. Va. 145, 342 S.E.2d 111 (1986); Syl. Pt. 2, *State v. Carrico*, 189 W. Va. 40, 427 S.E.2d 474 (1993). The statute provides:

> Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the state being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict; and every person charged with a misdemeanor

> before a justice of the peace, city police judge, or any other inferior tribunal, and who has therein been found guilty and has appealed his conviction of guilt and sentence to a court of record, shall be forever discharged from further prosecution for the offense set forth in the warrant against him, if after his having appealed such conviction and sentence, there be three regular terms of such court without a trial, unless the failure to try him was for one of the causes hereinabove set forth relating to proceedings on indictment. W. Va. Code § 62-3-21.[7]

The West Virginia Supreme Court has held: "If a conviction is validly obtained within the time set forth in the three-term rule, *W.Va. Code* 62-3-21, then that conviction is presumptively constitutional under the speedy trial provisions of the *Constitution of the United States,* Amendment VI, and *W.Va. Constitution,* Art. III, § 14." Syl. Pt. 3, *State v. Carrico*, 189 W. Va. 40, 427 S.E.2d 474 (1993). Of course, the time frame referred to by the *Carrico* Court is approximately one year, or the time it generally takes for three terms of the court to pass following the indictment of a criminal defendant. 189 W. Va. at 44, 427 S.E.2d at 478.

The speedy trial provision or "three-term rule," as it is commonly named, commences with the first term following the term in which the defendant was indicted. *State ex rel. Smith v. DeBerry*, 146 W. Va. 534, 120 S.E.2d 504 (1961), overruled on other grounds, *State ex rel. Sutton v. Keadle*, 176 W. Va. 138, 342 S.E.2d 103 (1985). "The term at which the indictment is returned is not to be counted in favor of discharge of a defendant." Syl. Pt. 1, in part, *DeBerry*, *supra*. Further, the three-term rule does not apply until after the defendant is both indicted and arraigned. Three terms of the court cannot pass without trial after the defendant is indicted and arraigned. *State v. Carter*, 204 W. Va. 491, 513 S.E.2d 718 (1998). It appears that under the three-term rule, this holds true even when the time between the return of the indictment and the date on which the defendant is arraigned exceeds ten years. *State ex rel. McCourt v. Alsop*, 220 W. Va. 644, 648 S.E.2d 631 (2007). Critically, however, this does not mean that the defendant cannot raise a Sixth Amendment speedy trial claim to a post-accusatory delay in bringing a case to trial.

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[7] West Virginia Code § 62-3-21 is to be distinguished from West Virginia Code § 62-3-1. West Virginia Code § 62-3-1 provides a criminal defendant with a statutory right to be tried during the term of the court in which he or she was indicted. Failure to try a defendant during the term in which he or she is indicted does not give rise to a Sixth Amendment claim. A discussion of a criminal defendant's rights under West Virginia Code § 62-3-1 is also found in *Good v. Handlan*, 176 W. Va. 145, 342 S.E.2d 111 (1986).

It is important to note that the statute provides that the three-term rule will not apply when "the failure to try [the accused] was caused . . . by reason of his escaping from jail, or failing to appear according to his recognizance." W. Va. Code § 62-3-21. In sum, if the failure to bring the accused to trial "is attributable to the accused in any manner the accused cannot take advantage of such delay and contend that he has been denied a speedy trial." *State ex rel. Spadafore v. Fox,* 155 W. Va. 674, 679, 186 S.E.2d 833, 836 (1972). See *also State v. VanHoose,* 227 W. Va. 37, 49, 705 S.E.2d 544, 556 (2010) (holding that a defendant cannot claim violation of right to speedy trial when the delay was attributable to his refusal to waive the marital testimonial privilege and allow his wife, who was an essential witness, to testify). See *State v. Paul C.*, --- W. Va. ---, 853 S.E.2d 569 (2020).

2. The Sixth Amendment Right to a Speedy Trial

A criminal defendant's right to a speedy trial is protected by the Sixth Amendment of the United States Constitution and Article III, Section 14 of the West Virginia Constitution. *State v. Foddrell*, 171 W. Va. 54, 297 S.E.2d 829 (1982). As stated above, a defendant's right to a speedy trial is invoked when he or she is arrested or charged by way of indictment or information. *State v. Drachman, supra*. Accordingly, a claim that a post-accusatory delay in bringing a defendant to trial violated his or her constitutional rights is evaluated under the speedy trial provision of the Sixth Amendment. Syl. Pt. 6, *State v. Jessie,* 225 W. Va. 21, 689 S.E.2d 21 (2009). There is no bright-line rule that renders a post-accusatory delay unconstitutional. Rather, the trial court should evaluate a number of factors relevant to the post-accusatory delay in trying the defendant. To that end, the West Virginia Supreme Court has held:

> A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the defendant has been denied a speedy trial. Syl. Pt. 2, *Foddrell,* 171 W. Va. 54, 297 S.E.2d 829; Syl. Pt. 6, *Jessie*, 225 W. Va. 21, 689 S.E.2d 21.

With regard to the first factor, the length of the delay, the West Virginia Supreme Court has observed: "In *State v. Foddrell*, 171 W. Va. 54, 297 S.E.2d 829 (1982), we found a five-and-one-half-year delay sufficient to merit further inquiry, and in *State v. Cox,* 162 W. Va. 915, 253 S.E.2d 517 (1979), a two-and-one-half-year delay was deemed sufficient to examine the other factors in the balancing test set out in *Barker.*" *Drachman*, 178 W. Va. at 211-12, 358 S.E.2d at 607-08. Further, the Court concluded: "Under the Sixth Amendment speedy trial right, the length of the delay is a triggering mechanism. Until there is some delay which is presumptively prejudicial there is no necessity for inquiry into the other factors that go into the balance." Syl. Pt. 5, *Drachman, supra.* However, the Court found that a delay of slightly more than one year, in addition to the remaining factors, did not constitute error. *State v. Cook*, 228 W. Va. 563, 723 S.E.2d 388 (2010).

The second factor, "the reasons for the delay" takes into consideration the State's explanation for the delay in trying the case. A trial court may consider, among other things, whether there is evidence of intentional delay or failure to procure the temporary custody of a defendant known to be incarcerated in another state. *Jessie*, 225 W. Va. 21, 29, 689 S.E.2d 21, 29.

The third factor from *Foddrell* examines whether the defendant asserted his or her right to a speedy trial. In *Jessie*, the West Virginia Supreme Court recognized that different weight should be given to an absence of a demand when the delay is between arrest and indictment, and an absence of demand when the delay is post-indictment. *Jessie,* 225 W. Va. at 29, 689 S.E.2d at 29 (citing *U.S. v. Macino*, 486 F.2d 750 (7th Cir. 1973)). The Court stated: "Importantly, we cannot ignore the fact that a person who is arrested but not charged will always nourish the hope that the government will decide not to prosecute." *Id*. (quoting *State v. Foat*, 442 So.2d 1146, 1154 (La. App. 1983)). Further, the United States Supreme Court has held: "We reject . . . the rule that a defendant who fails to demand a speedy trial forever waives his right." *Barker v. Wingo*, 407 U.S. 514, 528, 92 S. Ct. 2182 (1972).

The fourth factor considers whether the defendant has been prejudiced by the post-accusatory delay. In *Drachman*, the West Virginia Supreme Court found:

> With regard to the question of whether there was prejudice to the defendant arising from the delay, we note that *Barker* identified three interests of the defendant which the speedy trial right was designed to protect and which

> should be utilized in the assessment of the defendant's prejudice:
>
> (i) [T]o prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. *Drachman*, 178 W. Va. at 212-13, 358 S.E.2d at 608-09 (quoting *Barker v. Wingo*, 407 U.S. at 532, 92 S. Ct. at 2193).

3. State's Duty to Ensure a Defendant Receives a Speedy Trial

Once a criminal proceeding has commenced against a defendant, the State has a duty to insure that the defendant's right to a speedy trial is not violated. *State ex rel. Stines v. Locke*, 159 W. Va. 292, 220 S.E.2d 443 (1975). Obviously, once the defendant is indicted and arraigned, the State has an obligation to try the case within the statutorily mandated timeframe. However, the State also has an obligation, under certain circumstances, to procure the defendant's attendance for trial.

If a defendant has been indicted for an offense in a county in West Virginia and he is incarcerated in another state, the State has a mandatory duty to seek temporary custody of the defendant pursuant to West Virginia Code § 62-14-1 for the purpose of offering him a speedy trial.[8] *Drachman*, 178 W. Va. 207, 358 S.E.2d 603; *Stines*, 159 W. Va. 292, 220 S.E.2d 443. However, the defendant's out-of-state incarceration must have been known to the State. *McCourt,*220 W. Va. 644, 648 S.E.2d 631. If the State fails to seek temporary custody of a defendant who is known to be incarcerated in another state, then the subsequent terms of the court that pass are chargeable against the State under West Virginia Code § 62-3-21. *Stines, supra.*

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[8] The Court has distinguished a defendant who is serving a term of imprisonment in another state and a defendant who is being held for trial in another state. *State ex rel. Sutton v. Keadle*, 176 W. Va. 138, 342 S.E.2d 103 (1985).

If a defendant flees the state prior to trial, "W. Va. Code 62-3-21 imposes a duty on the State to exercise reasonable diligence to procure temporary custody of the defendant who has fled the State for the purpose of offering him a speedy trial once the defendant's out-of-state whereabouts become known." Syl. Pt. 2, *State ex rel. Boso v. Warmuth*, 165 W. Va. 247, 270 S.E.2d 631 (1980), overruled on other grounds, *Sutton*, 176 W. Va. 138, 342 S.E.2d 103. Related to the State's duty to exercise reasonable diligence:

> Under the "Three Term Rule," W. Va. Code 62-3-21, where an accused has been indicted in West Virginia and fled elsewhere, the defendant can only assert lack of reasonable diligence on the part of the State in procuring him for trial if the defendant himself has not resisted the State's efforts to return him for trial. Syl. Pt. 3, *State ex rel. Boso v. Warmuth*, 165 W. Va. 247, 270 S.E.2d 631 (1980) overruled on other grounds, *Sutton*, 176 W. Va. 138, 342 S.E.2d 103.

Finally, it does not appear that the State has a duty in the first instance, under West Virginia Code § 62-3-21, to investigate the location of a defendant whose whereabouts are unknown, including whether the defendant is incarcerated in another jurisdiction. *McCourt*, 220 W. Va. 644, 648 S.E.2d 631. However, a trial court may weigh a lack of diligence when evaluating a defendant's Sixth Amendment speedy trial claim.

With regard to a defendant who is being held or is incarcerated in West Virginia, the Supreme Court has held:

> As long as a defendant is being held for trial in one county in this State, he is not entitled to have the three-term rule, W.Va. Code, 62-3-21, run in the county where other criminal charges are pending in this State. If, however, a defendant is incarcerated under a sentence in one county and there are criminal charges pending in another county in this State, then the prosecutor in the county where the charges are pending must exercise reasonable diligence to secure the defendant's return for trial, otherwise the three-term rule, W.Va. Code, 62-3-21, is applicable. To the extent that Syllabus Points 2 and 3 of *State ex rel. Smith v. DeBerry,* 146 W.Va. 534, 120 S.E.2d 504

> (1961), and the Syllabus of *Ex Parte Hollandsworth v. Godby,* 93 W.Va. 543, 117 S.E. 369 (1923), vary from these principles, they are overruled. Syllabus, *Sutton*, 176 W. Va. 138, 342 S.E.2d 103.

C. Pre-accusatory Delays and a Defendant's Right to Due Process Under the Fifth Amendment of the United States Constitution

The constitutional right to a speedy trial guaranteed by the Sixth Amendment of the United States Constitution does not arise until a defendant is arrested or indicted. *U.S. v. Marion*, 404 U.S. 307, 92 S. Ct. 455 (1971). A pre-arrest or pre-accusatory delay may, however, give color to a claim under the Fifth Amendment of the United States Constitution and Article III, Section 10 of the West Virginia Constitution if the defendant can establish that the delay resulted in actual prejudice to his defense. *State v. Drachman*, 178 W. Va. 207, 358 S.E.2d 603 (1987); *State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (2009); *State v. Jessie*, 225 W. Va. 21, 689 S.E.2d 21 (2009).

A constitutional challenge to a pre-accusatory delay is not an easy issue to settle. As the *Marion* Court observed, "Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution." *Marion,* 404 U.S. at 324-25, 92 S. Ct. at 465. The West Virginia Supreme Court has addressed pre-accusatory delays and provided a framework to determine whether a constitutional violation has occurred.

As stated above, West Virginia does not have a statute of limitations affecting felony prosecutions. *State v. Carrico, supra*. Thus, the passage of time, standing alone, between the commission of a crime and a defendant's indictment or arrest, does not establish a constitutional violation. Rather, the West Virginia Supreme Court has held:

> To maintain a claim that preindictment delay violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution and Article III, Section 10 of the West Virginia Constitution, the defendant must show actual prejudice. To the extent our prior decisions in *State ex rel. Leonard v. Hey,* 269 S.E.2d 394 (W.Va.1980), *Hundley v. Ashworth,* 181 W.Va. 379, 382 S.E.2d 573 (1989), and their progeny are inconsistent with this holding, they are

> expressly overruled. Syl. Pt. 2, *Knotts*, 223 W. Va. 594, 678 S.E.2d 847.

A defendant's burden in establishing that a pre-accusatory delay caused actual prejudice to his or her defense is not a light one. The *Knotts* Court held:

> To demonstrate that preindictment delay violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution and Article III, Section 10 of the West Virginia Constitution, a defendant must introduce substantial evidence of actual prejudice which proves he was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was or will be likely affected. Syl. Pt. 4, *Knotts*, 223 W. Va. 594, 678 S.E.2d 847.

To be certain, to demonstrate "actual substantial prejudice" a defendant must do more than make conclusory allegations about dimming memories, lost witnesses, and misplaced documentary evidence. 223 W. Va. at 603, 678 at 856. In explaining a defendant's burden to demonstrate actual prejudice, the West Virginia Supreme Court cited with approval the conclusions reached by the South Carolina Supreme Court in *State v. Lee*, 653 S.E.2d 259 (S.C. 2007). The South Carolina Supreme Court observed that "the defendant must identify the evidence and expected content of the evidence with specificity, as well as show that he made serious efforts to obtain the evidence and that it was not available from other source[s]." *Knotts,* 223 W. Va. at 604, 678 S.E.2d at 857 (quoting *Lee*, 653 S.E.2d 259, 261 (S.C. 2007)).

In *Lee*, the defendant was indicted in 2001 and subsequently convicted of sexually abusing his step-daughters between 1982 and 1985. Prior to the indictment, in 1988, the Department of Social Services investigated the claims of sexual abuse, removing the girls for a while, but eventually returning them to the defendant's care. The defendant claimed that the pre-indictment delay violated his right to due process under the Fifth Amendment to the United States Constitution. The South Carolina Court of Appeals vacated the defendant's convictions upon a finding that the pre-indictment delay violated his right to due process and the South Carolina Supreme Court affirmed. The South Carolina Supreme Court found the following facts decisive:

> Lee had no record of the previous DSS investigation into the alleged abuse. He could not gain access to evidence concerning the Department of Juvenile Justice investigating officer or records from the family court proceedings. Because Lee *never* had access to these records, it was admittedly difficult for him to accurately identify specific pieces of evidence that would have exonerated him. Nonetheless, the absence of any contemporaneous evidence prejudiced Lee's ability to defend himself, as he had no ability to cross-examine the State's witnesses nor obtain items of exculpatory evidence. The missing evidence, although possibly damaging, on balance would have likely benefited Lee because it would have revealed the State's justification for placing the stepchildren back in the home with Lee and revealed why the State did not prosecute him in 1988 or 1989. *Lee*, 653 S.E.2d at 261.

With regard to the loss of witness testimony, the West Virginia Supreme Court found:

> [C]ourts have generally required that the defendant identify the witness he would have called; demonstrate, with specificity, the expected content of that witness' testimony; establish to the court's satisfaction that he has made serious attempts to locate the witness; and, finally, show that the information the witness would have provided was not available from other sources. *Knotts*, 223 W. Va. 594, 603, 678 S.E.2d 847, 856 (quoting *Jones v. Angelone*, 94 F.3d 900, 908 (4th Cir. 1996)).

In a 2010 case, the West Virginia Supreme Court applied the *Knotts* analysis to a case when the alleged sexual offenses occurred between 15 to 17 years before an indictment was issued. *State v. Cook*, 228 W. Va. 563, 723 S.E.2d 388 (2010), *cert denied*, 565 U.S. 855 (2011). The delay in the allegations occurred because the victims, who were 12 or 13 years of age at the time of the incidents, did not come forward until much later. Before trial, the defendant moved to dismiss the indictment based upon his claim that four deceased individuals would have supported

his defense. He also asserted that missing documents would aid in his defense. The trial court, however, declined to dismiss the indictment.

On appeal, the Supreme Court examined the defendant's claims concerning the "missing" testimony and documents. Finding the evidence vague and conclusory, the Court stated that: "Not only must the contemplated testimony of a missing or deceased witness be demonstrated with ample specificity, but the impact of that missing testimony on the defense must be shown." *Cook*, 228 W. Va. at 568, 723 S.E.2d at 394. Accordingly, the Court concluded that the defendant had failed to meet his initial burden of actual prejudice. See *Rash v. Plumley*, No. 12-0564 (W. Va. Supreme Ct., May 14, 2013) (memorandum decision) for a case in which a petitioner in a habeas corpus case failed to show actual prejudice related to a 17-year delay in prosecution.

If a defendant establishes that the pre-accusatory delay has caused actual prejudice resulting in a meaningful impairment of his or her defense, the circuit court must proceed to balance the interests of the defendant and the State. *Jessie, supra*. In this regard, the West Virginia Supreme Court held:

> In determining whether preindictment delay violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution and Article III, Section 10 of the West Virginia Constitution, the initial burden is on the defendant to show that actual prejudice has resulted from the delay. Once that showing has been made, the trial court must then balance the resulting prejudice against the reasonableness of the delay. In balancing these competing interests, the core inquiry is whether the government's decision to prosecute after substantial delay violates fundamental notions of justice or the community's sense of fair play. To the extent our prior decision in *Hundley v. Ashworth,* 181 W. Va. 379, 382 S.E.2d 573 (1989), and its progeny are inconsistent with this ruling, they are expressly overruled. Syl. Pt. 3, *Knotts*, 223 W. Va. 594, 678 S.E.2d 847.

As held by the Court in 2010, a trial court is not required to apply the second prong of *Knotts*, the balancing of the established prejudice against the delay in prosecution, unless the defendant meets his or her initial burden of showing actual prejudice. *Cook*, 228 W. Va. at 570, 723 S.E.2d at 395**.**

In a case in which a defendant was convicted of murder, the West Virginia Supreme Court reversed the case because of the prosecutor's improper comments, but it also addressed the pre-indictment delay of 25 years. *State v. Poore*, 226 W. Va. 727, 704 S.E.2d 727 (2010). The Court found that the failure to hold a hearing on the issue of pre-indictment delay constituted plain error and that such a hearing should be conducted before another trial.

IV. Diminished Capacity, Insanity, Voluntary Intoxication, and Involuntary Intoxication

A. Diminished Capacity Defense

The West Virginia Supreme Court has recognized that the diminished capacity defense may be raised by a defendant in a criminal trial. *State v. Joseph*, 214 W. Va. 525, 590 S.E.2d 718 (2003). This defense permits "a defendant to offer evidence of his mental condition with respect to his capacity to achieve the mens rea or intent required for the commission of the offense charged." 214 W. Va. at 529, 590 S.E.2d at 722. The Supreme Court has held:

> The diminished capacity defense is available in West Virginia to permit a defendant to introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged. This defense is asserted ordinarily when the offense charged is a crime for which there is a lesser included offense. This is so because the successful use of this defense renders the defendant not guilty of the particular crime charged, but does not preclude a conviction for a lesser included offense. Syl. Pt. 3, *Joseph*, 214 W. Va. 525, 590 S.E.2d 718.

As indicated by the *Joseph* Court, unlike the insanity defense, the diminished capacity defense, if established, does not provide a complete defense to a crime. 214 W. Va. at 530, 590 S.E.2d at 724. Rather, evidence of a diminished capacity may be applied to negate the *mens rea* element of the crime charged. *Id*. However, even if a defendant is able to establish that he or she suffered from a diminished mental capacity and is innocent of the crime charged, he or she may still be found guilty of a lesser included offense. *Id.* For example, a defendant may be able to

establish that he or she lacked the mental capacity to premeditate a killing, an element required for a first-degree murder conviction. However, a jury could still convict this defendant of second-degree murder, because premeditation is not an element of this offense. Further, and on a related point, many courts have rejected the use of the diminished capacity defense to general intent crimes such as sexual assault.[9] Instead, most courts have only recognized the diminished capacity defense in the context of specific intent crimes.

When a defendant raises the diminished capacity defense, he or she is required to put forth competent evidence that shows he or she suffered a diminished mental capacity when the crime was committed. *State v. Joseph, supra.* The Supreme Court has indicated that competent or credible evidence regarding a defendant's mental state at the time the criminal offense was committed should be offered in the form of expert testimony. *Joseph*, 214 W. Va. at 532, 590 S.E.2d at 725. However, expert testimony that the defendant suffered from "extreme mental or emotional disturbance"[10] is insufficient to establish diminished capacity. *State v. McKinley,* 234 W. Va. 143, 163, 764 S.E.2d 303, 323 (2014). If the evidence presented by the defendant is sufficient to support his or her theory of defense, the trial court must permit it to be considered by the trier of fact. *State v. Ferguson*, 222 W. Va. 73, 662 S.E.2d 515 (2008).

The West Virginia Supreme Court has not, in a reported opinion, addressed the use of the diminished capacity defense in a sexual offense case.[11] Obviously, a defendant cannot be prohibited from raising the defense merely because he or she is charged with a sexual offense. However, as observed above, the diminished capacity defense is not a complete defense; rather, it may be used to negate a specific intent. Related to that point, the diminished capacity defense is generally

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[9] See *State v. Daughtry*, 459 S.E.2d 747 (N.C. 1995) ("Diminished capacity is not a defense to first degree sexual offense").

[10] Extreme mental or emotional disturbance and diminished capacity are distinguishable in that the former requires a reasonable explanation for the disturbance, which is an objective component. Contrastingly, diminished capacity does not require that the emotional disturbance be reasonable. Instead, the presence of a mental disorder will lessen the defendant's crime, regardless of whether the emotional disturbance is reasonable. See *McKinley*, 234 W. Va. at 164, 764 S.E.2d at 324.

[11] In two memorandum decisions involving habeas corpus cases, the Supreme Court found that the defendants' claims concerning their mental states lacked merit. See *Lowe v. Ballard*, No. 11-0546 (W. Va. Supreme Ct., November 28, 2011) (memorandum decision); *Morgan v. Ballard*, No. 11-1677 (W. Va. Supreme Ct., January 14, 2013) (memorandum decision) (superseded by statute on other grounds as observed in *State v. Dubuque*, 239 W. Va. 660, 805 S.E.2d 421 (2017)).

unavailable as a defense to a general intent crime such as first degree sexual assault.[12]

B. Insanity

The insanity defense is an affirmative defense a defendant may raise in a criminal trial to establish that he or she should not be held criminally responsible for the crime charged. The West Virginia Supreme Court has explained the insanity defense as follows:

> When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law, and it is error for the trial court to give an instruction on the issue of insanity which imposes a different test or which is not governed by the evidence presented in the case. Syl. Pt. 2, *State v. Myers*, 159 W. Va. 353, 222 S.E.2d 300 (1976), overruled on other grounds by *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

In West Virginia, there is a presumption that a defendant was sane at the time the criminal act was committed. *State v. Milam*, 163 W. Va. 752, 260 S.E.2d 295 (1979); *State v. Daggett*, 167 W. Va. 411, 280 S.E.2d 545 (1981); *State v. Lockhart*, 208 W. Va. 622, 542 S.E.2d 443 (2000). Consequently, when the insanity defense is raised by a defendant, he or she "has the burden of presenting evidence fairly raising doubt that, at the time of the commission of the crime, he or she lacked the capacity to either appreciate the wrongfulness of his or her act or to conform his or her act to the requirements of the law." *Lockhart*, 208 W. Va. at 630, 542 S.E.2d at 451. Of course, this is not to say that the State is relieved of its duty to prove the defendant's guilt beyond a reasonable doubt. The West

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[12] As with any general intent crime, the *mens rea* for first degree sexual assault is inferred from the completion of the act. To obtain a conviction under West Virginia Code § 61-8B-3, the State must establish, beyond a reasonable doubt, that the defendant engaged in sexual intercourse or sexual intrusion with the victim, and in doing so, inflicted serious bodily injury or employed the use of a deadly weapon. A conviction for first degree sexual assault may also be obtained if it is shown that a defendant aged 14 years or older engaged in sexual intercourse or sexual intrusion with another person who was younger than 12 years old, provided the two were not legally married at the time.

Virginia Supreme Court has explained the burdens placed on a defendant and the State when the insanity defense is raised as follows:

> When an accused is relying upon the defense of insanity at the time of the crime charged, the jury should be instructed (1) that there is a presumption the accused was sane at that time; (2) that the burden is upon him to show that he was then insane; (3) that if any evidence introduced by him or by the State fairly raises doubt upon the issue of his sanity at that time, the presumption of sanity ceases to exist; (4) that the State then has the burden to establish the sanity of the accused beyond a reasonable doubt, and, (5) that if the whole proof upon that issue leaves the jury with a reasonable doubt as to the defendant's sanity at that time the jury must accord him the benefit of the doubt and acquit him. Syl. Pt. 3, *Daggett*, 167 W. Va. 411, 280 S.E.2d 545.

C. Intoxication Defenses

There are two types of intoxication defenses that may be raised by a defendant in a criminal trial: voluntary intoxication and involuntary intoxication. In the context of a criminal trial, these defenses are raised to establish that the defendant did not possess the *mens rea* or criminal intent to commit the offense charged. When raised, the defendant is required to present evidence regarding the level or degree of his or her intoxication that fairly casts doubt on the *mens rea* issue. *State v. Keeton,* 166 W. Va. 77, 272 S.E.2d 817 (1980).

1. Voluntary Intoxication Defense

It appears to be universally accepted by courts that voluntary intoxication does not provide a complete defense or legal excuse for committing a criminal act. Syl. Pt. 8, *State v. Bailey*, 159 W. Va. 167, 220 S.E.2d 432 (1975), overruled on other grounds, *State ex rel. D.D.H. v. Dostert*, 165 W. Va. 448, 269 S.E.2d 401 (1980)); 8 A.L.R.3d 1236.[13] However, West Virginia, along with other jurisdictions, has permitted limited use of this defense by defendants to negate a specific intent that is an element of a criminal offense. *Keeton*, 166 W. Va. 77, 272 S.E.2d 817. Generally, "the level of intoxication must be 'such as to render the accused incapable of forming an intent to kill or of acting with malice,

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[13] The Court, in *D.D.H. v. Dostert,* overruled Syllabus Point 6 of *Bailey* in that it held that joyriding was a lesser included offense of the crime of larceny of an automobile.

premeditation or deliberation.'" *Id*. at 820-21 quoting Syl. Pt. 1, *State v. Davis*, 52 W. Va. 224, 43 S.E. 99 (1902). Importantly, notwithstanding the assertion of this defense, the defendant can still be found guilty of any lesser included offense. *Id*. Finally, it should be noted that West Virginia, like many other jurisdictions, has rejected the use of the voluntary intoxication defense to general intent crimes, or offenses in which criminal intent is inferred from the completion of the act. *State v. Allman*, 240 W. Va. 383, 813 S.E.2d 36 n. 3 (2018).

With regard to sexual offenses, as discussed above, the majority of legal authority suggests that voluntary intoxication is not ordinarily a defense to a general intent crime such as first or second-degree sexual assault. However, under certain circumstances, the voluntary intoxication defense may be reasonably raised in sexual offense cases in which the offense charged is a specific intent crime.

2. Involuntary Intoxication Defense

The involuntary intoxication defense appears to be less common. Practically speaking, involuntary intoxication occurs in one of two ways. An individual is given an intoxicating substance without his or her knowledge. Or, and perhaps less often, a prescribed or over-the-counter medication has an adverse or unexpected effect on an individual resulting in the person's intoxication.

In the context of a criminal trial, many courts have recognized that involuntary intoxication can provide a complete defense or legal excuse to criminal charges when the intoxication is to such a degree that it removes the defendant's ability to distinguish between right and wrong. *People v. Garcia*, 113 P.3d 775 (Colo. 2005); 73 A.L.R.3d 195. However, it should be noted that the majority of courts expressly reject the proposition that addiction to alcohol or drugs constitutes involuntary intoxication. See*, e.g.*, *State v. Johnson*, 327 N.W.2d 580 (Minn. 1982).

In *State v. Alie*, 82 W. Va. 601, 96 S.E. 1011 (1918), the West Virginia Supreme Court long ago recognized involuntary intoxication as a viable defense to criminal charges. The Court found that if a defendant establishes that he or she was given an intoxicating substance without his or her knowledge that rendered the defendant temporarily insane;[14] it is

[14] In discussing the meaning of legal insanity, the *Alie* Court referred to the McNaghten Rule. Under the McNaghten Rule, "it [has been] said that the jurors ought to be told in all cases that every man is to be presumed to be sane, and possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing

error for the trial court not to instruct the jury on this defense. The Court did not appear to distinguish between general intent and specific intent crimes.

The West Virginia Supreme Court has not addressed the applicability of the involuntary intoxication defense in a sexual offense case. The case law from other jurisdictions suggests that if the existence of involuntary intoxication is supported by the evidence, the defense cannot be prohibited simply because the defendant is charged with a sexual offense. See 70C Am. Jur. 2d Sodomy § 97 (2018). Consequently, it can be inferred that if sufficient evidence is raised by the defendant that he or she was involuntarily intoxicated to such a degree that he or she did not appreciate the consequences of his or her conduct or did not have knowledge of a fact of consequence, the jury should be instructed accordingly.

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what was wrong." *State v. Alie*, 82 W. Va. 601, 96 S.E. 1011, 1014 (1918); Syl. Pt. 2, *State v. Myers*, 159 W. Va. 353, 222 S.E.2d 300 (1976), overruled on other grounds, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Chapter 6

EVIDENTIARY ISSUES IN SEXUAL OFFENSE CASES

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I. Rape Shield Law

Rule 412 of the West Virginia Rules of Evidence and West Virginia Code § 61-8B-11 comprise the rape shield law for West Virginia. Although these provisions are intended to complement each other, the comment to Rule 412 expressly states that it will supersede West Virginia Code § 61-8B-11 if the statute conflicts with the rule. The West Virginia Supreme Court has also recognized this principle. Syl. Pt. 3, *State v. Varlas*, 237 W. Va. 399, 787 S.E.2d 670 (2016).

The first recognized function or purpose of Rule 412 is to encourage victims to report sexual assaults by preventing the exposure of a victim's private life during discovery and trial. The second purpose of Rule 412 is to prevent the typecasting of a sexual assault victim. *State ex rel. Harvey v. Yoder*, 239 W. Va. 781, 785, 806 S.E.2d 437, 441 (2017) (quoting 1 Louis J. Palmer, Robin Jean Davis and Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 412.02[1] at 543 (6th ed. 2015)). See also *State v. Varlas*, 237 W. Va. 399, 407, 787 S.E.2d

670, 678 (2016); *State v. Guthrie*, 205 W. Va. 326, 339, 518 S.E.2d 83, 96 (1999).

A. History of Rape Shield Law

Before the 2014 revisions to the West Virginia Rules of Evidence, West Virginia's rape shield law was set forth in West Virginia Code § 61-8B-11 and former Rule 404(a)(3) of the West Virginia Rules of Evidence. *State v. Quinn*, 200 W. Va. 432, 436, 490 S.E.2d 34, 38 (1997). In 2014, revisions to the West Virginia Rules of Evidence went into effect. As a part of these revisions, the provisions of the rape shield rule set forth in Rule 404(a)(3) were transferred to Rule 412, a rule that governs the admissibility of evidence of a victim's sexual behavior or predisposition in a sex-offense case.

B. Rule 412 Overview

Although Rule 412 was new when it was promulgated in 2014, it included provisions from former versions of Rule of Evidence 404(a)(3).[1] In addition, Rule 412 covers the same types of evidence as West Virginia Code § 61-8B-11. Rule 412 and West Virginia Code § 61-8B-11 provide that, in sexual offense cases, evidence regarding the victim's sexual history will be excluded, unless the defendant can demonstrate that the intended use of the evidence at trial meets one of the specified exceptions.

Although similar, the first major difference between Rule 412 and Section 61-8B-11 is that Rule 412(b)(1) outlines the procedure the parties must follow to admit evidence of a victim's sexual history, behavior, or predisposition in criminal cases. Secondly, Rule 412 extends the bar on the admission of evidence when the victim's lack of consent is based solely on the incapacity to consent to a victim who is mentally defective or mentally incapacitated, as well as to a victim who is below a critical age. W. Va. R. Evid. 412(a)(3). As previously noted, the Supreme Court has established that Rule 412 will supersede West Virginia Code § 61-8B-11 if the statute conflicts with the rule. Syl. Pt. 3, *State v. Varlas*, 237 W. Va. 399, 787 S.E.2d 670 (2016). The comment to Rule 412 also provides that it will supersede the rape shield statute if the statute conflicts with it.

C. Validity of Law

The West Virginia Supreme Court has found that the rape shield law does not *per se* violate the state or federal constitutions. *State v.*

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[1] For a detailed analysis of the 2014 revisions to the West Virginia Rules of Evidence see Michael Spooner, *Changes and Updates to the West Virginia Rules of Evidence*, 117 W. Va. L. Rev. Online 2 (2015).

Guthrie, 205 W. Va. 326, 518 S.E.2d 83 (1999). The Court has upheld the statute's general exclusion of evidence pertaining to the sexual history of a victim of a sex offense by stating:

> A rape victim's previous sexual conduct with other persons has very little probative value about her consent to intercourse with a particular person at a particular time. That portion of the law which prohibits such evidence is constitutional. *State v. Green*, 163 W. Va. 681, 687, 260 S.E.2d 257, 261 (1979).

In *Persinger*, the Court affirmed this decision holding:

> In light of the judicially-sanctioned procedures set out in *State v. Green*, 163 W.Va. 681, 260 S.E.2d 257 (1979), the provisions of W. Va. Code, 61-8B-12, limiting the defendant's right to present evidence of the victim's prior sexual conduct are constitutional under the provisions of the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution. Syl. Pt. 1, *State v. Persinger*, 169 W. Va. 121, 286 S.E.2d 261 (1982).

After the decision in *Persinger*, the rape shield provision was moved to West Virginia Code § 61-8B-11. Further, neither Rule 404(a)(3), nor Rule 412 of the West Virginia Rules of Evidence was in force when *Persinger* and *Green* were decided, and therefore, the constitutionality of these rules was not evaluated. However, the validity of Rule 404(a)(3) was implied by the Court's subsequent holding, i.e., *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999). Similarly, the validity of Rule 412 has been recognized by the Court's rulings in *State v. Varlas*, 237 W. Va. 399, 787 S.E.2d 670 (2016) and *State ex rel. Harvey v. Yoder*, 239 W. Va. 781, 806 S.E.2d 437 (2017).

D. Exceptions to the Rape Shield Law

As discussed previously, Rule 412(a) and West Virginia Code § 61-8B-11(a) and (b) impose a general ban on the admission of evidence relating to a victim's sexual conduct or history. However, both provisions identify specific exceptions when evidence of a victim's prior sexual conduct may be admitted. The first exception allows evidence of specific instances of a victim's sexual behavior to show that the source of semen, injury, or other physical evidence was someone other than the defendant.

W. Va. R. Evid. 412(b)(1)(A). The second exception involves specific instances of the victim's sexual conduct with the defendant if it is offered on the issue of consent. W. Va. R. Evid. 412(b)(1)(B); W. Va. Code § 61-8B-11(a). To admit this evidence, the victim must have been legally capable of consent because of his or her age. W. Va. R. Evid. 412(a)(3); W. Va. Code § 61-8B-11(a). Alternatively, the circumstances of the assault must not have involved a victim who was mentally defective or mentally incapacitated. W. Va. R. Evid. 412(a)(3). The third exception involves impeaching the victim's credibility. However, the victim must first make his or her previous sexual conduct an issue by introducing evidence concerning it. W. Va. R. Evid. 412(b)(1)(C); W. Va. Code § 61-8B-1(b). The fourth exception is implicated if the exclusion of evidence would violate the defendant's constitutional rights. W. Va. R. Evid. 412(b)(1)(D). The following discussion outlines the exceptions to the general ban on admissibility of evidence of a victim's sexual behavior or predisposition.

1. Evidence Proving Source of Semen, Injury, or Other Physical Evidence

For criminal cases,[2] Rule 412 identifies an exception to the rape shield when evidence is offered to prove that "someone other than the defendant was the source of semen, injury, or other physical evidence." W. Va. R. Evid. 412(b)(1)(A). The Supreme Court has generally recognized that forensic evidence involving the source of semen may, in some circumstances, constitute relevant and material evidence in a sexual assault case. *Matter of Investigation of the West Virginia State Police Crime Laboratory, Serology Div.*, 190 W. Va. 321, 438 S.E.2d 501 (1993). Among other things, this case addressed relief that may be available to defendants in cases in which Fred Zain conducted forensic testing and testified. With regard to sexual assaults, the Court observed that:

> [W]here the defendant admitted intercourse with the prosecutrix, but asserted that sexual relations were consensual, forensic evidence regarding the source of semen would ordinarily be collateral, and a new trial may not be warranted. On the other hand, where the prosecutrix was unable to identify the defendant as her assailant, but serological identified the defendant as the source of semen found on the victim's undergarments,

[2] In civil cases, Rule 412(b)(2) also allows for the admission of a victim's sexual behavior or predisposition if the probative value substantially outweighs the danger of harm to the victim and of unfair prejudice to any party. Evidence of a victim's reputation may only be admitted if the victim has placed his or her reputation in controversy. W. Va. R. Evid. 412(b)(2).

> and the defense was alibi, a new trial may be warranted. 190 W. Va. at 339, 438 S.E.2d at 519.

Although this discussion does not directly address the evidence of a victim's sexual behavior, it is a recognition that, in some factual circumstances, the source of semen will be a determinative fact in a sexual assault case.

Specifically addressing the first exception to the general ban, Justice Ketchum, in a separate opinion, discussed the exception in Rule 412(b)(1)(A) that allows for the admission of evidence that is relevant "to prove that someone other than the defendant was the source of semen, injury, or other physical evidence." *State v. Wakefield*, 236 W. Va. 445, 781 S.E.2d 222 (2015). In this case, a woman had gone out with two men, one of whom was later convicted of conducting a drug-facilitated sexual assault. Apparently, there was some evidence that the victim and the other man had been kissing in a truck before the victim went into the house where she was later sexually assaulted by the defendant. At trial, the judge admonished the parties about questioning the witness in an inflammatory way about any contact between the victim and the witness. However, the trial court allowed defense counsel to question the third party about these facts. The record below indicated that the State had objected based upon the rape shield law. On appeal, the defendant argued that the trial court's admonishment prevented him from effectively cross-examining the witness about the incident. In the majority opinion, the Court, however, reviewed the record and found the trial court had only cautioned counsel about asking inflammatory questions, but did not prevent counsel from questioning the witness. Therefore, the Court affirmed this ruling.

In Justice Ketchum's separate opinion in *Wakefield*, he indicated his agreement with the majority concerning this ruling.[3] He wrote separately to emphasize that the rape shield law would not have barred the questioning, as the State had argued at trial. As an initial matter, Justice Ketchum referred to the provision of Rule 412 that allows the admission of "evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury or other physical evidence." W. Va. R. Evid. 412(b)(1)(A). He noted that, although Rule 412 had not been in effect at the time of the victim's sexual assault, it did not create new law, but clarified existing law. He went on to explain that the evidence was admissible under the

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[3] Justice Ketchum dissented with regard to another issue, the admission of expert testimony. However, he agreed with the majority in concluding that the circuit court did not err with regard to its admonishment to counsel and the admission of evidence concerning the victim's consensual activity with the third party.

provision of the rape shield law that allows for the admission of evidence when the evidence is "'(1) specifically related to the act or acts for which the defendant is charged; and (2) necessary to prevent manifest injustice.'" *Wakefield, supra* (quoting Syl. Pt. 3, in part, *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999)). Justice Ketchum, therefore, concluded that the evidence was properly admissible under the former exception to the rape shield law set forth in *Guthrie*.

The Supreme Court has addressed a case in which a trial court had excluded DNA evidence from a person other than the defendant. *State v. Timothy C.*, 237 W. Va. 435, 787 S.E.2d 888 (2016). In this case, the defendant was convicted of sexual offenses against two young girls, his daughter and a neighbor. The allegations against the defendant with regard to his seven-year-old daughter involved her statement that the defendant had made her perform oral sex on him. Before trial, the State obtained an order requiring the defendant to provide a saliva sample to compare to semen on the daughter's shirt. The results, however, eliminated the defendant as the source of the semen. Upon the State's motion, the trial court excluded the evidence under the rape shield law.

On appeal, the defendant argued that the trial court's exclusion of this evidence violated his constitutional right to a fair trial. Analyzing this issue, the Supreme Court first noted that admission of evidence under Rule 412(b) is discretionary, not mandatory. The Court then applied the three factor test established by Syllabus Point 6 of *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). With regard to the first factor, whether the evidence was relevant, the Court found that the DNA evidence supported the defendant's theory of innocence and also noted that the purposes for the evidence fell within the exceptions outlined in Rule 412(b)(1). With regard to the second *Guthrie* factor, whether the probative value of the evidence outweighed the prejudicial effect, the Court found that the evidence supported the defendant's theory of innocence. Therefore, the Court found that it satisfied this second factor. With regard to the third factor, whether the State's compelling interest in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense, the Court found that the defendant should have been allowed to present the DNA evidence. The Court noted that the State had pursued the DNA testing when it thought it would have prove that the defendant was the source of the semen, but then opposed its introduction when it showed that the DNA did not come from the defendant. Based upon the satisfaction of the three *Guthrie* factors, the Court found that the exclusion of the evidence violated the defendant's due process rights. The Court, therefore, reversed the defendant's conviction involving the sexual offenses against his daughter. However, the Court found that the exclusion of the DNA evidence was

harmless as to the second victim because the source of semen was not applicable to those charges.

2. The Consent Defense

In sex offense cases, a defendant may assert a consent defense and attempt to admit evidence of his or her sexual history with the victim to support this theory. Provided that the victim has reached an age where consent can be raised, the defendant may be able to admit this evidence as provided in West Virginia Code § 61-8B-11(a), which states:

> In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible. In any other prosecution under this article, evidence of specific instances of the victim's prior sexual conduct with the defendant shall be admissible on the issue of consent: Provided, That such evidence heard first out of the presence of the jury is found by the judge to be relevant.

Rule 412 also addresses the consent defense. Similar to Section 61-8B-11(a), Rule 412 provides that evidence of specific instances, reputation, or opinion evidence of the victim's sexual behavior or predisposition may not be admitted to prove consent if the victim's lack of consent is based solely on the victim's incapacity to consent due to age, mental defect, or mental incapacity. W. Va. R. Evid. 412(a)(3). However, in other prosecutions, evidence of specific instances of the victim's sexual behavior with respect to the accused person may be admissible to prove consent. W. Va. R. Evid. 412(b)(1)(B). The State may also introduce this type of evidence. Under these two provisions, a victim must have the legal ability to consent to sexual activity before evidence related to a victim's sexual conduct may be considered for admission on the issue of the victim's consent.

Before the adoption of Rule 412, a defendant who sought to introduce the prior sexual conduct of a victim was required to make an evidentiary proffer that allowed the trial court to weigh the interests of the defendant and of the State.[4] *State v. Wears*, 222 W. Va. 439, 665 S.E.2d

[4] A discussion on the procedural requirements for admission of this type of evidence is found in Section D.

273 (2008).[5] The evidence of previous consensual sexual acts between the defendant and the victim must be relevant to whether the victim consented to the act or acts in contention. Factors courts have found germane to the issue of consent include: the nature of the relationship that existed between the defendant and the victim, the duration of the relationship, and the time that has elapsed since the last consensual sexual act and the act or acts in issue. See e.g., *State v. Pancake*, 170 W. Va. 690, 296 S.E.2d 37 (1982); but see *State v. Jonathan B.*, 230 W. Va. 229, 737 S.E.2d 257 (2012). Although the rape shield provisions have been amended, this case law continues to provide guidance on the admission of this evidence.

In *Pancake*, the defendant was charged with the first degree sexual assault of his sister-in-law. His primary defense was that the victim consented to having sexual intercourse with him on the day in question. At an *in camera* hearing, evidence was presented that showed that approximately a year and a half before the alleged assault the defendant and victim had engaged in consensual sexual intercourse. The trial court ruled that this evidence was too remote to be relevant and would not allow the defendant to cross-examine the victim on the incident. Without extended discussion, the Supreme Court affirmed the trial court finding that the evidence of the previous sexual relationship was irrelevant to the issue of whether the victim consented to the present act. *Pancake*, 170 W. Va. 60, 296 S.E.2d 37.

In *State v. Parsons*, 214 W. Va. 342, 589 S.E.2d 226 (2003), the defendant was convicted of 21 counts of third degree sexual assault. The victim claimed that the defendant committed various sexual offenses against her over a period of approximately three years while she was a student at the junior high school where the defendant taught. According to the victim, all of the incidents occurred before she reached the age of 16. The defendant denied these allegations, and in turn, claimed that he and the victim had a consensual sexual relationship after she turned 16. *Parsons*, 214 W. Va. 342, 589 S.E.2d 226.

At trial, the defendant sought to admit evidence of this consensual relationship to explain why the victim knew certain information about the defendant and his home. The defendant also claimed this evidence explained why the victim had motive to fabricate the charges -- she was unhappy the relationship ended. The trial court excluded the majority of the evidence proffered by the defendant, finding that its admission was barred by West Virginia Code § 61-8B-11(a).

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[5] The *Wears* case involved a defendant who sought to introduce a victim's sexual conduct with a third party. The trial court found that the defendant's proffer was insufficient, and the Supreme Court affirmed.

On appeal, the defendant claimed that exclusion of the evidence denied him a meaningful defense. He argued that he had denied any sexual contact with the victim before she turned 16, and that he did not attempt to admit evidence that the victim consented when she was statutorily incapable. Instead, the defendant posited that he wanted to admit evidence of a consensual relationship that occurred when the victim was legally capable of consenting.

The Supreme Court stated that West Virginia Code § 61-8B-11 was arguably silent on the narrow issue raised by the defendant, and the Court acknowledged that such an argument might be more persuasive in another set of circumstances. *Parsons*, 214 W. Va. at 349-50, 589 S.E.2d at 233-34. However, the Court declined to reverse the ruling of the trial court on the facts presented. While much of the evidence the defendant offered regarding his relationship with the victim was excluded, he was allowed to introduce testimony that demonstrated that there had been contact between him and the victim after she turned 16. And thus, the Court found that his right to due process was not violated.

The Supreme Court overturned a defendant's second degree sexual assault conviction when the trial court excluded a series of 29 text messages between the victim and her boyfriend concerning the defendant's alleged sexual assault based upon Rule 412. *State v. Varlas*, 237 W. Va. 399, 787 S.E.2d 670 (2016). In *Varlas*, the victim alleged that the defendant had forced sexual intercourse with her. The circumstances of the alleged sexual assault involved a social situation between the victim, the defendant, and others. During the evening of the assault, the victim had been exchanging texts with her boyfriend about being in the company of another man. After the time of the alleged assault, the victim did not tell the other persons present that she had been assaulted. However, the victim told her boyfriend via a text message that she had been assaulted and then went to sleep. In response to her statement, the victim's boyfriend texted her 29 times over the course of two hours and hold her repeatedly to go to the hospital, and to file charges. In the texts, he stated that he was ending the relationship until she filed charges. Specifically, the boyfriend texted the following statement to the victim: "Good job at whoring around. This just shows me how you really are. If it was rape you would [have] already called the cops." *Varlas*, 237 W. Va. 399, 787 S.E.2d 670. The trial court allowed the prosecutor to ask the victim about her boyfriend's use of "very vulgar terms" to pressure her to report the assault. However, the trial court excluded the text messages based upon the rape shield law.

On appeal, the Supreme Court found that the text messages related to sexual conduct between the defendant and victim; therefore, the Court concluded that Rule 412(b)(1)(B) would permit the introduction of

the testimony as relevant to the victim's consent. The Court additionally reasoned that the erroneous exclusion of so much relevant evidence prejudiced the defendant. The Court noted that the defendant should have been allowed to introduce evidence that the victim's boyfriend had pressured the victim to report the circumstances as a crime. Although the jury heard that the victim's boyfriend had called the victim a vulgar name, the Court found that the exclusion of the text messages "thus resulted in an important aspect of the case being grossly deemphasized." 237 W. Va. at 408, 787 S.E.2d at 679. As an additional basis for reversal, the Court also found that the trial court erred in allowing the investigating officer to testify as an expert witness based upon what he had learned in class at the police training academy.

3. Impeaching the Credibility of the Victim

West Virginia Code § 61-8B-11(b) allows a defendant to introduce evidence of a victim's sexual history for impeachment purposes, provided the victim first makes his or her sexual history an issue at trial. West Virginia Code § 61-8B-11(b) provides:

> In any prosecution under this article evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct shall not be admissible: Provided, That such evidence shall be admissible solely for the purpose of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto.

Similarly, Rule 412(b)(1)(C) of the West Virginia Rules of Evidence allows for the admission of evidence of specific instances of sexual conduct with individuals other than the defendant and reputation or opinion evidence of the victim's sexual conduct to impeach the victim's credibility. However, the victim first must first make his or her previous sexual conduct an issue at trial. Although the text of the rule refers to the "victim," the Court has recognized that the "state" or "the prosecution" would be the party introducing the evidence. *Harvey*, 239 W. Va. 781, 806 S.E.2d 437 n.17 (quoting 1 Palmer, Davis & Cleckley, *Handbook on Evidence*, § 412.04[2][c], at 563).

Consistent with West Virginia Code § 61-8B-11(b) and well before the adoption of Rule 412, the Supreme Court held:

> As a general matter, W. Va. Code § 61-8B-11(b) bars the introduction of evidence, in a sexual assault prosecution, concerning (1) specific instances of the victim's sexual conduct with persons other than the defendant, (2) opinion evidence of the victim's sexual conduct and (3) reputation evidence of the victim's sexual conduct. Syl. Pt. 1, *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999).
>
> W. Va. Code § 61-8B-11(b) provides an exception to the general exclusion of evidence of prior sexual conduct of a victim of sexual assault. Under the statute, evidence of (1) specific instances of the victim's sexual conduct with persons other than the defendant, (2) opinion evidence of the victim's sexual conduct and (3) reputation evidence of the victim's sexual conduct can be introduced solely for the purpose of impeaching the credibility of the victim only if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto. Syl. Pt. 2, *Guthrie*, 205 W. Va. 326, 518 S.E.2d 83.

The question of whether the victim has put his or her sexual history in issue must be determined by the trial court. As demonstrated by *State v. Calloway*, 207 W. Va. 43, 528 S.E.2d 490 (1999), a case decided before the promulgation of Rule 412, the resolution of this issue may not be simple.

In *Calloway*, the victim alleged that the defendant forced his way into her apartment, beat her and sexually assaulted her. The defendant denied the beating and the sexual assaults. He claimed that he and the victim were smoking crack cocaine and an angry boyfriend inflicted the wounds when he found the pair together. Investigators found a semen stain on the victim's bed; however, DNA testing excluded the defendant as a contributor.

At trial, the State questioned the victim about why she opened the door on the day in question. She explained that she thought it was her mother or a male friend that often stopped by for breakfast. The victim did not offer any specific facts regarding her relationship with this man, and he

was not identified at trial.[6] After this line of questioning, the defendant attempted to introduce the semen stain to impeach the victim's credibility by showing she had previously had sex with this unidentified man. The trial court excluded the DNA evidence, finding that the victim had not put her sexual history in issue.

The Supreme Court found that it was not error to exclude the evidence, because the victim's testimony did not meet the requirements of West Virginia Code § 61-8B-11(b). After examining the exchange between the prosecutor and the victim, the Court stated that "the victim's vague characterization of her relationship with an unidentified man in no way put her past sexual history at issue." *Calloway*, 207 W. Va. at 52, 528 S.E.2d at 499.

Similarly, the West Virginia Supreme Court upheld a circuit court's decisions denying the defendant's inquiry into the victim's previous sexual experience. *State v. Haid,* 228 W. Va. 510, 721 S.E.2d 529 (2011). In *Haid*, the defendant was a 39-year old male who was charged with sexually assaulting a 15-year old female. The parties had originally met online and after six months of chatting, decided to meet in person. The defendant picked up the victim along the road near her home, then drove her to his home where he performed oral sex on her and had anal intercourse with her.

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[6] The relevant exchange between the victim and prosecutor is as follows:

Q. When were you next awakened?

A. I guess between 6:30 and 7:00 in the morning. It was already light out but it was early.

Q. What woke you?

A. A knock on the door.

Q. Did that surprise you ...?

A. No.

Q. Why didn't it surprise you?

A. Well, my grandmother was in the hospital so I assumed it was either mom, she had mentioned coming to pick me up because she knows me, she would have to wait for me to get ready so she would have been there early, to go to the hospital with her because I don't drive, so she would have picked me up, or a friend of mine usually stopped by.

I was bartending. He went to work early in the morning, I got home late and sometimes he would stop by and bring me breakfast before he had to be at work at 7:00, 7:30.

Q. *Was that friend a boyfriend?*

A. *He was not serious, we were mostly friends. It was developing that way.*

Q. So when you heard this knock at your door, what did you do?

A. I opened it.

State v. Calloway, 207 W. Va. 43, 48-49, 528 S.E.2d 490, 495-96 (1999) (emphasis in original).

At trial, the defendant's attorney attempted to question the victim regarding her sexual history and argued that the victim put her sexual history at issue by testifying about the acts that took place between herself and the defendant. The Supreme Court noted that "The proposed inquiry . . . appears to fly directly in the face of the rape shield statute," and the argument that this type of testimony opens the door for evidence of the victim's sexual history "is particularly insensitive to the purpose of this statute." 228 W. Va. at 518, 721 S.E.2d at 537. The Court, therefore, affirmed the circuit court's exclusion of this evidence.

In contrast to cases affirming the exclusion of evidence, the case of *State v. Jonathan B.*, 230 W. Va. 229, 737 S.E.2d 257 (2012) addresses facts where the exclusion of evidence was reversed on appeal. In *Jonathan B.*, the defendant was prosecuted for the forcible rape of his half-sister. The evidence relied upon by the State was primarily the victim's testimony. Before trial, the defendant sought to admit the victim's journal which was purportedly written after the rape and indicated that the victim had only had sexual intercourse with one person who was identified as "Chris." The stated purpose for the admission of the evidence was to impeach the victim's credibility. Finding that the rape shield statute applied, the circuit court excluded the journal.

On appeal, the Supreme Court reversed this ruling because it determined that the evidence was "highly probative" in that the journal was purportedly written after the alleged rape. 230 W. Va. at 241, 737 S.E.2d at 269. The Court also determined that the prejudicial value of the evidence was minimal because it was not offered to suggest that the victim was promiscuous. Rather, the purpose for the introduction of the evidence would be to impeach the victim's credibility. The Court, therefore, held that the journal could be admitted, subject to proper authentication.

In 2017, the Supreme Court addressed the exception to the exclusion of evidence established by Rule 412(b)(1)(C). *Harvey*, 239 W. Va. 781, 806 S.E.2d 437. The facts related to this issue involved the defendant's recorded statement to the police in which he informed them that he had purchased a Plan B contraception pill for the victim because she had told him that she had engaged in unprotected sex with another person. Since the State intended to introduce the entire recorded statement in evidence, the circuit court found that the defendant should be able to cross-examine the victim as to whether she had engaged in unprotected sex with another person during the relevant time period. The circuit court ruling indicated that defendant would be required to accept the victim's yes or no answer and would not be allowed further questions on the issue. In addition to other issues, the State sought to prohibit the circuit court ruling.

Addressing this issue, the Court found that Rule 412(b)(1)(C) is similar to the curative admissibility rule. *Harvey*, 239 W. Va. at 790, 806 S.E.2d at 446 (citing *U.S. v. Rucher*, 188 F. App'x 772, 778 (10th Cir. 2006); *State v. McKinley*, 239 W. Va. 143, 157, 764 S.E.2d 303, 317 (2014)). The Court further found that Syllabus Point 10 of *State v. Guthrie* sets forth guidance on the admission of this type of evidence. In a syllabus point, the Court held that:

> In order to rebut evidence on an evidentiary fact under Rule 412(b)(1)(C) of the West Virginia Rules of Evidence, (1) the original evidence must be inadmissible under Rule 412; (2) the rebuttal evidence must be similarly inadmissible; and (3) the rebuttal evidence must be limited to the same evidentiary fact as the original inadmissible evidence. Syl. Pt. 2, *Harvey, supra.*

Applying this test, the Court found that the excerpt of the defendant's statement -- that the victim had had unprotected sex with another person -- was inadmissible under Rule 412(a)(3) and satisfied the first factor. In addition, the Court found that Rule 412(a)(3) would prevent the defendant from cross-examining the victim about whether she had engaged in unprotected sex with someone else and that the second factor of Syllabus Point Two was satisfied. Further, the Court found that the limitation of the questioning of the victim satisfied the third factor of Syllabus Point Two -- the limitation of inadmissible rebuttal evidence to the same fact as the original inadmissible evidence. Since the factors of the test were satisfied, the Court did not prohibit the circuit court ruling with regard to the question of the victim as to whether she had engaged in unprotected sex with another person during the time period in which a Plan B contraceptive would be effective. See Section I.D.4 for a discussion of the writ of prohibition that prevented the defendant from questioning the victim about a sexual assault that occurred four years earlier.

4. Constitutional Exception

Rule 412 also includes an exception for "evidence whose exclusion would violate the defendant's constitutional rights." W. Va. R. Evid. 412(b)(1)(D). The West Virginia Supreme Court has recognized that the *Guthrie* test is applicable to constitutional challenges to the exclusion of evidence under Rule 412(b)(1)(D). *State ex rel. Harvey v. Yoder*, 239 W. Va. 781, 806 S.E.2d 437 n.9 (2017). Therefore, case law decided before the adoption of Rule 412 has addressed constitutional challenges to the rape shield law and would be relevant to its application.

The Supreme Court has upheld the constitutionality of the rape shield law's general exclusion of evidence of a victim's sexual history. In *Persinger*, the Court explained:

> A rape victim's previous sexual conduct with other persons has very little probative value about her consent to intercourse with a particular person at a particular time. That portion of the law which prohibits such evidence is constitutional. *Persinger*, 169 W. Va. at 125, 286 S.E.2d at 265.

Further, the exceptions to the rape shield law and the procedure that must be used to determine whether evidence is admissible under one of those exceptions serve to protect the defendant's constitutional rights. *Id.*

However, despite the facial validity of the rape shield law, the policies underlying its enactment, and the mandatory procedural safeguards, there may be instances when its application violates a defendant's constitutionally protected trial rights. A constitutional challenge to the application of the rape shield law requires a trial court to weigh the interests of the parties. There is plenary authority, which provides that a trial court cannot apply "rules of evidence in such a mechanistic manner so as to exclude evidence which is critical to the defense." *State v. Jenkins*, 195 W. Va. 620, 627, 466 S.E.2d 471, 477 (1995); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973). However, it has also been recognized that "in appropriate circumstances, the defendant's right to present relevant testimony may bow to accommodate other legitimate interests in the criminal trial process." *State v. Guthrie*, 205 W. Va. 326, 338, 518 S.E.2d 83, 95 (1999) (quoting *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S. Ct. 1743, 1746 (1991) (internal citations omitted)). In *Guthrie*, the Court expressly held that:

> The test used to determine whether a trial court's exclusion of proffered evidence under our rape shield law violated a defendant's due process right to a fair trial is (1) whether that testimony was relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense. Under this test, we will reverse a trial court's ruling only if there has been a clear

> abuse of discretion. Syl. Pt. 6, *Guthrie*, 205 W. Va. 326, 518 S.E.2d 83.

The defendant in *Guthrie, supra,* was charged with the first degree sexual assault of his wife. The defendant denied sexually assaulting his wife, but admitted on the day of the alleged assault he and his wife fought over finances and her alleged infidelity. During a forensic examination, the victim told hospital staff that she had not had sexual intercourse for approximately two months before the alleged assault. However, the examination results revealed the presence of spermatozoa from two or more individuals, and the defendant was excluded as a contributor.

At trial, the defendant attempted to have this evidence admitted to impeach the victim's credibility. The trial court found that the evidence was barred by the rape shield law. The evidence was irrelevant because identity was not an issue in this case. And further, the victim had not put her sexual history in issue, so the evidence was not available for impeachment purposes.

In his appeal, the defendant claimed that his due process right to a fair trial was violated because the trial court excluded relevant evidence regarding the credibility of the victim. Applying the above-cited standard, the Supreme Court concluded that the defendant's right to due process was not violated. The victim did not testify about her conversation with hospital staff, and she did not testify about her sexual history. Thus, the evidence was only "marginally relevant" for impeachment purposes. *Guthrie*, 205 W. Va. at 339, 518 S.E.2d at 96. Rather, given the facts, the proffered evidence was precisely the type of evidence that the rape shield law is designed to exclude. Under these circumstances, the Court concluded that the State's interest in protecting the victim was far greater. *Id.*

In a case in which the exclusion of evidence was found to violate a defendant's constitutional rights, the Tenth Circuit overturned a district court ruling that prevented a defendant from questioning the victim and a medical doctor about a prior sexual assault of the victim. *U.S. v. Begay*, 937 F.2d 515 (10th Cir. 1991). In *Begay*, the government had relied on expert testimony to prove the sexual assault. In an *in camera* hearing, the expert testified that he could not, however, determine whether the victim's physical condition, an enlarged hymenal opening and an abrasion, was caused by the sexual assault at issue or an earlier assault. On appeal, the Tenth Circuit held that the exclusion of the evidence -- questions about the earlier sexual assault -- violated the defendant's right to confrontation as established by the Sixth Amendment to the Constitution.

Similarly, the West Virginia Supreme Court found that the exclusion of DNA evidence violated a defendant's constitutional rights. *State v. Timothy C.*, 237 W. Va. 435, 787 S.E.2d 888 (2016). In *Timothy C.*, the defendant was convicted of the sexual assault of his seven-year-old daughter for allegedly putting his penis in her mouth. Semen recovered from her shirt, however, indicated that someone other than the defendant was the source. Finding that the defendant's purpose for introducing the evidence would not have thwarted the goal of the rape shield rule, the Court held that the probative value of the evidence outweighed the prejudicial effect to the State.

The West Virginia Supreme Court has squarely addressed the constitutionality of excluding evidence of a prior sexual assault of a victim. *State ex rel. Harvey v. Yoder*, 239 W. Va. 781, 806 S.E.2d 437 (2017). In *Harvey*, the 14-year-old victim had been sexually assaulted approximately four years earlier than the time that was at issue. The defendant asserted that he should be able to introduce evidence that the victim had asked him to harm the other perpetrator and that he had refused. He claimed that the victim has accused him of the sexual assault in retaliation for his refusal. Before trial, the circuit court found that the defendant should be able to present this evidence, and the State filed the petition for a writ of prohibition to challenge the ruling.

To address this issue, the Supreme Court noted its holding in Syllabus Point Three of *State v. Jenkins*, 195 W. Va. 620, 466 S.E.2d 471 (1995) that generally recognized that a trial court may not exclude evidence that prevents a criminal defendant from offering testimony in support of his or her defense. The Court noted that Syllabus Point Six of *Guthrie* governs whether evidence excluded under the rape shield law would violate a defendant's due process right to a fair trial.

Applying the first factor of the *Guthrie* test, the Court found that the evidence was not relevant. Citing authority from other jurisdictions, the Court concluded that a defendant does not have a constitutional right to present irrelevant evidence. With regard to the specific facts of the case, the Court noted that the earlier crime was not relevant to the allegations against the defendant. The Court further noted that the defendant's assertion lacked merit because the 14-year-old victim described her relationship with the 50-year-old defendant as consensual. It was the victim's mother who reported the relationship, which in turn, resulted in an investigation. The victim had not, in fact, taken steps to retaliate against the defendant. The Court, therefore, concluded that the exclusion of the evidence did not violate the defendant's constitutional rights.

E. Procedure for Determining Admissibility of Victim's Sexual Behavior

As noted earlier, one primary distinction between Rule 412 and West Virginia Code § 61-8B-11 is that Rule 412 establishes procedural steps that the defendant must follow in order to introduce evidence of the victim's sexual behaviors or predisposition at trial. Specifically, Rule 412(c) details pretrial procedures that the parties must follow before the court holds an *in camera* hearing to determine whether the evidence should be admitted.

First, the party who intends to offer evidence of the victim's sexual behaviors must file a motion that specifically describes the evidence and the purpose for which it is offered. W. Va. R. Evid. 412(c). Although Rule 412 does not expressly refer to a "written" motion, the provisions of Rule 412(c) imply that this type of motion should be made in writing. A motion under subsection (c) must be filed at least 14 days before trial unless the court, for good cause, sets a different time. It must be served on all parties, and the movant must notify the victim or, if appropriate, the victim's guardian or representative of the defendant's intent to offer the evidence. Under subsection (c)(2)(A), any motion should be sealed unless the court orders otherwise.

After the motion has been filed, the court is required to conduct an *in camera* hearing and must give the victim and the parties the right to attend and be heard.[7] Further, unless the court orders otherwise, the motion, any related materials, and the record of the hearing must be maintained under seal. W. Va. R. Evid. 412(c)(2). After the court conducts an *in camera* hearing, the evidence will only be admitted if the court determines that the evidence is specifically related to the act or acts that the defendant is charged with and is necessary to prevent manifest injustice. W. Va. R. Evid. 412(c)(2)(B). The standard for the admission of evidence established by Rule 412(c)(2)(B) is unique to West Virginia, and it was included in a former version of Rule 404(a)(3).

Former Rule 404(a)(3) allowed for the admission of this type of evidence as follows:

> Character of Victim of a Sexual Offense. In a case charging criminal sexual misconduct, evidence of the victim's past sexual conduct with the defendant as provided for in W. Va.

[7] Before Rule 412 was adopted, case law required trial courts to conduct an *in camera* hearing to determine whether the evidence would be admissible under the rape shield law. *State v. Green*, 163 W. Va. 681, 260 S.E.2d 257 (1979); *State v. Persinger*, 169 W. Va. 121, 286 S.E.2d 261 (1982).

> Code § 61-8B-11; and as to the victim's prior sexual conduct with persons other than the defendant, where the court determines at a hearing out of the presence of the jury *that such evidence is specifically related to the act or acts for which the defendant is charged and is necessary to prevent manifest injustice*. W. Va. R. Evid. 404(a)(3) (repealed September 2, 2014) (emphasis added).

Consistent with Rule 404(a)(3), the Supreme Court has held:

> Rule 404(a)(3) of the West Virginia Rules of Evidence provides an express exception to the general exclusion of evidence coming within the scope of our rape shield statute. This exception provides for the admission of prior sexual conduct of a rape victim when the trial court determines *in camera* that evidence is *(1) specifically related to the act or acts for which the defendant is charged and (2) necessary to prevent manifest injustice*. Syl. Pt. 3, *State v. Guthrie*, 205 W. Va. 326, 518 S.E.2d 83 (1999) (emphasis added).

Since the standard for the admission of evidence under Rule 412 is derived from earlier case law and former Rule 404(a)(3), the cases that adopted and applied this standard would be relevant to cases involving this provision in Rule 412(c)(2)(B). In interpreting former Rule 404(a)(3), the West Virginia Supreme Court noted, "a defendant seeking to introduce evidence of a victim's sexual history must offer an evidentiary proffer which affords the trial court a meaningful opportunity to balance the interests of the state, as embodied in the rape shield statute, against the interests of the defendant." *State v. Wears*, 222 W. Va. 439, 447, 665 S.E.2d 273, 281 (2008). Like Rule 412(c)(2)(B), the proffered evidence under former Rule 404(a)(3) had to be related to the act or acts in issue, and its admission had to have been necessary to prevent manifest injustice.

In *Wears*, the Supreme Court examined the admissibility of a victim's sexual history pursuant to Rule 404(a)(3). The 13-year-old victim alleged that the defendant and another adult male held her down and repeatedly stuck their fingers in her vagina while sucking on her upper body. According to the victim, this assault left her with small reddish bruises ("hickies") on her upper body. The victim's mother discovered

these bruises, and this discovery led to the charges brought against the defendant.

The defendant denied the assault. He claimed the victim was having an on-going illicit sexual relationship with another male and that the bruises on the victim were a result of this relationship. A letter from the prosecution indicated that the victim had admitted to this relationship after lying about it to law enforcement on two previous occasions. The defendant sought to admit evidence of this relationship to show another person committed the assault, to show the victim had a motive to lie, and to impeach the victim's credibility.

Prior to trial, the circuit court held two hearings regarding the admissibility of the proffered evidence. Ultimately, it ruled that the defendant could introduce evidence that the bruises came from another individual, provided the victim first claimed they came from the defendant. The circuit court did not allow the evidence to be introduced under Rule 404(a)(3), or to establish the victim's motive to lie about the defendant's assault.

The defendant submitted an affidavit signed by defense counsel. The affidavit quoted an unnamed witness and asserted that: the witness had observed a sexual relationship between the victim and the other man; the victim had been in the witness's home on multiple occasions with this man, including times after the alleged assault; the witness did not believe the victim's parents were aware of this relationship; and the witness had observed hickies on the victim's body after an encounter with this man, just prior to the alleged assault.

The Supreme Court found that the evidence proffered by the defendant was insufficient to meet the requirements of former Rule 404(a)(3). *Wears*, 222 W. Va. at 447, 665 S.E.2d at 281. The Court's conclusion was based on a number of factors. The allegations in the affidavit were vague and called for speculation. The witness did not sign the affidavit or appear at the *in camera* hearing, so there was no opportunity for the court or the State to assess her credibility, competency, or biases. Moreover, even if the affidavit contained the sworn statements of an identified witness, the proffered testimony did not exclude the defendant from the assault. Although the victim may have received hickies from a sexual encounter with another man the previous day, "such fact was not evidence specifically related to the separate sexual acts for which the Appellant was charged." *Wears*, 222 W. Va. at 448, 665 S.E.2d at 282. "The presentment of this evidence would not have excluded the Appellant, nor would it have proven that he was not involved in the assault the following day." *Id.*

With regard to the defendant's attempt to present evidence that the victim had a motive for lying, the Supreme Court found that the defendant's proffer was insufficient. *Wears*, 222 W. Va. at 448, 665 S.E.2d at 282. The affidavit was too vague on this point, and the fact that the victim had lied to law enforcement did not establish that the victim was lying to conceal her relationship with another man. There was no evidence presented that established the victim's parents knew of this relationship and that they disapproved. Absent proof of an illicit motive, this relationship had no bearing on the defendant's guilt or innocence. *Id.*

F. False Reports of Sexual Misconduct and the Rape Shield Law

In *State v. Quinn*, 200 W. Va. 432, 490 S.E.2d 34 (1997), the Supreme Court addressed whether a victim's previous reports of being a victim of sexual abuse or sexual assault are governed by the rape shield law. In *Quinn*, the defendant was charged with sexual misconduct toward a child by a parent, custodian, or guardian pursuant to West Virginia Code § 61-8D-5(a). At trial, the defendant maintained his innocence and asserted that the child, who was five-years-old at the time of the alleged incident, lied about the sexual abuse. He attempted to admit evidence that the child had made similar false allegations against others in the past. The proffered evidence consisted of the testimony of third parties who would state that the child had previously made false accusations against them. The trial court refused to allow the evidence finding that it was barred by West Virginia Code § 61-8B-11 and Rule 404(a)(3) of the West Virginia Rules of Evidence. The defendant appealed, contending that the rape shield law did not apply to the child's statements because they were false, and therefore, were not evidence of her sexual history.

As a matter of first impression, the Supreme Court held:

> Evidence that the alleged victim of a sexual offense has made statements about being the victim of sexual misconduct, other than the statements that the alleged victim has made about the defendant and that are at issue in the state's case against the defendant, is evidence of the alleged victim's "sexual conduct" and is within the scope of West Virginia's rape shield law, *W.Va.Code,* 61-8B-11 and *West Virginia Rules of Evidence* 404(a)(3), unless the defendant establishes to the satisfaction of the trial judge outside of the presence of the jury that there is a strong probability that the alleged victim's other statements are false. Syl. Pt. 1, *Quinn,* 200 W. Va. 432, 490 S.E.2d 34.

The burden is on the defendant to demonstrate "outside of the presence of the jury that there is a strong probability that the alleged victim's other statements are false." *Quinn*, 200 W. Va. at 438, 490 S.E.2d at 40. With regard to this standard, the Court held:

> Requiring strong and substantial proof of the actual falsity of an alleged victim's other statements is necessary to reasonably minimize the possibility that evidence which is within the scope of our rape shield law, *W.Va. Code*, 61-8B-11 and *West Virginia Rules of Evidence* 404(a)(3), is not erroneously considered outside of its scope. Syl. Pt. 2, *Quinn*, 200 W. Va. 432, 490 S.E.2d 34; Syl. Pt. 3, *State v. Jessica Jane M.*, 226 W. Va. 242, 700 S.E.2d 302 (2010).

The Court held that the following procedure should be followed before admitting previous allegations made by the victim:

> A defendant who wishes to cross-examine an alleged victim of a sexual offense about or otherwise introduce evidence about other statements that the alleged victim has made about being the victim of sexual misconduct must initially present evidence regarding the statements to the court out of the presence of the jury and with fair notice to the prosecution, which presentation may in the court's discretion be limited to proffer, affidavit, or other method that properly protects both the rights of the defendant and the alleged victim and effectuates the purpose of our rape shield law, *W.Va. Code*, 61-8B-11 and *West Virginia Rules of Evidence* 404(a)(3). Syl. Pt. 3, *Quinn*, 200 W. Va. 432, 490 S.E.2d 34; Syl. Pt. 2, *Jessica Jane M.*, 226 W. Va. 242, 700 S.E.2d 302.

If the defendant adequately demonstrates the falsity of the statements, the trial court can consider them as outside the scope of the rape shield law. *Quinn*, 200 W. Va. at 438, 490 S.E.2d at 40. However, a finding that the statements are outside of the rape shield law does not render them *per se* admissible in a criminal trial. Rather, "The evidence remains subject to all other applicable evidentiary requirements and considerations." *Id.*

The Supreme Court has again addressed the issue of a victim's allegedly false accusations against individuals other than the defendant. *State v. Jones*, 230 W. Va. 692, 742 S.E.2d 108 (2013). In *Jones*, the circuit court found that the defendant had not made the requisite showing of strong or substantial proof that the victim's allegations against these other individuals were false. In fact, the circuit court characterized the defendant's assertions as "speculative." Therefore, the circuit court found that it did not have to balance the victim's interest in keeping the information confidential against the defendant's interest in presenting a defense. On appeal, the Supreme Court affirmed the ruling and held that the exclusion of the evidence fell within the circuit court's discretion. 230 W. Va. at 700, 742 S.E.2d at 116.

1. *The Rock-Lucas Principle and West Virginia's Rape Shield Law*

The *Rock-Lucas* principle was established by the United States Supreme Court, and it is derived from the Court's decisions in *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704 (1987) and *Michigan v. Lucas*, 500 U.S. 145, 111 S. Ct. 1743 (1991). *Barbe v. McBride*, 521 F.3d 443 (4th Cir. 2008). This principle of law concerns the trial rights of criminal defendants, and state evidentiary rules and statutes that may exclude relevant evidence during a criminal trial based on a legitimate state interest. The *Rock-Lucas* principle prohibits a *per se* exclusion of evidence in a criminal trial; and instead, requires state courts to determine on a case-by-case basis, whether the state's evidentiary rule or statute, which excludes potentially relevant evidence, "is arbitrary or disproportionate to the State's legitimate interests." *Barbe*, 521 F.3d at 445 (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S. Ct. 2704, 2711 (1987)).

In *Barbe*, the Fourth Circuit was asked to determine whether a state circuit court's application of West Virginia's rape shield law in the underlying criminal trial violated the petitioner's Sixth Amendment right to confront the witnesses against him. Prior to and during the course of the underlying criminal trial, the victim had changed her story several times. In an attempt to buttress her trial testimony, the prosecution called an expert witness who testified that in her opinion the victim had been sexually abused as a child because she fit the diagnostic criteria for post-traumatic stress disorder. Following this direct testimony, the defense sought to cross-examine the expert about sexual abuse the victim suffered at the hands of other men. Without extended discussion, the circuit court found that the rape shield law prohibited this line of questioning. Specifically, the court found that the falsity exception from *Quinn*[8] did not

[8] *State v. Quinn*, 200 W. Va. 432, 490 S.E.2d 34 (1997).

apply, and therefore, the rape shield law unequivocally barred any evidence pertaining to sexual abuse suffered by the victim.[9]

The Fourth Circuit found that the state circuit court's *per se* exclusion of evidence regarding the victim's history of sexual abuse violated the *Rock-Lucas* principle, because the state court failed to examine the facts and assess the competing interests of the parties. *Barbe*, 521 F.3d at 458. The Court found that before a trial court excludes evidence offered by a criminal defendant, it must balance the rights of the defendant with the State's interest in enforcing its evidentiary rule. The Fourth Circuit stated that the following factors were pertinent to conducting a *Rock-Lucas* assessment:

> (1) the strength *vel non* of the state's interests that weigh against admission of the excluded evidence; (2) the importance of the excluded evidence to the presentation of an effective defense; and (3) the scope of the evidence ban being applied against the accused. *Id.* (internal citations omitted).

Applying these factors to the case before it, the Court concluded that the circuit court's application of the rape shield law was "disproportionate to the State's interest in having the law applied." *Barbe*, 521 F.3d at 460. The petitioner's defense was "critically impaired" and under the circumstances, the circuit court's rape shield ruling "indisputably contravened his Sixth Amendment confrontation right." *Id.*

Addressing this issue, the West Virginia Supreme Court examined a case in which a defendant sought to introduce a victim's allegedly false accusations against other perpetrators under the holdings set forth in *Quinn* and *Barbe*. *State v. Jones*, 230 W. Va. 692, 742 S.E.2d 108 (2013). Before trial, the defendant submitted allegations that he asserted were fact. The circuit court, however, found that the defendant's allegations were "speculative" and that he had not provided strong and substantial proof that the victim's allegations were, in fact, false. The circuit court, therefore, concluded that it did not have to balance the victim's interest in keeping the statements confidential against the defendant's interest in presenting a defense. On appeal, the Supreme Court found that the exclusion of the evidence was within the trial court's discretion. 230 W. Va. at 700, 742 S.E.2d at 116.

[9] The defense in *Barbe's* criminal trial was not attempting to show that the victim had previously made false allegations against others. Rather, the defense was attempting to show that there was an alternative explanation for the victim's psychological profile. *Barbe*, 521 F.3d at 447.

II. Victim Testimony Corroboration

"A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. Pt. 5, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981).[10] The obvious issue that arises in uncorroborated testimony cases is the credibility of the victim, particularly when the victim is a child. However, it would be rare for a trial court to enter a judgment of acquittal for a defendant upon a finding that the victim's testimony is inherently incredible, and thus, insufficient to support a conviction. *State v. McPherson*, 179 W. Va. 612, 371 S.E.2d 333 (1988).

In *McPherson*, the defendant was convicted of third degree sexual assault largely upon the uncorroborated testimony of the 14-year-old victim. The victim claimed she and a friend went to an unidentified residence with the defendant and his brother, and while there she and the defendant engaged in sexual intercourse. The prosecution elicited very few details from the victim regarding the incident alleged. A forensic examination was performed on the victim within 30 hours of the alleged incident, which produced no evidence that intercourse had taken place. The trial court denied the defendant's motion for an acquittal, but gave the jury a care-and-caution instruction regarding the victim's testimony.

On appeal, the defendant claimed that there was insufficient evidence to convict him because the victim's testimony was inherently incredible. He cited the following in support of his claim: there was no physical evidence of intercourse; there were significant contradictions between the victim's out-of-court statements and her trial testimony; there were contradictions between the victim's testimony and that of her friend who also testified for the State; and the prosecutor made extensive use of leading questions on direct.

The Supreme Court found that the victim's testimony was not inherently incredible. The Court stated that "inherent incredibility . . . is more than contradiction and lack of corroboration." *McPherson*, 179 W. Va. at 617, 371 S.E.2d at 338.[11] The Court noted that it was troubling that there was no physical evidence of sexual intercourse, given the factual circumstances of the case; however, the Court concluded that the statutory definition of penetration is broad. "[And while] there was very little precision involved in the questioning of the prosecutrix concerning the incident," the jury could conclude, based on the evidence presented, that penetration had occurred. 179 W. Va. at 618, 371 S.E.2d at 339. An acquittal based on insufficient evidence due to inherently incredible

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[10] See also Syl. Pt. 4, *State v. Green*, 163 W. Va. 681, 260 S.E.2d 257 (1979).

[11] See also *State v. Humphrey*, 177 W. Va. 264, 271, 351 S.E.2d 613, 619 (1986) for a discussion of inherent incredibility and a witness's testimony.

testimony should only be granted when the testimony defies physical laws. The absence of physical evidence was not impossible in this case and therefore, the victim's testimony did not defy physical laws. 179 W. Va. at 618, 371 S.E.2d at 339.

In a 2011 case, the Supreme Court again affirmed the principle that a defendant can be convicted on the uncorroborated testimony of a victim unless the testimony is inherently incredible. Syl. Pt. 1, *State v. Haid*, 228 W. Va. 510, 721 S.E.2d 529 (2011). The facts of *Haid* involved a 39-year-old man who met a 15-year-old girl online. When they met in person, the man performed oral sex and anal intercourse on the victim. The victim did not report the incident immediately, and consequently there was no corroborating forensic medical evidence to support her testimony. After reviewing its prior cases involving uncorroborated victim testimony, *Green, Beck,* and *McPherson*, the Court reaffirmed the principles that it is the jury's province to determine the credibility of the victim and/or the defendant and that a victim's uncorroborated testimony may provide a sufficient evidentiary basis for a conviction.

In *Haid*, the defendant specifically challenged the jury instruction on the issue of victim testimony. The Supreme Court, after reviewing the jury instruction, found no error. It did, however, include the text of an applicable jury instruction in circumstances where the victim's testimony is uncorroborated. For a discussion of the jury instruction, see Chapter 4 Section IX. D.

Note: As discussed in Section V. A. there may be legitimate concerns regarding the credibility and competency of a young child. A different analysis may be required to determine whether their testimony is sufficient to support a conviction.

III. Hearsay Rules and Exceptions

A. Rule 801 Definitions

The definitions necessary to analyze whether an extrajudicial statement may be admitted at trial are found in Rule 801 of the West Virginia Rules of Evidence. Rule 801(a), (b), and (c) provide the definitional parameters:

> (a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
> (b) Declarant. “Declarant" means the person who made the statement.
> (c) Hearsay. "Hearsay" means a statement that:

> (1) the declarant does not make while testifying at the current trial or hearing; and
> (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

In subsection (d) of Rule 801, certain types of extrajudicial statements are defined as nonhearsay. Under Rule 801(d), these statements may be admitted as substantive evidence at trial without regard to their hearsay nature, provided certain requirements are met.[12] The scope of Rule 801(d) and the requirements for the admission of these types of statements are discussed below.

1. Prior Statement by a Witness

Rule 801(d)(1) addresses prior statements of a declarant who is also a witness at trial. There are three types of extrajudicial statements that may be admitted into evidence under this subsection of Rule 801. The first type of statement is a prior inconsistent statement. A prior inconsistent statement is not hearsay if:

> The declarant testifies and is subject to cross-examination about a prior statement, and the statement is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition. W. Va. R. Evid. 801(d)(1)(A).

Three requirements must be met to admit a declarant's prior inconsistent statement. The statement must have been made under oath subject to the penalty of perjury at a judicial proceeding or in a deposition. The declarant must be a witness at the instant trial subject to cross-examination. And the prior statement must actually be inconsistent with the witness's trial testimony. Syl. Pt. 1, *State v. Collins*, 186 W. Va. 1, 409 S.E.2d 181 (1990). This rule is relatively straightforward. However, in *Collins,* the Supreme Court clarified that statements given during a police interrogation do not meet the requirements of Rule 801(d)(1)(A). Syl. Pt. 2, *Collins, supra.* The reason for this conclusion is that statements made during an interrogation are given in a highly coercive environment and the declarant is not subject to the penalty of perjury. 186 W. Va. at 6-8, 409 S.E.2d at 186-88. See *State v. Spadafore*, 159 W. Va. 236, 220 S.E.2d 655 (1975).

The Supreme Court has provided further guidance on the admission of prior inconsistent statement:

[12] These statements are still subject to the requirements of the other rules of evidence such as Rules 401, 402, and 403.

> Three requirements must be satisfied before admission at trial of a prior inconsistent statement allegedly made by a witness: (1) The statement actually must be inconsistent, but there is no requirement that the statement be diametrically opposed; (2) if the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached, the area of impeachment must pertain to a matter of sufficient relevancy and the explicit requirements of Rule 613(b) of the West Virginia Rules of Evidence—notice and an opportunity to explain or deny—must be met; and, finally, (3) the jury must be instructed that the evidence is admissible only to impeach the witness and not as evidence of a material fact. Syl. Pt. 1, *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550 (1996). See *State v. Barnett*, 226 W. Va. 422, 701 S.E.2d 460 (2010).

When the prior inconsistent statement involves an omission, the Supreme Court held that:

> When a prior inconsistent statement is offered to impeach a witness and the claimed inconsistency rests on an omission to state previously a fact now asserted, the prior statement is admissible if it also can be shown that prior circumstances were such that the witness could have been expected to state the omitted fact, either because he or she was asked specifically about it or because the witness was then purporting to render a full and complete account of the accident, transaction, or occurrence and the omitted fact was an important and material one, so that it would have been natural to state it. Syl. Pt. 3, *Blake*, 197 W. Va. 700, 478 S.E.2d 550.

The second type of statement defined as nonhearsay in 801(d)(1) is a prior consistent statement of a witness. A prior consistent statement of a witness may be admissible if:

> The declarant testifies and is subject to cross-examination about a prior statement, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying. W. Va. R. Evid. 801(d)(1)(B).

Before admitting a prior consistent statement, a trial court should focus on when the statement was made. Relying on applicable case law from the United States Supreme Court,[13] the West Virginia Supreme Court held:

> Under *West Virginia Rules of Evidence* 801(d)(1)(B) a prior consistent out-of-court statement of a witness who testifies and can be cross-examined about the statement, in order to be treated as non-hearsay under the provisions of the Rule, must have been made before the alleged fabrication, influence, or motive came into being. Syl. Pt. 6, *State v. Quinn*, 200 W. Va. 432, 490 S.E.2d 34 (1997).[14]

In *Quinn*, the defendant was accused of sexual misconduct toward a child by a custodian, a violation of West Virginia Code § 61-8D-5(a). The victim was five-years old at the time of the alleged assault. The defendant contested the allegations and claimed that the child had fabricated the story after she was removed from her mother's home by DHHR. He also asserted that she had been unduly influenced by her aunt. The State sought to admit evidence of the victim's previous statements regarding the defendant's alleged sexual abuse to rebut his claims of fabrication and undue influence.[15]

The Supreme Court reviewed the trial record and found that the victim reported the alleged sexual abuse to her mother and her aunt prior to being removed from her mother's home by the DHHR. Thus, her statements were made "pre-motive" and were admissible as a prior

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[13] *Tome v. U.S.*, 513 U.S. 150, 115 S. Ct. 696 (1995).

[14] This case also provides an examination of a victim's false allegations of sexual misconduct and admissibility under the rape shield law.

[15] The record indicates there was an ongoing investigation by DHHR into the victim's home life, which was unrelated to the charges brought against the defendant. The mother had voluntarily relinquished custody to the aunt to avoid having a formal petition filed against her. However, at the time in question the victim was staying with her mother.

consistent statement under Rule 801(d)(1)(B). *Quinn*, 200 W. Va. at 443, 490 S.E.2d at 45.

The final type of prior statement made by a witness that is defined as nonhearsay under Rule 801(d)(1) is a statement of identification. To be admissible under this subsection, the declarant must testify and must be subject to cross-examination. The statement must also "identif[y] a person as someone the declarant perceived earlier." W. Va. R. Evid. 801(d)(1)(C).

The Supreme Court interprets the scope of Rule 801(d)(1)(C) broadly. Third parties, including police officers, may testify about an out-of-court identification, if both the third party and the declarant are available for cross-examination during the trial. *State v. Spence*, 182 W. Va. 472, 388 S.E.2d 498 (1989). In *Spence*, the defendant robbed a convenience store. The victim made two separate identifications of the defendant to investigating officers prior to trial. Both of the out-of-court identifications were made through a photo array, and the victim provided corresponding written statements. However, at trial, over seven months later, the victim was unable to identify the defendant as the robber, and she could not recall many details of the incident. The trial court permitted her two written statements, as well as the testimony of the police officer who conducted the photo array to be admitted into evidence.

The defendant claimed that this was inadmissible hearsay. Addressing the admission of the police officer's testimony, the Supreme Court held:

> [Under Rule 801(d)(1)(C) of the West Virginia Rules of Evidence,] third party testimony regarding an out-of-court identification may in certain circumstances be admissible when the identifying witness testifies at trial because both the identifying witness and the third party are then available for cross-examination. Syl. Pt. 4, *State v. Spence*, 182 W. Va. 472, 388 S.E.2d 498 (1989) (quoting *State v. Carter*, 168 W. Va. 90, 282 S.E.2d 277 (1981)).

The constitutionality of the procedures used by the police is another issue that may arise in relation to out-of-court identifications. A defendant in a criminal prosecution may claim that the out-of-court identification is tainted because of overly suggestive actions by the police or other law enforcement personnel. If the out-of-court identification is found to be unconstitutional, both the out-of-court and in-court identifications may be suppressed.

In *Spence,* the Supreme Court addressed the issue of tainted out-of-court identifications, and adopted the *Biggers* test,[16] which evaluates the totality of the circumstances surrounding the witness's identification. The Court's holding is as follows:

> In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification [or testimony as to the out-of-court identification itself] a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Syl. Pt. 3, *Spence*, 182 W. Va. 472, 388 S.E.2d 498.

In *State v. Rummer*, 189 W. Va. 369, 432 S.E.2d 39 (1993), the Supreme Court addressed a defendant's claim that the out-of-court identification by the victim was tainted after applying the *Biggers* factors. The victim in *Rummer* claimed that she was sexually assaulted by the defendant while she was walking on a city sidewalk. The victim was able to see her attacker and the car he was driving. Shortly after the assault, the police were summoned, and while the officers were taking her statement, the victim spotted her attacker's car and pointed it out to the police. The police pulled the car over and asked the victim if the driver, who was the only person in the car, was her attacker. The victim identified the driver as the man who sexually assaulted her earlier that night. Evidence of this out-of-court identification was admitted at trial.

On appeal, the defendant asserted that the victim's out-of-court identification should have been suppressed at trial because the procedures used by the police were too suggestive because it involved a one-on-one identification of a perpetrator by a victim, and the confrontation was arranged by the police. The Supreme Court found as an initial matter that the procedure used by the police was unduly suggestive. *Rummer*, 189 W. Va. at 381, 432 S.E.2d at 51. However, the Court further found that evidence of a tainted identification may still be

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[16] *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972).

admissible if it is reliable under a totality of the circumstances. 189 W. Va. at 381-82, 432 S.E.2d at 52. In *Rummer*, the trial court held an *in camera* hearing and evaluated the *Biggers* factors. The area was well lit. The victim observed the defendant's car driving at a low rate of speed. And she was able to observe him for a sufficient period of time. Thus, her out-of-court identification of the defendant was admissible under Rule 801(d)(1)(B), and his right to due process was not violated.

2. Admissions by a Party-Opponent

Rule 801(d)(2) concerns extrajudicial statements made by a party that are offered against him or her in subsequent legal proceedings. Under Rule 801(d)(2), a statement is not hearsay if offered against an opposing party and:

> (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

However, only 801(d)(2)(A), (B), and (E) are addressed below.

According to Rule 801(d)(2)(A), an opposing party's statement is not hearsay when: "The statement is offered against an opposing party and was made by the party in an individual or representative capacity." A logical connotation when applied in a criminal trial is that the statement must be contrary to the defendant's own interests when made. However, the Supreme Court gives this rule a broad interpretation. The Court does not limit its application to confessions or inculpatory statements by the defendant that he or she committed the act in question.[17] *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995). Further, in *Sutphin*, the Supreme Court found that statements of prospective wrongdoing may also be admissible under Rule 801(d)(2)(A), holding: "A threat to commit an act in the future, if made by the declarant/party and offered against the

[17] See *2 McCormick on Evidence* § 254 at 142 (John W. Strong, Ed., 4th ed. 1992) ("Admissions do not need to have the dramatic effect or be the all-encompassing acknowledgement of responsibility that the word confession connotes. They are simply words or actions inconsistent with the party's position at trial, relevant to the substantive issues in the case, and offered against the party.").

party, is not hearsay under W. Va. R. Evid. 801(d)(2)." Syl. Pt. 5, *Sutphin*, 195 W. Va. 551, 466 S.E.2d 402.

Rule 801(d)(2)(B) concerns extrajudicial statements that are adopted by a defendant and offered against him or her at trial. The rule provides that a statement is not hearsay if "the statement is offered against an opposing party and is one the party manifested that it adopted or believed to be true." W. Va. R. Evid. 801(d)(2)(B). In a criminal trial, the State must submit sufficient evidence to demonstrate that the defendant adopted the proffered extrajudicial statement. An extrajudicial statement may be adopted affirmatively or by silence. An affirmative adoption of a statement may be demonstrated by the defendant's words or conduct that signifies his or her acquiescence or approval. Syl. Pt. 5, *State v. Howerton*, 174 W. Va. 801, 807, 329 S.E.2d 874, 880 (1985);[18] *State v. Carrico*, 189 W. Va. 40, 427 S.E.2d 474 (1993).

Adoption of an extrajudicial statement is manifested by the defendant's silence in situations where the circumstances naturally call for a reply. Syl. Pt. 3, *State v. Browning*, 199 W. Va. 417, 485 S.E.2d 1 (1997). In *Browning*, the Supreme Court identified four factors the State is required to demonstrate to establish a defendant's acquiescence through silence. These factors include proof that: a) the language used was fully understood by the defendant; b) the defendant had an opportunity to respond or speak; c) the circumstances surrounding the statement would ordinarily call for a reply;[19] and d) the defendant had some knowledge regarding the truth or falsity of the statement. *Browning*, 199 W. Va. at 424, 485 S.E.2d at 8. The Supreme Court clarified that adopted admissions do not necessarily have to be against the defendant's interest when made, holding:

> When a party adopts a statement by silence, in order to be admissible, the statement does not have to be accusatory or against the party's interest at the time it was made, but one that would naturally call for a reply if the truth of the statement was not intended to be admitted. Syl. Pt. 3, *Browning*, 199 W. Va. 417, 485 S.E.2d 1.

Rule 801(d)(2)(E) addresses extrajudicial statements made by a defendant's co-conspirator and offered against the defendant at trial. This

[18] *Howerton* applies the common law rule regarding adopted admissions.

[19] The Supreme Court has explained that the rationale for admitting admissions adopted by silence is the "universal principle of human conduct which leads us to repel an unfounded imputation or claim." *State v. Browning*, 199 W. Va. 417, 424, 485 S.E.2d 1, 8 (1997) (citing *Mudd v. Cline Ice Cream Co.*, 101 W. Va. 11, 131 S.E. 865 (1926)).

rule provides that a statement is not hearsay if "[t]he statement is offered against an opposing party and was made by the party's coconspirator during and in furtherance of the conspiracy." W. Va. R. Evid. 801(d)(2)(E). As is further established, "The statement must be considered but does not by itself establish . . . the existence of the conspiracy or participation in it under (E)." W. Va. R. Evid. 801. Before this evidence can be admitted in a criminal trial, on its face, the rule requires the proponent to demonstrate three factors are present: a) the statement is offered against the other party; b) it was made by the party's co-conspirator to the crime; and c) the statement was made during or in furtherance of the subject criminal activity.

In addition to these facial requirements, the Supreme Court has indicated that it is important to establish a proper foundation before admitting extrajudicial declarations by a co-conspirator.[20] *State v. Miller*, 195 W. Va. 656, 466 S.E.2d 507 (1995); *State v. Lassiter*, 177 W. Va. 499, 354 S.E.2d 595 (1987); *State v. Fairchild*, 171 W. Va. 137, 298 S.E.2d 110 (1982). This requires the State to establish that a conspiracy existed between the declarant and the defendant, and that the statements were made in furtherance of that conspiracy. *Miller*, 195 W. Va. at 666, 466 S.E.2d at 517 (citing *State v. Fairchild*, 171 W. Va. 137, 144, 298 S.E.2d 110, 117 (1982)).[21] The existence of the conspiracy should be established by independent evidence. *Id*.[22] While this does require the State to offer more than the statements of the declarant, the standard is not hard to meet. Generally, a foundation can be established by circumstantial evidence connecting the defendant, the declarant and the criminal activity.

For example, in *State v. Miller, supra*, the defendant was charged with two counts of second degree sexual assault. It was alleged that the forcible compulsion came from the defendant's brother who was also the 13-year-old victim's stepfather. The victim testified at trial about the nature

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[20] Under Federal Rule of Evidence 801(d)(2)(E), proof that a conspiracy existed between the declarant and the defendant must be shown by a preponderance of the evidence. *Bourjaily v. U.S.*, 483 U.S. 171, 107 S. Ct. 2775 (1987) (superseded by statute in *Wiest v. Lynch,* 15 F. Supp. 3d 543 (E.D. Pa. 2014)). After the *Bourjaily* decision, FRE 801(d)(2) was amended to require evidence in addition to the statement to establish the existence of a conspiracy, the declarant's participation in the conspiracy and the party's participation in the conspiracy. *U.S. v. Kemp*, 2005 U.S. Dist. Lexis 2072, 2005 WL 35270.

[21] *State v. Fairchild*, 171 W. Va. 137, 298 S.E.2d 110 (1982) was decided before the West Virginia Rules of Evidence were adopted. In *Fairchild*, the Court was applying the common law rule. Thus, *Fairchild* is not controlling; however, the Court has consistently relied on *Fairchild's* reasoning when resolving Rule 801(d)(2)(E) issues.

[22] See also *State v. Lassiter*, 177 W. Va. 499, 505, 354 S.E.2d 595, 601 (1987).

of her relationship with her stepfather, and the incidents of sexual assault involving the defendant and her stepfather. The victim was also permitted to recount statements her stepfather made to her pursuant to Rule 801(d)(2)(E).[23] The Supreme Court upheld the ruling permitting this testimony -- finding that without considering the declaration, the circuit court could conclude that there was sufficient circumstantial evidence of a conspiracy. *Miller*, 195 W. Va. at 666, 466 S.E.2d at 517. See *State v. White*, 228 W. Va. 530, 722 S.E.2d 566 (2011).

Another issue that may arise when a co-conspirator's hearsay statement is proffered is the timing of the declaration -- was the extrajudicial statement made during or in furtherance of the conspiracy? "The usual rule for determining what behavior was during the course of the conspiracy is whether the behavior was made while the plan was in existence and before its complete execution or termination." *State v. Helmick*, 201 W. Va. 163, 170, 495 S.E.2d 262, 269 (1997) (quoting J. Weinstein and M. Berger, *4 Weinstein's Evidence* ¶ 801(d)(2)(e), p. 176 (1981)) (internal citations omitted).

However, the Supreme Court has not limited 801(d)(2)(E) to statements made before the crime was committed or while it was being committed. The Court has extended the co-conspirator rule to certain statements made after the crime was completed, holding:

> Under Rule 801(d)(2)(E) of the West Virginia Rules of Evidence, a declaration of a conspirator, made subsequent to the actual commission of the crime, may be admissible against any co-conspirator if it was made while the conspirators were still concerned with the concealment of their criminal conduct or their identity. Syl. Pt. 3, *State v. Helmick*, 201 W. Va. 163, 495 S.E.2d 262 (1997); Syl. Pt. 6, *State v. Ramsey*, 209 W. Va. 248, 545 S.E.2d 853 (2000); Syl. Pt. 12, *State v. White*, 228 W. Va. 530, 722 S.E.2d 566 (2011).

To be admissible, a statement made after the crime was committed must in some way further the aims of concealing the conspiracy. *Helmick*, 201 W. Va. at 170, 495 S.E.2d at 269. See *State v. Henson*, 239 W. Va. 898, 806 S.E.2d 822 (2017).

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[23] The victim was permitted to testify that her stepfather told her: "Cecil [the defendant] wanted to do it." *Miller*, 195 W. Va. at 666, 466 S.E.2d at 517.

B. Select Hearsay Exceptions: Availability of Declarant Immaterial

Rule 802 of the West Virginia Rules of Evidence states: "Hearsay is not admissible except as provided by these rules." The Supreme Court has affirmed the exclusion of hearsay statements, holding:

> Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules. Syl. Pt. 1, *State v. Maynard*, 183 W. Va. 1, 393 S.E.2d 221 (1990); Syl. Pt. 5, *State v. Spinks*, 239 W. Va. 588, 803 S.E.2d 558 (2017).

Exceptions to the general ban on the admissibility of hearsay statements are found in Rule 803. Under this rule, if the extrajudicial statement meets the requirements of the proffered exception, it may be admitted in a criminal trial regardless of whether the declarant is available to testify.

1. Present Sense Impression - Rule 803(1)

"A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it," is not excluded by the hearsay rule regardless of whether the declarant is available to testify. W. Va. R. Evid. 803(1). The existence of three factors must be established before testimony can be admitted under the present sense impression exception. The proponent must demonstrate that:

> (1) the statement was made at the time or shortly after an event; (2) the statement describes the event; and (3) the event giving rise to the statement was within a declarant's personal knowledge. Syl. Pt. 4, in part, *State v. Phillips,* 194 W. Va. 569, 461 S.E.2d 75 (1995) (overruled on other grounds in *State v. Sutherland,* 231 W. Va. 410, 745 S.E.2d 448 (2013)); Syl. Pt. 6, *State v. Spinks*, 239 W. Va. 588, 803 S.E.2d 558 (2017).

The first factor requires the declaration to be made contemporaneous with the event. Contemporaneity between the event and the declaration "reduces the possibility of fabrication and memory lapses." *Phillips*, 194 W. Va. at 577, 461 S.E.2d at 83. The proponent must present some evidence regarding the lapse of time. While slight delays between the event and the uttering of the statement are permissible, there should not have been time for the declarant to engage in reflective thought. To meet the requirements of the second factor, the extrajudicial statement must describe or explain the event, not simply relate to it. The final factor requires the proponent to demonstrate that the declarant was speaking from personal knowledge. This will likely be obvious from the content of the statement, however, if necessary, the trial court may accept extrinsic evidence of the declarant's personal knowledge. *Phillips*, 194 W. Va. at 578, 461 S.E.2d at 84. An additional, though not mandatory factor concerns corroboration. On this issue the Supreme Court has held:

> Although a trial court may consider corroborating evidence in determining whether a statement meets the prerequisites of Rule 803(1) of the West Virginia Rules of Evidence, a separate showing of trustworthiness is not required for a statement to qualify under this hearsay exception. Syl. Pt. 5, *Phillips*, 194 W. Va. 569, 461 S.E.2d 75.

2. Excited Utterance - Rule 803(2)

The second exception to the general ban on hearsay evidence is the excited utterance. If the extrajudicial testimony is: "A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused," it is not excluded by the hearsay rule. W. Va. R. Evid. 803(2). There are three factors that must be present for an extrajudicial statement to be admitted under Rule 803(2). These factors are as follows:

> [T]he declarant must (1) have experienced a startling event or condition; (2) reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition. Syl. Pt. 7, in part, *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995).

With regard to the first factor, the startling event may be either physical or non-physical. *Sutphin*, 195 W. Va. at 564, 466 S.E.2d at 415. In *Sutphin*, for example, the Supreme Court found that threats to inflict future bodily injury constituted a startling event for the purposes of Rule 803(2). Proof of the startling event may be found in the content of the statement or from the surrounding circumstances.

The second factor concerns the time that has elapsed between the startling event and the declaration. This factor is significant because reliability comes from the fact that the declarant has not had time to recover from the event and engage in reflective thought. To determine whether the statement was made while under the stress or excitement of the event or condition, the following factors should be analyzed:

> (1) the lapse of time between the event and the declaration; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements. Syl. Pt. 8, in part, *Sutphin*, 195 W. Va. 551, 466 S.E.2d 402.

The final factor analyzed to determine whether a statement is admissible as an excited utterance concerns the content of the declaration. The statement must relate to the startling event. If the witness is a third party who is testifying about the declarant's statement, he or she does not have to be present at the startling event to permit the inference that the declarant's statement relates to the startling event. *Sutphin*, 195 W. Va. at 565, 466 S.E.2d at 416; *State v. Smith*, 178 W. Va. 104, 358 S.E.2d 188 (1987). "The veracity of the declaration is not founded upon the witness's participation in the event, but upon the participation of the declarant." *Smith*, 178 W. Va. at 110, 358 S.E.2d at 194. The Supreme Court has held that: "Out-of-court statements made by the victim of a sexual assault may not be introduced by a third party unless the statements qualify as an excited utterance under Rule 803(2) of the West Virginia Rules of Evidence." Syl. Pt. 3, *State v. Murray*, 180 W. Va. 41, 375 S.E.2d 405 (1988).

a. Prompt Complaint Rule Versus Excited Utterance

The Supreme Court has distinguished testimony that is admissible under the prompt complaint rule[24] from testimony that is admissible under the excited utterance exception. *Murray*, 180 W. Va. 41, 375 S.E.2d 405.

[24] This rule was first identified by the Supreme Court in *State v. Straight*, 102 W. Va. 361, 362, 135 S.E. 163, 164 (1926).

The prompt complaint rule permits a witness to testify that the victim complained of the sexual assault soon after it occurred to corroborate the occurrence of the assault. *Murray*, 180 W. Va. at 46, 375 S.E.2d at 410. In *Murray*, the Court held:

> A prompt complaint made by the victim of a sexual offense is admissible independently of its qualifications as an excited utterance. However, the details of the event or the name of the perpetrator is ordinarily not admissible. Syl. Pt. 4, *State v. Murray, supra.*

In *Murray*, the victim, a nine-year-old girl, reported to school officials that she had been sexually assaulted by her mother's live-in boyfriend. She made the claim after she was found in the school bathroom in severe pain by a member of the staff. The victim repeated these allegations to a DHHR official the same day, and again to law enforcement while the case was being investigated. Each time the victim reported the assault, she provided the details of the assault and the identity of her assailant. There was no dispute that these statements were made at least two weeks after the last assault.

At trial, the school principal, the DHHR worker, and the deputy sheriff were permitted to testify to the child's account of the events. On appeal, the defendant claimed that this testimony constituted impermissible hearsay. The State argued that the testimony was admissible under both the excited utterance exception and the prompt complaint rule. The Supreme Court found that the detailed statements were not admissible under the prompt complaint rule because the testimony went beyond the mere fact that the child complained of being a victim of sexual assault.[25] *Murray*, 180 W. Va. at 47, 375 S.E.2d at 411.

Although the West Virginia Supreme Court has recognized the prompt complaint rule, it has also recognized that, "There is no authority in West Virginia for an instruction advising the jury that the testimony of the victim is to be viewed with skepticism where a prompt complaint of rape or abuse was not made." *Ronnie R. v. Trent*, 194 W. Va. 364, 370, 460 S.E.2d 499, 505 (1995). In other words, the failure to report a sex crime immediately does not undermine the victim's credibility. In a footnote, the Supreme Court noted that the prompt complaint rule is based on an assumption that victims of sexual crimes should act in certain ways, but that children after do not report sexual assaults right away. *State v.*

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[25] The State also argued that the testimony was not offered for the truth of the matter asserted, but was offered to show that the witnesses responded reasonably to the child's complaint. The Court rejected this too. But see *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

Quinn, 200 W. Va. 432, 490 S.E.2d 34 n.18 (1997) (quoting *State v. Livingston*, 907 S.W.2d 392, 394 (Tenn. 1995)).

b. Excited Utterance by Unknown Declarant

Under certain limited circumstances, a statement by an unknown declarant may be admitted as an excited utterance in a criminal trial. *State v. Harris*, 207 W. Va. 275, 531 S.E.2d 340 (2000). In *Harris*, the defendant was charged with the domestic battery of his girlfriend. On the night of the alleged incident, the police were summoned to the defendant's home. Less than 15 minutes elapsed from the time the officers were dispatched until they encountered the victim. They noted she was crying and bleeding heavily from the nose. A crowd of approximately 10 people was gathered at the scene. An unidentified member of the crowd shouted to the officers that the defendant had just beaten up the victim.

The trial court permitted the unknown declarant's statement to be admitted as an excited utterance. On appeal, the defendant claimed that this statement constituted impermissible hearsay and should have been excluded. The Supreme Court affirmed the defendant's conviction, and extended the reach of Rule 803(2). As an initial matter, the Court recognized the Confrontation Clause concerns present when admitting the hearsay statement of an unavailable and unidentified declarant. *Harris*, 207 W. Va. at 280, 531 S.E.2d at 345. Further, the Court acknowledged that it is difficult to ascertain the circumstantial trustworthiness of this type of extrajudicial statement, i.e., whether the statement is based on the declarant's personal knowledge. Nonetheless, the Supreme Court found that under certain circumstances the statements of an unknown, unavailable, and anonymous declarant may be admissible. To determine admissibility the Court held:

> When a court in a criminal case is evaluating whether to apply the "excited utterance" exception of *W.Va.R.Evid.* 803 (2) to a hearsay statement offered against the defendant by an unknown, anonymous, declarant, the court should ordinarily conclude that the statement does not meet the criteria for the 803(2) exception, unless the statement is accompanied by exceptional indicia of reliability and the ends of justice and fairness require that the statement be admitted into evidence. Syl. Pt. 2, *Harris*, 207 W. Va. 275, 531 S.E.2d 340.

3. Then Existing Mental, Emotional, or Physical Condition - Rule 803(3)

The following type of statement is not excluded by the hearsay rule and may be admissible in a criminal trial:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as motive, intent, or plan), or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will. W. Va. R. Evid. 803(3).

A statement offered under this exception must relate to the declarant's state of mind or physical condition at the time the communication was made. *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995) (overruled on other grounds by *State v. Sutherland,* 231 W. Va. 410, 745 S.E.2d 448 (2013)). It is the spontaneous nature of such a statement that permits a court to infer reliability. There are four types of extrajudicial statements that may be admitted under Rule 803(3), including:

> a) statements of present bodily condition; b) statements of present state of mind or emotion, offered to prove a state of mind or emotion of the declarant that is 'in issue' in the case; c) statements of present state of mind [describing a declarant's] intent, plan or design, offered to prove subsequent conduct of the declarant in accordance with the state of mind; and d) statements of a testator indicating his state of mind and offered on certain issues in a will case. *Phillips,* 194 W. Va. at 579, 461 S.E.2d at 85 (quoting 2 Franklin D. Cleckley, *Handbook on West Virginia Evidence for West Virginia Lawyers*, § 8-3(B)(3) at 207 (3d ed. 1994)).

The first three types of statements are discussed below.

The first type, statements relating to the declarant's present physical condition are relatively straightforward. This type of statement is admissible under 803(3) if the declarant is describing his or her current physical condition, not a previous one, and the statement is relevant to an issue in the case. *Phillips*, 194 W. Va. at 579, 461 S.E.2d at 85. For example, a sexual assault victim's statement regarding his or her present physical condition may be relevant to the issue of whether an assault

occurred, or it may corroborate the victim's statements regarding when the assault occurred.

The second type of statement admissible under Rule 803(3), a statement concerning a declarant's present state of mind or emotion may be admissible if the declarant's state of mind is in issue and relevant to the resolution of the case. Such a statement may be admissible to establish the "motive, intent or reliance" of the declarant. Of course, the declarant's state of mind does not have to be directly in issue for the extrajudicial statement to be admissible under Rule 803(3). *Phillips*, 194 W. Va. at 579, 461 S.E.2d at 85. For example, a statement concerning a declarant's present state of mind or emotion may be admissible if it is probative of the intent or motive of the defendant. *State v. Browning*, 199 W. Va. 417, 426, 485 S.E.2d 1, 10 (1997). In *Browning*, the Supreme Court found that the decedent's statement that he fought with the defendant on the day before he was killed was admissible to establish that she had a motive to kill the decedent.

The third type of statement that may be admissible under Rule 803(3) is a declarant's state of mind declaration that evinces his or her intent to do something in the future. The declarant's state of mind does not have to be in issue; however, if the statement is offered to show the declarant subsequently acted in accordance with the statement, the declarant's state of mind must be relevant. *Phillips*, 194 W. Va. at 584, 461 S.E.2d at 90. However, this type of statement is not admissible to prove the conduct of the defendant or a third party. 194 W. Va. at 584, 461 S.E.2d at 90 n.23.

An extrajudicial statement offered under Rule 803(3) must also meet the relevancy requirements of Rules 401 and 402. "If the declarant's state of mind, etc., is irrelevant to the resolution of the case, then the evidence must be excluded." *Phillips*, 194 W. Va. at 580, 461 S.E.2d at 86. The Supreme Court has indicated that an evaluation of the timing of the extrajudicial statement and the event or act in issue is warranted in the relevancy analysis.[26] Finally, an extrajudicial statement offered under Rule 803(3) must be evaluated under Rule 403 to determine whether the prejudicial effect of a declarant's statement outweighs its probative value. *Phillips*, 194 W. Va. at 580-81, 461 S.E.2d at 86-87. For example, a victim/declarant's statements that he or she feared the defendant may be admissible under Rule 803(3), as evidence of the declarant's then existing state of mind. However, as one commentator has explained, such statements should be considered carefully by the trial court. Statements of fear are often coupled with statements detailing the acts that caused the

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[26] In several cases, the Supreme Court has examined to the timing of the statement to determine whether it is relevant to the issue on which it is offered. *State v. Whittaker*, 221 W. Va. 117, 650 S.E.2d 216 (2007); *State v. Browning*, 199 W. Va. 417, 485 S.E.2d 1 (1997); *State v. Sutphin*, 195 W. Va. 551, 466 S.E.2d 402 (1995).

fear, and a jury may be unable to separate the purpose for which the evidence is offered. 2 *McCormick on Evid.* § 274 (6th ed.). See also, Syl. Pt. 10, *State v. Kaufman*, 227 W. Va. 537, 711 S.E.2d 607 (2011) (holding that each statement in a narrative must be analyzed under Rules 401, 402 and 403 before admission).

4. Statements for Purposes of Medical Diagnosis or Treatment - Rule 803(4)

"A statement that is made for – and is reasonably pertinent to – medical diagnosis or treatment; and describes medical history; past or present symptoms or sensations; their inception; or their general cause" is not excluded by the hearsay rule. W. Va. R. Evid. 803(4). To be admissible under Rule 803(4):

> (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis. Syl. Pt. 5, in part, *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990); Syl. Pt. 4, in part, *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010).

Although the Court referred to statements made to "physicians" in *Edward Charles L.*, there is simply no requirement that the statement have been made to a physician for it to be admissible under Rule 803(4). Rather, the Supreme Court has indicated that statements for medical diagnosis or treatment may be made to a large array of professionals. *State v. Payne,* 225 W. Va. 602, 694 S.E.2d 935 (2010) (forensic nurses); *McKenzie v. Carroll Intern. Corp.*, 216 W. Va. 686, 610 S.E.2d 341 (2004) (physical therapists, nurses, technicians, and family members); *State v. Pettrey*, 209 W. Va. 449, 549 S.E.2d 323 (2001) (play therapists, social workers, and counselors); *Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (psychologists).

Rule 803(4) is commonly used in sexual offense cases involving victims who are children at the time of trial. In West Virginia, under Rule 803(4), if a child's extrajudicial statements meet the requirements of 803(4) and are otherwise admissible, the treating professional may recount the child's statements regarding the details of the assault or abuse and the identity of the alleged perpetrator. *Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123.[27] However, the testimony is inadmissible if the

[27] The Court has established a distinction between the allowable testimony of a treating professional and an expert. As established by the Supreme Court:

treating professional was interviewing the child strictly for forensic purposes. See Syl. Pt. 9, *Pettrey*, 209 W. Va. 449, 549 S.E.2d 323. In *Edward Charles L.*, the defendant was tried for committing various sexual offenses against his then four-year-old twins. The children were taken to a psychologist for treatment after their mother suspected they had been sexually abused. The children began seeing the psychologist approximately one year after the alleged sexual abuse occurred. At trial, the psychologist was permitted to testify to statements made by the children during their therapy sessions, including details of the abuse and their statements implicating their father.

The defendant appealed and claimed these statements constituted impermissible hearsay. The Supreme Court upheld the trial court's ruling, finding that the children were taken to the psychologist for treatment prior to any criminal proceedings. The Court also noted that the content of the children's statements were such that they could have been reasonably relied on by the psychologist for diagnosis and treatment. *Edward Charles L.*, 183 W. Va. at 654, 398 S.E.2d at 136.

In *Pettrey*, 209 W. Va. 449, 549 S.E.2d 323, the Supreme Court expanded *Edward Charles L.* and found that statements made during play therapy sessions are also admissible under Rule 803(4). Relying on precedent from several other states,[28] the Supreme Court held:

> When a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant's motive in making the statement is consistent with the purposes of promoting

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> [A]n expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury. Syl. Pt. 7, in part, *Edward Charles L.,* 183 W. Va. 641, 398 S.E.2d 123.

[28] See *Gohring v. State*, 967 S.W.2d 459 (Tex. App. 1998); *State v. Ackerman*, 953 P.2d 816 (Wash. App. 1998); and *Simmers v. State*, 943 P.2d 1189 (Wyo. 1997).

> treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes. Syl. Pt. 9, *Pettrey*, 209 W. Va. 449, 549 S.E.2d 323.

In *Pettrey,* the children were referred to the therapist by school officials for treatment of suspected sexual abuse. The play therapist's sole involvement with the children was for diagnosis and treatment of possible sexual abuse. 209 W. Va. at 460, 549 S.E.2d at 334.

Implicit to the Supreme Court's decision in *Edward Charles L.* is the principle that the meeting between the victim and medical professional cannot be held strictly for investigative or forensic purposes. In *Pettrey, supra*, the Court unequivocally held that testimony is inadmissible under Rule 803(4) "if the evidence was gathered strictly for investigative or forensic purposes." Syl. Pt. 9, in part, *Pettrey*, 209 W. Va. 449, 549 S.E.2d 323.

In *Misty D.G. v. Rodney L.F.*, 221 W. Va. 144, 650 S.E.2d 243 (2007), the Court elaborated on this restriction. In *Misty D.G.*, the family court modified the custodial arrangement of the parties after the mother's boyfriend was alleged to have sexually abused the parties' four-year-old daughter. At a modification hearing, the family court permitted the child's counselor to offer statements made by the child during therapy that described the alleged sexual abuse. Based in part on this testimony, the family court ordered supervised visitation. The circuit court reversed, in part, upon a finding that the family court improperly considered the testimony of the child's counselor.

On appeal, the Supreme Court found that the counselor's testimony was properly admitted pursuant to Rule 803(4), and was not gathered strictly for investigative or forensic purposes. The counselor was extensively questioned about the distinction between the forensic and clinical elements of her sessions. She acknowledged working in "a dual capacity, initially evaluating the situation in a forensic manner in order to gather information necessary for evaluation and treatment and subsequently treating the child over the course of numerous counseling sessions." The Supreme Court concluded that the information was not "gathered strictly for investigative or forensic purposes." (quoting *Pettrey*, 209 W. Va. 449, 452, 549 S.E.2d 323, 326). The Court clarified that a trial court must examine "the child's motive in originally making the statement" not "the use ultimately made of the child's statement." *Misty D.G.*, 221 W. Va. at 150-51, 650 S.E.2d at 249-50.

5. Statements Made to Forensic Nurses - Rule 803(4)

The Supreme Court has addressed the admissibility of statements made to a forensic nurse examiner under Rule 803(4). Syl. Pt. 6, *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010). The facts of *Payne* involved a 12-year-old girl who was sexually assaulted by her mother's boyfriend. After the mother reported the assault to the sheriff, she was advised to take her daughter to a hospital for medical treatment and an examination. A forensic nurse both examined and interviewed the girl.

At trial, the defendant objected to the admissibility of the statements that the girl had made to the nurse examiner because he claimed that the girl had been referred to the nurse solely for forensic purposes. The State argued, however, that the interview and examination had a dual purpose, both medical treatment and forensic investigation. Based upon a finding that the examination had a dual purpose, the circuit court allowed the nurse examiner to testify about the victim's statements during the interview.

Addressing this type of evidence, the Court discussed the cases of *Edward Charles L.* and *Pettrey* which allow the admission of these types of statements when the purpose for the statements is consistent with promoting treatment. These types of statements are inadmissible if the evidence is gathered "strictly for investigative or forensic purposes." See Syl. Pt. 9, *Pettrey*, 209 W. Va. 449, 549 S.E.2d 323 (2001); *Payne*, 225 W. Va. at 608, 694 S.E.2d at 941.

The Court went on to review cases from other jurisdictions that have determined admissibility of these types of statements based upon the purpose for which the information was gathered. See e.g., *State v. Anderson*, 864 A.2d 35 (Conn. 2005); *State v. Martin M.*, 971 A.2d 828 (Conn. 2009); *State v. Williams*, 154 P.3d 322 (Wash. 2007); *Webster v. State*, 827 A.2d 910 (Md. 2003). One factor that provided a basis to exclude the evidence was the remoteness in time between the alleged assault and the examination. See *Coates v. State*, 930 A.2d 1140 (Md. 2007); *State v. Ortega*, 175 P.3d 929 (N.M. 2007). However, the Court found that authority from other jurisdictions allowed these types of statements to be admitted when they were obtained "for dual medical and forensic purposes." *Payne*, 225 W. Va. at 609, 694 S.E.2d at 942. The Court, therefore, adopted the following syllabus point:

> When a child sexual abuse or assault victim is examined by a forensic nurse trained in sexual assault examination, the nurse's testimony regarding statements made by the child during the examination is admissible at trial under the

> medical diagnosis or treatment exception to the hearsay rule, *West Virginia Rule of Evidence* 803(4), if the declarant's motive for making the statement was consistent with the purposes of promoting treatment and the content of the statement was reasonably relied upon by the nurse for treatment. In determining whether the statement was made for purposes of promoting treatment, such testimony is admissible if the evidence was gathered for a dual medical and forensic purpose, but it is inadmissible if the evidence was gathered strictly for investigative or forensic purposes. Syl. Pt. 6*, Payne*, 225 W. Va. 602, 694 S.E.2d 935.

6. Admission of a Narrative

In a murder case the West Virginia Supreme Court established an analysis for the admission of a narrative. *State v. Kaufman*, 227 W. Va. 537, 711 S.E.2d 607 (2011). In *Kaufman*, a man was convicted of the first-degree murder of his wife, and one primary source of evidence was his wife's diary, which was more than 60 pages in length. At trial, the court found that the entire diary was trustworthy, and admitted it under the residual hearsay exception and the hearsay exception allowing statements of the "then existing mental, emotional or physical condition." A police officer read the entire journal into evidence at trial.

With regard to the admission of the diary, the Supreme Court first noted that the trial court treated the entire diary as one statement. The Court, however, observed that some of the statements may have been non-hearsay because they involved threats. The Court also discussed the reasoning adopted by the Sixth Circuit in *United States v. Canan*, 48 F.3d 954, 960 (6th Cir. 1995) that requires a trial court to analyze each statement of a narrative separately and determine the applicable exception to the hearsay rule before admitting a particular statement from a narrative. Assuming that the hearsay rule would allow the admission of a statement, the Court found that a trial court would have to analyze the admissibility of each statement or remark with regard to relevancy under Rule 401, admissibility under Rule 402 and finally whether it should be excluded under Rule 403. Finding that the diary had been erroneously admitted and reversing the conviction, the Court held that:

> When ruling upon the admission of a narrative under Article VIII (Hearsay) of the West Virginia Rules of Evidence, a trial court must break down the narrative and determine the

> separate admissibility of each single declaration or remark. The trial court must also analyze whether the declaration or remark is relevant pursuant to W.Va. R. Evid. 401 and, if so, admissible pursuant to W.Va. R. Evid. 402. However, if the probative value of the declaration or remark is substantially outweighed by the danger of unfair prejudice, then it may be excluded pursuant to W.Va. R. Evid. 403. Syl. Pt. 10, *Kaufman*, 227 W. Va. 537, 711 S.E.2d 607.

Not surprisingly, the admission of a narrative has arisen in sex offense cases. See e.g., *State v. Jonathan B*., 230 W. Va. 229, 737 S.E.2d 257 (2012). In *Jonathan B.*, the circuit court found that the victim's notebook was inadmissible under the rape shield statute because it contained a statement indicating that the victim had only had sexual intercourse with an individual other than the defendant. The Supreme Court found that the narrative was relevant to the victim's credibility, not to show promiscuity. The Court held that the notebook should be admissible subject to proper authentication.

In a case in which the State sought a pretrial writ of prohibition, the Court addressed a trial court's pretrial rulings concerning the admission of a diary of the 11-year-old female victim in a sex offense case pursuant to Syllabus Point 10 of *Kaufman*. *State ex rel. Games-Neely v. Silver*, 236 W. Va. 387, 780 S.E.2d 653 (2015). The facts of this case involved allegations that the girl's 47-year-old neighbor had "groomed" her over a period of time and then had sexual contact with her on two occasions. During the investigation, the police discovered the girl's diary which detailed her attraction to and contact with the defendant. The diary itself was pink, it included pictures, and it contained her recorded thoughts over an 11-month period.

Applying Syllabus Point 10 of *Kaufman*, the trial court examined each diary entry and found that many of the statements were admissible under the then-existing state of mind or emotional condition hearsay exception. W. Va. R. Evid. 803(3). Additionally, the court found that some of the statements were admissible as a non-hearsay admission from the defendant or as non-hearsay because it provided context. The trial court, however, found that a two-page excerpt of the diary should be excluded pursuant to Rule 403 because it described the girl's emotional state and alleged sexual encounters in graphic and explicit terms that had occurred months earlier. In addition, the trial court found that it would exclude a four-page excerpt in which the girl expressed her frustration with discipline from the mother's boyfriend. The trial court also determined that a typed

transcript of the diary should be prepared and used at trial because it found that the size, color (pink) and simplicity of the writing could result in unfair prejudice towards the defendant. In response to these pretrial rulings, the State sought a writ of prohibition to challenge the exclusion of this evidence.

After discussing the standard for a writ of prohibition as established by case law,[29] the Court addressed these evidentiary rulings. Noting the standard for the admission of a narrative under Syllabus Point 10 of *Kaufman*, the Court did not find error with regard to the application of the hearsay rules. However, the Court found error with regard to the exclusion of the two-page portion of the diary based upon the Rule 403 balancing test. The Court reasoned that the graphic and explicit nature of the subject matter was not *unfairly* prejudicial. As recognized by the Court, "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." *State ex rel. Games-Neely v. Silver*, 236 W. Va. 387, 780 S.E.2d 653, 658 (quoting *State v. Potter*, 197 W. Va. 734, 751, 478 S.E.2d 742, 759 (1996) (emphasis added)). The Court observed that the trial court did not fully appreciate the probative value of the diary. It went on to observe that: "Trials involving sexual offenses often turn on the jury's assessment of the relative credibility of the child and the accused, particularly where physical evidence is lacking." *Id.* Based upon this analysis, the Court granted a writ of prohibition because it concluded that the danger of unfair prejudice did not outweigh the probative value of the evidence. The Court did not, however, find any error with regard to the trial court ruling that provided that a prepared transcript of the diary would be admitted, as opposed to the diary itself.

C. Rule 804 – Hearsay Exceptions – Declarant Unavailable

Rule 804 excludes five types of statements from the hearsay rule if the declarant is unavailable as a witness. For the purposes of Rule 804, a declarant is unavailable if he or she:

> (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
> (2) refuses to testify about the subject matter despite a court order to do so;
> (3) testifies to not remembering the subject matter;

[29] The Court relied on Syllabus Point 3 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996) and Syllabus Point 3 of *River Riders, Inc. v. Steptoe*, 233 W. Va. 240, 672 S.E.2d 376 (2008).

> (4) cannot be present or testify at trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4). W. Va. R. Evid. 804(a)(1)-(5), in part.

However, a declarant is not unavailable as a witness if "the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from testifying." W. Va. R. Evid. 804(a), in part. The former testimony exception and statement against interest exception are discussed below.

1. Rule 804(b)(1) – Former Testimony

In a criminal prosecution, the former testimony of a witness may be admissible if it was:

> Testimony that: (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination. W. Va. R. Evid. 804(b)(1).

With regard to the issue of unavailability, the Supreme Court has held: "As a condition precedent to the admissibility of former testimony under *W.Va.R.Evid.* 804(b)(1), the proponent of such testimony must show the unavailability of the witness. If the witness is available, the in-court testimony of that witness is preferred." Syl. Pt. 1, *State v. Woods*, 194 W. Va. 250, 460 S.E.2d 65 (1995) (quoting Syl. Pt. 3, *Rine v. Irisari*, 187 W. Va. 550, 420 S.E.2d 541 (1992)).

When the State seeks to admit former testimony against a criminal defendant, "[i]n order to satisfy its burden of showing that the witness is unavailable, the State must prove that it has made a good-faith effort to obtain the witness's attendance at trial." Syl. Pt. 2, *State v. Woods*, 194

W. Va. 250, 460 S.E.2d 65 (1995); Syl. Pt. 3, in part, *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990) (overruled on other grounds, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006)).[30] The State is required to use substantial diligence in procuring the attendance of the witness at trial. There is not a bright line test for what actions the State must take before a witness can be declared unavailable. However, in *Woods*, the Supreme Court indicated that the issuance of a subpoena for the witness, coupled with law enforcement efforts to locate the witness by questioning family members constituted a good faith effort. 194 W. Va. at 253-54, 460 S.E.2d at 68-69.

2. Rule 804(b)(3) – Statement Against Interest

Rule 804(b)(3) allows certain statements which when made are against the pecuniary, proprietary, or penal interest of the declarant to be admitted at trial over a hearsay objection. Rule 804(b)(3) states:

> The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: A statement that: a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Prior to admitting a statement under Rule 804(b)(3), outside the presence of the jury, the trial court must conduct an intensive inquiry into the content of the statement, the reliability of the statement, and the availability of the declarant to testify at trial. *State v. Mason*, 194 W. Va. 221, 460 S.E.2d 36 (1995) (overruled on other grounds, *State v. Mechling*,

[30] In light of the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), the West Virginia Supreme Court overruled, in part, a number of its opinions regarding hearsay testimony in *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006). *Mechling* overruled *State v. James Edward S.* in holding that testimonial statements by a witness who does not appear at trial are barred unless the witness is unavailable and the accused had a previous opportunity to cross-examine the witness.

219 W. Va. 366, 633 S.E.2d 311 (2006)).[31] An extrajudicial statement proffered for admission under Rule 804(b)(3) also requires a trial court to conduct an independent analysis of the statement's admissibility under the Confrontation Clause. *Id*.; *In the Interest of Anthony Ray Mc.*, 200 W. Va. 312, 489 S.E.2d 289 (1997).

In *State v. Mason*, *supra*, the Supreme Court squarely addressed the admission of extrajudicial statements against a criminal defendant pursuant to Rule 804(b)(3). The Court adopted the following four-part test to examine the admissibility of a statement made against a declarant's penal interest:

> To satisfy the admissibility requirements under Rule 804(b)(3) of the West Virginia Rules of Evidence, a trial court must determine: (a) The existence of each separate statement in the narrative; (b) whether each statement was against the penal interest of the declarant; (c) whether corroborating circumstances exist indicating the trustworthiness of the statement; and (d) whether the declarant is unavailable. Syl. Pt. 8, *State v. Mason*, 194 W. Va. 221, 460 S.E.2d 36 (1995).

The first prong of the *Mason* test requires the trial court to examine the proffered evidence and remove any statements that are not statements of the declarant. However, if the proffered evidence is part of an interview, then the question may become the adopted statement of the declarant. *In the Interest of Anthony Ray Mc.*, 200 W. Va. 312, 489 S.E.2d 289 (1997). Next, the trial court must isolate and examine each statement and exclude those statements that are not against the declarant's penal interest. Relying on *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994), the West Virginia Supreme Court has held: "A declarant's self-serving collateral statements and neutral collateral statements are not admissible into evidence under the *against penal interest* exception of Rule 804(b)(3) of the West Virginia Rules of Evidence." Syl. Pt. 4, *In the Interest of Anthony Ray Mc.*, 200 W. Va. 312, 489 S.E.2d 289 (1997) (emphasis in original).[32] This holding is

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[31]*Mechling* overrules *Mason* to the extent that *Mason* permits testimonial statements of a declarant who is unavailable at trial to be admitted when the defendant did not have a prior opportunity to cross-examine the witness.

[32] As provided in *Anthony Ray Mc.*, an example of self-serving collateral statement is: "Jane Doe used the gun." In addition, an example of a neutral collateral statement is: "John Doe and I robbed Taco Bell." According to this analysis, only the

significant because it largely eliminates the admission of statements by an accomplice, co-defendant, or other third party pursuant to Rule 804(b)(3), which inculpate the defendant. Obviously, these types of statements are presumptively unreliable, and further, nothing in the rules of evidence suggests that such statements are admissible simply because they are made in conjunction with a self-inculpatory statement. *Anthony Ray Mc.*, 200 W. Va. at 321, 489 S.E.2d at 298.

The third prong of the *Mason* test requires the trial court to scrutinize the trustworthiness of the declarant's self-inculpatory statements. There are two concerns relevant to the assessment of the reliability of a declarant's self-inculpatory statement. First, there is the inherent reliability of the statement. As the Supreme Court explained in *Anthony Ray Mc.*, because a declarant's self-serving and neutral collateral statements are not admissible pursuant to 804(b)(3), "the concern for the inherent reliability of the self-inculpatory statement is somewhat diminished."[33] 200 W. Va. at 322, 489 S.E.2d at 299. Indeed, "[t]he very fact that a statement is genuinely self-inculpatory . . . is itself one of the 'particularized guarantees of trustworthiness.'" *Id.* (quoting *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994)). The second part of the trustworthiness inquiry is what may be inferred from the declarant's statement. In this part of the analysis, the trial court should consider the "totality of the circumstances surrounding the making of the statements." *Anthony Ray Mc.*, 200 W. Va. at 322-23, 489 S.E.2d at 299-300. And the trial court must "consider other relevant and credible evidence," which the defendant may proffer to cast doubt on the reliability of the declarant's statements. 200 W. Va. at 323, 489 S.E.2d at 300.

Finally, the trial court must determine the declarant's availability to testify at trial. Generally, the burden is on the proponent of the evidence to demonstrate the witness's unavailability. With regard to the State in a criminal trial, "In order to satisfy its burden of showing that the witness is unavailable, the State must prove that it has made a good-faith effort to obtain the witness's attendance at trial. This showing necessarily requires

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statement "I robbed the Taco Bell" should be subject to admission at trial. *Anthony Ray Mc.*, 200 W. Va. at 321, 489 S.E.2d at 298 n.13.

[33] A statement by an accomplice will typically indicate that a defendant committed a criminal act. For example: "I drove the car and Jane Doe fired shots from the car window." The statement "I drove the car" is self-inculpatory. The statement "Jane Doe fired shots from the car window," is a neutral collateral statement. Under our previous law, it was crucial to determine the trustworthiness of the self-inculpatory statement, because our previous law permitted bootstrapping a neutral collateral statement which inculpated a third party. By adopting the *Williamson* analysis, any type of collateral statement under Rule 804(b)(3) is barred. Therefore, the concern with the inherent reliability of a self-inculpatory statement like "I drove the car," is diminished. *Anthony Ray Mc.*, 200 W. Va. 312, 489 S.E.2d 289 n.18.

substantial diligence." Syl. Pt. 3, *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990).[34]

Generally, in criminal prosecutions, the State will be the proponent of evidence offered under Rule 804(b)(3). However, as contemplated by the rule, a defendant may also offer a declarant's statement which is against his or her penal interest for exculpatory purposes. A defendant who offers evidence under Rule 804(b)(3) faces a "formidable burden." *State v. Milburn*, 204 W. Va. 203, 511 S.E.2d 828 (1998); *State v. Beard*, 194 W. Va. 740, 748-49, 461 S.E.2d 486, 494-95 (1995). He or she must demonstrate that "the circumstances clearly indicate that the statement was not fabricated." *Beard*, 194 W. Va. at 749, 461 S.E.2d at 495 (citing 2 Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 8-4(B)(3)(3d ed. 1994)).

3. The Confrontation Clause and Rule 804

The Confrontation Clause and the hearsay rules serve a similar purpose in a criminal prosecution, as both operate to preserve a defendant's right to confront his or her accuser by placing limits on the introduction of extrajudicial statements at trial. However, it is important to note that the Confrontation Clause may bar the admission of evidence, which is admissible under the hearsay rules. *State v. Mason*, 194 W. Va. 221, 228, 460 S.E.2d 36, 43 (1995). Thus, trial courts should conduct two separate analyses before admitting an extrajudicial statement against the defendant in a criminal trial. *In the Interest of Anthony Ray Mc.*, 200 W. Va. 312, 318, 489 S.E.2d 289, 295 (1997).

In *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990),[35] the Supreme Court held: "The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement." The first prong of this analysis, the unavailability of the declarant to testify at trial, was modified by the Court in *State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999) to comply with United States Supreme Court

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[34] This standard was adopted as part of the Confrontation Clause requirement of unavailability. The Supreme Court has subsequently applied it to Rule 804 unavailability. *State v. Woods*, 194 W. Va. 250, 460 S.E.2d 65 (1995).

[35] In Syllabus Point 7 of *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), the West Virginia Supreme Court overruled *James Edward S.* and other cases to the extent that they permitted the admission of testimonial statements by witnesses who did not appear at trial, without regard to a witness's unavailability, and without regard to whether the accused had the opportunity to cross-examine the witness.

precedent.[36] In *Kennedy*, the Supreme Court held that an inquiry into the unavailability of a witness to testify is only required when the challenged extrajudicial statements were made in a prior judicial proceeding. 205 W. Va. at 229, 517 S.E.2d at 462.[37]

When the unavailability analysis is required, it is the duty of the proponent to establish the hearsay declarant's unavailability to testify at trial. *State v. James Edward S.*, 184 W. Va. at 413, 400 S.E.2d at 848. To satisfy this burden, the proponent must show "that it made a good-faith effort to obtain the witness's attendance at trial." Syl. Pt. 3, in part, *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990). "This showing necessarily requires substantial diligence." *Id.*

If the extrajudicial statements in issue were not made in a previous judicial proceeding, the trial court need only examine the reliability of the proffered evidence. The Confrontation Clause requires the proponent of extrajudicial statements to demonstrate that they possess a particularized guarantee of trustworthiness, such that cross-examination would not impugn their reliability. *State v. Mason*, 194 W. Va. at 232, 460 S.E.2d at 47. Proof of reliability can come from the totality of the circumstances that surround the making of the statement and render the declarant particularly worthy of belief. *James Edward S.*, 184 W. Va. at 414, 400 S.E.2d at 849 (quoting *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139 (1990)). "Reliability can usually be inferred where the evidence falls within a firmly rooted hearsay exception." Syl. Pt. 5, in part, *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990).

The Supreme Court does not recognize Rule 804(b)(3) as a firmly rooted hearsay exception. *In the Interest of Anthony Ray Mc.*, 200 W. Va. 312, 489 S.E.2d 289 (1997); *State v. Mason*, 194 W. Va. 221, 460 S.E.2d 36 (1995). Therefore, trial courts must examine the constitutional reliability of a declarant's self-inculpatory statement before it can be admitted at trial. Likewise, Rule 804(b)(5) is not a firmly rooted exception, and trial courts must conduct a Confrontation Clause analysis before admitting an extrajudicial statement under this rule. *James Edward S.*, 184 W. Va. at 415, 400 S.E.2d at 849.

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[36] *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736 (1992).

[37] This modification seems somewhat illogical given the protections provided in a judicial proceeding. For a thorough justification, please see *State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 n.7 (1999); and *United States v. Inadi*, 475 U.S. 387, 394-98, 106 S. Ct. 1121, 1125-28 (1986).

D. Residual Exception - Rule 807

As a part of the 2014 revisions to the West Virginia Rules of Evidence, former Rules 803(24) and 804(b)(5) were combined and transferred to Rule 807. Former Rules 803(24) and 804(b)(5) contained residual or catch-all exceptions to the general ban on hearsay evidence. Rule 807 provides:

> Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice. W. Va. R. Evid. 807.

The rule also includes a notice requirement, and subsection (b) provides that "[t]he statement is admissible only if, before the trial or hearing, the proponent gives the adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it." W. Va. R. Evid. 807(b).

The comment to Rule 807 states that this change was made solely to "facilitate additions to Rules 803 and 804" and "[n]o change in meaning is intended."[38] As such, courts will follow the same analysis previously used for hearsay admitted under former Rules 803(24) and 804(b)(5). See *State v. Michael C.,* No. 14-0727 (W. Va. Supreme Court, June 12, 2015) (memorandum decision); *Tex S. v. Pszczolkowski*, 236 W. Va. 245, 778 S.E.2d 694 (2015). Accordingly, this discussion will focus primarily on the analysis used under the former rules.

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[38] In 2007, Rule 807 was added to the Federal Rules of Evidence. West Virginia's Rule 807 is identical to Federal Rule 807.

1. Former Rule 803(24)

Former Rule 803(24) contained the residual or catch-all exception to the ban on hearsay evidence. This exception provided:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. W. Va. R. Evid. 803(24).

Former Rule 803(24) was narrowly construed because extrajudicial statements proffered under this exception are presumptively unreliable. *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990) (overruled on other grounds, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006)). The burden is on the proponent to demonstrate that the extrajudicial statement meets all of the requirements stated in the rule. Statements offered under Rule 803(24) should have the same guarantee of trustworthiness as a statement admitted under a specific exception. Reliability comes from the circumstances surrounding the making of the statement that indicate the declarant's veracity is beyond debate. *James Edward S.*, 184 W. Va. at 414, 400 S.E.2d at 849.

The State may seek to admit extrajudicial testimony under the residual hearsay exception in a sexual offense case involving a child victim in situations where the child is unavailable to testify or the child's statements do not fit another exception. In *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990), the trial court permitted the mother of the two alleged victims to testify pursuant to Rule 803(24) about statements one of the children made to her regarding alleged sexual

abuse by his father. The Supreme Court upheld the trial court's ruling, relying largely on the fact that both children testified at trial and were available for cross-examination. Importantly, the Court explained that parents should not normally be permitted to testify if the children are available to testify and the extrajudicial statement does not fall into one of the specific hearsay exceptions. Moreover, if the child is not available for cross-examination, admitting their out-of-court statements under 803(24) raises significant Sixth Amendment concerns. *Edward Charles L.*, 183 W. Va. at 654-56, 398 S.E.2d at 136-38.

In *State v. Jessica Jane M.*, 226 W. Va. 242, 700 S.E.2d 302 (2010), the Supreme Court revisited its holding in *Edward Charles L.*, regarding the admission of extrajudicial statements pursuant to Rule 803(24). The defendant in *Jessica Jane M.* was indicted for and subsequently tried and convicted of 14 felony offenses relating to the sexual abuse of her seven-year old daughter. At trial, over the objection of the defendant, the trial court permitted the child's foster mother to testify about statements the child made regarding the sexual abuse perpetrated on her by the defendant and the defendant's boyfriend. The child also testified and was subject to cross-examination by the defendant's counsel.

The West Virginia Supreme Court held that the trial court did not abuse its discretion by admitting the foster mother's testimony. Relying on *Edward Charles L.*, the Court found that the fact that the child testified and was subject to cross-examination ameliorated the real risks of admitting the hearsay statements. 226 W. Va. 242, 700 S.E.2d 302 (2010).

Courts in other jurisdictions have reviewed extrajudicial statements proffered under a residual hearsay exception in child sexual offense cases with caution. These courts have identified several factors that are relevant to determine the reliability and trustworthiness of a child's extrajudicial statements that is offered under a residual or catch-all exception to the hearsay rule. These factors include: a) the circumstances under which the statement was made; b) the declarant's motivation for making the statement; c) the spontaneity of the statement; d) the consistency of the statement; e) the unusualness of the child's explicit sexual knowledge; and f) the child's age.[39]

2. Former Rule 804(b)(5)

Previously, Rule 804(b)(5) and its counterpart Rule 803(24) were commonly referred to as the catch-all or residual exceptions to the general ban on the admission of hearsay evidence at trial. The primary distinction

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[39] *U.S. v. Balfany*, 965 F.2d 575 (8th Cir. 1992); *State v. Aaron L.*, 865 A.2d 1135 (Conn. 2005); and *Leshe v. State*, 803 S.W.2d 522 (Ark. 1991).

is that under Rule 804(b)(5) was that the declarant be unavailable, and under Rule 803(24) unavailability was immaterial.[40] As discussed *supra*,[41] both former Rules 803(24) and 804(b)(5) were combined and transferred to Rule 807. However, Rule 807 is not intended to change the meaning for the residual exceptions included in the former rules. The analysis concerning the admissibility of these statements will not change, so case law addressing the residual exception of Rule 804(b)(5) provides guidance on the admissibility of these types of statements. Former Rule 804(5)(b) provided:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. W. Va. R. Evid. 804(5)(b).

Similar to former Rule 803(24), former Rule 804(b)(5) provided a narrow exception for the admission of hearsay testimony, and the proponent must show that all five factors from the rule are present. As the Supreme Court has explained, "the statements offered must normally be so uncontroversial that cross-examination would be of marginal utility." *State v. Johnson*, 210 W. Va. 404, 409, 557 S.E.2d 811, 816 (2001) (quoting *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843

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[40] For a good factual illustration of the residual exception and declarant unavailability, see *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139 (1990). As previously discussed, the residual exceptions to the hearsay rule are commonly used in sexual offense cases involving children.

[41] See previous section discussing former Rule 803(24).

(1990) (overruled on other grounds, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006)).

Trustworthiness should be the focal point for trial courts. The proponent must demonstrate that the extrajudicial statement has a particularized guarantee of trustworthiness. *James Edward S.*, 184 W. Va. at 414-15, 400 S.E.2d at 849-50.[42] Reliability must be shown from the "totality of circumstances" surrounding the making of the statement. It cannot come from corroborating evidence. Trial courts must make a record to support a finding of admissibility. *Id.*

Additionally, the proponent must offer the statement to prove a material fact, and its probative value must be unsurpassed. *State v. Smith*, 178 W. Va. 104, 113, 358 S.E.2d 188, 197 (1987). If the evidence is offered for a collateral issue it is not admissible. The evidence should comport with the general purpose of the rules of evidence and serve the interest of justice. *Smith*, 178 W. Va. at 112-13, 358 S.E.2d at 197. Obviously, if the extrajudicial statement is only marginally relevant or infringes on the constitutional rights of the defendant it would be inadmissible under Rule 804(b)(5). Finally, the proponent of the evidence must provide adequate notice of their intent to use the evidence at trial. The Supreme Court has reaffirmed the holding of *Smith* with regard to the factors a proponent must show to admit a statement under the residual exception to the hearsay rule. *In re J.S.*, 233 W. Va. 394, 758 S.E.2d 747 (2014).

E. The *Crawford* Analysis

> The Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* guarantee an accused the right to confront and cross-examine witnesses. The Confrontation Clause contained in the Sixth Amendment provides: "In all criminal prosecutions, the accused shall ... be confronted with the witnesses against him[.]" Likewise, the Confrontation Clause contained in the *West Virginia Constitution,* Section 14 of Article III, provides that in the "[t]rials of crimes, and misdemeanors ... the accused shall be ... confronted with the witness against him[.]"

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[42] In *James Edward S.*, the Supreme Court was addressing whether evidence admitted under Rule 803(24) violated the Confrontation Clause. The Court relied substantially on *Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139 (1990). In subsequent cases, the Court has applied the Confrontation Clause analysis on reliability to issues involving Rule 803(24) and Rule 804(b)(5).

> *State v. Mechling*, 219 W. Va. 366, 371, 633 S.E.2d 311, 316 (2006).

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), the United States Supreme Court held that the admission of extrajudicial statements that are testimonial in nature are prohibited by the Confrontation Clause, unless the declarant is unavailable to testify, and the accused had a prior opportunity to cross-examine the individual. The *Crawford* Court found that the Confrontation Clause guarantees a criminal defendant the right to confront his or her accusers; and further, this right cannot be disregarded by evidentiary rules that permit the introduction of evidence that is untested by the adversarial process, such as testimonial statements. 541 U.S. at 61-63, 124 S. Ct. at 1370-71. Moreover, a judicial determination that testimonial statements are reliable simply does not satisfy constitutional requirements imposed by the Confrontation Clause.

Of course, *Crawford* and *Mechling* only apply to "'testimonial statements' [that] cause a declarant to be a 'witness' against the defendant." *Mechling*, 219 W. Va. at 373, 633 S.E.2d at 318 (quoting *Crawford*, 541 U.S. at 51-52, 124 S. Ct. at 1364-65). "Non-testimonial statements by an unavailable declarant, on the other hand, are not precluded from use by the Confrontation Clause." *Id.* There is not an exhaustive list of types of statements that are considered testimonial; however, some guidelines have been provided.

The *Crawford* Court provided some examples of declarations that can generally be characterized as testimonial statements, including: 1) *ex parte* in-court testimony; 2) the "functional" equivalent of *ex parte* testimony, such as, affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar statements that could be reasonably expected to be used against the defendant; 3) deposition testimony; 4) confessions; 5) statements that a witness could reasonably believe would be available for use at trial; and 6) statements taken by police during an interrogation. 541 U.S. at 51-52, 124 S. Ct. at 1364-65. The Court also expressly noted that business records and statements made by a co-conspirator are not testimonial statements, and therefore, these types of extra-judicial statements are beyond the reach of *Crawford*.

In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266 (2006), the United States Supreme Court further elucidated what is meant by testimonial statements. The Supreme Court expressly held that:

> Statements are nontestimonial when made in the course of police interrogation under

> circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis*, 547 U.S. at 822, 126 S. Ct. 2273-74.

In consideration of *Crawford* and *Davis,* the West Virginia Supreme Court stated that:

> We believe that the Court's holdings in *Crawford* and in *Davis* regarding the meaning of "testimonial statements" may therefore be distilled down into the following three points. First, a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Second, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency. And third, a court assessing whether a witness's out-of-court statement is "testimonial" should focus more upon the witness's statement, and less upon any interrogator's questions. *Mechling*, 219 W. Va. at 376-77, 633 S.E.2d at 321-22.

It should be noted that the *Crawford*/*Mechling* analysis applies only to hearsay statements, that is statements that are offered to prove the truth of the matter asserted. *State v. Waldron*, 228 W. Va. 577, 580, 723

S.E.2d 402, 405 (2012) (quoting Louis J. Palmer, Jr., and Robin Jean Davis, Vol. 2, *Handbook on Evidence for West Virginia Lawyers*, § 8-4(A) (2011)). If a statement is not hearsay (not admitted for the truth of the matter asserted) then the *Crawford/Mechling* analysis does not apply. *Id.*

In a case involving sexual abuse by a parent, guardian, or custodian, the mother of the victim was allowed to testify as to what her four-year-old daughter told her. *State v. Lambert*, 232 W. Va. 104, 750 S.E.2d 657 (2013). The Supreme Court held that the *Crawford/Mechling* analysis did not apply because the statement was offered to explain why the child's mother contacted the authorities, not for the truth of the matter asserted.

IV. Evidence of Other Crimes, Wrongs, or Acts by Offender

A. Generally

Rule 404(b) of the West Virginia Rules of Evidence excludes the admission of evidence of other bad acts or crimes committed by a criminal defendant to prove he or she committed the act in issue. However, Rule 404(b) is inclusive and the evidence may be offered for a number of alternative purposes. *State v. Edward Charles L.*, 183 W. Va. 641, 647, 398 S.E.2d 123, 129 (1990). It provides that:

> (1) Prohibited uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> (2) Permitted uses; notice required. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Any party seeking the admission of evidence pursuant to this subsection must:
>
> (A) provide reasonable notice of the general nature and the specific and precise purpose for which the evidence is being offered by the party at trial; and
> (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice. W. Va. R. Evid. 404(b).

Evidence of other crimes or acts by the defendant is commonly submitted in sexual offense cases. The procedural and substantive requirements for admitting other bad act evidence in a criminal case are discussed below.

B. Procedure for Admitting 404(b) Evidence

The procedure for the admission of 404(b) evidence is a follows:

> Any party seeking the admission of evidence pursuant to this subjection must: (A) provide reasonable notice of the general nature and specific and precise purpose for which the evidence is being offered by the party at trial; and (B) do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice. W. Va. R. Evid. 404(b)(2).

It should be noted that the text of Rule 404(b) was modified in the 2014 revisions so that the party seeking the admission of the evidence has the burden to notify the other party.[43] The earlier version of Rule 404(b) required the prosecutor to provide this evidence when the defendant requested notice of Rule 404(b) evidence. The language of current Rule 404(b) is similar to Trial Court Rule 32.02 which also requires the State to notify the defendant of its intent to introduce Rule 404(b) evidence.

As noted in the comment to Rule 404(b), the notice provisions of Rule 404(b) incorporate the requirements of *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). This provision requires the party seeking the admission of the evidence must identify the "specific and precise purpose for which the evidence is being offered by the party at trial..." W. Va. R. Evid. 404(b)(2)(A). It is the duty of the trial court to determine whether the proffered evidence is admissible.

1. Duty of State or Other Proponent

In criminal prosecutions, the State may seek the admission of evidence related to a defendant's other acts. When the State intends to offer this evidence, it must provide the defendant with notice of its intent to introduce evidence pursuant to Rule 404(b)(2). The State must provide the trial court with the specific and precise relevant purpose for which the evidence is offered. W. Va. R. Evid. 404(b)(2); *McGinnis*, 193 W. Va. at 155, 455 S.E.2d at 524. The State must identify the fact or issue to which the evidence is relevant, and it must plainly articulate how the 404(b) evidence is probative of that fact or issue. See Syl. Pt. 5, *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 601 S.E.2d 75 (2004).

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[43] In 2014, Rule 404(b) was amended to apply to any party in a case, not simply to the State in a criminal prosecution.

The Supreme Court has reversed a defendant's sexual assault conviction based upon its conclusion that the State failed to show how the admitted evidence related to one of the allowable purposes established by Rule 404(b).[44] *State v. Angle*, 233 W. Va. 555, 759 S.E.2d 786 (2014). In *Angle*, the trial court had allowed an officer to testify that the defendant had been accused, but denied his involvement in two assaults that occurred subsequent to the crime for which he was convicted. The Court reviewed the record in detail and concluded that the State had not shown that the evidence was relevant to any absence of mistake or to any *modus operandi* of the defendant. The Court noted that the only similarity was that the subsequent offenses occurred in the same neighborhood.

2. In Camera Hearing

a. Finding that the Other Bad Act Occurred

Once the State gives notice of its intent to introduce 404(b) evidence, the trial court should conduct an *in camera* hearing to determine whether the evidence is admissible. *McGinnis*, 193 W. Va. at 158-59, 455 S.E.2d at 527-28. Generally, for the other bad act evidence to be admissible, it must be probative of a material fact in issue and not offered to prove character or conformity with previous conduct. As a threshold matter, the trial court must find by a preponderance of the evidence that the other act occurred and that the defendant committed the act. If the court is unable to make this initial finding then the evidence is not admissible under Rule 404(b). *Id.*

The West Virginia Supreme Court has reversed a sexual assault conviction based, in part, on a trial court's failure to find that the alleged other acts were committed by the defendant. *State v. Angle*, 233 W. Va. 555, 759 S.E.2d 786 (2014). In *Angle*, the trial court allowed an officer to testify that subsequent sexual assaults of an adult victim and juvenile victim had occurred in the same neighborhood where the victim had resided and that the defendant had been questioned about these subsequent offenses but denied that he had been involved. At trial, the officer was permitted to testify that the defendant had been accused but had denied his involvement in those two assaults. Reversing the defendant's conviction, the Supreme Court concluded that the trial court never found that the defendant had, in fact, committed the other sexual assaults. The Court noted that while subsequent uncharged offenses may be admitted, the trial court never made the requisite finding -- that the defendant had committed the two other offenses.

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[44] The allowable purposes include motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident. W. Va. R. Evid. 404(b).

b. Relevancy

If the trial court is satisfied that the defendant committed the other bad act, it must proceed to evaluate the relevancy of the evidence pursuant to Rules 401[45] and 402.[46] Though important, a finding of relevancy under Rule 404(b) is not dependent on whether the other bad acts are similar to the crime charged.[47] Rather, in assessing the admissibility of the proffered evidence the court should determine whether it is logically relevant or being offered for some specific purpose other than to establish the defendant's bad character. *McGinnis*, 193 W. Va. at 156, 455 S.E.2d at 525.

c. 403 Balancing Test

If the trial court determines that the evidence is relevant under Rules 401 and 402, it must conduct a balancing test pursuant to Rule 403[48] to determine whether the probative value of the evidence substantially outweighs the risk of unfair prejudice. Unfair prejudice occurs when the evidence suggests the decision will be made on an improper basis, such as an emotional one. *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994). It does not mean the damage that can be inflicted on a defendant's case due to the probative force of the evidence. *Id.* In conducting a 403 balancing test, the trial court may consider the following factors:

> (a) the need for the evidence, (b) the reliability and probative force of the evidence, (c) the likelihood that the evidence will be misused because of its inflammatory effect, (d) the effectiveness of limiting instructions, (e) the availability of other forms of proof, (f) the extent to which admission of evidence will require trial within trial, and (g) the remoteness and similarity

[45] W. Va. R. Evid. 401 states: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

[46] W. Va. R. Evid. 402 provides that: "Relevant evidence is admissible unless any of the following provides otherwise: (a) the United States Constitution; (b) the West Virginia Constitution; (c) these rules; or (d) the rules adopted by the Supreme Court of Appeals of West Virginia. Irrelevant evidence is not admissible."

[47] Note, if the evidence is offered to show a *modus operandi* of the defendant, similarity of acts must be demonstrated. *McGinnis*, *supra.*

[48] W. Va. R. Evid. 403 states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

> of the proffered evidence to the charged crime. *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 n.11 (1994).

The West Virginia Supreme Court affirmed a trial court when it allowed the State to present the testimony of three minor witnesses who had also been victims of the defendant. *State v. Timothy C.*, 237 W. Va. 435, 447-450, 787 S.E.2d 888, 900-903 (2016). The Court noted that the trial court had heard testimony of the witnesses at a *McGinnis* hearing, that the trial court found that the defendant had committed the abuse, and that the evidence was relevant to the defendant's lustful disposition towards children and the absence of mistake or an accident on his part. The Court's summary is an example of the required analysis when a party proposes the admission of this type of evidence.

3. The Limiting Instruction

If the trial court determines that the other bad act evidence is admissible pursuant to Rule 404(b), it must give the jury a limiting instruction that identifies the specific and precise purpose for which the evidence is offered. See Syl. Pt. 1, *McGinnis*, 193 W. Va. 147, 455 S.E.2d 516. The "limiting instruction shall be given at the time the evidence is offered, and must be repeated in the trial court's general charge to the jury at the conclusion of the evidence." Syl. Pt. 5, in part, *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 601 S.E.2d 75 (2004).

C. Lustful Disposition Exception to Rule 404(b)

Evidence establishing the lustful disposition or sexual propensity of a defendant towards children may be admissible over a Rule 404(b) objection in a sexual offense case. *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990). In *Edward Charles L.*, the Supreme Court held:

> Collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment. To the extent that the conflicts with our decision in *State v. Dolin*, 176 W. Va. 688, 347 S.E.2d 208 (1986), it is overruled. Syl. Pt. 2, *Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123.

The Court reasoned that a lustful disposition exception was warranted due to a number of factors that unfairly erode the credibility of a child victim who testifies in a sexual offense case. *Edward Charles L.*, 183 W. Va. at 650-51, 398 S.E.2d at 132-33. In *State v. McIntosh*, 207 W. Va. 561, 534 S.E.2d 757 (2000), the Supreme Court reaffirmed *Edward Charles L.* and clarified that evidence of the defendant's lustful disposition was potentially applicable in all sexual offense cases that involve a child victim, and was not limited to prosecutions involving victims who are children at the time of trial. [49] The Supreme Court has declined to extend this exception to cases involving adult victims. *State v. Angle*, 233 W. Va. 555, 759 S.E.2d 786 (2014). See *State v. Timothy C.*, 237 W. Va. 435, 447-450, 787 S.E.2d 888, 900-903 (2016) for a discussion of the analysis that should be made when a party proposes the admission of this type of evidence.

D. Remoteness and the Admission of Rule 404(b) Evidence

The issue of remoteness may be raised when evidence of prior bad acts committed by a defendant are proffered for admission by the State in a sexual offense case. With regard to Rule 404(b) evidence in general, the Supreme Court has held: "As a general rule remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility." Syl. Pt. 5*, State v. Winebarger,* 217 W. Va. 117, 617 S.E.2d 467 (2005) (quoting Syl. Pt. 6, *State v. Gwinn*, 169 W. Va. 456, 288 S.E.2d 533 (1982)). The Court has explained that, "the remoteness of Rule 404(b) evidence, along with its similarity to other charges, weighs on its probative value as well as its danger of undue prejudice." *State v. Gary A.*, 237 W. Va. 762, 791 S.E.2d 392 (2016).

In *State v. Edward Charles L*. when the Court adopted the lustful disposition exception to Rule 404(b), it held that other bad act evidence was admissible under that exception "provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment." Syl. Pt. 2, in part, *Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123. The Court's holding in *Edward Charles L.* appears to indicate that when other bad act evidence is offered under the lustful disposition exception, a trial court should consider the temporal span between the previous bad act and the act or acts in issue.

In *State v. Parsons*, 214 W. Va. 342, 589 S.E.2d 226 (2003), the Supreme Court once again addressed the issue of remoteness and the admission of prior bad act evidence. The defendant in *Parsons* was

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[49] See also *Ballard v. Hunt*, 235 W. Va. 100, 772 S.E.2d 199 (2015); *State v. Rash*, 226 W. Va. 35, 697 S.E.2d 71 (2010); *State v. Parsons*, 214 W. Va. 342, 589 S.E.2d 226 (2003); and *State v. Graham*, 208 W. Va. 463, 541 S.E.2d 341 (2000) for cases applying the lustful disposition or sexual propensity analysis.

alleged to have committed various sexual offenses against the victim while she was a junior high school student from 1977 to 1980. The circuit court permitted other witnesses to testify that they too suffered the defendant's unwanted sexual attacks while they were students at the school where the defendant taught. These collateral offenses were alleged to have occurred from approximately 1959 to 1971.

On appeal, the defendant claimed that the collateral acts were too distant in time to be admissible under *Edward Charles L.'s* lustful disposition exception. However, the Supreme Court declined to overrule the circuit court finding that the evidence presented "a continuous chain of conduct that demonstrated [the defendant's] sexual interest in underage girls over a twenty-year period." *Parsons*, 214 W. Va. at 350, 589 S.E.2d at 234. If the evidence had only pertained to an isolated incident that occurred many years ago, the outcome might have been different. *Id.*

The case of *State v. Jonathan B.*, 230 W. Va. 229, 737 S.E.2d 257 (2012) is an opinion in which the Court found error primarily because the trial court failed to consider that Rule 404(b) evidence must be close in time to the charged offense. In *Jonathan B.*, the trial court had allowed testimony about the pornographic file names which were found on the defendant's computer. The files were, however, created approximately four years after the charged offense. Finding that the trial court had failed to consider the temporal requirement for the admission of 404(b) evidence, the Court reversed the defendant's conviction. Although the Court focused on the remoteness of the evidence, the Court also found that no *McGinnis* hearing had been conducted, that the trial court did not make its finding pursuant to the preponderance of the evidence and that the trial court failed to give a limiting instruction. For all of these reasons, the Court found that the 404(b) evidence had been erroneously admitted.

E. Harmless Error Analysis for Rule 404(b) Evidence

Even when Rule 404(b) evidence has been improperly admitted, it may still be subject to harmless error analysis. Syl. Pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979). The Supreme Court has adopted two different tests with regard to the erroneous admission of evidence, dependent on whether the evidence is of a constitutional or nonconstitutional nature. The test to determine whether the admission of improper evidence of a nonconstitutional nature is harmless follows:

> (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt;

> (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury. Syl. Pt. 2, in part, *Atkins*, 163 W. Va. 502, 261 S.E.2d 55.

The West Virginia Supreme Court has applied this test to review improperly admitted evidence in a sex offense case. *State v. Robert Scott R., Jr.*, 233 W. Va. 12, 754 S.E.2d 588 (2014). In this case, the defendant was convicted of committing 30 sexual offenses against four minors. On appeal, the defendant argued that the trial court improperly admitted evidence that he had sent pornographic text messages to a witness. Reviewing the record, the Supreme Court found that the *McGinnis* hearing was inadequate. However, it held that the admission of the evidence was harmless for several reasons. First, two other witnesses also testified about receiving pornographic text messages from the defendant, and defense counsel had not objected. In addition, the Court found that the witness testified that the defendant had fondled her breasts and rubbed her genital area and that the jury, therefore, would not have focused on the testimony about the text messages. Third, the Court found that the other evidence presented was sufficient to convict him of the charged offense. For these reasons, the Court found that the admission of the testimony about the pornographic text messages was harmless beyond a reasonable doubt.

When the admission of evidence is of a constitutional nature, the West Virginia Supreme Court has established that: "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. Pt. 5, *State ex. rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975). As recognized by the West Virginia Supreme Court, "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." Syl. Pt. 20, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974).

F. Intrinsic Evidence

Evidence of other bad acts of the defendant that is intrinsic to the crime charged may be admissible in a criminal trial. Other act evidence is intrinsic when it is "inextricably intertwined" with the crime charged, when the other act is part of a single criminal episode, or when the other act was a "necessary preliminary" to the crime charged. *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 n. 29 (1996) (citing *U.S. v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990)). In criminal trials, intrinsic evidence may be

admitted under two separate theories. It may be admitted for a purpose other than to prove criminal propensity pursuant to Rule 404(b). *State v. Hager*, 204 W. Va. 28, 511 S.E.2d 139 (1998). Intrinsic evidence is also admissible outside of the confines of Rule 404(b) as *res gestae* or context evidence that is necessary for a full presentation of the case, or is appropriate to complete the story of the crimes. *State v. Slaton*, 212 W. Va. 113, 119, 569 S.E.2d 189, 195 (2002) (citing *U.S. v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980)). Obviously, the difference between these two uses is not always separated by a bright line. However, the practical implication of the latter use is that the trial court is not required to follow the procedural safeguards of *McGinnis* if it determines that the evidence is not governed by Rule 404(b). *State v. Slaton*, 212 W. Va. 113, 569 S.E.2d 189 (2002); *State v. Dennis*, 216 W. Va. 331, 607 S.E.2d 437 (2004).

Intrinsic evidence offered as *res gestae* of the crime charged, is subject to certain limiting factors. A trial court should ascertain whether the proffered evidence is temporally related to, causally connected with, and illustrative of the crime charged. *Dennis*, 216 W. Va. at 351, 607 S.E.2d at 457. Further, "[o]ther criminal act evidence admissible as part of the res gestae or same transaction introduced for the purpose of explaining the crime charged must be confined to that which is reasonably necessary to accomplish such purpose." Syl. Pt. 1, *State v. Spicer*, 162 W. Va. 127, 245 S.E.2d 922 (1978).

The admission of intrinsic evidence is interpreted liberally. It may be admitted even though the other acts did not occur contemporaneously with the crime charged if the evidence provides the fact finder with the full story of the crime or the relationship between the victim and the defendant. *Slaton*, 212 W. Va. 113, 569 S.E.2d 189; *Dennis*, 216 W. Va. 331, 607 S.E.2d 437; and *State ex rel. Wensell v. Trent*, 218 W. Va. 529, 625 S.E.2d 291 (2005). In *Slaton*, the defendant was charged with a single count of first degree sexual assault against a five-year-old boy. Over the objection of the defendant, the child and his mother were permitted to testify about multiple sexual assaults perpetrated by the defendant. The Supreme Court found that the "multiple incidents of sexual assault were 'inextricably intertwined,'" and they were part of a "single criminal episode, and thus was admissible."[50] *Slaton*, 212 W. Va. at 119-20, 569 S.E.2d at 195-96.

In *Dennis*, the defendant was convicted of kidnapping, second degree robbery, two counts of second degree sexual assault, violating a domestic violence protective order, and domestic battery. The trial court permitted the State to introduce prior acts of physical and verbal abuse perpetrated by the defendant against the victim that occurred three

[50] The Court also noted the implausibility of instructing a young child to limit their testimony to one act or incident.

months before the crimes charged. The trial court did not admit the evidence pursuant to Rule 404(b), but instead found that these acts constituted intrinsic evidence and were "part of the fabric of the underlying charge." The Supreme Court upheld this ruling and found that the evidence was necessary "to complete the story of the crime on trial," especially "in light of the domestic violence overlay to the pattern of behavior." *Dennis*, 216 W. Va. at 352, 607 S.E.2d at 458.

Similar to the Supreme Court's holding in *Dennis* is its decision in *State ex rel. Wensell v. Trent, supra*. In *Wensell*, the defendant was convicted of 13 sexual offenses against his two minor stepdaughters. At trial, the State presented evidence of several incidents of excessive and harsh discipline employed by the defendant against the girls. On appeal, the defendant claimed that admission of this evidence violated Rule 404(b). The State contended that it was necessary to illustrate the conditions in the home and explain the girls' reluctance to report the crimes while they were living with their stepfather. The Supreme Court found that the evidence concerning the discipline was "merely presented as context evidence." *Wensell*, 218 W. Va. at 536, 625 S.E.2d at 298. The Court stated that the evidence "portrayed to the jurors the complete story of the inextricably linked events with regard to the interaction between the appellant and his stepdaughters and amounted to intrinsic evidence." *Id.*

The Supreme Court has provided further guidance on the admission of intrinsic evidence in a sex offense case. *State v. Harris*, 230 W. Va. 717, 742 S.E.2d 133 (2013). In *Harris*, the defendant was indicted in 2002 for crimes that had occurred between 1982 and 1984 against a victim named M.R.W. who was approximately five or six at the time of the sexual abuse.[51,52] Although the defendant was charged with only two incidents involving M.R.W., she testified as to other times, approximately ten times, that the defendant sexually assaulted her during this same time period. On appeal, the defendant argued that the admission of evidence of the other uncharged incidents violated Rule 404(b).

When considering the defendant's assignment of error, the Court observed that the preliminary question is to determine whether the "other bad acts" were intrinsic evidence or extrinsic evidence under *State v. LaRock*, 196 W. Va. 294, 312, 470 S.E.2d 613, 631 n. 29 (1996). If the evidence is intrinsic to the indicted charge, it is not subject to the

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[51] The defendant was also indicted for sexual crimes against three other victims, but the indictments were severed and tried separately.

[52] Footnote 4 of the opinion indicates that the defendant had been repeatedly resentenced over the course of the years. The opinion does not indicate why there was such a delay between trial and the conclusion of the appeal.

requirements of Rule 404(b). *Harris*, 230 W. Va. at 722, 742 S.E.2d at 138 (citing cases). The Court concluded that the other uncharged crimes that occurred during the relevant two-year time period were intrinsic to the acts for which the defendant had been tried and convicted. The Court, therefore, concluded that the limitations of Rule 404(b) did not apply.

In her concurring opinion, Justice Workman cited to three other cases that address the difficulties of limiting the testimony of a child victim to indicted incidents. See *State v. Brown*, 780 P.2d 880 (Wash. 1989); *Covington v. State*, 703 P.2d 436 (Alaska App. 1985); *State v. Arceo*, 928 P.2d 843 (Haw. 1996). She specifically noted a common problem in these cases -- that a child victim may not be able to identify the exact time, place, or circumstance of the assaults. She asserted that the Court should hold that all evidence of this type should be considered intrinsic evidence so that it would not be subject to Rule 404(b). *Harris*, 230 W. Va. at 140, 742 S.E.2d at 133 (Workman, J., concurring).

V. Witness Competency Issues

Under the West Virginia Rules of Evidence, issues regarding witness competency in a sexual offense case is a preliminary question to be settled by the trial court. W. Va. R. Evid. 104(a). Generally, a witness's competency to testify is construed liberally. Rule 601 of the West Virginia Rules of Evidence provides: "Every person is competent to be a witness except as otherwise provided for by these rules." Likewise, West Virginia Code § 61-8B-11(c) states: "In any prosecution under this article, neither age nor mental capacity of the victim shall preclude the victim from testifying." However, despite the liberal construction of the applicable law, the Supreme Court has distinguished between competency issues regarding adult witnesses and child witnesses.

A. Competency Issues and Young Children

Witness competency issues may still emerge when a young child is the testifying witness, because when it comes to young children the line between competency and credibility may be blurred. *Burdette v. Lobban*, 174 W. Va. 120, 122, 323 S.E.2d 601, 603 (1984). In this regard, Rule 601's liberal policy does not change the underlying problems that may be attendant to a young child's testimony. *State v. Stacy*, 179 W. Va. 686, 689, 371 S.E.2d 614, 617 (1988). There may be legitimate problems concerning a child's ability to independently recall events, their ability to understand questions posed by the court or counsel, and their ability to understand the duty to tell the truth. Due to the inflammatory impact a child's testimony can have on a jury, the Supreme Court has found that it is better to evaluate the child's competency prior to the child being called as a witness.

Generally, an evaluation of a child's competency to testify should consider the following factors:

> (1) the mental capacity, at the time of the occurrence concerning which he is to testify, to receive an accurate impression of the events; (2) a memory sufficient to retain an independent recollection of the occurrence; (3) the capacity to express in words his memory of the occurrence; (4) the capacity to understand simple questions about it; and (5) an understanding of the obligation to speak the truth on the witness stand. *State v. Jones*, 178 W. Va. 519, 362 S.E.2d 330 n.2 (1987) (citation omitted).

A competency evaluation may be performed by the presiding judge or by an independent psychiatrist or psychologist. If the competency of the child is a close question, the Supreme Court has indicated that an independent psychological evaluation should be conducted consistent with the Court's opinion in *Burdette*. *State v. Stacy*, 179 W. Va. 686, 371 S.E.2d 614 (1988).

Any additional psychological examination of the child may only be had if a compelling need is demonstrated by the defendant. *State v. Delaney*, 187 W. Va. 212, 417 S.E.2d 903 (1992). The trial court should consider the following factors to determine whether a compelling need exists for additional psychological testing of a child witness:

> (1) the nature of the examination requested and the intrusiveness inherent in that examination; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use. Syl. Pt. 3, in part, *Delaney*, 187 W. Va. 212, 417 S.E.2d 903; Syl. Pt. 2, *State ex rel. J.W. v. Knight*, 223 W. Va. 785, 679 S.E.2d 617 (2009).[53]

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[53] In 2020, the Legislature added subsection (e) to West Virginia Code § 61-8B-11. This subsection provides that a court may not order a sexual abuse victim to undergo a forensic medical examination for evidence of a sexual offense. The holding of *Delaney*

Further, the Supreme Court has held: "Assuming it otherwise meets the requirements of admissibility, the reliability of a child's testimony is properly a matter for assessment by the trier of fact who is charged with making determinations regarding the weight and credibility of such testimony." Syl. Pt. 3, *State v. Smith*, 225 W. Va. 706, 696 S.E.2d 8 (2010).

As recognized by the Supreme Court, it is within a trial court's discretion to determine whether a child is competent to testify and this type of ruling will not be reversed except where "there is a clear showing of abuse of discretion." *State v. Jessica Jane M.*, 226 W. Va. 242, 235, 700 S.E.2d 302, 315 (2010). In *Jessica Jane M.*, the Supreme Court concluded that the trial court did not err when it allowed a child to testify about a sexual assault. The Supreme Court noted that the trial court had spoken with the child and that the conversation demonstrated that the child had the capacity and intelligence to understand that she was required to be truthful. Therefore, the Supreme Court affirmed the trial court's finding that the child was competent to testify. 226 W. Va. at 255, 700 S.E.2d at 315.

B. Issues Regarding Competency of Persons with Low IQ or Mental Illness

Note: See Chapter 3 for a discussion of the legal authority governing competency evaluations of adult witnesses.

As discussed above, in criminal proceedings each witness is presumed competent to testify under Rule 601. The Supreme Court has interpreted witness competency broadly when the testimony of an adult witness is challenged, favoring a policy that admits all relevant evidence and permits the fact finder to determine how much weight should be given to the evidence. The Court has stated that "neither feeblemindedness nor insanity renders a witness incompetent or disqualified." *State v. Merritt*, 183 W. Va. 601, 396 S.E.2d 871 (1990).[54] Generally, there are only three circumstances that may render an adult witness incompetent to testify: 1) the witness does not have knowledge of the matters about which he is to testify; 2) the witness does not have the capacity to recall; or 3) the witness does not understand their duty to testify truthfully. *Merritt*, 183 W.

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or *J.W.*, to the extent that they allow a court to order such an examination, has been superseded by this legislative amendment. However, the limitation on additional psychological examinations as set forth in *Delaney* remains valid.

[54] See also *State ex rel. Azeez v. Mangum*, 195 W. Va. 163, 465 S.E.2d 163 (1995), for a case where a victim was diagnosed with mental retardation and unspecified mental illness. At trial, it was established that she suffered active hallucinations and delusions. However, she was found competent to testify by the trial court.

Va. at 608, 396 S.E.2d at 878 (citations omitted). If none of these factors are present, an adult witness should be permitted to testify.

VI. Testimonial Privileges

The issue of whether a testimonial privilege exists in a criminal trial is a preliminary question for the trial court. W. Va. R. Evid. 104(a). The existence of a testimonial privilege should generally be addressed in a motion *in limine* prior to trial, but can be raised during trial as well. Rule 501 of the West Virginia Rules of Evidence addresses testimonial privileges, providing: "Common law governs a claim of privilege unless any of the following provides otherwise: (a) the United States Constitution; (b) the West Virginia Constitution; (c) rules prescribed by the Supreme Court of Appeals of West Virginia; or (d) West Virginia statutes."

A. Marital Privileges and Criminal Trials

In West Virginia, there are two testimonial privileges relating to the marital relationship that may prevent one spouse from offering testimony during the criminal trial of the other spouse. The spousal testimony privilege which may be invoked to prohibit a witness spouse from being compelled to offer testimony against a defendant in a criminal trial is found in West Virginia Code § 57-3-3. The marital confidence privilege which may be invoked to prohibit a witness spouse from testifying about confidential communications made by the other spouse while the parties were married is found in West Virginia Code § 57-3-4. Importantly, while similar in some regards, these two marital privileges are distinct and should be analyzed separately.

1. Spousal Testimony Privilege

The spousal testimony privilege, codified at West Virginia Code § 57-3-3, provides:

> In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other except in the case of a prosecution for an offense committed by one against the other, or against the child, father, mother, sister or brother of either of them. The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the

subject of any comment before the court or jury by anyone.

This privilege "absolutely prohibits the spouse of a criminal defendant from testifying against the defendant, except where the defendant is charged with a crime against the person or property of the other spouse or certain other relatives. When properly invoked, this statute precludes all adverse testimony by a spouse, not merely disclosure of confidential communications." Syl. Pt. 11, in part, *State v. Bradshaw,* 193 W. Va. 519, 457 S.E.2d 456 (1995). The spousal testimony privilege may be raised by either party prior to the witness spouse's testimony, provided the parties are legally married at the time of trial.[55] *State v. Evans*, 172 W. Va. 810, 310 S.E.2d 877 (1983).[56]

a. Testimony of a Witness Spouse That Is Not Adverse

The Supreme Court has found that West Virginia Code § 57-3-3 only prohibits a witness spouse from offering *adverse* testimony in a criminal prosecution against the other spouse, and that it does not serve as a general bar to all compelled testimony. *State v. Jarrell*, 191 W. Va. 1, 442 S.E.2d 223 (1994). In *Jarrell*, the defendant was charged and convicted of the first degree murder of his brother-in-law. At trial, over the objection of the defendant, the trial court allowed the grand jury testimony of the defendant's wife to be read into evidence.[57]

The Supreme Court upheld this ruling. The Court noted that as a general rule the grand jury testimony of the witness spouse should not be read into evidence in cases where the spousal testimony privilege has been properly invoked. *Jarrell*, 191 W. Va. at 5, 442 S.E.2d at 227. However, the Supreme Court found that the adverse testimony privilege did not apply in the case at bar. The wife's grand jury testimony primarily provided evidence against her sister-in-law who was a co-indictee for the crime. While her testimony did place the defendant at the home of the decedent on the day he was murdered, it was not adverse to the

[55] The Supreme Court has indicated that the existence of a legal marriage is the determinative factor for the purposes of the spousal testimony privilege and not the health of the marriage. The defendant spouse may assert the privilege even if the parties are separated and/or one has filed for divorce. *State v. Evans*, 170 W. Va. 3, 287 S.E.2d 922 (1982) and *State v. Bradshaw*, 193 W. Va. 519, 537-38, 457 S.E.2d 456 (1995).

[56] This opinion has been referred to as *Evans II*. It is the defendant's appeal upon remand following the Supreme Court's reversal of his first conviction in *State v. Evans*, 170 W. Va. 3, 287 S.E.2d 922 (1982), identified as *Evans I*. In *Evans I*, the defendant also raised the issue of the spousal testimony privilege.

[57] Apparently, a hearsay objection was not raised.

defendant's defense. *Id.* The Supreme Court indicated that not all testimony which is "situationally adverse" to the defendant falls within the protection of the privilege. *Id.* at 3 n.4.[58] And a witness spouse may be compelled to answer objective questions in a grand jury investigation where their spouse is the target. *Id.*

2. Marital Confidence Privilege

The marital confidence privilege, codified at West Virginia Code § 57-3-4, provides:

> Neither husband nor wife shall, without the consent of the other, be examined in any case as to any confidential communication made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage existed.

This privilege prohibits a witness spouse from testifying about a confidential communication made by the other while the parties were married. This privilege, unlike the spousal testimony privilege, survives divorce. In other words, the defendant spouse in a criminal case can prevent the witness spouse from testifying about a confidential communication made during the parties' marriage, even if they are divorced at the time of trial.

For the purposes of the marital confidence privilege, a confidential communication can include an oral or written communication, as well as, the acts or conduct of a spouse. Syl. Pt. 1, *State v. Robinson*, 180 W. Va. 400, 376 S.E.2d 606 (1988). The test for determining whether a communication between spouses is confidential is whether it was made "in reliance on the confidence of the marital relation, i.e. whether there was an expectation of confidentiality." Syl. Pt. 2, in part, *Robinson*, 180 W. Va. 400, 376 S.E.2d 606; *State v. Bradshaw*, 193 W. Va. 519, 536-37, 457 S.E.2d 456, 473-74 (1995). All communications between a husband and wife are presumed confidential, and if the State seeks to introduce a spouse's testimony they must prove otherwise. *Payne v. Payne*, 97 W. Va. 627, 651, 125 S.E. 818, 827 (1924); *Bradshaw*, 193 W. Va. at 537, 457 S.E.2d at 474.

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[58] The Court is relying, in part, on *In re Grand Jury Proceedings*, 664 F.2d 423 (5th Cir. 1981). While the Fifth Circuit did find that a spouse could be compelled to give grand jury testimony against the other spouse, the Court explained that the questions should be objective, "neither calculated to, nor capable of incriminating her husband." Obviously, in *Jarrell*, the wife's testimony placed him with the victim on the night of his death. The jury could view this as circumstantial evidence of his guilt.

A finding that a communication is not confidential will depend on the facts and circumstances present in the case; there is no bright line rule.

a. Communications That Are Not Protected by the Marital Confidence Privilege

Generally, there are two types of communications that are not subject to the marital confidence privilege: communications that are made in the known presence of a comprehending third party, *Nash v. Fidelity-Phenix Fire Ins. Co.*, 106 W. Va. 672, 146 S.E. 726 (1929); *State v. Bohon*, 211 W. Va. 277, 565 S.E.2d 399 (2002), and threats made against one's spouse. *Fuller v. Fuller*, 100 W. Va. 309, 130 S.E 270 (1925). Additionally, threats a defendant made simultaneously against his spouse and the victim of a crime are not protected by the marital confidence privilege. *State v. Richards*, 182 W. Va. 664, 391 S.E.2d 354 (1990). In *Richards*, the Court found that the threat was not made in reliance on the marital relation and was therefore admissible. It is not clear whether all threats made by a defendant spouse against a third party are outside of the marital confidence privilege. Presumably, if the witness spouse were not a target of the threat, and the threat were made in reliance on the marital relationship, the witness spouse could be precluded from testifying about the statement.

b. Confidential Communications Later Revealed to a Third Party/Waiver of the Marital Confidence Privilege

In criminal trials, "only the accused can waive the marital confidence privilege during a criminal prosecution." Syl. Pt. 5, *State v. Bohon*, 211 W. Va. 277, 565 S.E.2d 399 (2002). Thus, the defendant may assert the privilege even if their spouse has later revealed the substance of the confidential communication to a third party. However, the third party may testify regarding these extrajudicial statements if they are otherwise admissible. *Bohon*, 211 W. Va. at 282-83, 565 S.E.2d at 404-05; see also *Nash v. Fidelity-Phenix Fire Ins. Co.*, 106 W. Va. 672, 146 S.E. 726, 727 (1929).

3. Extrajudicial Statements of a Spouse

For the purposes of the spousal testimony privilege codified at West Virginia Code § 57-3-3, an extrajudicial statement made by a spouse, which is admissible under an exception to the hearsay rule, is not testimony within the meaning of the statutes. *State v. Bailey*, 179 W. Va. 1, 3-4, 365 S.E.2d 46, 48-49 (1987). Thus, out-of-court statements which are adverse to the defendant spouse can be admitted even when the

spousal testimony privilege has been properly invoked if they are admissible under the evidentiary rules governing hearsay. *Id.*

In *Bailey*, the defendant was charged with first degree murder. The decedent was Mr. Bailey's wife's first husband. Prior to marrying Mr. Bailey, she gave a statement to police, in which she indicated that the defendant had threatened the decedent prior to shooting him. At trial, the defendant asserted the spousal testimony privilege, which prevented his wife from testifying. However, over the objection of the defendant, the trial court allowed the State to introduce the wife's statement to police pursuant to Rule 803(24) of the West Virginia Rules of Evidence.[59] The Supreme Court found that West Virginia Code § 57-3-3 only applies to *adverse testimony*, the Court indicated that the hearsay statements were not testimony within the meaning of the statute. *Bailey*, 179 W. Va. at 3-4, 365 S.E.2d at 48-49. Thus, the defendant's wife's statement to the police concerning threats made about the decedent was not subject to the spousal testimony privilege.

In *State v. Bradshaw*, 193 W. Va. 519, 540, 457 S.E.2d 456, 477 (1995), the Supreme Court reaffirmed *Bailey*. The *Bradshaw* Court held that "evidence derived from statements by a spouse to the police during the course of an investigation do not fall within the marital privilege exclusion." However, the Supreme Court indicated that if the facts had indicated that the witness spouse was coerced to reveal incriminating information "about the defendant spouse, a different conclusion may be reached." *Bradshaw*, 193 W. Va. at 540, 457 S.E.2d at 477.

It should be noted that while the statements given to the police in *Bradshaw* and *Bailey* may not be testimony within the meaning of West Virginia Code § 57-3-3, these types of statements may be considered testimonial statements under a Confrontation Clause analysis. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004); and *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006). According to *Crawford* and *Mechling*, the Confrontation Clause prohibits the admission of testimonial statements of a declarant unless the witness is unavailable and the accused had a prior opportunity to cross-examine the witness. Statements given to law enforcement officers during an interrogation that can "reasonably be expected to be used prosecutorially" are considered testimonial statements. *Crawford*, 541 U.S. at 51-52, 124 S. Ct. at 1364.

[59] As discussed *supra*, former Rule 803(24) was transferred to Rule 807 in 2014.

B. Clergy–Communicant Privilege

The clergy-communicant privilege, which is codified at West Virginia Code § 57-3-9 provides in relevant part:

> No priest, nun, rabbi, duly accredited Christian Science practitioner or member of the clergy authorized to celebrate the rites of marriage in this state pursuant to the provisions of article two, chapter forty-eight of this code shall be compelled to testify in any criminal or grand jury proceedings or in any domestic relations action in any court of this state: (1) With respect to any confession or communication, made to such person, in his or her professional capacity in the course of discipline enjoined by the church or other religious body to which he or she belongs, without the consent of the person making such confession or communication; or . . .

Communications between an authorized member of the clergy and an individual are privileged if the following factors are present:

> A communication will be privileged, in accordance with W. Va. Code, 57-3-9, if four tests are met: (1) the communication must be made to a clergyman; (2) the communication may be in the form of a confidential confession or a communication; (3) the confession or communication must be made to the clergyman in his professional capacity; and (4) the communication must have been made in the course of discipline enjoined by the rules of practice of the clergyman's denomination. Syl. Pt. 3, *State v. Potter*, 197 W. Va. 734, 478 S.E.2d 742 (1996); Syl. Pt. 2, *State v. Lowery*, 222 W. Va. 284, 664 S.E.2d 169 (2008).

The term communication is not limited to statements that are incriminatory to the defendant. *Potter*, 197 W. Va. at 755, 478 S.E.2d at 759 n. 22.

VII. Expert Testimony

A. Generally

Article VII of the West Virginia Rules of Evidence addresses the use of expert testimony in a criminal trial. "The admissibility of testimony

by an expert is a matter within the sound discretion of the trial court[.]" Syl. Pt. 6, in part, *Helmick v. Potomac Edison Co.,* 185 W. Va. 269, 406 S.E.2d 700 (1991). Generally, issues regarding the use of expert testimony should be settled prior to trial, and outside the presence of the jury. *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995).

Rule 702 controls the admission of expert testimony; it provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. W. Va. R. Evid. 702(a).

Subsection (b) of Rule 702 governs the admissibility of expert testimony when the testimony is based on a novel scientific theory. It states that:

> In addition to the requirements in subsection (a), expert testimony based on a novel scientific theory, principle, methodology, or procedure is admissible only if:
> (1) the testimony is based on sufficient facts or data;
> (2) the testimony is the product of reliable principles and methods; and
> (3) the expert has reliably applied the principles and methods to the facts of the case. W. Va. R. Evid. 702(b).

As discussed below, the Supreme Court has adopted two standards for evaluating the admission of expert testimony under Rule 702. The Court makes a distinction between testimony that is scientific, and testimony that is technical or specialized. *Watson v. INCO Alloys Int'l, Inc.*, 209 W. Va. 234, 545 S.E.2d 294 (2001). This distinction is important in sex offense cases, because expert testimony may relate to scientific evidence, such as DNA, or the testimony may be specialized and relate to the psychological profile of a victim.

Rule 703 addresses the bases of expert opinion testimony, providing:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in

> the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect. W. Va. R. Evid. 703.

Rule 704 concerns an expert's testimony on the ultimate issue of a case, providing:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact. W. Va. R. Evid. 704.

In criminal cases generally, and sexual offense cases particularly, the expert may not infer or opine whether they believe the defendant is guilty because this invades the province of the jury. Syl. Pt. 7, *State v. Edward Charles L.,* 183 W. Va. 641, 398 S.E.2d 123 (1990). Similarly, an expert in a sexual offense case may not state whether they personally believe the victim. Syl. Pt. 3, *State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771 (1995).

This rule is liberally construed with regard to what experts may rely on to form their opinion. In addition to personal observations and an investigation, an expert may rely on the reports and observations of others, and he or she may rely on hearsay statements of the victim or other declarant, as long as the information is information reasonably relied upon by others in the field. Syl. Pt. 2, *Mayhorn v. Logan Medical Foundation*, 193 W. Va. 42, 454 S.E.2d 87 (1994).

Under Rule 705,[60] an expert is not required to disclose the basis of his or her opinion, unless directed to do so by the court or asked on cross-examination. W. Va. R. Evid. 705; *State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771. If questioned by the court or counsel, an expert may explain in detail what facts and data form the basis for his or her opinion. *State v. Riley*, 201 W. Va. 708, 500 S.E.2d 524 (1997). For example, an expert may recount out-of-court statements made by a victim that describe abuse

[60] Rule 705 of the West Virginia Rules of Evidence states: "Unless the court orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination."

or an assault, provided the jury is instructed on the purpose for which they are admitted. 201 W. Va. at 714, 500 S.E.2d at 530.

Finally, Rule 706 provides trial courts with the authority to appoint an expert *sua sponte*, in addition to any expert retained by a party. This rule provides in relevant part:

> (a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he or she consents to act. A witness so appointed shall be informed of his or her duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his or her findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.
>
> (c) Disclosure of Appointment. The jury shall in no way be advised that the court appointed the witness, absent an agreement to so advise by all parties.
> (d) Parties' Experts of Own Selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection. W. Va. R. Evid. 706(a), (c), and (d).

Obviously, each party has the right to question a court appointed expert and have access to their findings.

B. *Daubert/Wilt* Analysis and Scientific Testimony and Evidence

1. Analytical Framework

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), the United States Supreme Court established the standard for admitting expert testimony on scientific methodology, scientific reasoning, and scientific evidence under Federal Rule of Evidence 702.[61] The *Daubert* Court found that trial courts must perform a gate-keeping role under Federal Rule of Evidence 702 to ensure that all scientific testimony and evidence admitted at trial is both reliable and relevant. In *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), the West Virginia Supreme Court adopted the *Daubert* analysis with regard to scientific testimony and scientific evidence admitted under West Virginia Rule of Evidence 702. In *Wilt* and subsequent cases, the Supreme Court has provided an analytical framework for trial courts to follow.

Under *Wilt* and its progeny, there are two preliminary questions a trial court must answer before admitting scientific testimony. First, the trial court must determine whether the expert's testimony is based on scientific methodology and reasoning. It is the basis of the expert's testimony that must be analyzed to determine whether it is scientific in nature. If it is not, the trial court is not required to engage in the *Daubert/Wilt* analysis and may evaluate the testimony under the general 702 standard. *Gentry v. Mangum,* 195 W. Va. 512, 466 S.E.2d 171 (1995); *Watson v. INCO Alloys Int'l, Inc.*, 209 W. Va. 234, 545 S.E.2d 294 (2001).[62]

If the testimony is based on scientific methodology or reasoning, the trial court must determine whether the individual is qualified as an expert. *Gentry,* 195 W. Va. at 524, 466 S.E.2d at 183 n.16. The following test should be used:

> First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify. Syl. Pt. 5, in part, *Gentry*, 195 W. Va. 512, 466 S.E.2d 171.

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[61] In *Daubert*, the United States Supreme Court abandoned the longstanding *Frye* or general acceptance test. Under the Court's current analysis for admitting scientific testimony, general acceptance is a factor going to reliability.

[62] In this regard, West Virginia departs from the analyses used in federal courts. In *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999), the United States Supreme Court held that the *Daubert* analysis should be used for all proffers of expert testimony. See also Robin Jean Davis, *Admitting Expert Testimony in Federal Courts and Its Impact on West Virginia Jurisprudence*, 104 W. Va. L. Rev. 485 (2002).

This inquiry should be liberally construed. *Gentry*, 195 W. Va. at 525, 466 S.E.2d at 184.

If the proffered expert testimony is scientific and the individual is qualified as an expert, the trial court must evaluate the relevancy and reliability of the testimony. Generally, this should be done prior to trial in accord with the following two-part analysis:

> First, the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the circuit court must ensure that the scientific testimony is relevant to the task at hand. Syl. Pt. 4, in part, *Gentry,* 195 W. Va. 512, 466 S.E.2d 171.

The term "good science" denotes the reliability and validity of the scientific methodology and reasoning employed by the expert. A trial court can evaluate reliability by assessing the proffered testimony under the following factors:

> (a) whether the scientific theory and its conclusions can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community. Syl. Pt. 2, in part, *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993).

The second part of the analysis addresses the relevancy of the expert's testimony. Within the context of Rule 702, the expert's testimony is relevant if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591, 113 S. Ct. 2786, 2795 (1993). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.* (citation omitted).

The case of *State v. Wakefield*, 236 W. Va. 445, 781 S.E.2d 222 (2015), illustrates the required analysis for the admission of expert testimony. In this case involving an alleged drug-facilitated sexual assault, the circuit court found that two witnesses were qualified to render expert opinions on Gamma-Hydroxybutyrate (GHB) intoxication. As noted in the opinion, the victim was examined by a forensic nurse examiner

approximately 16 to 20 hours after the alleged assault. The first expert, Dr. Adams, had a Ph.D. in pharmacology and toxicology, and she testified that she could not conclude, to a degree of medical certainty, that GHB had been administered during the sexual assault. Although some GHB was detected in the victim's urine, it was consistent with the amount of the substance found in the urine of persons who had not received any GHB.

The second expert, Trinka Porrata, was a former Los Angeles police officer who trained police officers on drug-facilitated sexual assaults and also had significant experience involving GHB. Ms. Porrata testified that, in her opinion, GHB had been administered to the victim because of the victim's symptoms -- the victim's out-of-body sensations, her inability to move and to speak, her pristine memory loss and excessive vomiting. The lack of detectable amounts of GHB led Ms. Porrata to conclude that GHB had been administered, as opposed to other drugs which would have still been detectable.

On appeal, the defendant argued that the circuit court erred in qualifying Ms. Porrata as an expert. Affirming the circuit court ruling on this issue, the Court noted that Ms. Porrata had authored several peer-reviewed articles about GHB fatalities, had trained police officers on drug-facilitated sexual assaults, and had authored legislation associated with sexual assaults. The Court concluded, therefore, that Ms. Porrata met the factors established by Syllabus Point 5 of *Gentry*.

With regard to the admission of Ms. Porrata's testimony, the Court observed that:

> [A]ssessing "reliability" is a shorthand term of art for assessing whether the testimony is to a reasonable degree based on the use of knowledge and procedures that have been arrived at using the methods of science -- rather than being based on irrational and intuitive feelings, guesses, or speculation. If the former is the case, then the jury may (or may not, in its sole discretion) "rely upon" the testimony. *Wakefield*, 236 W. Va. 445, 781 S.E.2d 222 (quoting *In re Flood Litigation*, 222 W. Va. 574, 582, 668 S.E.2d 203, 211 n.5 (2008)).

With regard to Ms. Porrata's testimony, the Court noted that double blind testing supported her testimony. In addition, the Court noted that the scientific theory was generally accepted in the scientific community and was taught to law enforcement. For that reason, the Court found that, based on the standard set forth above, the circuit court did not abuse its

discretion when it allowed Ms. Porrata to testify about her opinion as to whether the alleged sexual assault was facilitated by GHB.

In his dissenting opinion, Justice Ketchum, however, asserted that Ms. Porrata should not have been qualified as an expert because she was not trained in forensic toxicology, nor had she published any peer-reviewed articles on the specific issue of whether a victim had ingested GHB. Rather, he noted that her articles addressed GHB deaths. He went on to note that she "indicated that her testimony was outside the scope of what is established and accepted within the scientific community." *Wakefield*, 236 W. Va. at 466, 781 S.E.2d at 243 (Ketchum, J., dissenting). He, therefore, concluded that "the scientific community has not had the opportunity to scrutinize Ms. Porrata's theories, determine their potential rate of error or accept or decline them." *Id.*

In another case addressing the qualification of a witness as an expert, the Supreme Court held that the trial court erred when it allowed the investigating officer to testify as an expert. *State v. Varlas*, 237 W. Va. 399, 787 S.E.2d 670 (2016). Specifically, the trial court permitted the investigating officer to testify as an expert about the general reluctance of victims to report sexual assaults. The basis for the officer's expertise was what he learned at training conducted by the West Virginia State Police and his investigation of one other sexual assault case. The Supreme Court noted that this testimony was "not strictly necessary" to reverse the conviction, but addressed it because this issue would likely recur at a retrial. The primary basis for the reversal was the exclusion of a series of 29 text messages sent by the victim's boyfriend that encouraged her to report the assault.

2. *Taking Judicial Notice of Certain Scientific Testing and Reasoning*

A lengthy *Daubert/Wilt* analysis will not be required every time scientific evidence or expert testimony relating to scientific methodology or scientific knowledge is offered. In many cases, a trial court may take judicial notice of the validity of the scientific principles underlying the expert's opinion pursuant to Rule 201. *Gentry*, 195 W. Va. 512, 522, 466 S.E.2d 171, 181. For instance, a trial court may take judicial notice of the following without resorting to a lengthy *in limine* hearing: a) DNA analysis (*State v. Woodall*, 182 W. Va. 15, 385 S.E.2d 253 (1989)); b) bite mark evidence as a means of identification (*State v. Armstrong*, 179 W. Va. 435, 369 S.E.2d 870 (1988)); c) blood testing (*State ex rel. Oldaker v. Fury*, 173 W. Va. 428, 317 S.E.2d 513 (1984)); and d) finger print and ballistic tests (*State v. Barker*, 179 W. Va. 194, 366 S.E.2d 642 (1988)).

C. The Rule 702 Analysis and Specialized or Technical Expert Testimony

When an expert's testimony is not derived from scientific knowledge, a trial court is not required to perform the *Daubert/Wilt* analysis. Rather, a general Rule 702 analysis regarding the expert's qualifications and the relevancy of their testimony should be conducted. *Gentry*, 195 W. Va. 512, 466 S.E.2d 171. Under Rule 702, the proponent must establish: 1) the witness is an expert; 2) the witness's testimony will consist of scientific, technical or specialized knowledge; and 3) the testimony will assist the trier of fact. *Gentry*, 195 W. Va. at 524, 466 S.E.2d at 183; *Watson v. INCO Alloys Int'l, Inc.*, 209 W. Va. 234, 545 S.E.2d 294, 302 (2001). The guiding principle under the Rule 702 analysis is one of relevancy -- will the expert's testimony assist the trier of fact to resolve the issue in contention. *Gentry, supra.*

In determining who qualifies as an expert, a trial court should conduct the two-step inquiry identified in Syllabus Point 5 of *Gentry, supra.* With regard to the first factor, the proffered expert's experience, training, or education does not have to be in "complete congruence" with the issue the proponent seeks to prove. *State v. Wood*, 194 W. Va. 525, 535, 460 S.E.2d 771, 781 (1995) (citation omitted). Rather, to qualify as an expert, the witness's experience or training should confer "special knowledge not shared by mankind in general." *Wood,* 194 W. Va. at 534, 460 S.E.2d at 780 (quoting Syl. Pt. 2, in part, *State v. Baker*, 180 W. Va. 233, 376 S.E.2d 127 (1988)).

In *Wood*, the defendant was charged with the first degree sexual assault of his stepdaughter. At trial, he objected to a social worker being qualified an as expert because she was not a psychiatrist or psychologist. The Supreme Court affirmed the trial court finding that specific educational requirements are not necessary. 194 W. Va. at 535, 460 S.E.2d at 781. In *Wood*, the proposed expert was a licensed social worker who had worked with abused children for nine years. Therefore, she was qualified to state whether the child had characteristics consistent with a child who has been sexually abused.

In the second part of the expert qualification inquiry, the trial court must determine whether the witness's area of expertise covers the opinion they seek to render. *Gentry, supra.* This can be established by examining the witness's education, training, and practical experience. *Baker*, 180 W. Va. 233, 376 S.E.2d 127. The primary or exclusive focus of the witness's work does not have to be on the topic in issue. *Sharon B.W. v. George B.W.*, 203 W. Va. 300, 507 S.E.2d 401 (1998). For example, in *Sharon B.W.*, the father sought to admit expert testimony that his son had been sexually abused. The proposed expert was a clinical psychologist who

had worked with children for at least 15 years; however, the focus of his work was not on sexually abused children. The circuit court found that he was not qualified to give expert testimony on sexually abused children. The Supreme Court disagreed, and found that the failure to qualify the psychologist was error. The doctor's training and experience qualified him to testify about the opinion he formed after interviewing the child. *Sharon B.W.*, 203 W. Va. at 304, 507 S.E.2d at 405. The error, however, was not considered reversible.

Finally, as discussed above the expert's testimony must be relevant. It must provide the trier of fact with information they would not ordinarily possess; information that will help them resolve a matter that is in issue in the case. For example, in a sex offense case, an expert may explain characteristics that are commonly present in children who have been sexually abused. This may elucidate behavior that the victim has exhibited that the trier may not normally associate with the trauma of sexual abuse or assault.

D. Expert Testimony in Sex Offense Cases

Expert testimony is routinely used in sexual offense cases and generally will be focused in one of two areas. An expert may be called to interpret test results of scientific evidence taken from the scene or the victim.[63] And an expert may be called to testify about the psychological profile of the victim or the accused.[64]

In sexual offense cases involving children, expert testimony may be used to explain the behavior or mental state of a child victim. The standard for admitting expert testimony in these cases is as follows:

> Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether

[63] As stated above, trial courts will often be able to take judicial notice of the methods used in analyzing the evidence, e.g. DNA evidence. If judicial notice is taken of the expert's methods then the issue will be whether the witness is qualified as an expert.

[64] For this type of testimony, the trial court should conduct the general 702 analysis.

> the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury. Syl. Pt. 7, *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990); Syl. Pt. 3, *State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771 (1995); and Syl. Pt. 4, *State v. James B.,* 204 W. Va. 48, 511 S.E.2d 459 (1998).[65]

There is not a reported or prescribed list of what constitutes objective findings. The pertinent inquiry on this matter is whether the treating professional followed the standard or accepted practice for interviewing and treating victims of sexual abuse and assault. A review of the relevant case law indicates that experts in this field arrive at their finding by interviewing the victim, talking to parents or caregivers, reviewing medical and school records, and observing the victim's behavior. Unlike a treating professional, an expert of this nature may not testify as to whether he or she believes the child or as to whether the defendant committed the sexual assault. *Id.*

With regard to criminal defendants, the Court has held that the State may not offer expert testimony that the defendant has the character trait of a pedophile. *Ballard v. Hunt*, 235 W. Va. 100, 772 S.E.2d 199 (2015). In this *habeas corpus* case, a defendant challenged his convictions for first degree sexual abuse and sexual abuse by a custodian based upon expert testimony that the State had presented at trial. Apparently, the defendant had a prior conviction for the sexual abuse of his nine-year old stepsister for which he had been imprisoned.

During the defendant's imprisonment, he received counseling, and this counselor's testimony was presented at the trial for a subsequent sex offense against an 11-year-old boy. The counselor was qualified as an expert in sex offender treatment and counseling, but had not completed a master's degree in psychology. His qualifications for evaluating sex offenders was based primarily on his experience as a counselor for sex offenders in a correctional facility.

At trial, the counselor testified that there was a diagnostic impression on file at the prison that indicated that the defendant was a pedophile. The counselor also testified that the defendant had participated only in a minimal amount of counseling while imprisoned for the earlier sex offense. In addition, the prosecutor, in his opening statement referred to the defendant as a pedophile. In his closing argument, the prosecutor referred to the minimal counseling and

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[65] The Court's holding in *Edward Charles L*. is not limited to those individuals trained as a psychiatrist or psychologist.

diagnostic impression that the defendant was a pedophile. The admission of this evidence and the statements formed the basis for the defendant's challenge to his conviction in the *habeas corpus* case. After the circuit court conducted an omnibus hearing, it found that the testimony of the counselor and the statements of the prosecutor referring to the defendant as a pedophile constituted inadmissible character evidence and reversed the defendant's conviction. The warden and the Commissioner of the West Virginia Division of Corrections and Rehabilitation appealed the ruling to the Supreme Court.

On appeal, the Supreme Court first discussed the lustful disposition exception found in Rule 404(b) and established by *Edward Charles L.* and found that the defendant's prior sex offense conviction had been properly admitted under Rule 404(b). Turning to the expert testimony, the Court noted that the admission of expert testimony falls within the trial court's discretion. Reviewing case law from other states, the Court concluded that evidence about or reference to a defendant as a "pedophile" is improper, but is subject to a harmless error analysis. *Hunt*, 235 W. Va. at 105, 772 S.E.2d at 204. In a syllabus point, the Court held that:

> The opinion evidence of an expert witness proffered by the State in a criminal prosecution, merely to show that the accused has the character trait of a pedophile under the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, is inadmissible pursuant to Rule 404(a) of the West Virginia Rules of Evidence to prove that on a particular occasion the accused acted in accordance with that character trait. Syl. Pt. 2, *Hunt*, 235 W. Va. 100, 772 S.E.2d 199.

Applying the standard to the instant case, the Court concluded that the admission of the evidence and the prosecutor's statements were erroneous. Despite this error, the Court reviewed the other evidence presented at trial and concluded that it "overwhelmingly" established the defendant's guilt of the offense against the 11-year-old boy. For that reason, the Court concluded that the admission of the evidence and statements constituted harmless error.

In a separate opinion in which he concurred in part and dissented in part, Justice Loughry, and Justice Workman who joined in the separate opinion, distinguished impermissible character testimony from expert evidence diagnosing a defendant of pedophilic disorder. He, then, asserted that the admission of this type of expert testimony should be

analyzed under Rules 702 through 704 instead of evaluating it as character evidence under Rule 404(a). He further indicated that this type of evidence would be subject to the balancing test found in Rule 403.

VIII. Authentication of Social Media Text Messages

In a sexual assault case, a circuit court admitted Facebook Messenger text messages after a witness testified that the messages were a conversation between herself and her father. *State v. Benny W.*, 242 W. Va. 618, 837 S.E.2d 679 (2019). On appeal, the defendant alleged error and argued that the text messages should have been authenticated as photographs and that the circuit court should have followed the procedures set forth in *State v. Palmer*, No. 14-0862, 2016 W. Va. Lexis 445, 2016 WL 3176472 (W. Va. Supreme Court, June 3, 2016) (memorandum decision). The Supreme Court, however, found that the text messages had been properly authenticated by the witness as a conversation with the defendant and affirmed the circuit court ruling. In a syllabus point, the Supreme Court provided guidance on the authentication of text messages found on social media:

> Under Rule 901(a) of the West Virginia Rules of Evidence, social media text messages may be authenticated in numerous ways including, for example, by a witness who was a party to sending or receiving the text messages, or through circumstantial evidence showing distinctive characteristics that link the sender to the text messages. Syl. Pt. 2, *Benny W.*, *supra.*

Chapter 7

SENTENCING, POST-CONVICTION PROCEEDINGS, AND POST-CONVICTION SUPERVISION

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I. Mandatory HIV-Related Testing

When an individual is charged with or convicted of specific sexual offenses, the court is required to order the individual to undergo HIV-related testing. W. Va. Code § 16-3C-2(h). The following offenses are subject to the mandatory testing requirements: prostitution, sexual abuse, sexual assault, incest, or sexual molestation.[1]

The applicable regulations governing mandatory HIV testing indicate that the testing applies both to adults and to juveniles who are charged, convicted, or adjudicated delinquent of specified sexual offenses. W. Va. C.S.R. Title 64, Series 64, Section 4.3.b. In addition, the applicable statute defines the term "convicted" to include an "adjudicated juvenile offender." W. Va. Code § 16-3C-1(d). Therefore, the mandatory testing requirements apply both to adults and to juveniles.

The applicable regulations have established a procedure for the testing of a defendant or juvenile respondent charged with one of the specified offenses. W. Va. C.S.R. Title 64, Series 64, Section 4.3.b. The court with jurisdiction over the charged offense should require the defendant or juvenile respondent to undergo the testing within 48 hours of the initial appearance. W. Va. C.S.R. § 64-64-4.3.b.1. The court may delay the testing if the defendant or juvenile respondent requests a hearing, but the testing cannot be delayed beyond 48 hours of the issuance of an indictment or information for a defendant or the filing of a juvenile petition. W. Va. C.S.R. § 64-64-4.3.b.1.A. If the defendant or juvenile respondent is in custody, then the medical staff at the facility should perform the testing. If the defendant or juvenile respondent is released, then the designated local health board should conduct the testing. W. Va. Code § 16-3C-2(h)(3).

If a defendant is convicted or a juvenile respondent is adjudicated of any of the specified offenses, he or she is required to undergo testing immediately. The court is required to revoke any pretrial release order and may not otherwise release the defendant or juvenile respondent until the testing and counseling is completed. W. Va. Code §§ 16-3C-2(h)(7); 16-3C-1(d).

When the testing is completed, a copy of the test results must be transmitted to the court and must be maintained in the court file as a confidential record. W. Va. Code § 16-3C-2(f)(6); W. Va. C.S.R. § 64-64-4.3.b.2. In turn, the clerk should provide a copy of the test results to counsel for the defendant or juvenile and the prosecuting attorney. The

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[1] There is no West Virginia crime specifically denominated as "sexual molestation."

prosecutor is the official responsible to communicate the test results to the victim. W. Va. Code § 16-3C-3(a)(2).

If the defendant is sentenced to a jail or prison term, the court must order that a copy of the test results be provided to the Division of Corrections and Rehabilitation. W. Va. Code § 16-3C-2(h)(7). In the case of a juvenile, if custody is committed to Bureau of Juvenile Services, disclosure to the agency should be made pursuant to W. Va. C.S.R. § 64-64-4.3.e. If the test results are negative, the court, upon the State's request, may require the defendant to undergo further testing. W. Va. Code § 16-3C-2(h)(10). Any testing should comply with guidelines established by the United States Public Health Service. Unless a defendant is indigent, the court is required to order the defendant to pay restitution to the State for the costs of the testing and counseling for the defendant and the victim. W. Va. Code § 16-3C-2(h)(13).

II. DNA Sampling

A. Applicable Offenses

Persons convicted of certain offenses, as enumerated in West Virginia Code § 15-2B-6, including the following sexual offenses, are subject to mandatory DNA sampling:

1. § 61-8-12 (Incest);
2. Chapter 61, Article 8B (Sexual Offenses);
3. Attempt of any Chapter 61, Article 8B offense; and
4. Chapter 61, Article 8D (Child Abuse Offenses).[2]

B. Procedures for Withdrawal of Blood Sample

Upon incarceration following conviction for an applicable offense, the Division of Corrections and Rehabilitation or Regional Jail facility where the defendant is held is responsible for drawing and submitting the blood sample to the State Police. When a defendant is not incarcerated following conviction, the sheriff is responsible for transporting the defendant and ensuring that the DNA sample is taken. DNA samples may

[2] This requirement would also apply to juveniles convicted of a covered offense after transfer to adult jurisdiction. West Virginia Code § 15-2B-6 provides that DNA sampling is required for: "(a) Any person convicted of an offense described in section one, four, seven, nine, nine-a (when that offense constitutes a felony), ten, ten-a, ten-b, twelve, fourteen or fourteen-a, article two, chapter sixty-one of this code or section twelve, article eight of said chapter (when that offense constitutes a felony), shall provide a DNA sample to be used for DNA analysis as described in this article. Further, any person convicted of any offense described in article eight-b or eight-d of said chapter shall provide a DNA sample to be used for DNA analysis as described in this article."

be collected at a prison or jail or a local hospital unit. W. Va. Code § 15-2B-9(a); see also W. Va. C.S.R., Title 81, Series 9 - W. Va. DNA Databank.

C. Procedure Upon Refusal to Comply

If a convicted defendant refuses to provide law enforcement or a Division of Corrections and Rehabilitation official the DNA sample as mandated by statute, the State must seek relief in the circuit court. Upon a finding of failure to comply with the statutory requirement, the court shall order the defendant to submit to DNA testing. W. Va. Code § 15-2B-6(f).

III. Post-Conviction Bail

Except in certain instances, a defendant may be admitted to bail after he or she has been convicted pending an appeal. W. Va. Code § 62-1C-1(b). Post-conviction bail may not be granted when the offense is punishable by life imprisonment. When the offense was committed (or attempted to be committed) with a firearm or other deadly weapon, the defendant may not be admitted to bail pending an appeal. Further, a defendant may not be admitted to bail pending an appeal when the offense involved violence to a person.

With regard to sexual offenses, the West Virginia Supreme Court held that: "The offense of first degree sexual assault under W. Va. Code, 61-8B-3(a)(2), involves violence to a person and is, therefore, subject to the provisions of W. Va. Code, 62-1C-1(b), with regard to post-conviction bail." Syllabus, *State ex rel. Spaulding v. Watt*, 188 W. Va. 124, 423 S.E.2d 217 (1992). The offense in *Spaulding* was not a forcible rape. Rather, it involved a defendant who sexually assaulted his five-year-old stepdaughter and seven-year-old stepson, circumstances in which the victims were legally incapable of consent. The defendant argued that the offenses did not involve violence to a person and he should have been granted post-conviction bail because the elements of the offense did not involve forcible compulsion. However, the Supreme Court rejected this argument and reasoned that the term "violence" was not limited to "physical violence." The Court expressly stated that: "There can be no dispute that even in the absence of any significant physical trauma, sexual assaults on young children result in severe emotional and psychological harm." 188 W. Va. at 126, 423 S.E.2d at 219. The decision in *Spaulding* was limited to cases involving first degree sexual assaults; however, the Court's reasoning would likely apply to other sexual offenses involving victims who are legally incapable of consent to sexual activity. See e.g. *State v. J.E.*, 238 W. Va. 543, 796 S.E.2d 880 (2017); *State v. George K.*, 233 W. Va. 698, 760 S.E.2d 512 (2014).

In cases in which post-conviction bail may be allowed, the trial court should consider whether it is likely that the defendant will prevail upon the appeal. W. Va. Code § 62-1C-1(b). This factor is not, however, the only consideration. Syl. Pt. 4, *State v. Steele*, 173 W. Va. 248, 314 S.E.2d 412 (1984). The court may also consider:

> The pendency of other charges against the defendant, the amount of the individual's pretrial bond, the regularity of his preconviction appearances, the severity of the sentence imposed, and the likelihood of meritous grounds for an appeal. Also pertinent are the defendant's community ties, his age, and his health. Syl. Pt. 5, *Steele, supra*; See *State ex rel. Bennett v. Whyte*, 163 W. Va. 522, 529, 258 S.E.2d 123, 127 (1979).

Since the denial of post-conviction bail may be reviewed by summary petition to the West Virginia Supreme Court, the trial court should conduct a hearing and develop a factual record. *Steele*, 173 W. Va. at 251, 314 S.E.2d at 414-15; *State v. Gary*, 162 W. Va. 136, 247 S.E.2d 420 (1978). A record should be developed both for cases in which post-conviction bail is discretionary and cases in which it is barred by West Virginia Code § 62-1C-1(b). The development of a record allows the Supreme Court "to perform a meaningful review under W. Va. Code § 62-1C-1." *Steele*, 173 W. Va. at 251, 314 S.E.2d at 414.

IV. Presentence Investigations and Evaluations

A. Presentence Investigation and Report

Unless excused by the court, a probation officer is required to conduct a presentence investigation and prepare a report. W. Va. R. Crim. P. 32; W. Va. Code § 62-12-7. If a defendant has been convicted of a felony or any offense established by Articles 8B or 8D of Chapter 61 and the victim is a child, the defendant may not be released on probation until the trial court has considered the report. W. Va. Code § 62-12-7(b). When a defendant has been convicted of offenses established by Articles 8B or 8D of Chapter 61 or of incest (W. Va. Code § 61-8-12) and the victim is a child, a presentence report may include a statement from the child's treating therapist, psychologist, or physician. A presentence report, however, is unnecessary if a defendant is not eligible for probation pursuant to West Virginia Code § 62-12-2, the statute that outlines eligibility guidelines for probation. See *State v. Bruffey*, 207 W. Va. 267, 272, 531 S.E.2d 332, 337 (2000). See Section VIII for a discussion of statutory bars to probation in sex offense cases.

B. Evaluations in Sexual Offense Cases

If a defendant has been adjudicated guilty of certain sexual offenses, he or she may not be eligible for probation unless he or she has undergone a "physical, mental and psychiatric study and diagnosis." W. Va. Code § 62-12-2(e). The offenses subject to this requirement include: 1) incest (W. Va. Code § 61-8-12); 2) offenses established by Articles 8B (Sexual Offenses) or 8C (Filming of Sexually Explicit Conduct of Minors); and 3) West Virginia Code § 61-8D-5 (Sexual Abuse by a Parent, Guardian, Custodian or Person in Position of Trust to a Child). This study is commonly referred to as a "sex offender evaluation." The evaluation must prescribe a treatment plan that "requires active participation in sexual abuse counseling at a mental health facility or through some other approved program." W. Va. Code § 62-12-2(e).

Although a person who has been convicted of a sexual offense must undergo a sex offender evaluation to be considered for probation, West Virginia Code § 62-12-2(e) provides:

> That nothing disclosed by the person during such study or diagnosis shall be made available to any law-enforcement agency, or other party without that person's consent, or admissible in any court of this state, unless such information disclosed shall indicate the intention or plans of the probationer to do harm to any person, animal, institution or property, in which case such information may be released only to such persons as might be necessary for protection of the said person, animal, institution or property.

This provision, therefore, establishes conditions discussed below on the disclosure of any information revealed during the evaluation and subsequent therapy.

As an initial condition, this provision requires the consent of the offender before a therapist may disclose any information obtained during the evaluation or therapy. In addition to the requirement established by West Virginia Code § 62-12-2(e), a HIPAA regulation (45 C.F.R. § 164.508) and provisions in West Virginia Code § 27-3-2 also require a sex offender therapist to obtain consent from the offender before disclosing information from a sex offender evaluation or therapy. However, there is no requirement to obtain consent if the offender shares with the therapist the intention or plans of future harm to persons, animals, institutions, or property. W. Va. Code § 62-12-2(e). This statutory exception to the confidentiality of mental health records is consistent with the judicially

recognized duty of a therapist to report threats or plans of future harm. See *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 131 Cal. Rptr. 14 (1976) (superseded by statute as recognized by *Regents of Univ. of California v. Superior Court*, 29 Cal. App. 5th 810, 240 Cal. Rptr. 3d 675 (2018)); *Davis v. Monsanto Co.*, 627 F. Supp. 418, 421 (S.D.W. Va. 1986).

As a secondary condition, this statutory subsection expressly states that, with or without consent, any information disclosed is not "admissible in any court of this state." W. Va. Code § 62-12-2(e). Although the West Virginia Supreme Court has not interpreted this provision, it suggests that the Legislature has granted use immunity regarding **past** misconduct that could otherwise serve as a basis for new criminal charges or probation revocation charges. The language in this statutory subsection is fairly analogous to the statutorily granted use immunity barring the admission, in related criminal proceedings, of any incriminating information obtained during the course of court-ordered psychological or psychiatric examinations and treatment of adults in civil child abuse and neglect proceedings. See W. Va. Code § 49-4-603**;** *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002).

One issue that commonly arises as a result of sex offender evaluations is whether a person would be amenable to treatment, including outpatient treatment, because he or she has not acknowledged his or her culpability with regard to the crime. As noted by the Supreme Court, "[m]any treatment programs require participants to acknowledge and accept responsibility for their behaviors as part of the treatment process and a distinction must be made between guilt as a matter of law and guilt as an acknowledgement of responsibility for therapeutic purposes." *State v. Shrader*, 234 W. Va. 381, 390, 765 S.E.2d 270, 279 (2014). In a case in which a juvenile was adjudicated of second degree sexual assault and committed to the Industrial Home for Youth, the Court discussed the sex offender evaluation that indicated that the juvenile might not be receptive to treatment because he was unwilling to accept his conviction. *State v. Kirk N.*, 214 W. Va. 730, 591 S.E.2d 288 (2003).[3] On the advice of counsel, the juvenile had declined to discuss the facts of the case with the evaluator. At the hearing, the evaluator testified that the juvenile might be amenable to treatment, but that she had no knowledge regarding the way he perceived the circumstances. The Court concluded that this factor, in addition to others, supported the disposition imposed by the trial court.

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[3] The Court also discussed other reasons that supported the juvenile's disposition, such as the seriousness of the offense, a lack of appreciation for the court's authority, and the parents' failure to adequately supervise him. 214 W. Va. at 742, 591 S.E.2d at 300.

For a case that involved a defendant who denied the facts supporting his conviction at sentencing and later admitted the facts on a motion for reconsideration, see *State v. Goff*, 203 W. Va. 516, 509 S.E.2d 557 (1998). In *Goff*, the trial court found as one basis to deny the motion for reconsideration, that the original sentence was correct because the defendant had only admitted responsibility for the offense after he was sentenced to prison. See also *Shrader*, 234 W. Va. 381, 765 S.E.2d 270 for a case addressing whether a defendant had violated the terms of his plea agreement when issues arose as to whether he had admitted the underlying acts during therapy.

Another issue that may arise is the appropriateness of a treatment program. In a case involving sexual abuse convictions, a defendant argued that he should have been released to a treatment program pursuant to his plea agreement. *State v. Wolfe*, 201 W. Va. 760, 500 S.E.2d 873 (1997).[4] The circuit court denied his request because the treatment program was not a recognized sex offender treatment program, but rather an alcohol abuse program. Reviewing the provisions of West Virginia Code § 61-2-12(e), the Court noted that: "[T]he clear and unambiguous language of that statute provides that the eligibility for probation is dependent upon a physical, mental, and psychiatric study and diagnosis and treatment plan." 201 W. Va. at 763, 500 S.E.2d at 876. The Court further discussed that the defendant had not been evaluated by a psychiatrist and that "[t]he statutory requirements governing this matter must be strictly observed." *Id.* For those reasons, the trial court ruling was affirmed.

V. Diagnosis and Classification

A court may require a person who has been convicted of any felony or any offense established by Article 8B (Sexual Offenses) or Article 8D (Child Abuse) against a minor child be placed in the custody of the Division of Corrections and Rehabilitation for the purpose of diagnosis and classification. W. Va. Code § 62-12-7a. The period of incarceration for this purpose may not, however, exceed 60 days. Although a court may require a defendant to undergo this process, the statute indicates, in mandatory terms, that a presentence report should be prepared and provided to the diagnosis and classification unit before the defendant is placed in the custody of such unit. See *State v. Plumley*, 184 W. Va. 536, 540-41, 401 S.E.2d 469, 473-74 (1990).

[4] In *Wolfe*, the defendant argued that the lower court's refusal to grant him probation was a violation of his plea agreement which allowed probation if he were admitted to a sex offender treatment program.

VI. Victim Considerations at Sentencing

Note: This discussion is limited to the court's consideration of victim concerns at sentencing. For a discussion of pretrial considerations, such as a victim's input into plea negotiations, see Chapter 3.

A. Victim Impact Statements

As part of the Victim Protection Act of 1984, West Virginia Code § 61-11A-3 establishes a procedure for the preparation, submission, and disclosure of a victim impact statement. A victim impact statement is properly considered by a court when it imposes a sentence. *State v. Tyler*, 211 W. Va. 246, 565 S.E.2d 368 (2002).

A victim impact statement is a summary of information concerning a crime victim and the effects of the crime on the victim. W. Va. Code § 61-11A-3(b). It should identify the victim, and it should include an itemized statement of the victim's economic loss because of the crime. Also, it should include a description of the victim's psychological and physical injuries resulting from the crime. Further, it should include information concerning any changes in the victim's welfare, lifestyle, or family relationships that have occurred as a result of the crime. Finally, it should indicate whether the victim or his or her family members have sought medical or psychological treatment as a result of the crime. In cases involving child victims of incest, sexual offenses, or child abuse, the statement may also include an opinion from a treating therapist, psychologist, or physician about the effects that different dispositions may have on the child. W. Va. Code § 61-11A-3(d). Any other information related to the effect of the crime on the victim and his or her family may be included.

West Virginia Code § 61-11A-3(a) indicates that any presentence report, unless otherwise ordered by the court, should include a victim impact statement. In cases when a presentence report is not prepared, a victim impact statement may still be prepared and submitted to the court. West Virginia Code § 61-11A-3(b) indicates that probation officers are responsible for preparing the reports. However, the victim witness coordinator, in some counties, is responsible for the preparation and submission of the report.

West Virginia Code § 61-11A-3(e) provides that the victim impact statement must be disclosed to the defendant and his or her counsel at least 10 days before the sentencing hearing. If the defendant requests, the court is required to hear testimony or consider any other information that the defendant wants to present concerning any alleged factual inaccuracies in the victim impact statement. In a case in which a

defendant was not provided a copy of a confidential victim impact statement before sentencing, the Supreme Court denied the defendant's motion to withdraw his guilty plea, but remanded the case with instructions that the defendant be provided a copy of the statement and be allowed to introduce testimony or other information concerning any factual dispute. *State v. Moore*, 179 W. Va. 288, 367 S.E.2d 757 (1988). The Supreme Court clearly stated that the defendant should be allowed to present rebuttal evidence.

B. Victim Statements at Sentencing

In addition to victim impact statements, West Virginia Code § 61-11A-2 establishes a procedure for the presentation of victim statements at sentencing in all felony cases and in misdemeanor cases if death occurs during the commission of a crime. For the purposes of such statements, a victim may be any victim of a felony, the fiduciary of a deceased victim's estate, or a member of a deceased victim's family. In addition, the regulations governing Article 11A indicate that, in addition to the representatives noted above, the guardian or other immediate family member of a minor victim is authorized to receive notice and participate on behalf of the minor. 142 C.S.R. § 4-3.3. See *Tyler*, 211 W. Va. 246, 565 S.E.2d 368.

Before a sentence is imposed, the prosecuting attorney's office is required to notify a victim, as defined above, of the sentencing hearing. W. Va. Code § 61-11A-2(c). In addition, the prosecutor must inform the victim that he or she has a right to submit a written statement or make an oral statement at the sentencing hearing. The statement must be related to the facts of the case, the extent of any injuries, or any financial losses. W. Va. Code § 61-11A-2(b).

If the victim wants to make an oral statement at sentencing, the victim must notify the court that he or she wishes to make an oral statement. If the victim fails to notify the court, the victim is considered to have waived the right to appear and speak at sentencing. As noted above, a victim may submit a written statement to the court instead of making an oral statement. If a victim submits a written statement, it is to be filed as part of the record. W. Va. Code § 61-11A-2(b).

C. Restitution and Payment of Victim's Treatment Costs

At sentencing, a court is required to order restitution in any criminal case that caused physical, psychological, or economic injury to a victim to the greatest extent that is economically practicable after a consideration of the defendant's financial condition. W. Va. Code § 61-11A-4(a). If a court

does not order restitution or only orders partial restitution, the reasons for doing so must be stated on the record.

As established by West Virginia Code § 61-11A-4(b), the court is authorized to require a defendant to pay for treatment costs when the victim sustains a bodily injury. The types of treatment costs authorized by this section are physical, psychiatric, and psychological care. In addition, costs for physical and occupational therapy are authorized. There is also a reference to reimbursements for "nonmedical care." Presumably, this section is a reference to alternative medical care. To authorize reimbursement for this type of treatment, the treatment must be "a method of healing recognized by the law of the place of treatment." W. Va. Code § 61-11A-4(b)(2)(A). In addition to treatment costs, a court may require a defendant to reimburse a victim for lost income that occurred as a result of a crime. If a victim dies as a result of a crime, the court may order a defendant to pay for funeral costs.

Although subsection (b)(2) of West Virginia Code § 61-11A-4 authorizes the payment of treatment costs only when a victim suffers a bodily injury as a result of a crime, West Virginia Code § 61-8B-13 expressly establishes that a court may require a defendant to pay treatment costs for any Article 8B convictions whether or not the victim has suffered a bodily injury. The types of treatment costs authorized by this section include any medical, psychological, or psychiatric treatment.

When determining whether to order restitution, the court should consider the amount of the victim's loss, the defendant's financial resources, his or her earning ability, the dependents of the defendant and any other appropriate factors. W. Va. Code § 61-11A-5. A court may not impose restitution for costs for which a victim has received or will receive reimbursement. W. Va. Code § 61-11A-4(e). An order of restitution should require the defendant to make restitution to the greatest extent that is economically practicable after a consideration of the defendant's financial condition. W. Va. Code § 61-11A-4(a). If a court does not order restitution or only orders partial restitution, it must explain its reasons on the record.

A court is authorized to establish a payment plan for restitution, but the payment plan may not exceed: 1) any probationary period; 2) a term of five years after the end of any term of imprisonment; and 3) in any other case, five years after the date of sentencing. The payment of restitution is considered a condition of probation or parole unless it is wholly or partially impractical. W. Va. Code § 61-11A-4(g). The failure to pay restitution may result in the revocation of probation or parole. When revocation is considered, the court or parole board is required to consider the following: 1) the defendant's employment status; 2) earning ability; 3) whether the

failure to pay is willful; and 4) any other circumstances relevant to a defendant's ability to pay.

VII. Findings Relevant to a Defendant's Custodial, Visitation, or Parental Rights to a Child Victim

If a defendant is convicted of any of the offenses established by Article 8B and the defendant has custodial, visitation, or parental rights to a victim who is a child and who resides with the defendant, the trial court, at sentencing, is required to find that the defendant is an abusing parent within the meaning of the definitions established by Chapter 49 of the West Virginia Code. W. Va. Code § 61-8B-11a. Similarly, if a defendant is convicted of a felony offense established by West Virginia Code § 61-8D-5 and the defendant has custodial, visitation, or parental rights to the child victim and the victim resided with the defendant, the trial court is also required to find that the defendant is an abusing parent. W. Va. Code § 61-8D-9.[5] If any other children reside in the same household as the victim, the court, in its discretion, may find that the defendant is an abusing parent with regard to those children as well. W. Va. Code §§ 61-8B-11a; 61-8D-9. The trial court is expressly authorized to take any further action allowed by Chapter 49. W. Va. Code §§ 61-8B-11a; 61-8D-9.

VIII. Statutory Prohibitions to Probation and Other Alternative Sentencing for Sexual Offenses

A. Use of a Firearm

Although West Virginia Code § 62-12-2(b) is not specific to sexual offenses, it prohibits a defendant's release on probation if he or she used a firearm either during the commission of a felony or during an attempt to commit a felony.[6] A person who is convicted of a felony offense because he or she was an accessory before the fact or a principal in the second degree is not subject to this prohibition if the principal in the first degree was the only defendant who used the firearm. The West Virginia Supreme Court has addressed a case in which there were three assailants and a firearm was used during the commission of a sexual assault. *Acord v. Hedrick*, 176 W. Va. 154, 342 S.E.2d 120 (1986). In *Acord,* the victim's testimony indicated that three assailants sexually assaulted her and that a gun had been held to her head during the assaults. The defendant,

[5] The findings required by West Virginia Code § 61-8D-9 apply to all of the offenses established by Article 8D, not simply sexual abuse by a parent, guardian, custodian, or person in a position of trust to a child.

[6] A firearm is defined as: "[A]ny instrument which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive, gunpowder, or any other similar means." W. Va. Code § 62-12-2(d).

however, argued that a firearms interrogatory should not have been submitted to the jury based on this evidence. Rejecting the defendant's argument, the Court held that:

> West Virginia Code § 62-12-2(b) does not require that there be evidence that each principal in the first degree involved in a felony held a gun at all times. As long as there is evidence from which the jury can logically infer that the principal used a gun in the commission of the felony, the principal is subject to the provisions of West Virginia Code § 62-12-2(b). Syl. Pt. 11, *Acord, supra.*

When the State seeks to enhance a defendant's sentence because he or she used a firearm, the State is required to notify the defendant in one of two ways. Syl. Pt. 2, *State v. Johnson*, 187 W. Va. 360, 419 S.E.2d 300 (1992). The State may either include the charge in the indictment pursuant to West Virginia Code § 62-12-2(c)(1) or notify the defendant in writing pursuant to West Virginia Code § 62-12-2(c)(2) that it intends to submit a special interrogatory to the jury. If the State chooses to notify the defendant in writing, as opposed to including the sentence enhancement in the indictment, the basis for seeking a sentence enhancement must be set out in the same manner as would be required if it were included in the indictment.

In a case in which the State notified defense counsel the day before trial that it was seeking sentence enhancement pursuant to West Virginia Code § 62-12-2(c), the Court held that timing of the notice was insufficient. *State v. McClanahan*, 193 W. Va. 70, 454 S.E.2d 115 (1994). In *McClanahan*, the notice was served on defense counsel the day before trial via facsimile and was filed in the clerk's office the day of trial. Reversing the enhancement of the defendant's sentence, the Court explained that: "[T]he purpose of requiring the State to file a notice of the decision to seek enhancement of a sentence for the use of a firearm is to insure that a defendant shall have a reasonable time to choose between alternative causes of action, such as plea bargaining or proceeding to trial." *McClanahan*, 193 W. Va. at 76, 454 S.E.2d at 121. The Court further noted that a trial attorney, in the final hours before trial, would not have time to both prepare for trial and review the details of a plea agreement. In a case decided one year earlier, the Court reversed a trial court for submitting an interrogatory to the jury when the defendant had not been provided notice under either method that a sentence enhancement would be sought. *State v. Richards*, 190 W. Va. 299, 438 S.E.2d 331 (1993).

In addition to notifying the defendant, there must be a finding by the court or jury that the defendant used a firearm in the commission of a crime. W. Va. Code § 62-12-2(c)(1). In the case of a guilty or no-contest plea, the court must make such a finding. In the case of a trial to the court, the court again makes the finding. When the case has been tried before a jury, a special interrogatory must be submitted to the jury concerning this issue. The facts supporting a finding that a firearm was used must be established beyond a reasonable doubt.

The findings concerning the use of a firearm are mandatory before a person can be ineligible for probation. *State v. Ranski*, 170 W. Va. 82, 289 S.E.2d 756 (1982). In *Ranski*, the trial court accepted a guilty plea but did not make a specific finding that the defendant had used a firearm during the commission of her crime. Reversing the trial court who found the defendant ineligible for probation based upon the use of a firearm, the Supreme Court held that:

> Pursuant to W. Va. Code § 62-12-2(c), a trial judge must specifically find, as a matter of record, that a firearm was used in the commission of the crime before a person convicted of the crime upon a plea of guilty may be found ineligible for probation under W. Va. Code § 62-12-2(b). Syllabus, *Ranski, supra.*

B. Commission of Certain Sexual Offenses Against Children

Targeting persons who have committed violent sexual offenses against children, West Virginia Code § 61-8B-9a prohibits a court from placing a defendant on probation, home incarceration, or other alternative sentence if the State proves that certain statutory conditions have been met and at least one of the aggravating circumstances listed in the statute occurred during the commission of the crime. To be subject to this code section, a defendant must have been convicted of one of the following offenses: 1) first degree sexual assault; 2) second degree sexual assault; 3) third degree sexual assault; 4) first degree sexual abuse; 5) second degree sexual abuse; or 6) third degree sexual abuse. Additionally, the defendant must have been 18 years or older, and the victim must have been younger than 12 years of age.

In addition to those facts, the State must prove that ***one*** of the following aggravating circumstances occurred. First, the person used forcible compulsion to commit the offense. Second, the act constituted a "predatory act" which is defined as "an act directed at a stranger or at a

person with whom a relationship has been established or promoted for the primary purpose of victimization." W. Va. Code § 15-12-2(m). Third, the defendant used a weapon or any article that caused the victim to reasonably believe it was a dangerous weapon and used it to cause the victim to submit. Fourth, the defendant moved the victim "from one place to another and did not release the victim in a safe place." W. Va. Code § 61-8B-9a(a)(4). For the purposes of this subsection, a victim is considered to have been released in a safe place if the victim was released "in a place and manner which realistically conveys to the victim that he or she is free from captivity in circumstances and surroundings wherein aid is relatively available." *Id.*

The fact that the State is seeking this type of sentence enhancement must be included in the indictment or other charging document. W. Va. Code § 61-8B-9a(b)(1). In cases of a conviction resulting from a plea or trial to the court, the court must make findings of the facts that support the sentence enhancement. If the case is tried by a jury, the jury shall, by a special interrogatory, make findings concerning this type of sentence enhancement. In all cases, the facts supporting the sentence enhancement must be proven beyond a reasonable doubt. W. Va. Code § 61-8B-9a(b)(2).

C. Prohibition on Pretrial Diversion Agreements for Certain Sex Offenses

A defendant is ineligible to participate in a pretrial diversion program if he or she is charged with any of the following sexual offenses: first degree sexual assault (W. Va. Code § 61-8B-3), second degree sexual assault (W. Va. Code § 61-8B-4), or first degree sexual abuse (W. Va. Code § 61-8B-7). W. Va. Code § 61-11-22(d).[7]

D. Deferred Adjudication

West Virginia Code § 61-11-22a allows a court to defer an adjudication of guilt after the entry of a guilty plea and impose appropriate terms and conditions upon a defendant.

This statute does not expressly exclude a sexual offender from receiving a deferred adjudication. However, other more specific statutes would, in many, if not most cases, prevent the release of a sexual offender on probation or other community supervision. See *Young v. State*, 241 W. Va. 489, 826 S.E.2d 346 (2019) (holding that a person charged with a DUI offense may only seek a deferred adjudication under the statutes specific

[7] West Virginia Code § 61-11-22(d) also establishes limits on pretrial diversion agreements for some types of cases involving domestic violence or driving under the influence.

to DUI offenses). As noted above, West Virginia Code § 61-11-22(d) prohibits pretrial diversions in cases involving specified sexual offenses.

E. Alternative Sentencing Prohibited in Cases of Enhanced Penalties for Subsequent Convictions for Sexual Offenses

Note: For a discussion of the elements of this code section, see Chapter 2.

West Virginia Code § 61-8B-9b(b) and (c) prohibits alternative sentencing when a defendant has a prior conviction for a sexually violent offense against a victim who was under 12 years old and who is subsequently convicted of a sexually violent offense. A "sexually violent offense" is defined as one of the following: 1) first degree sexual assault; 2) second degree sexual assault; 3) sexual assault of a spouse as defined by the former provisions of West Virginia Code § 61-8B-6; or 4) first degree sexual abuse. W. Va. Code § 15-12-2(i). Convictions from another state, federal, or military jurisdiction for a similar crime may serve as the predicate offense for sentence enhancement purposes. When a defendant is subject to sentence enhancement pursuant to this code section, the defendant is not eligible for probation, home incarceration, or other alternative sentences, such as the weekend jail program, the work program for county agencies, a community service program, or a day report center established by West Virginia Code § 62-11A-1a.

F. Enhanced Penalties for Certain Recidivist Offenses

The statute governing eligibility for probation generally provides that probation may be allowed in cases in which the sentence is less than life imprisonment. W. Va. Code § 62-12-2(a). However, West Virginia Code § 61-11-18 provides for an enhanced penalty of life imprisonment with no possibility of parole when a person has a prior conviction for first degree murder, second degree murder, or first-degree sexual assault and is subsequently convicted of one of these offenses. Therefore, a defendant who is sentenced pursuant to West Virginia Code § 61-11-18(b) would be statutorily barred from probation.

IX. Constitutional Parameters for Conditions Imposed on Sex Offenders

Note: When sex offenders are released on probation, parole, or supervised release, they will be subject to various conditions. The conditions imposed on an offender are subject to constitutional limitations as discussed below.

In North Carolina, a group of registered sex offenders challenged a North Carolina criminal statute that imposed criminal penalties on specified sex offenders for being present at a wide variety of locations. *Doe v. Cooper*, 842 F.3d 833 (4th Cir. 2016). The statute in question prohibited these sex offenders from being on the premises of a facility that was used for the care and supervision of minors, from being within 300 feet of any location primarily used for the care of minors, or from being present at any place where minors regularly gathered for educational, recreational or social programs. The district court found that the provision preventing sex offenders from being present at a place where minors regularly gathered for scheduled educational, recreational, or social programs was unconstitutionally vague. It also found that the provision that prevented sex offenders from being within 300 feet of a location primarily used for minors was unconstitutionally broad because it impeded sex offenders from being present in a wide variety of public places.

On the State's appeal, the Fourth Circuit found that the provision restricting sex offenders from present at places where minors gathered for regularly scheduled programs was unconstitutionally vague. Specifically, the Fourth Circuit found that the provision -- "regularly scheduled" -- had no standard or definition for determining whether programs were, in fact, regularly scheduled. Similarly, the Fourth Circuit found that the provision -- "where minors gather" lacked a defining standard in that the statute did not identify how many minors must gather and did not explain whether a place where minors and adults gathered together would be considered a restricted zone. 842 F.2d at 843.

The Fourth Circuit also addressed the provision of the statute that prohibited the sex offenders from being present within 300 feet of a place primarily used for the care of minors. The Court found that the statute inhibited sex offenders from being present in a wide variety of public venues, such as streets and parks. 842 F.2d at 845. The Fourth Circuit, therefore, struck down this provision as well.

More recently, the United States Supreme Court found that a North Carolina statute that made it a felony for a registered sex offender to access a commercial social networking website was unconstitutional. *Packingham v. North Carolina*, 582 U.S. ---, 137 S. Ct. 1730 (2017). The Court based its decision on the First Amendment principle that "all

persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." 582 U.S. at ---, 137 S. Ct. at 1735. The Court noted that the case was one of the first to address the application of the First Amendment to the internet.

Specifically, the Court found that the North Carolina statute barred access to common social media websites. It also found that its decision would not bar a state from enacting a more specific law. However, it held that this broad statute unconstitutionally restricted speech protected by the First Amendment.

Subsequent to the *Packingham* opinion, the West Virginia Supreme Court addressed a parole condition that completely barred a parolee's use of the internet. *Mutter v. Ross*, 240 W. Va. 336, 811 S.E.2d 866 (2018). The parolee in *Mutter* had a conviction for first degree sexual assault, burglary, and attempted aggravated robbery, and the parole condition at issue prevented him from possessing a computer or other device with internet access. Reviewing the revocation proceedings, the Court found that the parole condition was an overly broad restriction. Adopting a new syllabus point, the Court held that:

> Generally, under Packingham v. North Carolina, 137 S.Ct. 1730, 198 L. Ed. 2d 273 (2017), a parole condition imposing a complete ban on a parolee's use of the internet impermissibly restricts lawful speech in violation of the *First Amendment to the United States Constitution*. There are instances, however, where the West Virginia Parole Board has a legitimate interest in restricting a parolee's access to the internet. The restrictions must be narrowly tailored so as to not burden substantially more speech than is necessary to further the government's legitimate interests. Syllabus, *Mutter*, 240 W. Va. 336, 811 S.E.2d 866.

In footnote 36 of its opinion, the Court noted that its decision did not affect the validity of *State v. Hargus*, 232 W. Va. 735, 753 S.E.2d 893 (2013). The condition at issue in *Hargus* was that the defendant was not allowed to live in a residence with a computer. The Court expressly stated that: "*Hargus* remains valid law because the following two circumstances were present in that case: (1) his underlying offense involved the internet; and (2) he had a history of using the internet to engage in criminal behavior." *Mutter*, 240 W. Va. 336, 811 S.E.2d 866 n. 36.

X. Conditions for Release on Probation and Other Alternative Sentences

Note: Certain sex offenders placed on probation may be subject to electronic monitoring or polygraph examinations. Since these conditions may apply to offenders on probation, parole, or supervised release, they are discussed in Sections XIII and XIV.

If granted probation, a person who has been convicted of a sexual offense is subject to the same general conditions of probation as is any other defendant. W. Va. Code § 62-12-9. In cases of probation, these conditions include that a defendant may not have any further criminal violations, that he or she cannot leave the State without permission, and that he or she must comply with directives from the court concerning supervision. Other general conditions include the payment of restitution and court costs. Additionally, a person who has been convicted of a sexual offense may be subject to electronic monitoring or polygraphs which are discussed in Sections XIII and XIV.

A. Sex-Offender Evaluation and Treatment

A person who has been convicted of specified sexual offenses is required to undergo a physical, mental and psychiatric study, and diagnosis before he or she may be admitted to probation. W. Va. Code § 62-12-2(e). This requirement applies to defendants convicted of any of the following offenses: incest, offenses established by Article 8A of Chapter 61 (preparation, distribution or exhibition of obscene matter to minors), sexual offenses established by Articles 8B and 8C (Filming of Sexually Explicit Conduct of Minors), and sexual offenses established by West Virginia Code § 61-8D-5. In addition, the defendant is required to participate in sexual abuse counseling or another approved treatment program. For a discussion of sex offender evaluations and treatment programs, see Section IV of Chapter 7.

B. Residency Restrictions

1. Probation

If a defendant has been convicted of incest (W. Va. Code § 61-8-12) or an offense established by Article 8B (Sexual Offenses) or Article 8D (Child Abuse) and the victim was a child, the defendant may not live in a residence with any minor child or may not exercise visitation with any minor child. W. Va. Code § 62-12-9(a)(4). Additionally, the defendant may not have any contact with the victim. Although this subsection is written in mandatory terms, a defendant may request modification of this

condition. The burden, however, is on the defendant to prove that such a modification is in the best interest of the child.

2. Work Release

A provision similar to West Virginia Code § 62-12-9(a)(4) is included in West Virginia Code § 62-11A-1(h), a provision that governs release of an inmate for employment purposes or other approved reasons. This provision prohibits a defendant from living with a minor child, visiting with a minor child, or contacting the victim if the victim was a minor and the defendant was convicted of incest, and any offense established by either Article 8B (Sex Offenses), Article 8C (Filming of Sexually Explicit Conduct of Minors), or Article 8D (Child Abuse). As with the statute governing probation conditions, a defendant may request relief from this condition. However, the burden is on the defendant to prove that the modification would be in the best interest of the child.

C. Sex Offender Registration

Note: A complete discussion of sex offender registration and requirements is found in Chapter 8.

If a defendant is convicted, whether by plea or trial, of any of the offenses listed below and is released on probation, he or she is required to register as a sex offender. W. Va. Code § 62-12-2(f). Similarly, a defendant who is convicted of an attempt of any of these offenses is also required to register as a sex offender. These offenses include:

1. Offenses established by Article 8B of Chapter 61 (Sexual Offenses);

2. Offenses established by Article 8C (Filming of Sexually Explicit Conduct of Minors);

3. Sexual abuse by a parent, guardian, custodian or person in a position of trust to a child, West Virginia Code § 61-8D-5;

4. Sending, distributing, exhibiting, possessing, displaying or transporting material by parent, guardian or custodian, depicting child engaged in sexually explicit conduct, West Virginia Code § 61-8D-6;

5. Abduction of a person, West Virginia Code § 61-2-14;

6. Incest, West Virginia Code § 61-8-12;

7. Provided that the victim was a minor and the defendant was convicted of a felony offense of detaining a person in a house of prostitution, West Virginia Code § 61-8-6; or

8. Provided that the victim was a minor and the defendant was convicted of a felony offense of procuring a person for a house of prostitution, West Virginia Code § 61-8-7.

When such an offender is released on probation, the probation officer must, in writing, notify the State Police within three days of the release. W. Va. Code § 62-12-2(g). The notice must include the information listed below:

1. The defendant's full name;
2. His or her address;
3. His or her social security number;
4. A recent photograph of the defendant;
5. A brief description of the crime; and
6. The defendant's fingerprints.

If a person has been found to be a sexually violent offender as defined by West Virginia Code § 15-12-2a, the probation officer must provide the additional information listed below:

1. Identifying factors, including physical characteristics;
2. A history of the crime; and
3. Documentation of treatment received for the mental abnormality or personality disorder. W. Va. Code § 62-12-2(g).

XI. Court Determination That an Offender Is a Sexually Violent Predator

An offender who is convicted or found not guilty by reason of mental illness, mental retardation, or addiction of a sexually violent offense may be subject to a summary proceeding to determine whether he or she is a sexually violent predator. W. Va. Code § 15-12-2a. As the term itself implies, this label is reserved for a small, but extremely dangerous group of offenders who are at risk to commit repeated acts of sexual violence. Under the West Virginia Sex Offender Registration Act (WVSORA), a determination that an offender is a sexually violent predator enhances the obligations of the offender, the courts, the State Police, and detention facilities. W. Va. Code §§ 15-12-1, *et seq.* An offender's classification as a sexually violent predator also increases the responsibilities of those supervising the offender's release. See W. Va. Code §§ 62-11D-2; 62-11D-3; and 62-12-26; see also *Regulations and Procedures Pertaining to*

the West Virginia Sex Offender Registration Act, C.S.R., Title 81, Series 14. A person who has been found to be a sexually violent predator must be subject to polygraph examinations and electronic monitoring. W. Va. Code §§ 62-11D-2 and -3.

A. Definitions

Under WVSORA, a sexually violent predator is defined as a "person who has been convicted or found not guilty by reason of mental illness, mental retardation or addiction of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." W. Va. Code § 15-12-2(k); see also W. Va. C.S.R. § 81-14-2.9 (similar definition). The term "mental abnormality or personality disorder" is defined as "a congenital or acquired condition of a person, that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons."[8] W. Va. Code § 15-12-2(l); see also W. Va. C.S.R. § 81-14-2.3 (similar definition). For the purposes of WVSORA, a predatory act is "an act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization." W. Va. Code § 15-12-2(m); see also W. Va. C.S.R. § 81-14-2.4 (defined more broadly to also include acts directed at family members). Under WVSORA, a sexually violent offense includes the following codified offenses, and similar offenses in another state, federal, or military jurisdiction: sexual assault in the first degree (W. Va. Code § 61-8B-3); sexual assault in the second degree (W. Va. Code § 61-8B-4); sexual assault of a spouse (formerly codified as W. Va. Code § 61-8B-6); and sexual abuse in the first degree (W. Va. Code § 61-8B-7). W. Va. Code § 15-12-2(i); see also W. Va. C.S.R. § 81-14-2.8 (defined more broadly to also include any violent offense that is determined by a court to be sexually motivated).

B. Procedure

Once an offender has been sentenced for the commission of a sexually violent offense, or the court has entered a judgment of acquittal upon a finding that the offender is not guilty by reason of mental disease, mental retardation, or addiction of a sexually violent offense, the prosecutor may initiate a proceeding to determine whether the offender is a sexually violent predator. W. Va. Code § 15-12-2a(c). Although the

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[8] The definition of the term mental abnormality adopted by the West Virginia Legislature is identical to the definition adopted by the Kansas Legislature. See K.S.A. § 59-29a02. The United States Supreme Court has found that this definition satisfies the requirements of substantive due process. *Kansas v. Hendricks*, 521 U.S. 346, 356-58, 117 S. Ct. 2072, 2079-80 (1997).

language of West Virginia Code § 15-12-2a does not specify when such a proceeding should be conducted, the Supreme Court has held that one "is intended to be held in conjunction with the sentencing phase of a criminal offense." Syl. Pt. 1, in part, *State v. Myers*, 227 W. Va. 453, 711 S.E.2d 275 (2011). Although this type of proceeding should ordinarily be conducted at or near the sentencing, it may be initiated "at any point prior to the offender's release from prison for the purpose of making this determination." Syl. Pt. 2, in part, *Myers,* 227 W. Va. 453, 711 S.E.2d 275. In *Myers*, the Court reversed the circuit court finding when the summary proceeding was conducted after the defendant's release from prison. In footnote 14 of the opinion, the Court noted that there were outstanding charges against the defendant, and the State might have an additional opportunity to initiate another summary proceeding against him.

To initiate the summary proceeding, the prosecutor must file a written pleading with the sentencing court that sets forth the prosecutor's claim that the offender suffers from a mental abnormality that makes the offender likely to engage in predatory acts of sexual violence. W. Va. Code § 15-12-2a(c). The prosecutor must identify those facts from the record of the offender's criminal trial that support this claim. The burden is on the prosecutor to demonstrate, by a preponderance of the evidence, that the offender suffers from a mental abnormality or personality disorder that makes him or her likely to engage in sexually violent offenses in the future. W. Va. Code § 15-12-2a(c) and (f). Once a petition is filed, the court must conduct a summary proceeding (before the court without a jury) and determine whether the offender is a sexually violent predator. W. Va. Code § 15-12-2a(b).

Prior to rendering its decision, the court must request and review a report from the Sex Offender Registration Advisory Board.[9] W. Va. Code § 15-12-2a(e). The procedure for circuit court referrals to the Board is detailed in the *Regulations and Procedures Pertaining to the West Virginia Sex Offender Registration Act*, W. Va. C.S.R. § 81-14-12.2 of these regulations. The Board's report should include its findings and conclusions as to whether the offender is a sexually violent predator. The court may also order the offender to undergo a "psychiatric or other clinical examination" before rendering its decision to assist the court in determining whether the offender suffers from a mental abnormality. If deemed necessary, after such an examination, the court may require the offender to undergo a "period of observation in an appropriate facility." W. Va. Code § 15-12-2a(d). The defendant has the right to an examination

[9] The Legislature created the Sex Offender Registration Advisory Board in 1999. Its members are appointed by the Secretary of the Department of Military Affairs and Public Safety. The members consist of mental health professionals who specialize in the behavior and treatment of sex offenders, victims' rights advocates, and law-enforcement representatives. See W. Va. Code § 15-12-2b.

by an independent expert of his or her choice, and also has the right to present the expert witness's testimony. W. Va. Code § 15-12-2a(f).

At the hearing, the court may consider the testimony of expert witnesses for the State and the offender. Expert testimony may be helpful to explain an offender's mental health diagnosis and how the diagnosis can affect volitional capacity. At the conclusion of the hearing, the court must make written findings based on a preponderance of the evidence as to whether the offender is a sexually violent predator. W. Va. Code § 15-12-2a(f). If an offender is found to be a sexually violent predator, the clerk of the court must forward a copy of the order to the State Police. W. Va. Code § 15-12-2a(g).

C. Definition of Mental Abnormality

The term mental abnormality is not easy to apply, nor is it easy for a court or an expert to predict future acts of violence. Other courts faced with the task of determining whether a person suffers from a mental abnormality for the purposes of classifying them as a sexually violent predator have considered: the offender's clinical diagnosis, if any; the nature and extent of their crime(s); the age of their victim(s); the offender's treatment history; and the offender's history of criminal conduct.

For example, in *Commonwealth v. Hitner*, 910 A.2d 721 (Pa. Super. 2006), a Pennsylvania Superior Court found that there was sufficient evidence for the trial court to conclude that the offender was a sexually violent predator within the meaning of Pennsylvania's Megan's Law III. An expert testified that the offender suffered from a paraphilia (a mental disorder characterized by a preference for obsession with unusual sexual practices) known as sexual sadism,[10] and was also diagnosed as having anti-social personality disorder.[11] The expert opined that there were many

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[10] Sexual sadism is classified in the DSM-IV-TR under Paraphilias and Sexual Disorders. This disorder is characterized by intense sexually arousing fantasies, sexual urges or behaviors involving real acts in which the psychological or physical suffering, including humiliation, of the victim is sexually exciting to the person. The sexual fantasies, urges or behaviors cause clinically significant distress or impairment to the person in social, occupational or other important areas of functioning. It is a chronic disorder. If the person's partners are nonconsenting, the acts are likely to be repeated until the person is apprehended. Diagnostic and Statistical Manual (American Psychiatric Association, 4th ed. 1995).

[11] Antisocial Personality Disorder is classified in the DSM-IV-TR as a Personality Disorder. This disorder is characterized by a pervasive disregard for and violation of the rights of others by a person who is age 18 years or older, provided the person exhibited signs of Conduct Disorder before he or she reached the age of 15 years. Often, people with antisocial personality disorder are physically aggressive toward people and animals, they are deceitful, they lack remorse and/or empathy and they do not conform to lawful

factors from the offender's life and his crimes that supported these diagnoses. The offender had an extensive criminal history, starting as a juvenile; he showed little remorse for his crimes; and he was unusually cruel to his victims, burning them, degrading them, and pulling out their hair for his own sexual gratification. *Hitner*, 910 A.2d at 729-30. The court concluded based on the evidence presented that sexual sadism and antisocial personality disorder, constituted mental abnormalities[12] within the meaning of Megan's Law III. 910 A.2d at 730.

Also, in *Smith v. State*, 148 S.W.3d 330 (Mo. App. S.D. 2004), the Missouri Court of Appeals for the Southern District found that there was sufficient evidence to conclude that an offender who was diagnosed with pedophilia[13] was a sexually violent predator. The offender had a history of molesting young girls, he expressed a belief that young girls were trying to entice him sexually, and he refused to participate in sex offender therapy. Two experts concluded based on his diagnosis of pedophilia, and his sexual history, that he suffered from a mental abnormality[14] that made him likely to reoffend. *Smith*, 148 S.W.3d at 334.

The case of *Commonwealth v. Squire*, 685 S.E.2d 631 (Va. 2009) provides guidance on the analysis of the definition of a "sexually violent predator."[15] In *Squire*, the defendant was originally convicted of rape and was sentenced to a term of imprisonment. After his initial release on parole, he later committed criminal offenses that were not sexual in nature. After a civil commitment proceeding, the trial judge found that the defendant did have a mental abnormality or personality disorder, but that the state did not prove that the defendant was likely to engage in sexually

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social conduct. Diagnostic and Statistical Manual (American Psychiatric Association, 4th ed. 1995).

[12] Pennsylvania's former definition of the term mental abnormality is identical to the definition adopted by the West Virginia Legislature. See former 42 Pa. C.S.A. § 9792. This statute expired in 2012; however, *Hitner*, provides guidance on how the term "mental abnormality" was interpreted by the court.

[13] Pedophilia involves sexual activity with a prepubescent child by a person who is at least 16 years old, and is at least five years older than the child. It is characterized by at least 6 months of recurrent intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children. And the fantasies, urges or behaviors cause clinically significant distress or impairment in the social, occupational or other important functioning areas for the person. Diagnostic and Statistical Manual (American Psychiatric Association, 4th ed. 1995).

[14] Missouri's definition of the term mental abnormality is identical to the definition adopted by the West Virginia Legislature. See V.A.M.S. 632.480.

[15] The definition of a "sexually violent predator" under Va. Code § 37.2-900 is similar to West Virginia's definition in W. Va. Code § 15-12-2(k); and the analysis in *Squire* is helpful to interpret of the West Virginia definition.

violent acts. The trial court relied on the fact that, for over a period of six years, the defendant had not reoffended "by charge, conviction or institutional infraction." 685 S.E.2d at 632. On appeal, the Virginia Supreme Court found that the applicable definition of a sexually violent predator contained two elements: 1) a mental abnormality or personality disorder; and 2) a likelihood of engaging in sexually violent acts. 685 S.E.2d at 634. The Supreme Court also noted that the defendant had not committed any sexually violent acts for 10 years. For these reasons, the Supreme Court affirmed the dismissal of the petition.

D. Rights of the Offender

When a circuit court conducts a hearing pursuant to West Virginia Code § 15-12-2a the offender is entitled to certain protections. The offender has the right to be present at the hearing and to have access to any medical evidence to be presented by the State. He or she has the right to the assistance of counsel and must be permitted to present evidence and cross-examine witnesses. The offender also has the right to an examination by an independent expert of his or her choice and to call that expert to offer testimony on his or her behalf. W. Va. Code § 15-12-2a(f). An offender may petition the sentencing court to remove the sexually violent predator designation if the underlying qualifying conviction is later reversed or vacated. W. Va. Code § 15-12-3a.

XII. Supervised Release

A. Effective Date for Enactment and Amendments

West Virginia Code § 62-12-26, the statute that authorizes the imposition of extended supervision or supervised release for sex offenders, was originally enacted in 2003, with an effective date of June 6, 2003. Under the original statute, as part of the sentence imposed for anyone convicted of one of the specified sexual offenses after the effective date, the sentencing court had the discretion to impose a period of supervised release. By its express terms, the statute had no retroactive application.

Enacted in 2006, House Bill 101 amended West Virginia Code § 62-12-26, with an effective date of October 1, 2006. The amended statute also has no retroactive application. Among other changes under the 2006 amendments, the imposition of a period of supervised release for specified sex offenders is no longer discretionary.

The Legislature amended West Virginia Code § 62-12-26 in 2015 with an effective date of May 26, 2015. In subsection (b)(2), the statute prohibits an offender from loitering within 1,000 feet of a school or

childcare facility or within 1,000 feet of the residences of a victim of a sexually violent offense for which the defendant was convicted. The subsection expressly states that the prohibition only applies to defendants convicted after the amendment's effective date.

In 2021, the Legislature amended West Virginia Code § 62-12-26 with an effective date of July 5, 2021. The amendment subjects persons convicted of violations of West Virginia Code §§ 61-8A-2 (distribution or display of obscene matter to a minor); 61-8A-4 (use of obscene matter to seduce a minor), or 61-3C-14b (soliciting a minor via computer) on or after the effective date to periods of supervised release.

B. Constitutionality of West Virginia Code § 62-12-26

In a consolidated appeal involving three cases, the Supreme Court rejected facial constitutional challenges to West Virginia Code § 62-12-26. *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011). However, the Court later found that retroactive application of the supervised statute would violate *ex post facto* principles found in both the United States and West Virginia Constitutions. *State v. Deel*, 237 W. Va. 600, 788 S.E.2d 741 (2016). The Court has also addressed the constitutionality of issues associated with modification in *State v. Hedrick*, 236 W. Va. 217, 778 S.E.2d 666 (2015) and revocation in *State v. Hargus*, 232 W. Va. 735, 753 S.E.2d 893 (2013). A discussion of the cases involving modification and revocation is included in Sections F and G.

1. Cruel and Unusual Punishment

As an initial argument in *James*, the petitioners alleged that the supervised release statute was facially unconstitutional because it imposes an additional punishment for certain sex offenses. Specifically, the petitioners argued that imposing a period of supervised release, in addition to incarceration and registration as a sex offender, constituted cruel and unusual punishment. The petitioners asserted that the additional punishment of supervised release for the specified offenses was disproportionate. Rejecting these arguments, the Court held that the statute did not constitute cruel and unusual punishment because the appropriate period of supervised release is "largely left to the determination and sound discretion of the sentencing court" and "it is within the legislative prerogative to address societal problems through such policy determinations." *James,* 227 W. Va. at 107, 710 S.E.2d at 416. In Syllabus Point 6, the Court held that additional periods of supervision did not constitute cruel and unusual punishment.

2. Procedural Due Process Challenges

In *James*, the petitioners also argued that the supervised release statute violated their rights to procedural due process by authorizing judges to impose an additional period of supervised release without jury involvement or fact finding by a jury. The Supreme Court, however, observed that the sentencing court does not make any additional finding, other than that the defendant was convicted of an offense that subjects him or her to supervised release. The Court further explained that the period of supervised release is subject to the sentencing court's discretion, but this provision does not violate due process. For these reasons, the Court adopted Syllabus Point 9 and rejected the challenge that the supervised release statute violates procedural due process.

As another challenge, the petitioners argued that the statute was unconstitutionally vague because there are no statutorily established supervisory guidelines. Addressing this issue, the Court noted the statute requires probation officers to provide a written statement of terms and conditions when a defendant is placed on supervised release. See W. Va. Code § 62-12-26(i). The Court found that the flexibility in establishing terms and conditions did not indicate that the statute was vague. The Court further found that the statute was not vague in that it does not leave a sentencing court with the choice to impose supervised release. Rather, certain convictions require additional periods of supervised release. Adopting Syllabus Point 9, the Court concluded that the statute is not unconstitutionally vague.

3. Double Jeopardy

In *James*, the petitioners argued that the supervised release statute violated double jeopardy principles because it imposes multiple punishments for the same offense or act. However, the Court noted that the double jeopardy protection against multiple punishments "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature" and "the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent." 227 W. Va. at 111, 710 S.E.2d at 420 (citing *Ohio v. Johnson*, 467 U.S. 493, 499, 104 S. Ct. 2536 (1984)). The Court further concluded that it is within the Legislature's authority to prescribe multiple punishments for certain felony offenses. For these reasons, the Court adopted Syllabus Point 11, and held that the statute does not violate double jeopardy principles.

4. Ex Post Facto Principles

In *Deel*, a defendant was convicted of four counts of sexual assault and abuse in 2004 for offenses committed in 2001, approximately two years before the original supervised release statute was enacted. 237 W.

Va. 600, 788 S.E.2d 741. At the original sentencing, the trial court ordered that the defendant would be subject to an additional ten years of probation[16] once he discharged his sentence. The sentences to three of the offenses were suspended, and the suspension allowed, in theory, the trial court to impose this additional period of probation. After the defendant discharged his penitentiary sentence in 2015, reported to probation and registered as a sex offender, the trial court conducted another hearing to determine the terms of any additional supervision. At this hearing, both the State and defense counsel assumed that the supervised release statute was regulatory in nature and did not constitute an additional punishment. After hearing arguments, the trial court ordered the defendant to serve a 20-year period of supervised release, rather than the five-year period proposed by defense counsel.

On appeal, the Supreme Court reviewed the record to determine whether the imposition of a period of supervised release violated *ex post facto* principles found in the United States and West Virginia Constitutions, even though the parties had assumed that the supervised release statute was civil and regulatory in nature. The Supreme Court reviewed its decision in *James* in which it had recognized the punitive nature of the supervised release statute. Given the punitive nature of the statute, the Court concluded that, in Syllabus Points 3 and 4, any retroactive application of the statute violated the *ex post facto* provisions in the United States and West Virginia Constitutions. Therefore, the Court concluded that periods of supervised release cannot be imposed on defendants for offenses committed before the effective dates of the statute and its amendments. The Court went on to address two of its prior memorandum decisions that it determined had been incorrectly decided.

C. Allowable Periods of Supervised Release

West Virginia Code § 62-12-26(a) establishes the minimum and maximum periods of extended supervision or supervised release for sex offenders convicted of a felony violation under the following West Virginia Code provisions: 1) West Virginia Code § 61-8-12 (Incest); 2) Chapter 61, Article 8B; 3) Chapter 61, Article 8C (Child Pornography Offenses); or 4) Chapter 61, Article 8D (Sexual Abuse by a parent, guardian, custodian or person in position of trust to a child). In addition, defendants convicted of violations of West Virginia Code §§ 61-8A-2 (distribution or display of obscene matter to a minor), 61-8A-4 (use of obscene matter to seduce a minor), or 61-3C-14b (soliciting a minor via computer) are subject to terms

[16] Amended in 2017, West Virginia Code § 62-12-11 limits total periods of probation to no longer than seven years. At the time that the Court decided *Deel*, the total period for probation could not exceed five years.

of supervised release.[17] Periods of supervised release must be imposed at disposition and are considered part of the original sentence or punishment. A supervised release period begins after the expiration of any period of probation, incarceration, or parole, whichever expires later. W. Va. Code § 62-12-26(c).

A period of supervised release, not to exceed 50 years, must be imposed at disposition for all offenses noted above and which are specified in West Virginia Code § 62-12-26. An offender who is subject to a mandatory sentence of incarceration pursuant to West Virginia Code § 61-8B-9a because of aggravating circumstances for either first degree sexual assault (W. Va. Code § 61-8B-3) or first degree sexual abuse (W. Va. Code § 61-8B-7) is also required to be subject to a *minimum* ten-year period of supervised release. If a person is designated as a sexually violent predator pursuant to West Virginia Code § 15-12-2a, he or she must be subjected to supervised release for life. W. Va. Code § 62-12-26(a).

D. Supervised Release Residency and Employment Restrictions

If a person is serving a required minimum ten-year period (aggravated circumstances under W. Va. Code § 61-8B-9a) or lifetime period (sexually violent predator under W. Va. Code § 15-12-2a) of supervised release, the person is subject to mandatory residency and employment restrictions. W. Va. Code § 62-12-26(b). The first restriction prohibits an offender from establishing a residence or accepting employment within 1,000 feet of a school or childcare facility. The second restriction prohibits an offender from establishing a residence or accepting employment within 1,000 feet of the residence of the victim of a sexually violent offense for which the offender was convicted. W. Va. Code § 62-12-26(b)(1).

Another restriction involving loitering must be imposed when an offender is required to serve a minimum of 10 years because of aggravated circumstances or a lifetime period because of a designation as a sexually violent predator. Such a person must be prohibited from loitering within 1,000 feet of a school or childcare facility or within 1,000 feet of the residence of a victim of a sexually violent offense for which the person was convicted. W. Va. Code § 62-12-26(b)(2). The subsection expressly limits the application of this conviction to persons who were convicted after the effective date of the amended statute -- May 26, 2015.

[17] The effective date of the amendments to West Virginia Code § 62-12-26 is July 5, 2021. Therefore, defendants who are convicted of violations of these statutes either on or after July 5, 2021 are subject to periods of supervised release.

The term "loitering" as defined in subsection (b)(2) means "to enter or remain on property while having no legitimate purpose or, if a legitimate purpose exists, remaining on that property beyond the time necessary to fulfill that purpose." W. Va. Code § 62-12-26(b)(2). The prohibition on loitering should not, however, be interpreted to prohibit a person's presence on or near a location or facility if the person is present because he or she has been directed to be at the location or facility for activities such as supervision or counseling or because the person's supervising officer has given him or her express permission to be present at the location.

Additionally, an offender who is serving a required minimum ten-year period or a lifetime period of supervised release and was convicted of a sexually violent offense against a child may not reside in a home with a child who is under 16, except in certain narrow circumstances. To be able to do so, the offender must have one of the following relationships to the child: the offender must be the child's parent, grandparent, or stepparent, provided that the offender was the child's stepparent before the sexual offense occurred. Not only must certain relationship requirements be satisfied, the offender's parental rights to **any** child in the home must not have been terminated. Further, the child must not have been a victim of a sexually violent offense committed by the offender. Finally, the court must determine that the offender is not likely to cause harm to a child with whom he or she resides. W. Va. Code § 62-12-26(b)(3). Since the requirements of this subsection are rather stringent, it would be fairly unusual for a court to allow an offender on supervised release to live with a child who is under 16.

As noted above, these employment and residency restrictions during supervised release are mandatory in only some cases. A sentencing court, however, has the discretionary authority to impose employment and residency restrictions as part of sentencing in other sex offender cases as well. W. Va. Code § 62-12-26(b). Any condition imposed upon a sex offender is subject to constitutional limitations. For a discussion of this issue, see Section IX.

E. Termination

Although periods of supervised release are mandatory, West Virginia Code § 62-12-26(h)(1) allows a court to terminate a supervised release period after a minimum of two years. See also W. Va. Code § 62-12-26(a). To do so, a court must find that the conduct of the defendant warrants the termination of the supervised release period and the interests of justice require the period to be terminated. The procedure for terminating a period of supervised release is governed by Rule 32.1(b) of

the West Virginia Rules of Criminal Procedure. W. Va. Code § 62-12-26(h)(1).

F. Extension or Modification

1. Procedure

Before a period of supervised release expires, a court may extend the period if the maximum allowable term was not originally imposed. W. Va. Code § 62-12-26(h)(2). A court may also modify the terms of supervised release before the period of supervised release expires. The procedure for extending or modifying a term of the supervised release is governed by Rule 32.1(b) of the West Virginia Rules of Criminal Procedure. W. Va. Code § 62-12-26(h)(2). Pursuant to Rule 32.1(b), a defendant would be entitled to a hearing and assistance of counsel to extend or modify the terms of supervised release.

It should be noted that Rule 32.1(b) expressly provides that the extension of a term of probation cannot be considered favorable to a defendant. Similarly, the extension of a term of supervised release would not be considered favorable. Therefore, a defendant who is faced with a proposed extension would be entitled to a hearing and assistance of counsel. However, a hearing would not be required if the modification was requested by the defendant or the court, upon its own motion, and the relief would be favorable to the defendant. In such cases, the State must be given notice of the modification and a reasonable time to object. W. Va. R. Crim. P. 32.1(b).

2. Constitutional Considerations

In *State v. Hedrick*, 236 W. Va. 217, 778 S.E.2d 666 (2015),[18] the West Virginia Supreme Court clarified the due process requirements for modifying the terms of supervised release and reiterated the proposition asserted in *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976) -- that terms of supervision must be reasonable. As part of his original sentence, the defendant was sentenced to a 25-year term of supervised release but no specific conditions were imposed at that time.[19] At the beginning of the supervised release period, the probation officer, in

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[18] The defendant's constitutional challenges to the supervised release statute were initially addressed in *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011), an appeal in which three underlying cases were consolidated.

[19] West Virginia Code § 62-12-26 provides, in relevant part: "[A]ny defendant convicted of [specific offenses] shall, as part of the sentence imposed at final disposition, be required to serve, *in addition to any other penalty or condition imposed by the court*, a period of supervised release of up to fifty years . . .. " (emphasis added).

addition to the standard terms of supervision, imposed two handwritten conditions of release: 1) that the resort the defendant owned could not employ him in any capacity; and 2) that he could not be present at the resort. See W. Va. Code § 62-12-26(i).[20] The defendant's counsel was not present when the probation officer included those conditions. In response, the defendant, through counsel, moved to strike these two conditions of his supervised release. After conducting a hearing, the circuit court declined to strike the conditions. On appeal, the Supreme Court held that the defendant's procedural due process rights were not violated because his counsel challenged the two conditions before the State alleged any violation of the terms. The Court also found that the terms were reasonable and necessary to protect the public.

In addition to challenging the initial terms of his supervised release, the defendant also appealed the imposition of additional terms that the circuit court imposed to resolve a petition to revoke the defendant's supervised release. The circuit court had imposed the additional terms after it had conducted a hearing on the revocation petition, and the terms were imposed instead of revoking the term of supervised release. On appeal, the Supreme Court rejected the defendant's due process arguments with regard to three of the additional conditions. It, however, remanded the case because the fourth condition prevented the defendant from entering one of his farms. As a basis for the remand, the Court noted that the lower court had failed to address maintenance of the farm and livestock, should the ban be continued.

G. Revocation

1. Terms of Incarceration

West Virginia Code § 62-12-26(h)(3) authorizes a court to revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release. When a term of incarceration is imposed, the defendant is not entitled to any credit for time previously served on supervised release. As an alternative to prison, the court may order home incarceration under subsection (h)(4). At the time of revocation, if the term of incarceration imposed is less than the maximum period of supervised release ***allowed*** by West Virginia Code § 62-12-26(j) [as opposed to the period of supervised release that the court originally established], the court may include a new period of supervised release to follow the term of incarceration. Pursuant to subsection (i), the length of

[20] West Virginia Code § 62-12-26(i) states as follows: "The court shall direct that the probation officer provide the defendant with a written statement at the defendant's sentencing hearing that sets forth all the conditions to which the term of supervised release is subject and that it is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required."

the new supervised release term cannot exceed the original period under subsection (a) less any term of incarceration.

The revocation provisions in subsection (h)(3), as well as most other provisions in this statute, use virtually identical language as found in the federal supervised release statute applicable to federal crimes generally. (18 U.S.C. § 3583 -- Inclusion of a term of supervised release after imprisonment.) A major difference between the federal statute and West Virginia Code § 62-12-26 is that the maximum terms of supervised release in the federal statute typically range from one to five years, depending upon the class of the federal offense. In contrast, under West Virginia's statute, the supervised release period for sex offenders is up to 50 years, or for life if the offender is designated as a sexually violent predator.

2. Constitutional Considerations

If an offender's supervised release term is revoked because of a violation of a supervision condition and the offender is sentenced to a term of incarceration, courts have rejected double jeopardy challenges to the imprisonment. Since a term of supervised release is imposed as part of the original sentence, a revocation and reimprisonment as punishment for violation of conditions of supervised release is viewed as relating to the original conviction and sentence. *Johnson v. United States*, 529 U.S. 694, 120 S. Ct. 1795 (2000) (sanctions imposed upon revocation of supervised release are part of the penalty for the initial offense); *United States v. Wyatt*, 102 F.3d 241 (7th Cir. 1996) (rejecting double jeopardy challenge on grounds that sanctions for violating the conditions of supervised release are part of the original sentence). If the act constituting the violation of the supervised release conditions is a criminal offense in its own right, it could also be the basis for a separate criminal prosecution. Only in the circumstance where the revocation of supervised release was pursued and resulted in punishment, and the person was separately convicted for the same offense, would double jeopardy concerns be triggered.

As earlier noted, West Virginia Code § 62-12-26 authorizes lengthy periods of supervised release for sex offenders following the completion of their initial sentence. In *State v. Hargus*, 232 W. Va. 735, 753 S.E.2d 893 (2013), two petitioners raised due process, equal protection, and double jeopardy challenges to their incarceration after supervised release revocation proceedings. In their due process challenge, the petitioners argued that the revocation provisions in subsection (g) violated their due process rights because they could be subject to an additional period of incarceration based upon a finding by the Court that they violated the terms of their supervised release. Specifically, the petitioners argued that

they should be entitled to have a jury make such a finding, as opposed to the court. They also argued that the State should be required to prove a violation beyond a reasonable doubt, as opposed to the standard established by the statute of clear and convincing evidence. Replying on *Johnson*, *supra*, the Supreme Court, however, found that the revocation provisions do not violate due process principles because a revocation proceeding is a continuation of the original prosecution, not a new prosecution for additional offenses. Based upon this reasoning, the Court held the revocation provisions did not violate due process principles.

The petitioners' equal protection challenges were also rejected. In its analysis, the Court noted that "equal protection means that the State cannot treat similarly situated people differently unless circumstances justify the disparate treatment." *Hargus,* 232 W. Va. at 742, 753 S.E.2d at 901 (citing *Kyriazis v. University of West Virginia*, 192 W. Va. 60, 67, 450 S.E.2d 649, 656 (1994)). However, the Court found that sex offenders are not similarly situated to criminal defendants who have not committed the sex offenses specified in Section 62-12-26(a). Therefore, the Court held that extended supervision periods for sex offenders do not violate equal protection principles.

Further, the Court rejected the petitioners' double jeopardy challenges. Again, the Court noted that the revocation proceeding is merely a continuation of the proceeding for the original offense. Therefore, it does not violate the federal or state constitutions' prohibition against double jeopardy.

The final challenge to the revocation proceedings involved a condition imposed on Petitioner Hargus, that he was not allowed to reside in a residence with a computer. He argued that the condition violated his First Amendment rights. The Court, however, rejected this argument and found that the restriction related to the goals of deterrence and protecting the public. Apparently, Mr. Hargus had engaged in downloading child pornography from the internet.

The case of *Hargus* was decided well before the opinion of *Packingham v. North Carolina*, 582 U.S. ---, 137 S. Ct. 1730 (2017),[21] a case in which a registered sex offender violated a North Carolina statute that established a felony offense if a registered sex offender accessed a commercial social networking site. The United States Supreme Court found that the North Carolina statute was overly broad and suppressed lawful speech.

Subsequent to the *Packingham* decision, the West Virginia Supreme Court addressed a case involving the revocation of an offender's

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[21] For a more thorough discussion of this case, see Section IX.

parole and commented on the condition imposed on Mr. Hargus. *Mutter v. Ross*, 240 W. Va. 336, 811 S.E.2d 866 (2018). In *Mutter*, the Court reversed the parole revocation after it found that the condition, a complete ban on the parolee's internet usage, violated his First Amendment rights as set forth in *Packingham*. The Court, however, noted that its decision did not affect the validity of the decision in *Hargus* because the restriction on Mr. Hargus was not a complete ban on internet usage. Rather, the Court noted that the condition in *Hargus* remained valid because the defendant had an underlying offense involving child pornography and he used the internet to engage in criminal behavior. *Mutter*, 240 W. Va. 336, 811 S.E.2d 866 n. 36.

3. Revocation Proceedings

The revocation provisions of the supervised release statute clearly specify that such proceedings are to be conducted "pursuant to the West Virginia Rules of Criminal Procedure applicable to revocation of probation." W. Va. Code § 62-12-26(h)(3). The basic procedures, therefore, are set forth in Criminal Procedure Rule 32.1 (Revocation or Modification of Probation), under subsection (2) captioned *Revocation Hearing*. Under this rule, unless waived, the revocation hearing must be held within a reasonable time, and the person provided the following: a) written notice of the alleged violation; b) the opportunity to appear and present evidence on his or her own behalf; c) the right to appear and hear the evidence supporting the alleged violation, with opportunity to cross-examine adverse witnesses; d) the opportunity to present evidence refuting the allegations; and e) notice of the right to counsel including appointed counsel. W. Va. R. Crim. Pr. 32.1(a).

4. Procedural Challenges

Since West Virginia Rule of Criminal Procedure 32.1 should be followed in supervised release revocation proceedings, case law addressing probation violations apply to supervised release revocation proceedings. The cases addressing due process challenges to probation revocation procedures have echoed the basic requirements of Rule 32.1, while adding the well-established points that the judge should be impartial and must issue written findings following the proceeding. In addition, the Supreme Court held that:

> The final revocation proceeding required by the due process clause of the Fourteenth Amendment and necessitated by W. Va. Code, 62-12-10, As amended, must accord an accused with the following requisite minimal procedural protections: (1) written notice of the

> claimed violations of probations; (2) disclosure to the probationer of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a 'neutral and detached' hearing officer; (6) a written statement by the fact-finders as to the evidence relied upon and reasons for revocation of probation. Syl. Pt. 12, *Louk v. Haynes*, 159 W. Va. 482, 223 S.E.2d 780 (1976).

Since *Louk*, these procedural requirements have been reiterated in other cases raising due process challenges to probation revocation proceedings. See *State v. Brown*, 215 W. Va. 664, 600 S.E.2d 561 (2004); *State ex rel. Jones v. Trent*, 200 W. Va. 538, 490 S.E.2d 357 (1997); *State v. Minor*, 176 W. Va. 92, 341 S.E.2d 838 (1986). As the reversals of probation revocations in some of the above-cited cases illustrate, these fundamental due process principles should be followed in proceedings to revoke supervised release as well.

With regard to the standard of proof, West Virginia Code § 62-12-26(h)(3) requires the State to prove a violation of supervised release conditions "by clear and convincing evidence." In contrast, case law has established that the State must prove allegations of probation violations "by a clear preponderance of the evidence." Syl. Pt. 4, *Sigman v. Whyte*, 165 W. Va. 356, 268 S.E.2d 603 (1980). See also *State ex rel. Jones v. Trent*, 200 W. Va. 538, 490 S.E.2d 357 (1997) (hearsay evidence can satisfy due process for probation revocation if found to be sufficiently reliable). This variation in terminology raises the question as to whether the "clear and convincing" standard for supervised release revocation is different (i.e. higher) than the "clear preponderance" standard for probation revocation. No cases could be found where these two variations were directly in issue. In one West Virginia case, however, the Supreme Court did make the observation that this State's probation revocation "clear preponderance" standard is higher than the proof requirement for probation violations in many jurisdictions; and is "more in line" with the standard requiring "clear and convincing evidence." *State v. Ketchum*, 169 W. Va. 9, 289 S.E.2d 657 n. 4 (1981). In view of this observation, and the similarity in purpose of probation and supervised release, the particular terminology used by the Legislature in the supervised release statute does not appear to denote a different standard of proof than that used in probation revocation hearings.

H. Delayed Revocation

West Virginia Code § 62-12-26(k) establishes a procedure for the revocation of supervised release after the period has expired, provided that certain conditions, discussed below, have been met. The sanctions that can be imposed are similar to the revocation sanctions that a court can impose under subsection (h) during a currently active supervised release term. The delayed revocation provisions of subjection (k) are virtually identical to the delayed revocation provisions of the federal supervised release statute, codified at 18 U.S.C. § 3583.

Both the West Virginia provision and the federal provision on delayed revocation proceedings expressly require the prior issuance (before the supervised release term expires) of a "warrant or summons" regarding the alleged violation in order to proceed on a revocation proceeding *after* the supervised release period has expired. In contrast, while a period of supervised release is active, an offender who is charged with a violation of supervised release conditions may be brought to court on a revocation petition. The federal cases that construe the delayed revocation provision strictly construe the warrant or summons requirements.

For example, in *United States v. Vargas-Amaya,* 389 F.3d 901 (9th Cir. 2004) the court held that the jurisdiction to revoke can be extended beyond the term of supervision by warrant only if it is issued upon probable cause supported by oath or affirmation, as required by the Fourth Amendment. The court concluded that a bench warrant based on unsworn allegations was not sufficient. In another case, *United States v. Hazel*, 106 F. Supp. 2d 14 (D.D.C. 2000), the court held that an order for a hearing on a violation of supervised release was not a "summons" within the meaning of the federal delayed revocation statute. Since no summons or warrant was issued and the defendant appeared only on the basis of the hearing order, the court concluded it had no jurisdiction to proceed with revocation since the supervised release term had expired before the date set for the hearing. See also *United States v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005) (holding that the court retained jurisdiction to adjudicate the condition of the defendant's supervised release after his term had ended because of summons for the violation was issued during the supervised release period); *United States v. Hondras*, 296 F.3d 601 (7th Cir. 2002) (holding that the delayed revocation provision allows a court to revoke a defendant's supervised release even after the term of release has ended, so long as a valid warrant or summons was issued before the end of the period). To date, there are no West Virginia cases construing this requirement.

XIII. Polygraph Examinations

A. Retroactive Application

Enacted in 2006, Article 11D of Chapter 62 of the West Virginia Code established conditions for requiring certain sex offenders to be subject to polygraph examinations. A rule of statutory construction is that new statutes (or amendments to existing statutes) are to be applied prospectively, absent language indicating that retroactive application is also intended. The Legislature has codified this rule as follows: "A statute is presumed to be prospective in its operation unless expressly made retrospective." W. Va. Code § 2-2-10(bb). As similarly put in *State v. Bannister*, 162 W. Va. 447, 453, 250 S.E.2d 53, 56 (1978): "[T]here is a presumption that a statute is intended to operate prospectively, unless it appears, by clear, strong and imperative words or by necessary implication that the Legislature intended to give the statute retroactive force and effect."

Article 11D does not include language that makes the polygraph provisions retroactive. Nevertheless, by necessary implication, it is reasonably apparent that the Legislature intended that these statutes be applied retroactively. Under express language used in the statute governing polygraph examinations, any person "required to register as a sex offender pursuant to the provisions of article twelve, chapter fifteen of this code" may be required to undergo polygraph examinations as a condition of probation, parole, or supervised release. W. Va. Code § 62-11D-2(a). Any person who has been determined to be a sexually violent predator is also required to be subject to polygraphs. Since the sex offender registration provisions expressly "apply both retroactively and prospectively" [W. Va. Code § 15-12-2(a)], the clear implication is that the Legislature intended retroactive effect for these new sex offender supervision provisions as well.

The requirement to register as a sex offender is triggered upon conviction, unless incarcerated. All sex offenders who are released on probation are required to immediately register with the State Police. Sex offenders released on parole or supervised release following a jail or prison sentence are required to register upon their release from incarceration. W. Va. Code § 15-12-2(e)(1). Since they are subject to the registry requirements, sex offenders on probation, parole, or supervised release, therefore, can be subject to the polygraph examination provisions in Article 11D of Chapter 62, regardless of their date of conviction.

B. Offenders Who May Be Subject to Polygraphs

Any person who has been determined to be a sexually violent predator according to the procedure established by West Virginia Code § 15-12-2a and is released on probation, parole, or supervised release ***must*** be subject to polygraph examinations. Additionally, a court or supervising entity ***may*** require a sex offender who is subject to registry requirements found in West Virginia Code §§ 15-12-1, *et seq.* to submit to polygraph examinations as a condition of probation, parole, or supervised release. W. Va. Code § 62-11D-2(a).

C. Payment for Polygraph Examinations

A person who is required to undergo polygraph examinations is responsible for the expense unless it is established that he or she is unable to do so. W. Va. Code § 62-11D-2(c). To establish the inability to pay for polygraph examinations, the offender must submit an affidavit to the circuit court in the county of supervision. If the court concludes that the offender is unable to pay for the examinations, the court is required to issue an order with these findings and forward it to the supervising entity. In these circumstances, the supervising entity will be responsible for payment. W. Va. Code § 62-11D-2(c).

D. Limitations on Polygraph Examinations

As contemplated by the statutes governing polygraph examinations, there are two general types of examinations: 1) a full-disclosure polygraph or sexual history polygraph; and 2) a maintenance test. The first type of examination, a full-disclosure polygraph, is an examination designed to elicit the entire sexual history of the offender. W. Va. Code § 62-11D-1(3). The second type of examination, a maintenance test, is designed to determine whether an offender is compliant with the terms of release, including any conditions related to treatment. W. Va. Code §§ 62-11D-1(4) and -2(b). An offender who is required to submit to polygraph testing shall be required to undergo one maintenance examination per year. Although additional examinations may be required, an offender may not be required to undergo more than five polygraph examinations per calendar year. W. Va. Code § 62-11D-2(b).

In addition to establishing requirements and limits for offenders who are subject to polygraphs, West Virginia Code § 62-11D-2 places certain limits on the persons who perform polygraphs. As an initial requirement, the person conducting the test must be a "certified polygraph analyst" (as defined by West Virginia Code § 62-11D-1). W. Va. Code § 62-11D-2(d). The analyst must, therefore, be licensed according to the requirements established by West Virginia Code § 21-5-5c; must be certified to conduct

post conviction sex offender tests by the American Polygraph Association; must complete no less that 20 hours of training that has been approved by the American Polygraph Association; and must use standards for sex offender testing that have been established by the American Polygraph Association. W. Va. Code § 62-11D-1(1). Even if otherwise qualified, a peace officer may not conduct a polygraph examination within the boundaries of his or her jurisdiction. W. Va. Code § 62-11D-2(f). The number of polygraph examinations an analyst may conduct (on various offenders) during a 24-hour period is governed by subsection (e) of West Virginia Code § 62-11D-2.

E. Admissibility of Polygraph Results

West Virginia Code § 62-11D-2(b) provides that: "The results of any examination are not admissible in evidence and are to be used solely as a risk assessment and treatment tool." In an additional subsection, the statute expressly provides that: "Nor shall any information or disclosure be admissible in any court in this state." W. Va. Code § 62-11D-2(e)(2). This same subsection prohibits a polygraph examiner from disclosing any information obtained during a full disclosure polygraph to law enforcement or other parties, except for the supervising entity.[22] These provisions indicate that the Legislature has granted use immunity with regard to any **past** offenses disclosed during polygraph examinations. Since the provision states that information obtained during a polygraph examination is not admissible in any court, the language also appears to prohibit the use of the results of polygraph examinations in probation, parole, or supervised release revocation proceedings. West Virginia case law has prohibited the use of results and information from polygraph examinations in criminal trials but has not addressed admissibility in other proceedings such as probation, parole, or supervised release revocation proceedings. Syl. Pt. 1, *State v. Chambers*, 194 W. Va. 1, 459 S.E.2d 112 (1995); Syl. Pt. 1, *State v. Beard*, 194 W. Va. 740, 461 S.E.2d 486 (1995); Syl. Pt. 2, *State v. Frazier*, 162 W. Va. 602, 252 S.E.2d 39 (1979); Syl. Pts. 4 and 5, *State v. Tyler G.*, 236 W. Va. 152, 778 S.E.2d 601 (2015).

A discussion of *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136, 79 L.Ed.2d 409 (1984) follows because almost all cases that have addressed the use of polygraph examinations as part of post-conviction supervision and the admissibility of such polygraph results have relied on it. In *Murphy*, the defendant was charged with criminal sexual conduct, pled guilty to charges of false imprisonment, and was placed on probation. He was required to participate in a sexual offender treatment program as a condition of probation. During the course of his treatment, he admitted to a counselor that he had raped and murdered a teenage girl approximately

[22] The subsection, however, creates exceptions to the prohibition on disclosure if a person either consents or discloses an intent or plan to commit a future crime.

six years earlier. He later stopped participating in the treatment program. The counselor informed the probation officer of this admission, and the probation officer required the defendant to come to her office. During the meeting, the probation officer questioned the defendant about the prior murder and the facts of the false imprisonment case. During the interview, the defendant denied the facts related to the false imprisonment charge but admitted to the earlier rape and murder. After this information was disclosed to law enforcement authorities, the defendant was tried and convicted of the rape and murder of the teenage girl. On appeal, the issue was whether the defendant's Fifth Amendment rights were violated by the admission of his confession to his probation officer in his criminal trial.

As an initial matter, it should be noted that the Fifth Amendment privilege must be asserted, and it is not self-executing unless an exception applies. The Court went on to analyze whether any of the exceptions to this general rule applied. The Court concluded that Mr. Murphy could not be considered "in custody," one of the exceptions, when he made the statements at a probation appointment he was required to attend. As noted by the Court, he was free to leave the interview. The Court also concluded that Mr. Murphy was not placed in a classic penalty situation because there was no direct evidence that Mr. Murphy confessed to the crime because he believed that his probation would be revoked if he did not answer the questions. Finally, the Court concluded that he was not entitled to an exception that has been recognized and developed in relation to the filing of a tax return by a gambler. See *Mackey v. United States*, 401 U.S. 667, 91 S. Ct. 1160 (1971); *Grosso v. United States*, 390 U.S. 62, 88 S. Ct. 709 (1968); *Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697 (1968). Therefore, the Court held that:

> Since Murphy revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations. Because he had not been compelled to incriminate himself, Murphy could not successfully invoke the privilege to prevent the information he volunteered to his probation officer from being used against him in a criminal prosecution. *Murphy,* 465 U.S. at 440, 104 S. Ct. at 1149.

In footnote 7 of *Murphy*, the United States Supreme Court recognized a distinction between questions about a probation condition, such as a residential requirement, that would not support a separate criminal prosecution and questions about a probation condition or past criminal activity that would support a separate criminal prosecution. The Court noted that questions about a condition that would not support a

separate criminal prosecution would not be subject to a claim of the Fifth Amendment privilege because revocation proceedings are not criminal proceedings. The Court further noted a court may properly consider a probationer's silence in a revocation proceeding.

A Pennsylvania state court case includes a helpful discussion of the principles governing the use of therapeutic polygraph examinations. *Commonwealth v. Camacho-Vasquez*, 81 Pa. D. & C. 4th 353 (2007). After summarizing cases that have addressed the use of post-conviction polygraphs, the court noted that the majority of jurisdictions that have addressed this question have upheld the use of such examinations, albeit with certain limitations. Based upon *Murphy*, the court concluded that "a defendant cannot be compelled as a condition of probation/parole to answer questions that could be used against him if he were tried for another crime." *Camacho-Vasquez*, 81 Pa. D. & C. 4th at 364. However, the court concluded that a polygraph examination can properly elicit information about the underlying offense because the defendant has already been found guilty (either by plea or by trial) of the offense and the defendant cannot be punished twice for the offense. The court further concluded that the questions raised during a polygraph examination must be "reasonably related" to either deterrence or rehabilitative purposes and cannot be used as a "fishing expedition." Citing *Camacho-Vasquez*, a Pennsylvania Superior Court has approved the use of therapeutic polygraph testing for a probationer who was required to participate in sex offender counseling. *Commonwealth v. Shrawder*, 940 A.2d 436 (Pa. Super. Ct. 2007).

Courts that have addressed the issue of admissibility of information and results from polygraph examinations, not for criminal trials, but for proceedings, such as probation revocation proceedings, have reached different results. The Montana Supreme Court has established an absolute bar to the admissibility of polygraph results in **any** court proceeding, including bond revocation proceedings. *State v. Hameline*, 344 Mont. 461, 188 P.3d 1052 (2008). See *State v. Staat,* 248 Mont. 291, 811 P.2d 1261 (1991). In *Hameline*, the court further recognized that "any evidence otherwise admissible could be rendered inadmissible if a polygraph test was used to produce or influence the outcome of that evidence." *Hameline*, 344 Mont. at 466, 188 P.3d at 1056 (quoting *State v. Anderson*, 293 Mont. 472, 977 P.2d 315 (1999)). See *People v. Miller*, 208 Cal. App.3d 1311, 256 Cal. Rptr. 587 (1989). Although the Montana Supreme Court has barred the admission of polygraph results and related information in all court proceedings, it has recognized that polygraph examinations may be still required even though the results may not be admitted in court proceedings. *Hameline, supra.*

In contrast to the Montana Supreme Court, the Kansas Supreme Court held that the results of a polygraph examination were admissible in probation revocation proceedings. *State v. Lumley,* 267 Kan. 4, 977 P.2d 914 (1999). The Court relied upon a distinction explained in *Murphy* between probation conditions that would not support separate criminal charges and acts that could support separate criminal charges. The Oregon Supreme Court has also allowed the admission of polygraph examination evidence in probation revocation proceedings because the proceedings are not governed by Oregon's Rules of Evidence, rules that prohibit the admission of polygraph evidence. *State v. Hammond*, 218 Or. App. 574, 180 P.3d 137 (2008).

In 2016, the New Jersey Superior Court issued a comprehensive opinion that addressed the Parole Board's use of polygraphs to monitor sex offenders who are subject to parole supervision. *J.B. v. New Jersey State Parole Bd.*, 444 N.J. Super. 115, 131 A.3d 413 (2016). The case originated when a group of sex offender parolees brought suit to challenge the Parole Board's use of polygraphs to monitor them. After an initial challenge, the Superior Court referred the matter to a trial court to develop an evidentiary record and to issue findings of fact concerning the use of polygraphs. Over a period of several years, the trial court heard testimony from experts and officials involved in the polygraph program. After the development of an extensive record, the Superior Court addressed the challenges brought by the appellants: that the Parole Board's use of polygraphs violated their constitutional rights and that the Parole Board's polygraph program is arbitrary, capricious, and unreasonable.

In its analysis, the Superior Court initially noted that there are two different types of results that may be generated during a polygraph session. The first type of result includes the statements that an individual may make in relation to a polygraph examination. The second type of result is data generated by the machine or the examiner's report that is based upon the offender's physiological responses during an examination.

Regarding the first type of result, a parolee's statements, the Court held that this type of evidence may be used against an offender in court, subject to limitations. The Court first ruled that an examiner is not required to issue *Miranda* warnings before an interview because interviews with probation and parole officers are not considered custodial interrogation. See *Minnesota v. Murphy*, 465 U.S. 420, 104 S. Ct. 1136 (1984). The Court also upheld a regulation that an offender does not have a right to have counsel present during such an interview. The Court, however, indicated that an offender could seek redress on a case-by-case basis if an examiner refuses to honor an offender's invocation of his or her privilege against self-incrimination or questions him or her in an abusive manner.

With regard to technical results, the measurements of the offender's physiological responses, the Court noted that a state statute prohibited the admission of these types of results in court to prove a probation or parole violation. The Court further held that these types of results could not be used to justify additional restrictions on an offender. However, the Court held that, in general, these types of results could be used for therapeutic purposes, even though results are not admissible in court.[23]

XIV. Electronic Monitoring

A. Retroactive Application

Article 11D of Chapter 62 of the West Virginia Code went into effect in 2006 and provides for the use of electronic monitoring and polygraph examinations for certain sex offenders. A rule of statutory construction is that new statutes (or amendments to existing statutes) are to be applied prospectively, absent language indicating that retroactive application is also intended. The Legislature has codified this rule as follows: "A statute is presumed to be prospective in its operation unless expressly made retrospective." W. Va. Code § 2-2-10(bb). As similarly put in *State v. Bannister*, 162 W. Va. 447, 453, 250 S.E.2d 53, 56 (1978): "[T]here is a presumption that a statute is intended to operate prospectively, unless it appears, by clear, strong and imperative words or by necessary implication that the Legislature intended to give the statute retroactive force and effect."

Article 11D does not include language that makes the provisions retroactive. Nevertheless, by necessary implication, it is reasonably apparent that the Legislature intended that these statutes should be applied retroactively. Under express language in the statute governing electronic monitoring, any person "required to register as a sex offender pursuant to the provisions of article twelve, chapter fifteen of this code" can be subject to electronic monitoring as a condition of probation, parole, or supervised release. W. Va. Code § 62-11D-3(a). Since the sex offender registration provisions expressly "apply both retroactively and prospectively" [W. Va. Code § 15-12-2(a)], the clear implication is that the Legislature intended the provisions governing electronic monitoring to apply retroactively as well.

The requirement to register as a sex offender is triggered upon conviction, unless incarcerated. All sex offenders who are released on probation are required to immediately register with the State Police. Sex

[23] As discussed earlier in this section, West Virginia Code § 61-11D-2 has placed a general ban on the admissibility of polygraph results in court. The only exceptions arise when a person consents to the disclosure or a person discloses an intent to commit a future crime.

offenders released on parole or on supervised release following a jail or prison sentence are also required to register upon their release from incarceration. W. Va. Code § 15-12-2(e)(1). Since they are subject to the registry requirements, any sex offender on probation, parole, or supervised release, therefore, can be subject to the electronic monitoring provisions in Article 11D of Chapter 62, regardless of the date of conviction. The electronic monitoring requirement may be imposed by the court as a condition of probation or supervised release or may be required by the offender's supervising entity. W. Va. Code § 62-11D-3(a).

In addition to the authority established by Article 11D, electronic monitoring can be imposed pursuant to the Home Incarceration Act, West Virginia Code §§ 62-11B-1, *et seq*.

B. Offenders Who May Be Subject to Electronic Monitoring

If a person has been designated as a sexually violent predator pursuant to West Virginia Code § 15-12-2a, he or she **must be** subject to electronic monitoring as a condition of probation, parole, or supervised release. If a person is required to register as a sex offender, he or she **may be** subject to electronic monitoring as a condition of probation, parole, or supervised release. W. Va. Code § 62-11D-3(a).

C. Payment for Electronic Monitoring

A person subject to this type of electronic monitoring is responsible for the expense unless it is established that he or she is unable to do so. To establish the inability to pay for electronic monitoring, the offender must submit an affidavit to the circuit court in the county of supervision. If the court concludes that the offender is unable to pay the cost of electronic monitoring, the court is required to issue an order with the findings and forward it to the supervising entity. In these circumstances, the supervising entity will be responsible for the payment. W. Va. Code § 62-11D-3(c).

D. Types of Electronic Monitoring

As established by West Virginia Code § 62-11D-1(2), electronic monitoring includes the following types of technologies: 1) voice verification; 2) radio frequency; 3) video display/breath alcohol test; 4) global positioning satellite; or 5) global positioning satellite -- cellular. It may also include a combination of those technologies.

When an offender is placed on electronic monitoring pursuant to West Virginia Code § 62-11D-3, the minimum initial level of monitoring must be radio frequency with enforced curfews. Within 30 days of being

placed on electronic monitoring, the offender must be assessed to determine the type of monitoring that is necessary to safeguard the public. Although the statute refers to an assessment, there is no specific guidance concerning the type of assessment that is required. After the assessment is conducted, the level of electronic monitoring may be either increased or decreased. It may not, however, be reduced to a level less than voice verification with a curfew.

XV. Duties of Division of Corrections and Rehabilitation Regarding Sex Offenders

A. Mandatory Prerelease Risk Assessment

The Division of Corrections and Rehabilitation is required to perform a prerelease risk assessment for inmates who have been convicted of the following crimes: 1) incest (W. Va. Code § 61-8-12); 2) a felony violation of Article 8B (Sexual Offenses); and 3) felony violations of Article 8D (Child Abuse). W. Va. Code § 62-12-27. The assessment must be completed before discharge, and it must include a prediction of the statistical risk that the inmate will reoffend after he or she is released. Before the inmate may be released, the Division of Corrections and Rehabilitation is required to forward the results to the supervising entity.

B. Parole Hearings: Notification to and Participation of Victims

West Virginia Code § 62-12-23 establishes a procedure for notifying certain officials, victims, and family members of victims before parole hearings are conducted. The procedure must be followed if the inmate has a conviction for any of the following crimes: murder, aggravated robbery, first or second degree sexual assault, kidnapping, child abuse resulting in injury, child neglect resulting in injury, arson, or any sexual offense against a minor.

To implement this procedure, the prosecutor, after sentencing, is required to prepare a form that lists certain information, including contact information for the victim and his or her family members, and forward it to the circuit court which sentenced the offender, the Parole Board, the Commissioner of Corrections, and all persons listed on the form. W. Va. Code § 62-12-23(b). At least 45 days before a parole hearing, the Parole Board must provide notice of the hearing to the persons listed on the form. W. Va. Code § 62-12-23(c). The notice sent to the victim and victim's family members must be sent by certified mail, return receipt requested. The notice to other recipients may be sent by regular mail, facsimile, or electronic mail. The notice must inform the persons that only the victim has the right to submit a written statement or appear at the parole hearing.

If the victim is deceased, is a minor, or is otherwise incapacitated, the family members may participate on the victim's behalf. At the parole hearing, the board must determine whether a victim or his or her representatives are present. If so, the parole board is required to allow such persons to address the board as to whether the inmate should be granted parole. W. Va. Code § 62-12-23(d).

If parole is granted, the parole board is required to notify all persons listed on the form that the inmate will be discharged on a particular date. W. Va. Code § 62-12-23(e). The release date must be at least 30 days after the date on which parole is granted. The parole board is also required to prepare a written statement explaining its decision to grant parole. Upon request, the explanation must be provided to persons whose names are listed on the parole notification forms.

XVI. Post-Conviction Challenges Involving DNA

A. Procedure for Motions for Post-Conviction DNA Testing

Enacted in 2004, West Virginia Code § 15-2B-14 established statutory procedures to address motions for post-conviction DNA testing. Several months before the enactment of West Virginia Code § 15-2B-14, the West Virginia Supreme Court had decided a case that governs when an inmate is entitled to post-conviction DNA testing. *State ex rel. Richey v. Hill*, 216 W. Va. 155, 603 S.E.2d 177 (2004). The following discussion outlines the procedures for post-conviction DNA testing.

A felon who is incarcerated may file a written motion requesting DNA testing. A motion for post-conviction DNA testing is properly addressed by the circuit court in the county in which the defendant was convicted. Pursuant to West Virginia Code § 15-2B-14(b)(1), an incarcerated felon may request appointment of counsel to represent him or her with the filing of a motion for post-conviction DNA testing. The request for counsel must include the following information: 1) a statement that the person did not commit the crime; 2) a statement that the DNA testing is relevant to his or her innocence; and 3) a statement indicating whether the person has ever been appointed counsel for post-conviction DNA testing. If the request does not include the required information, the court should return the request and inform the person that the request cannot be processed without the required information. W. Va. Code § 15-2B-14(b)(2).

A person is entitled to the appointment of counsel with regard to post-conviction DNA testing if he or she is indigent, has not been appointed counsel in the past for this purpose and the required information for the request is included (i.e., a statement indicating his or her innocence

and the relevancy of DNA testing to the person's innocence). W. Va. Code § 15-2B-14(b)(3)(A). If counsel has been previously appointed to pursue post-conviction DNA testing on the inmate's behalf, the court has the discretion whether to appoint counsel or not. W. Va. Code § 15-2B-14(b)(3)(B).

If counsel is appointed to file a motion for post-conviction DNA testing, the appointment is limited in scope to the preparation and litigation of the motion. Additionally, this statute provides that the appointment of counsel for post-conviction DNA testing does not automatically entitle that person to the appointment of counsel in a post-conviction *habeas corpus* proceeding. W. Va. Code § 15-2B-14(b)(4). In *Richey*, the Court noted that a motion for post-conviction DNA testing would be considered an "eligible" proceeding under West Virginia Code § 29-21-2(2). Further, if the petitioner is indigent, the cost of the DNA testing should be borne by the State.

The right to file a motion for post-conviction DNA testing is considered absolute and may not be waived. A purported waiver in a plea agreement would not be considered valid. W. Va. Code § 15-2B-14(m); Syl. Pt. 7, *State ex rel. Burdette v. Zakaib*, 224 W. Va. 325, 685 S.E.2d 903 (2009). However, an offender does not have an absolute right to have the testing conducted. *Id.*

According to West Virginia Code § 15-2B-14(c), a motion for DNA testing must be verified and must include the following information. First, it must explain why the perpetrator's identity either was or should have been a significant issue in the underlying case. A motion for DNA testing must also explain how the verdict or sentence would have been more favorable had DNA results been available when the inmate was convicted. In addition, the motion should further identify the evidence that should be tested and the type of testing requested. Further, the motion should indicate the results of any prior DNA or other biological testing that was conducted by either the State or defense. Finally, the motion must indicate whether a previous motion for post-conviction DNA testing had been filed and the outcome of it. W. Va. Code § 15-2B-14(c)(1).

The motion must be served on the prosecutor in the county in which the inmate was convicted and the governmental agency or laboratory (if known) that possesses the evidence. Any response to the motion must be filed within 60 days of service unless a continuance for good cause has been granted. W. Va. Code § 15-2B-14(c)(2).

If the evidence was subject to prior DNA or other biological testing, the court shall require the party at whose request the testing was conducted to provide all information or related reports to both the court

and opposing party. W. Va. Code § 15-2B-14(d). The disclosure of the required information should be helpful to evaluate whether any further testing should be allowed.

The court has the discretion whether to conduct a hearing on the motion. The court also has the discretion as to whether the convicted person should be present at a hearing. W. Va. Code § 15-2B-14(e).

West Virginia Code § 15-2B-14(f) has established a list of factors that must be satisfied before a person is entitled to DNA testing. Syllabus Point 6 of *Richey* also identified factors that must be satisfied, most of which are substantially similar to subsection (f). First, the evidence must be available for testing and must be in a condition such that testing could be conducted. Secondly, a chain of custody for the evidence must be established so that it can be determined that the evidence was not altered. Third, the identity of the perpetrator either was or should have been a substantial issue in the underlying case. Fourth, the inmate must make a *prima facie* showing that the evidence is material to the perpetrator's identity as a participant in the crime. Fifth, the DNA test results should raise a reasonable probability that the verdict or sentence would have been more favorable had test results been available at the time the person was convicted. Sixth, the evidence must not have been previously tested or the testing, currently proposed, could provide results that would be more discriminating or could reasonably contradict prior test results. Seventh, the requested testing must be a method that is accepted within the scientific community. Eighth, the method of testing must not have been available to the defendant at the time of conviction or there must have been a finding of ineffective assistance of counsel. Finally, the motion must not have been filed for the purposes of delay.

It should be noted that Syllabus Point 6 of *Richey* indicates that negative test results must be "outcome determinative" in proving the petitioner not guilty of the offense. However, West Virginia Code § 15-2B-14(f) is less stringent in that a petitioner is only required to show that the DNA testing would have resulted in a more favorable verdict or sentence. Syllabus Point 6 of *Richey* also provides that the petitioner's theory supporting the testing must not be inconsistent with the defenses presented at trial. This factor is not included in West Virginia Code § 15-2B-14(f). These two factors set forth in *Richey* could be interpreted to be more stringent than the factors established by West Virginia Code § 15-2B-14(f). Since the statute was enacted after *Richey* was decided, the standards set forth in the statute, to the extent that they are less stringent, should control. See *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995).

According to West Virginia Code § 15-2B-14(j), an order deciding a motion for post-conviction DNA testing is subject to review only via a petition for a writ of prohibition or mandamus in the Supreme Court. A party aggrieved by the ruling must file such a petition within 20 days of the entry of the order.

B. Case Law Governing Post-Conviction DNA Testing

The West Virginia Supreme Court has recognized that the introduction of false evidence, standing alone, is not enough to overturn a jury verdict. In a case addressing the introduction of falsified evidence, the Court held that: "Although it is a violation of due process for the State to convict a defendant based on false evidence, such conviction will not be set aside unless it is shown that the false evidence had a material effect on the jury verdict." Syl. Pt. 2, *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 190 W. Va. 321, 438 S.E.2d 501 (1993).[24] The Court reached this conclusion after it conducted a thorough review of case law from other state and federal jurisdictions.

In a later case, the petitioner sought an original jurisdiction writ of mandamus to compel the Superintendent of the West Virginia State Police and the Kanawha County Prosecuting Attorney to conduct DNA tests on evidence introduced in his trial for third-degree sexual assault. *Richey v. Hill*, 216 W. Va. 155, 603 S.E.2d 177 (2004). The Court declined to issue a writ of mandamus, in part, because this issue had been addressed in prior post-conviction *habeas corpus* proceedings. The Court also declined to issue a writ of mandamus because the petitioner was not incarcerated. The Court further pointed out that the identification of the assailant was not a disputed issue in the underlying case. For those reasons, the Court found that the petitioner did not have an established right that should be enforced by mandamus.

Providing further clarification regarding motions for post-conviction DNA testing, the Supreme Court has recognized that a petitioner has the absolute right under West Virginia Code § 15-2B-14 to request post-conviction DNA testing. However, he or she does not have the absolute right to have the testing conducted. Syl. Pt. 7, *Burdette*, 224 W. Va. 325, 685 S.E.2d 903 (2009). In *Burdette*, the Court also clarified that prisoners who were convicted between 1979 and 1999 and against whom a serologist other than Fred Zain offered evidence were not automatically entitled to have additional DNA testing. Syl. Pt. 6, *Burdette, supra*. They were, however, entitled to request post-conviction DNA testing. To grant a

[24] The cited case is often referred as *Zain I*, and it established procedures for post-conviction relief for inmates who had been convicted through the false testimony of Fred Zain, a former serologist for the Division of Public Safety.

motion for post-conviction DNA testing, "the evidence sought to be tested must likely produce an opposite result if a new trial were to occur, and the evidence cannot be such that its purpose is merely to impeach or discredit a State's witness." Syl. Pt. 6, in part, *Burdette, supra.*

In *Burdette*, the petitioner had requested DNA testing of a cigarette butt that was introduced at trial that placed him at the scene of a murder. Other evidence was also introduced. After the circuit court denied the petitioner's request, he sought relief in the Supreme Court. Declining to issue a writ of mandamus, the Court pointed out that the State had introduced other "overwhelming evidence" that was sufficient to support the conviction. 224 W. Va. at 333, 685 S.E.2d at 911. In addition, the Court discussed the petitioner's numerous statements regarding the murder. In light of other evidence that placed the petitioner at the crime scene, the Court determined that a negative DNA test would not produce an opposite result at another trial. For these reasons, the Court denied the petition for a writ of mandamus.

Chapter 8

SEX OFFENDER REGISTRATION

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I. Introduction

The West Virginia Sex Offender Registration Act ("WVSORA") is a regulatory act intended to promote public safety and welfare. W. Va. Code § 15-12-1a. WVSORA is mandatory. It applies prospectively and retroactively to all persons who are convicted (or found not guilty by reason of mental illness, mental retardation, or addiction) of certain offenses defined in Chapter 61. Registration is also required for other offenses when the sentencing judge makes a specific finding that the crime was sexually motivated. W. Va. Code § 15-12-2(a)-(c).

II. Constitutionality of WVSORA

The West Virginia Supreme Court has addressed constitutional challenges to WVSORA, consistently upholding the Act's validity. The Court has found that WVSORA is a regulatory act that does not criminalize previously legal conduct or increase punishment for an existent

crime. *Hensler v. Cross*, 210 W. Va. 530, 558 S.E.2d 330 (2001). Thus, WVSORA may be applied retroactively to offenders convicted before the Act's passage without violating state and federal prohibitions against *ex post facto* laws. *Hensler*, 210 W. Va. at 536, 558 S.E.2d at 336. Further, the provisions of WVSORA that require lifetime registration of certain sexual offenders and allow for public dissemination of certain information regarding the offender may also be applied retroactively without violating *ex post facto* principles. *Haislop v. Edgell*, 215 W. Va. 88, 593 S.E.2d 839 (2003).

The West Virginia Supreme Court has held that the 1999 amendments to the WVSORA which retroactively increased the registration period for certain sex offenders from ten years to life based on the age of the victim do not violate the separation of powers provisions of the state and federal constitutions. *State v. Bostic,* 229 W. Va. 513, 523, 729 S.E.2d 835, 845 (2012). In *Bostic,* the defendant entered into a plea agreement in 1997 in which he pled guilty to a misdemeanor offense of sexual abuse in the second degree. At the time he entered his guilty plea, the offense required that he register as a sex offender for a period of ten years. 229 W. Va. at 516, 729 S.E.2d at 838. In 1999, the WVSORA was amended to increase the registration period for certain sex offenders from ten years to life. Among the categories of sex offenders affected were those who had been convicted of certain offenses involving a minor. The amendments applied retroactively, and the defendant's registration period increased from ten years to life. 229 W. Va. at 517, 729 S.E.2d at 839.

The defendant argued that because he pled guilty to second degree sexual abuse, an offense which does not take the victim's age into account, the West Virginia State Police ("WVSP") would be required to conduct additional fact-finding as to the victim's age in order to enforce the 1999 amendments. 229 W. Va. at 523, 729 S.E.2d at 845. Specifically, the defendant argued that because the WVSP is an agency under the executive branch, this allowed the WVSP to perform judicial functions in violation of the separation of powers provisions. However, the Supreme Court held that the issue of whether the offense involved a minor was determined by operation of law pursuant to West Virginia Code § 15-12-4(a)(2)(E) and the WVSP was merely required to implement the law. 229 W. Va. at 521, 729 S.E.2d at 844. Therefore, the Supreme Court held that the 1999 amendments did not violate the separation of powers provisions of the federal and state constitutions.

The WVSORA has also been upheld against procedural due process challenges. The Supreme Court has held:

> W. Va. Code § 15-12-4 (2000), which requires life registration for certain sexual offenders,

> and W. Va. Code § 15-12-5 (2001), which allows for public dissemination of certain information about life registrants, do not violate the procedural due process protections afforded by the West Virginia Constitution. Syl. Pt. 6, *Haislop v. Edgell*, 215 W. Va. 88, 593 S.E.2d 839 (2003).

Procedural due process standards do not entitle a sexual offender to a hearing prior to registration, regarding the offender's "current dangerousness." *Haislop v. Edgell*, 215 W. Va. 88, 96, 593 S.E.2d 839, 847 (2003). *Haislop* is consistent with federal law regarding sex offender registry laws, and federal standards of procedural due process. *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160 (2003). Under the WVSORA, in particular, and registry laws in general, the issue of an offender's current dangerousness is of no consequence because the registry requirement turns on the offender's previous conviction alone and not his or her risk of re-offending. *Haislop,* 215 W. Va. at 96, 593 S.E.2d at 847; *Connecticut Dept. of Public Safety, supra*.

Notably, however, both the United States Supreme Court and the West Virginia Supreme Court appear to have left open the question of whether a registry law, such as WVSORA, can be challenged on substantive due process grounds. *Haislop*, 215 W. Va. at 96-97, 593 S.E.2d at 847-48; *Connecticut Dept. of Public Safety*, 538 U.S. 1, 123 S. Ct. 1160.[1] It has been recognized in these decisions that if an offender can clearly demonstrate that he is rehabilitated and poses no risk of reoffending, he may have grounds to challenge the law as applied to him. In *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140 (2003), Justice Ginsburg spoke in greater detail regarding factual circumstances that may give rise to a substantive due process claim.[2] In her dissenting opinion Justice Ginsburg stated:

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[1] In *Haislop* and *Connecticut Department of Public Safety*, the primary issue was whether the registry law in contention violated principles of procedural due process. A challenge to a registry law's requirements may also be brought on equal protection grounds. *Connecticut Dept. of Public Safety*, 538 U.S. 1, 123 S. Ct. 1160 (Souter and Ginsburg, J.J. concurring). Although a substantive due process argument was asserted in a West Virginia Supreme Court case, the Court quickly refuted this allegation because the petitioner's argument actually focused on procedural due process rights. Therefore, the substantive due process issue is still undecided in West Virginia case law. *See In re Jimmy M.W.,* No. 13-0762 (W. Va. Supreme Court, May 30, 2014)(memorandum decision).

[2] *Smith v. Doe*, which was decided the same term as *Connecticut Department of Public Safety*, addressed an *ex post facto* challenge to Alaska's sex offender registry law. Justice Ginsburg, along with Justices Breyer and Stevens dissented in *Smith v. Doe*, because they believed Alaska's law was punitive in its effect.

> And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation. John Doe I, for example, pleaded *nolo contendere* to a charge of sexual abuse of a minor nine years before the Alaska Act was enacted. He successfully completed a treatment program, and gained early release on supervised probation in part because of his compliance with the program's requirements and his apparent low risk of reoffense. He subsequently remarried, established a business, and was reunited with his family. He was also granted custody of a minor daughter, based on a court's determination that he had been successfully rehabilitated. The court's determination rested in part on psychiatric evaluations concluding that Doe had "a very low risk of re-offending" and is "not a pedophile." Notwithstanding this strong evidence of rehabilitation, the Alaska Act requires Doe to report personal information to the State four times per year, and permits the State publicly to label him a "Registered Sex Offender" for the rest of his life. *Smith v. Doe*, 538 U.S. 84, 117-18, 123 S. Ct. 1140, 1160 (2003) (internal citations and footnote omitted).

III. The West Virginia Sex Offender Registration Act

A. Who is Required to Register Under WVSORA?

1. Qualifying Offenses

The requirements of WVSORA generally apply to all sexual offenders who live, work, or attend school in West Virginia. If a person has been convicted (or found not guilty by reason of mental illness, mental retardation, or addiction) of a qualifying offense or an attempted qualifying

offense specified in West Virginia Code § 15-12-2(b), then he or she must comply with WVSORA.[3] A qualifying offense includes: 1) the offenses defined in Chapter 61, Article 8A (preparation, distribution, or exhibition of obscene matter to minors); 2) the offenses defined in Chapter 61, Article 8B (sexual offenses), including sexual assault of a spouse formerly codified as 61-8B-6; 3) the offenses defined in Chapter 61, Article 8C (filming sexually explicit conduct of minors); 4) the offenses defined in Chapter 61, Article 8D, Sections 5 and 6 (sexual offenses of a child by a parent, guardian, custodian, or person in a position of trust to a minor, distributing material by a parent, guardian, or custodian depicting a child engaged in sexually explicit conduct); 5) Chapter 61, Article 8, Sections 6, 7, and 12 (detention in place of prostitution; procuring for house of prostitution; incest); 6) Chapter 61, Article 2, Section 14 (abduction of person; kidnapping or concealing a child); 7) Chapter 61, Article 3C, Section 14b (soliciting minor via computer)[4] as it relates to the provisions of Chapter 61 listed in West Virginia Code § 15-12-2(b); and 8) Chapter 61 Article 14, Sections 2 (as the offense relates to sexual servitude), 5, and 6. W. Va. Code § 15-12-2(b).

2. *Criminal Offenses That Are Sexually Motivated*

The WVSORA also applies to those persons who are convicted of a criminal offense that the sentencing judge finds was sexually motivated. W. Va. Code § 15-12-2(c). For the purposes of the WVSORA, the term sexually motivated means "that one of the purposes for which a person committed the crime was for any person's sexual gratification." W. Va. Code § 15-12-2(j). This statutory language "must be read and applied strictly and narrowly to assure that an offense's gravity, dangerousness, and sexually illicit nature is comparable to that of the specific offenses that are identified in W. Va. Code § 15-12-2(b)." Syl. Pt. 3, in part, *State v. Whalen*, 214 W. Va. 299, 588 S.E.2d 677 (2003). "The evidentiary standard for a finding of 'sexual motivation' pursuant to W. Va. Code § 15-12-2(c) [2001] is proof beyond a reasonable doubt, and a defendant must be given the opportunity to oppose and contest such a proposed finding with evidence and argument." Syl. Pt. 2, *Whalen*, *supra*. Further, a defendant must be informed prior to trial or prior to the entry of a plea that the court may make a finding that the crime was sexually motivated pursuant to West Virginia Code § 15-12-2(c). Syl. Pt. 1, *Whalen*, *supra*. See *State v. Seen*, 235 W. Va. 174, 772 S.E.2d 359 (2015) for a case in which the Supreme Court reversed a sexual motivation finding because

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[3] The obligations and responsibilities under WVSORA are further detailed in the *Regulations and Procedures Pertaining to the West Virginia Sex Offender Registration Act*, Code of State Regulations, Title 81, Section 14.

[4] The term "computer" is broadly defined and includes cellular telephones, as well as other electronic devices such as desktop computers, laptops, tablets, games consoles, or any other electronic data storage device. W. Va. Code § 61-3C-3(c).

the defendant was not provided pretrial notice of the "sexual motivation" finding. The defendant should also be informed about what registration requirements he or she will be subjected to as a result of such a finding. *Whalen*, 214 W. Va. at 303, 588 S.E.2d at 681.

Subsequent to the *Seen* opinion, the West Virginia Supreme Court addressed a case in which a defendant, although charged with second degree sexual assault and conspiracy, was convicted by a jury of simple battery. *State v. Kennedy*, 243 W. Va. 58, 842 S.E.2d 262 (2020). The facts involved the defendant carrying the intoxicated teenage victim to another room and engaging in sexual intercourse with her. Earlier in the evening, the defendant had engaged in other acts that could have constituted battery. At sentencing, the trial court found that the battery was carrying the victim to another room, that the battery was sexually motivated and that the defendant was, therefore, subject to sex offender registry requirements.

On appeal, the defendant argued that the circuit court erred when it found that the defendant committed the battery when he carried the victim to the other room. The Supreme Court, however, found that the conduct (carrying the victim) was part of the alleged criminal transaction, and the circuit court did not abuse its discretion when it made this finding.

Secondly, the defendant argued that the circuit court finding of sexual motivation contradicted the jury verdict in that he was convicted of a battery, not a sexual offense. The Court, however, found that the circuit court was not prevented from making an independent determination that the battery was sexually motivated because the circuit court, at sentencing, has this responsibility. See Syl. Pt. 2, *Kennedy, supra*; W. Va. Code § 15-12-2(c).

Thirdly, the defendant asserted that he did not receive timely notice that the State was seeking a finding of sexual motivation and relied on *Whalen, supra*. The Supreme Court, however, noted that the defendant's counsel, during the trial, had not been certain that he would request the battery instruction. The State had, however, opposed the instruction throughout the trial. The Supreme Court held that the defendant was not denied due process because the circumstances were unique and the defendant was convicted of a lesser included offenses not contained in the indictment. For all these reasons, the Supreme Court affirmed the trial court's rulings.

3. Qualifying Offense From Another Jurisdiction

The WVSORA also applies to those persons who were convicted

(or found not guilty by reason of mental illness, mental retardation, or addiction) of a sexual offense or an attempted offense in another jurisdiction, provided that conviction of the offense required proof of the same essential elements as those offenses identified in West Virginia Code § 15-12-2(b). Accordingly, if a person is required to register as a sex offender under the laws of another state, the District of Columbia, any U.S. Territory, under the United States Code, or under the Uniform Code of Military Justice -- if he or she lives, works, attends school in West Virginia, owns property that is regularly visited, or is a visitor in West Virginia for 15 or more consecutive days -- then he or she must comply with the WVSORA. W. Va. C.S.R. §§ 81-14-17.7 and 17.8.

4. Juvenile Adjudications

Finally, the express language of the WVSORA does not address juveniles who are convicted or found delinquent of a sexual offense in West Virginia or some other jurisdiction. The broad language used in the WVSORA can be read to include those juveniles who are transferred to a circuit court's *adult* criminal jurisdiction and are convicted or found not guilty by reason of mental illness, mental retardation, or addiction of a qualifying offense specified in West Virginia Code § 15-12-2(b), and to those juveniles who are required to register under the laws of another jurisdiction.

In case law, the West Virginia Supreme Court has found that a juvenile adjudication does not constitute a criminal conviction. Syl. Pt. 3, *State ex rel. Slatton v. Boles*, 147 W. Va. 674, 130 S.E.2d 192 (1963). See also *Brookes v. Boles*, 151 W. Va. 576, 153 S.E.2d 526 (1967). Similarly, the Legislature has established that a juvenile adjudication is not deemed to be a conviction. W. Va. Code § 49-4-103. Based upon this authority, the Court concluded that, "[W]e find the phrase any person who has been convicted of an offense contained in W.Va. Code § 15-12-2(b) [2012], does not include a juvenile who has been adjudicated delinquent." Syl. Pt. 3, in part, *State v. J.E.,* 238 W. Va. 543, 796 S.E.2d 880 (2017).

In *J.E.*, the State had argued that the Adam Walsh Act requires juveniles, age 14 and older, who are adjudicated of a qualifying offense to register as a sex offender. *J.E.*, 238 W. Va. 543, 796 S.E.2d 880. The Court, however, rejected this argument and noted again that the language of the WVSORA does not require a juvenile who is adjudicated of a sexual offense to register as a sex offender. 238 W. Va. at 550, 796 S.E.2d at 887.

Currently, under the laws of some states juvenile sex offenders adjudicated under delinquency laws are required to register. Additionally, under the Adam Walsh Act, enacted by the United States Congress in

2006, states will lose eligibility for certain federal grant funding if they fail to pass laws requiring juveniles who are age 14 years or older and are convicted or adjudicated delinquent of a crime similar to or as serious as aggravated sexual abuse to register as sex offenders.[5] 34 U.S.C. § 20911(8). The Final Guidelines promulgated by the Justice Department which interpret the Adam Walsh Act, state that for the purposes of determining whether a sexual act is comparable to 18 U.S.C. § 2241 (aggravated sexual abuse), an element of the offense should include: "engaging in a sexual act with another by force or the threat of serious violence; or engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim."[6] However, West Virginia has not enacted such legislation to date.

B. Where Should an Offender Register?

Any person required to register under the WVSORA must do so in person at the West Virginia State Police detachment in the county or counties of his or her residence. W. Va. Code § 15-12-2(d). Any offender who resides in another jurisdiction (another state, federal, or military jurisdiction) and who is required to register under the laws of that

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[5] In some federal cases, juveniles are subject to federal sex offender registration. 34 U.S.C. § 20911(8). . The applicable subsection provides that:

> The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18, United States Code [18 USCS § 2241]), or was an attempt or conspiracy to commit such an offense. 34 U.S.C. § 20911(8).

Generally speaking, 18 U.S.C. § 2241 prohibits:

> (a) knowingly caus[ing] another person to engage in a sexual act--
> (1) by using force against that person; or
> (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; [or
> (b) engaging in a sexual act with another by rendering unconscious or involuntarily drugging the victim; or
> (c) engaging in a sexual act with a person under the age of 12]. 18 U.S.C. § 2241.

[6] The Final Guidelines were published by the Department of Justice on July 2, 2008, and Supplemental Guidelines were issued on January 11, 2011. The citation reference above is found on page 16 of the 2011 Guidelines. The Department of Justice also issued Supplemental Guidelines in effect on August 1, 2016, that address sex offender registration of adjudicated juveniles. The Final Guidelines may be accessed via the Internet at https://smart.gov/pdfs/SORNA-Juvenile-Guidelines-8-1-2016.pdf (accessed May 20, 2021).

jurisdiction, must also register in accordance with the WVSORA in any county of West Virginia where he or she works, attends school, will be visiting for 15 or more consecutive days, or owns or leases habitable property that he or she regularly visits. W. Va. Code § 15-12-9(b).

The West Virginia Supreme Court has addressed a case in which a defendant was convicted for his failure to provide updated information concerning his residence. *State v. Beegle*, 237 W. Va. 692, 790 S.E.2d 528 (2016). The facts of this case involved a defendant who provided addresses for his residence and his employment.[7] According to the defendant, he began residing at his place of employment, but he did not update his residency information with the State Police as required by West Virginia Code §§ 15-12-2 and -3. The Court noted that the Sex Offender Registration Act requires an offender to disclose all applicable residences and addresses. Further, the Court noted that, absent accurate information regarding an offender's addresses, the registry would not fulfill its purpose.

Finding that the evidence was sufficient to support the defendant's conviction, the Court held that: "Under the Sex Offender Registration Act, West Virginia Code §§ 15-12-1 to -10 (2014), a sex offender may have multiple addresses and is required to register each one." Syl. Pt. 1, *Beegle*, 237 W. Va. 692, 790 S.E.2d 528. In another syllabus point, the Court held that:

> A registered sex offender who resides for any extended period of time at his place of employment or job site is required to update the registry to reflect that his/her physical address includes his/her work-related address for purposes of complying with the disclosure requirements of the Sex Offender Registration Act, West Virginia Code §§ 15-12-1 to -10 (2014). Syl. Pt. 2, *Beegle, supra.*

In this case, the Court also rejected the defendant's claims that the two terms "residence" and "address" were unconstitutionally vague.

C. What Information About an Offender Is Collected By the State Police?

Any person who is required to register under the WVSORA must provide the State Police, at a minimum, with the following information:

[7] A careful reading of the case raises questions as to whether the defendant truly resided at the address designated as his residence. The testimony at trial indicated that he kept personal items at the residence, received his mail, and spent approximately one night per month in the residence. 237 W. Va. at 698, 790 S.E.2d at 534.

1. The offender's full name, any aliases used by the offender, former names of the offender, and any nicknames the offender is known by;

2. The offender's date of birth, sex, race, height, weight, eye color, and hair color;

3. The address where the offender resides or intends to reside. The address of any habitable property the offender owns or leases that he or she visits regularly. A post office box is unacceptable;

4. The name and address of the offender's employer or place of occupation, and any future employers. A post office box is unacceptable;

5. The name and address of any schools or training facilities the offender attends or plans to attend in the future. A post office box is unacceptable;

6. The offender's social security number;

7. A full faced photograph of the offender that was taken at the time of registration;

8. A brief description of the crime or crimes for which the offender was convicted;

9. The date of the conviction and the jurisdiction in which the conviction was obtained;

10. The date of release from incarceration, or the date the offender was placed on probation;

11. A full set of fingerprints and palm prints;[8]

12. The make, model, color, and license plate number of any vehicle, motor home, or trailer the offender owns or regularly uses;[9]

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[8] The applicable regulation indicates that the written notice on the registration form should include the right thumb print of the offender. W. Va. C.S.R. § 81-14-8.3.a.8.

[9] The term "trailer" includes travel trailers, fold-down camping trailers, and house trailers, as those terms are defined in West Virginia Code § 17A-1-1.

13. Information relating to any Internet accounts the offender has or uses, including screen names, user names, and any aliases the offender uses on the Internet; and

14. Information relating to any telephone numbers, or electronic paging device numbers the offender has or uses. This includes residential, work, and mobile telephone numbers.
W. Va. Code § 15-12-2; W. Va. C.S.R § 81-14-8.

If an offender is classified as a sexually violent predator, then he or she must provide information in addition to that specified above. The offender must provide notice of: identifying factors such as scars and tattoos, a history of the offense or offenses for which he was convicted, and documentation of any treatment received for a mental abnormality or personality disorder. W. Va. Code § 15-12-2(f).

D. What Additional Information Must Be Obtained for the Sex Offender Registry?

1. The offender's date of birth;

2. The sex, race, height, weight, hair, and eye color;

3. The date of any address change;

4. Jurisdiction and conviction date;

5. Date released from incarceration or placed on probation;

6. Offense for which the offender was convicted;

7. Parole or probation officer name and telephone number;

8. Three photographs to include a front, right, and left profile; and

9. Required signatures. W. Va. C.S.R. § 81-14-13.2.

DI. When is an Offender Required to Register?

Any offender who is required to register under WVSORA must do so upon conviction or finding of not guilty by reason of mental illness, mental retardation, or addiction. Specifically, any individual convicted of a qualifying offense, unless incarcerated, must register with the State Police

within three business days of the date of his or her conviction or finding of not guilty by reason of mental illness, mental retardation, or addiction. An offender who is incarcerated or confined to a mental health facility following his or her conviction of a qualifying offense must register with the State Police within three business days of his or her release from confinement. If a registered offender is incarcerated for any offense, the statute requires that he or she register within three business days of release. W. Va. Code § 15-12-2(e).

Despite this statutory requirement, the West Virginia Supreme Court has recognized that the requirement to register within three business days of release is "expressly connected to the offender's underlying conviction of a 'qualifying offense' which is set forth in West Virginia Code § 15-12-2(b)." Syl. Pt. 1, in part, *State v. Judge*, 228 W. Va. 787, 724 S.E.2d 758 (2012). An offender "who is released from incarceration or confinement on an *unrelated charge* has a duty to return to the State Police detachment to update the information on file only if there has been a change to any previously reported information or if sufficient time has passed to require an address verification as required by West Virginia Code § 15-12-10." Syl. Pt. 2, in part, *Judge*, *supra* (emphasis added).

In *Judge*, the offender had spent one night in a regional jail on an unrelated, non-qualifying charge. He had, however, updated his registry information several weeks before his arrest on the unrelated charge. After he was charged with the felony offense of failing to register, the defendant moved to dismiss the indictment. In turn, the trial court granted the defendant's motion. On appeal, the West Virginia Supreme Court carefully reviewed the statutes and held that the duty to register upon release from incarceration applies only to qualifying offenses.

F. Duties of the Circuit Courts, Correctional and DHHR Facilities, and Probation/Parole Officers

1. Circuit Courts

If a defendant is convicted or found not guilty by reason of mental illness, mental retardation, or addiction of a qualifying offense or attempted qualifying offense specified in West Virginia Code § 15-12-2(b), or a sexually motivated offense, as provided in West Virginia Code § 15-12-2(c), where the judge found the crime to be sexually motivated, the circuit court has a duty to inform the defendant of his or her obligations under the WVSORA. The circuit court should, on the record, question the defendant and his or her counsel regarding whether the defendant received notice of the Act's requirements and whether he or she understands them. The court must require the defendant to sign a

statement, in open court, acknowledging that he or she has received notice of the WVSORA's requirements. The signed notice constitutes *prima facie* evidence that the defendant has knowledge of his or her obligation to comply with the WVSORA. Finally, under this statutory notice provision, the circuit court must provide a copy of the signed statement to the State Police. W. Va. Code § 15-12-2(g); W. Va. C.S.R. § 81-14-9.1.

In addition to the duties discussed above, anytime a defendant is convicted or found not guilty by reason of mental illness, mental retardation, or addiction of a qualifying offense under the WVSORA, the circuit court must see that a copy of the defendant's registry information is sent to the State Police. The information should be transmitted within 72 hours of entry of the sentencing or commitment order and should include all of the information required by West Virginia Code § 15-12-2(d), as well as non-identifying information about the victim. The information disclosed about the victim should include: his or her sex and age at the time of the offense, and the relationship, if any, between the victim and the offender. W. Va. Code § 15-12-2(e)(2); W. Va. C.S.R. § 81-14-9.8.

2. Correctional and DHHR Facilities

The WVSORA places affirmative duties on the officials operating correctional and mental health facilities that house sexual offenders.[10] Anytime a person who is required to register as a sex offender is released from incarceration or confinement, the correctional facility or mental health facility has a duty to inform the offender of his or her obligations under the WVSORA prior to release. W. Va. Code § 15-12-6. The correctional facility or mental health facility must obtain all of the information specified in West Virginia Code § 15-12-2(d), and a signed statement from the offender acknowledging that he or she has received notice of the WVSORA's requirements. This information, as well as notice of the person's release, must be transmitted to the State Police within three business days that it is received. W. Va. Code § 15-12-2(e)(1); W. Va. C.S.R. § 81-14-8.3.

In addition to the duties discussed above, prior to releasing an inmate convicted of a violation of West Virginia Code § 61-8-12 or a felony violation of an offense defined in Chapter 61, Articles 8B and 8D, the Division of Corrections and Rehabilitation must conduct a pre-release risk assessment. The assessment should be conducted to determine the statistical risk that the inmate will reoffend. The results of the assessment

[10]These duties are specifically imposed on the Commissioner of Corrections, regional jail administrators, city officials or sheriffs operating jails, and the Secretary of the Department of Health and Human Resources. W. Va. Code § 15-12-2(e)(1).

must then be sent to the inmate's probation or parole officer. W. Va. Code § 62-12-27.

3. Probation and Parole Officers

The WVSORA also imposes duties on the probation and parole officers who supervise sex offenders. An officer that supervises an offender must provide the offender with notice of the WVSORA's requirements. The supervising officer must also obtain from the offender all of the information specified in West Virginia Code § 15-12-2(d). This information must be transmitted to the State Police within three business days of receiving it. W. Va. Code § 15-12-2(e)(1).

Likewise, a probation or parole officer who accepts authority over a sex offender from another jurisdiction pursuant to West Virginia Code §§ 28-7-1, *et seq*.[11] must give the offender notice of his or her obligations under the WVSORA, must obtain the information specified in West Virginia Code § 15-12-2, and must report this information to the State Police. The supervising officer should also obtain a signed statement from the offender that acknowledges receipt of the WVSORA's requirements. W. Va. Code § 15-12-9.

G. Duration of Registry Requirements

Under the WVSORA, a sex offender must either register for a period of ten years or for life. The obligations of an offender who is required to comply with the WVSORA are suspended during periods of incarceration in a jail or prison, or confinement in a mental health facility. W. Va. Code § 15-12-4(a). Further, if a person's conviction is overturned, they may petition the sentencing court to have their name removed from the registry. W. Va. Code § 15-12-4(b).

1. Offenders Required to Register for Ten Years

As established by West Virginia Code § 15-2-2(b), any person who is convicted or found not guilty by reason of mental illness, mental retardation, or addiction of one of the following offenses is required to comply with the WVSORA for a period of ten years:

a. Article 8A: Preparation, distribution or exhibition of obscene matters to minors;

b. Article 8B: Sexual offenses, including sexual assault of a spouse;

[11] Article 7 of Chapter 28 of the West Virginia Code contains the Interstate Compact for the Supervision of Adult Offenders.

c. Article 8C: Filming of sexually explicit conduct of minors;

d. Article 8D, sections 5 and 6: Sexual abuse by a parent, guardian, custodian or person in a position of trust to a child; Parent, guardian, custodian distributing material depicting child engaged in sexually explicit conduct;

e. W. Va. Code § 61-2-14: Abduction of person with intent to defile;

f. W. Va. Code § 61-8-6: Detention of person in place of prostitution;

g. W. Va. Code § 61-8-7: Procuring for a house of prostitution;

h. W. Va. Code § 16-8-12: Incest;

i. W. Va. Code § 61-3C-14b: Soliciting a minor via computer;[12]

j. W. Va. Code §§ 61-14-2, 5, and 6, as an offense relates to human trafficking for purposes of sexual servitude;

k. A sexually motivated offense as defined in W. Va. Code § 15-12-2(j);[13] and

l. Conviction of an attempt to commit a qualifying offense. W. Va. Code § 15-12-2(b)(c).

If the offender is sentenced to a period of incarceration or confinement, the 10-year period commences upon the offender's release from jail, prison, or a mental health facility. If no term of incarceration or confinement is imposed then the 10-year period commences upon conviction or finding that the offender is not guilty by reason of mental illness, mental retardation, or addiction. Under no circumstances will the 10-year period be reduced due to the offender's release from probation,

[12] The term "computer" is broadly defined to include laptops, desktops, tablets, cell phones, and game consoles. See W. Va. Code § 61-3C-3(c).

[13] Subsection 81-14-7.2b of the Regulations and Procedures Pertaining to the West Virginia Sex Offender Registration Act erroneously states that persons required to register based upon a finding by the court that a general offense was sexually motivated, pursuant to West Virginia Code § 15-12-2(c) must register for life.

parole, or other supervised release. W. Va. Code § 15-12-4(a)(1). If during the 10-year period, an offender is incarcerated or confined in a mental health facility, for any offense, the 10-year period is tolled until his or her release.

2. Offenders Required to Register for Life

The majority of persons convicted of a sexual offense in West Virginia will be required to register as a sex offender for life. The obligations imposed on offenders who are required to register for life are suspended while the offender is incarcerated or confined to a mental health facility. Those offenders who are required to register for life are identified below. W. Va. Code § 15-12-4(a)(2).

a. Previous Conviction of a Qualifying Offense

If a person who has been convicted or found not guilty by reason of mental illness, mental retardation, or addiction on one or more previous occasions for any qualifying offense, then he or she is required to register for life. W. Va. Code § 15-12-4(a)(2)(A). For the purposes of the WVSORA, the previous conviction or finding of not guilty by reason of mental illness, mental retardation, or addiction may have been entered in West Virginia, another state, the District of Columbia, a U.S. Territory, or under federal or military law, provided proof of the same essential elements as those listed for sexual offenses in Chapter 61 were required for the conviction.

b. Multiple Victims or Multiple Violations of a Qualifying Offense

If a person has been convicted or found not guilty by reason of mental illness, mental retardation, or addiction of any qualifying offense, and the court, upon motion by the prosecutor, finds by clear and convincing evidence that the offense involved multiple victims or multiple violations of the qualifying offense, then he or she must register for life. W. Va. Code § 15-12-4(a)(2)(B).

c. Conviction of a Sexually Violent Offense

If a person is convicted or found not guilty by reason of mental illness, mental retardation, or addiction of a sexually violent offense, then he or she must register for life. W. Va. Code § 15-12-4(a)(2)(C). For the purposes of WVSORA, a sexually violent offense includes the following:

1. Sexual assault in the first degree, W. Va. Code § 61-8B-3;

2. Sexual assault in the second degree, W. Va. Code § 61-8B-4;

3. Sexual abuse in the first degree, W. Va. Code § 61-8B-7;

4. Sexual assault of a spouse, formerly codified as West Virginia Code § 61-8B-6; and

5. An offense with similar elements of proof as one of the above-listed West Virginia offenses from another state, federal, or military jurisdiction.

W.Va. Code § 15-12-2(i).

d. Sexually Violent Predators and Offenses Against Minors

If a person is determined by a circuit court to be a sexually violent predator, then he or she is required to register for life. W. Va. Code § 15-12-4(b)(2)(D). Finally, if a person is convicted or found not guilty by reason of mental illness, mental retardation, or addiction of any qualifying offense in which the victim was a minor, then he or she must register for life under WVSORA. W. Va. Code § 15-12-4(a)(2)(E). For the purposes of WVSORA, a minor is anyone under 18 years of age.

H. Registration of Out-of-State Offenders

The provisions of WVSORA potentially apply to sex offenders who are convicted or found not guilty by reason of mental illness, mental retardation, or addiction of a sexual offense in another jurisdiction. If a person is required to register as a sex offender, according to the laws of another state, the District of Columbia, a U.S. Territory, or by federal or military law, he or she must also register as a sex offender in West Virginia if the offender: works in West Virginia, attends school or a training facility in West Virginia, is a visitor in West Virginia for more than 15 consecutive days, or owns or leases habitable property in West Virginia that he or she regularly visits. W. Va. Code § 15-12-9(b). The person must register within three business days of the start of employment, work, school enrollment, or visit. W. Va. C.S.R. § 81-14-17.7.a.

If a person is required to register as a sex offender under the laws of another jurisdiction, and he or she changes his or her residence to West Virginia, the person must register as a sex offender with the State Police within 10 days of relocation. W. Va. Code § 15-12-9(c); W. Va. C.S.R. § 81-14-17.8.a.

I. Verification of Registry Information

Registered offenders must report in person in the month of their birth to verify their registry information. W. Va. Code § 15-12-10. An offender is required to report annually regardless of whether there are any changes in his or her information.

Any offender who is classified as a sexually violent predator must report in person to verify his or her information in the months of January, April, July, and October, regardless of whether there are any changes in his or her information. W. Va. Code § 15-12-10.

All offenders who are required to verify their registry information should report in person to the State Police detachment in their county or counties of registration. The State Police may require any offender to submit to new fingerprints or photographs as part of the verification process. W. Va. Code § 15-12-10. Additionally, the State Police may require any offender to provide online information, which includes information relating to the registrant's internet accounts, screen names, user names, or aliases pursuant to West Virginia Code § 15-12-2(d)(8). W. Va. Code § 15-12-10.

Notwithstanding the verification requirements stated in West Virginia Code § 15-12-10, an offender who is required to register under WVSORA has a continuous obligation to notify the State Police of any changes in his or her registry information. W. Va. Code § 15-12-3. Under the State Police Registry Regulations, if the offender intends to change his or her address or residence, either within the State or to somewhere out of state, then the offender must physically appear at the State Police detachment where he or she last registered, at least 10 business days prior to the anticipated move, and give notice of the anticipated change. W. Va. C.S.R. § 81-14-17.6.a. When an offender changes residence, place of employment or occupation, school or training facility, or any other required registration information, he or she must physically appear at the State Police detachment where they reside, work, or attend school, and provide the necessary information within 10 business days after making the change. W. Va. C.S.R. § 81-14-17.6.c. Out of state offenders who begin working, attending school, visiting West Virginia, or who move to this State, have similar in-state notification and registration requirements. W. Va. C.S.R. §§ 81-14-17.7 to 17.9.

IV. Court Determination that an Offender Is a Sexually Violent Predator

An offender who is convicted or found not guilty by reason of mental illness, mental retardation, or addiction of a sexually violent offense may be subject to a summary proceeding to determine whether he or she is a sexually violent predator. W. Va. Code § 15-12-2a. As the term itself implies, this label is reserved for a small but extremely dangerous group of offenders who are at risk to commit repeated acts of sexual violence. Under WVSORA, a determination that an offender is a sexually violent predator enhances the obligations of the offender, the courts, the State Police, detention facilities, and post-release supervising officers. See W. Va. Code §§ 62-11D-2; 62-11D-3; and 62-12-26; see also *Regulations and Procedures Pertaining to the West Virginia Sex Offender Registration Act*, W. Va. C.S.R. Title 81, Series 14.

A. Definitions

Under the WVSORA, a sexually violent predator is defined as a "person who has been convicted or found not guilty by reason of mental illness, mental retardation or addiction of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." W. Va. Code § 15-12-2(k). "The term 'mental abnormality' means a congenital or acquired condition of a person, that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons."[14] W. Va. Code § 15-12-2(l); see also W. Va. C.S.R. § 81-14-2.3 (similar definition). For the purposes of WVSORA, a predatory act is "an act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization." W. Va. Code § 15-12-2(m); see also W. Va. C.S.R. § 81-14-2.4 (defined more broadly to also include acts directed at family members). Finally, under WVSORA a sexually violent offense includes the following codified offenses, and similar offenses in another state, federal, or military jurisdiction: sexual assault in the first degree (W. Va. Code § 61-8B-3); sexual assault in the second degree (W. Va. Code § 61-8B-4); sexual assault of a spouse (formerly codified as W. Va. Code § 61-8B-6); sexual abuse in the first degree (W. Va. Code § 61-8B-7); and any similar offense in another state, federal, or military jurisdiction. W. Va. Code § 15-12-2(i); see also W. Va. C.S.R. § 81-14-2.8

[14] The definition of the term mental abnormality adopted by the West Virginia Legislature is identical to the definition adopted by the Kansas Legislature. See K.S.A. § 59-29a02. The United States Supreme Court has found that this definition satisfies the requirements of substantive due process. *Kansas v. Hendricks*, 521 U.S. 346, 356-58, 117 S. Ct. 2072, 2079-80 (1997).

(defined more broadly to also include any Article 8B offense that included forcible compulsion, bodily injury, use of a deadly weapon, or any violent offense that is determined by a court to be sexually motivated).

B. Procedure

Once an offender has been sentenced for the commission of a sexually violent offense, or the court has entered a judgment of acquittal upon a finding that the offender is not guilty by reason of mental disease, mental retardation, or addiction of a sexually violent offense, the prosecutor may initiate a proceeding to determine whether the offender is a sexually violent predator. W. Va. Code § 15-12-2a(a). The prosecutor must file a written pleading with the sentencing court that sets forth the prosecutor's claim that the offender suffers from a mental abnormality that makes the offender likely to engage in predatory acts of sexual violence. W. Va. Code § 15-12-2a(c). The prosecutor must identify those facts from the record of the offender's criminal trial that support this claim. The burden is on the prosecutor to demonstrate, by a preponderance of the evidence, that the offender suffers from a mental abnormality that makes him or her likely to engage in sexually violent offenses in the future. W. Va. Code § 15-12-2a(f). Once a petition is filed, the court must conduct a summary proceeding that is triable before the court without a jury and determine whether the offender is a sexually violent predator. W. Va. Code § 15-12-2a(b).

The relevant statute, West Virginia Code § 15-12-2a, does not establish a time for filing this type of petition. However, the West Virginia Supreme Court has adopted two syllabus points that interpreted the statute and established limits on proceedings to determine whether an offender is a sexually violent predator. *State v. Myers*, 227 W. Va. 453, 711 S.E.2d 275 (2011). After a careful discussion of the statute, the Supreme Court concluded that West Virginia Code § 15-12-2a intended for this type of proceeding "to be held in conjunction with the sentencing phase of a criminal offense." Syl. Pt. 1, *Myers, supra.* Recognizing that a sexually violent predator proceeding should ordinarily occur in conjunction with the sentencing phase, the Court held that the summary proceeding could be initiated at any point before the offender is released from prison. Syl. Pt. 2, *Myers, supra*.

A brief review of the underlying facts from *Myers* follows. The defendant, Stanley Myers, was initially convicted of three counts of first-degree sexual assault and one count of third-degree sexual assault. While he was in prison, the Supreme Court had reversed his criminal conviction on the grounds of ineffective assistance of counsel. Instead of another trial, the defendant entered guilty pleas to three counts for first degree sexual abuse and one count of third-degree sexual assault. At the sentencing for these new offenses, the circuit court found the defendant to

be a "sexual predator," but a summary proceeding as required by West Virginia Code § 15-12-2a was not conducted. After the defendant completed his sentence and was released on parole, he registered as a sex offender.

Approximately three years after his release, the defendant began pursuing a boy by placing notes and candy in a library book. After discovering the defendant's actions, the State found out that the defendant had not been identified as a sexually violent predator. To address this situation, the State filed a motion to initiate a summary proceeding. After an evidentiary hearing, the circuit court found that the defendant was a sexually violent predator. In turn, the defendant appealed the ruling that allowed the summary proceeding to be initiated after his release from incarceration and the finding that he was a sexually violent predator. Reviewing the WVSORA, the Court concluded that the summary proceeding should be conducted in connection with the sentencing phase because the purpose is to provide enhanced supervision and to notify the public. The Court, however, noted that the statute's purpose is to protect the public. Therefore, it is permissible to initiate a proceeding after sentencing, but no later than an offender's release from prison. With particular regard to Stanley Myers, the Court, in footnote 14, observed that there were additional charges pending against him, and that the State would have another opportunity to initiate a sexually violent predator proceeding.

Once a petition is filed, the court should request and review a report from the Sex Offender Registration Advisory Board.[15] The Board's report should include its findings and conclusions as to whether the offender is a sexually violent predator. W. Va. Code § 15-12-2a(e); see also W. Va. C.S.R. § 81-14-12.2. The court may also order the offender to undergo a "psychiatric or other clinical examination" before rendering its decision to assist the court in determining whether the offender suffers from a mental abnormality. And if deemed necessary, after such an examination, the court may require the offender to undergo a "period of observation in an appropriate facility." W. Va. Code § 15-12-2a(d).

The court may also consider the testimony of expert witnesses for the State and the offender. Expert testimony may be helpful to explain an offender's mental health diagnosis and how the diagnosis can affect volitional capacity. At the conclusion of the hearing, the court must make written findings based on a preponderance of the evidence as to whether

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[15] The Legislature created the Sex Offender Registration Advisory Board in 1999. Its members are appointed by the Secretary of the Department of Military Affairs and Public Safety. The members consist of mental health professionals who specialize in the behavior and treatment of sex offenders, victims' rights advocates, and law-enforcement representatives. See W. Va. Code § 15-12-2b.

the offender is a sexually violent predator. W. Va. Code § 15-12-2a(f). If an offender is found to be a sexually violent predator, the clerk of the court must forward a copy of the order to the State Police. W. Va. Code § 15-12-2a(g).

C. What is a Mental Abnormality?

The term mental abnormality is not easy to apply, nor is it easy for a court or an expert to predict future acts of violence based on a finding that an individual has a mental abnormality. Other courts faced with the task of determining whether a person suffers from a mental abnormality for the purposes of classifying them as a sexually violent predator have considered: the offender's clinical diagnosis, if any; the nature and extent of the crime(s) committed; the age of the victim(s); records of the offender's mental health treatment history, if any; and the offender's history of criminal conduct. To date, the West Virginia Supreme Court has not decided a case involving this term.

However, in *Commonwealth v. Hitner*, 910 A.2d 721 (Pa. Super. 2006), a Pennsylvania Superior Court found that there was sufficient evidence for the trial court to conclude that the offender was a sexually violent predator within the meaning of Pennsylvania's Megan's Law III. An expert testified that the offender suffered from a paraphilia known as sexual sadism,[16] and was also diagnosed as having anti-social personality disorder.[17] The expert opined that there were many factors from the offender's life and the nature and extent of his criminal conduct that supported these diagnoses. The offender had an extensive criminal history, starting as a juvenile; he showed little remorse for his crimes; and he was unusually cruel to his victims, burning them, degrading them, and pulling out their hair for his own sexual gratification. *Hitner*, 910 A.2d at

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[16] Sexual sadism is classified in the DSM-IV-TR under Paraphilias and Sexual Disorders. This disorder is characterized by intense sexually arousing fantasies, sexual urges or behaviors involving real acts in which the psychological or physical suffering, including humiliation, of the victim is sexually exciting to the person. The sexual fantasies, urges or behaviors cause clinically significant distress or impairment to the person in social, occupational or other important areas of functioning. It is a chronic disorder. If the person's partners are nonconsenting, the acts are likely to be repeated until the person is apprehended. Diagnostic and Statistical Manual (American Psychiatric Association, 4th Ed. 1995).

[17] Antisocial Personality Disorder is classified in the DSM-IV-TR as a Personality Disorder. This disorder is characterized by a pervasive disregard for and violation of the rights of others by a person who is age 18 years or older, provided the person exhibited signs of Conduct Disorder before he or she reached the age of 15 years. Often, people with antisocial personality disorder are physically aggressive toward people and animals, they are deceitful, they lack remorse and/or empathy and they do not conform to lawful social conduct. Diagnostic and Statistical Manual (American Psychiatric Association, 4th Ed. 1995).

729-30. The court concluded, based on the evidence presented, that sexual sadism and antisocial personality disorder constituted mental abnormalities[18] within the meaning of Megan's Law III. 910 A.2d at 730.

In *Smith v. State*, 148 S.W.3d 330 (Mo. App. 2004), the Missouri Court of Appeals for the Southern District found that there was sufficient evidence to conclude that an offender who was diagnosed with pedophilia[19] was a sexually violent predator. The offender had a history of molesting young girls, he expressed a belief that young girls were trying to entice him sexually, and he refused to participate in sex offender therapy. Two experts concluded, based on his diagnosis of pedophilia and his sexual history, that he suffered from a mental abnormality[20] that made him likely to reoffend. *Smith*, 148 S.W.3d at 334.

D. Rights of the Offender

When a circuit court conducts a hearing pursuant to West Virginia Code § 15-12-2a, the offender is entitled to certain due process protections. The offender has the right to be present at the hearing and to have access to any medical evidence to be presented by the State. He or she has the right to the assistance of counsel and must be permitted to present evidence and cross-examine witnesses. The offender also has the right to an examination by an independent expert of his or her choice, and to call that expert to offer testimony on his or her behalf. W. Va. Code § 15-12-2a(f).

An offender may petition the sentencing court to remove the sexually violent predator designation if the underlying qualifying conviction is reversed or vacated. W. Va. Code § 15-12-3a.

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[18] Pennsylvania's former definition of the term "mental abnormality" is identical to the definition in West Virginia Code § 15-12-2(l). See former 42 Pa. C.S.A. § 9792. This statute expired in 2012; however, *Hitner,* provides guidance on how the term "mental abnormality" is interpreted by a court.

[19] Pedophilia involves sexual activity with a prepubescent child by a person who is at least 16 years old and is at least five years older than the child. It is characterized by at least 6 months of recurrent intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children. And the fantasies, urges or behaviors cause clinically significant distress or impairment in the social, occupational or other important functioning areas for the person. Diagnostic and Statistical Manual (American Psychiatric Association, 4th Ed. 1995).

[20] Missouri's definition of the term mental abnormality is identical to the definition adopted by the West Virginia Legislature in West Virginia Code § 15-12-2(l). See V.A.M.S. 632.480.

V. Distribution and Disclosure of Registry Information by the West Virginia State Police

A. Distribution by the State Police

1. *Mandatory Distribution*

The State Police detachment in the county or counties where an offender is registered is responsible for distributing the offender's notification statement in the city and county where the registrant resides, owns, or leases habitable real property that he or she regularly visits, is employed or attends school or a training facility. Within five business days[21] of receiving an offender's notification statement, the State Police detachment is required to distribute a copy to the following persons and entities: a) law enforcement agencies, including county, municipal and campus police departments; b) the county superintendent of schools; c) the Department of Health and Human Resources, Child Protective Services division; d) all community and religious organizations that regularly provide services to youths; e) individuals and organizations which provide day care services to youths; f) individuals and organizations that provide services for mentally or physically incapacitated or infirm persons; g) the Federal Bureau of Investigation; and h) the local state police detachment. W. Va. Code § 15-12-5(a). An offender's notification statement contains all of the information required by West Virginia Code § 15-12-2(d). Because the notification statement contains information that is not disclosed to the public, the State Police can require any person or entity receiving it to sign a nondisclosure statement. See W. Va. C.S.R. § 81-14-15.2.a.2.

If an offender is classified as a sexually violent predator, the State Police detachment in the county or counties in which the offender is registered must notify the prosecuting attorney of the offender's status. The State Police and the prosecuting attorney must conduct a community notification program. The notification program should include publication of the offender's name, a recent photograph, the offender's current address, and the location of any property the offender owns or leases that he or she regularly visits. The legal rights and obligations of the offender and the public should be included in the notice. W. Va. Code § 15-12-5(b)(1).

Finally, the State Police may obtain records that were compiled in conjunction with the offender's sexual offense. This includes, but is not

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[21] For the purposes of the WVSORA, business day means days exclusive of Saturdays and Sundays and legal holidays listed in West Virginia Code § 2-2-1(a) and (b). W. Va. Code § 15-12-2(n).

necessarily limited to, records pertaining to the investigation, prosecution, adjudication, incarceration, probation, parole, or presentence review of the offender. If an offender's records are requested, the agency holding the records must provide a copy to the State Police. W. Va. Code § 15-12-6a.

2. Discretionary Distribution

The State Police may distribute an offender's notification statement to "authorized law-enforcement agencies, campus police and governmental agencies of the United States and its territories, of foreign countries duly authorized to receive the same, of other states within the United States and the State of West Virginia," provided the requested information will be used solely for law enforcement related purposes. Upon request, the State Police may distribute a copy of an offender's notification statement to a federal, state, or local government agency that is required to complete employment related background checks. W. Va. Code § 15-12-5(c); see also W. Va. C.S.R. §§ 81-14-15.8 and 15.9 (responsibility of Sex Offender Registry). Finally, the State Police must notify the Division of Motor Vehicles, pursuant to West Virginia Code § 17B-2-3, when the State Police receives notice of a sexually violent predator either registering or being determined in West Virginia. W. Va. C.S.R. § 81-14-15.8. Similarly, the State Police may disclose information to the Division of Motor Vehicles, pursuant to West Virginia Code § 17B-2-3, related to any offender required to register.[22] The State Police can require these entities to sign a nondisclosure statement, as they are receiving information about the offender that is not disclosed to the public.

3. Notification of an Offender's Relocation

If the State Police receive notice that an offender who is required to register under WVSORA intends to move to another state or country, the State Police must transmit the offender's registry information to law enforcement officials in the jurisdiction where the offender intends to

[22] The applicable provisions provide:

(5) To any person, who has previously been adjudged to be afflicted with or suffering from any mental disability or disease and who has not at the time of application been restored to competency by judicial decree or released from a hospital for the mentally incompetent upon the certificate of the superintendent of the institution that the person is competent, and not then unless the commissioner is satisfied that the person is competent to operate a motor vehicle with a sufficient degree of care for the safety of persons or property;

(7) To any person when the commissioner has good cause to believe that the operation of a motor vehicle on the highways by the person would be inimical to public safety or welfare. W. Va. Code § 17B-2-3(a)(5) and (7).

move. If an offender is incarcerated in West Virginia, and he or she informs institution officials of an intention to relocate upon release, institution officials must notify the State Police of both the offender's intention to relocate and the jurisdiction to which the offender intends to relocate. Institution officials must provide this information at least 10 business days prior to the offender's release. Offenders who are not incarcerated are obligated to notify the State Police if they intend to move outside of the State of West Virginia. An offender who intends to relocate must notify the State Police of his or her intent to move and the location of the move at least 10 business days prior to moving. W. Va. Code § 15-12-7.

When any other information changes, or the offender changes residence, work, or school locations from one West Virginia county to another, the State Police must be notified within 10 business days after the change. W. Va. Code § 15-12-3; see also W. Va. C.S.R. § 81-14-17.6.

B. Disclosure to the Public

The Legislature has found that in the interest of public safety and welfare, certain information about those persons convicted of sexual offenses must be disclosed to the public. W. Va. Code § 15-12-1a(b). The State Police Sex Offender Registry is required to maintain an Internet website containing information on all offenders who are required to register for life under WVSORA. W. Va. Code § 15-12-2(h); see also W. Va. C.S.R. § 81-14-15.4.[23] The WVSORA does not dictate what information must be disclosed to the public. The Internet website maintained by the State Police generally contains: the offender's name; a photograph of the offender; the address of the offender's residence; physical characteristics of the offender; the general location of the offender's employer; general location of where the offender attends school; the address of any real property the offender owns or leases; and a general description of the crime and victim. The website also allows members of the public to determine whether a particular e-mail address or user name is that of a registered sex offender. However, the identity of the offender is not disclosed in this process.

Additionally, a resident of a county in which an offender is required to register may petition the circuit court for an order requiring the State Police to disclose information pertaining to a registered offender that is not included on the Internet website. For example, a resident may seek more specific information about where a registered offender attends school or is employed. The burden is on the resident/petitioner to specify what

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[23] The Internet website may be accessed at https://apps.wv.gov/StatePolice/SexOffender.

information is sought. If upon considering the petition, the court finds the information is relevant to public safety and that it outweighs any privacy interests of the offender, the court may grant the petition and order the State Police to disclose the information. The court may prohibit the resident from disclosing the information to any other persons or entities. W. Va. Code § 15-12-5(b)(3).

C. Information that Is Excluded from Disclosure to the Public

The WVSORA prohibits the disclosure of specific or identifying information about the victim. The WVSORA also prohibits the disclosure of an offender's telephone or pager numbers to members of the public. Victim information and the telephone and pager numbers of the offender are not disclosed to the public under any circumstances. W. Va. Code § 15-12-5(b)(1).

Certain other information contained in an offender's notification statement is also excluded from public disclosure. This generally includes: the offender's social security number, the name and address of an offender's employer, and the name and address of a school or training facility the offender attends. This type of information is protected not only for the interests of the offender, but also for the interests of an employer or a school that is associated with the offender. However, as noted in Section B above, a member of the public may be able to obtain this information pursuant to West Virginia Code § 15-12-5.

VI. Penalties for Failure to Register or Provide Notice of Registration Changes; Penalties for Aiding and Abetting

A. Registry Requirements

Any person who is required to register as a sex offender under the WVSORA and provide notification of changes in registry information under the WVSORA, may be prosecuted for his or her failure to comply. W. Va. Code § 15-12-8. A person who is required to register under the WVSORA who fails to report a change or changes in his or her registry information may be charged for each separate item of information that has changed and has not been updated with the State Police. W. Va. Code § 15-12-8(a). See *State v. Judge,* 228 W. Va. 787, 724 S.E.2d 758 (2012) (holding that the duty to register within three days of release applies to the offender's underlying conviction for a qualifying offense and further holding that a sex offender who is released from incarceration on an unrelated charge only has to return to the State Police detachment if there is a change in information or offender must verify his or her address). Generally, the penalty that may be imposed will depend on the initial

registry requirements of the offender, and whether the offender has any previous convictions for noncompliance with WVSORA.

B. Challenges to Convictions for Failure-to-Register Offenses

In *State v. Beegle*, 237 W. Va. 692, 790 S.E.2d 528 (2016), the Court upheld a defendant's conviction for failure to update registry information when he did not inform the State Police of the address of a second residence. Apparently, the defendant had one residence where he received his mail, kept personal items, and stayed overnight one or two nights in a month. He had begun residing at his place of employment but did not report this address as a residence. Affirming the circuit court conviction, the Supreme Court held that: "Under the Sex Offender Registration Act, West Virginia Code §§ 15-12-1 to -10 (2014), a sex offender may have multiple addresses and is required to register each one." Syl. Pt. 1, *Beegle*, 237 W. Va. 692, 790 S.E.2d 528. The Court further held that the terms -- "residence" and "address" were not unconstitutionally vague.

In 2016, the West Virginia Supreme Court observed that it had not addressed whether a sentence imposed upon a defendant for failing to comply with registration requirements could result in a unconstitutionally disproportionate sentence. *State v. Collins*, 238 W. Va. 123, 792 S.E.2d 622 (2016). In *Collins*, the petitioner's original conviction was for the misdemeanor offense of third-degree sexual abuse. He was 20 at the time of the offense, and the victim was a 14-year-old girl. The petitioner filed a *pro se* Rule 35(b) motion to reduce his sentence for his third offense of failing to comply with registry requirements. On appeal, his counsel raised two additional constitutional challenges -- that the sentence was unconstitutionally disproportionate, and that lifetime registration was a cruel and unusual punishment. The Court declined to address the petitioner's constitutional challenges because it had previously found that a Rule 35 motion cannot be used to challenge convictions or sentencing. See *State v. Marcum*, 238 W. Va. 26, 792 S.E.2d 37 (2016). The Court noted that constitutional challenges, such as those advanced in *Collins*, would have to be advanced first at sentencing and then in a direct appeal.

In 2019, the West Virginia Supreme Court upheld West Virginia Code § 15-12-2, the registry statute, against a vagueness challenge. *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019). In this case, a sex offender had initial felony convictions for kidnapping and second-degree sexual assault. After his release from prison, he initially complied with his sex offender registry requirements, but eventually failed to continue meeting the requirements. After a conviction for failure to register and the expiration of this second sentence, he again initially complied. However, he stopped using one phone number that he had

earlier provided to the State Police and started using his wife's phone number. Once law enforcement discovered these circumstances, the defendant was charged with two counts of failure to update his registry information. After the defendant was convicted of these offenses, the State filed a recidivist information. In turn, the defendant was found guilty of recidivism and was sentenced to life imprisonment.

To challenge his sentence, the defendant first argued that the phrase in West Virginia Code § 15-2-2(d)(9) that requires an offender to provide phone numbers that the registrant "has or uses" is vague and would require the offender to provide large amounts of information. The Supreme Court, however, rejected the argument and noted that although the statute included this broad requirement, the statute was not unconstitutionally vague. The defendant also challenged his conviction based upon the sufficiency of the evidence because he still had the phone number he had provided, but it was out of service. The Court, however, rejected the challenge because the phone number no longer allowed law enforcement to monitor the offender and failed to serve the purposes of the statute. Similarly, the defendant had failed to provide his wife's phone number to law enforcement, and the Court found that it was a phone that he used, and that he should have provided it to law enforcement. The defendant also challenged his sentence based on instructions given to the jury that stated that time was not of the essence for the offense. The defendant argued that time was, in fact, of the essence because he should have registered within 10 days of the charge. The Court rejected this challenge because the instruction came almost verbatim from the relevant statute and cases. Further, the Court found that the indictment provided the defendant with detailed notice of the charges and that the notice allowed him to prepare and present a defense to the charges. For these reasons, the Supreme Court affirmed the use of the instruction.

Advancing another challenge, the defendant argued that the sentence of ten to twenty-five years for second offense failure to update is unconstitutionally disproportionate under *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983). Addressing this argument, the Court found that the objective test, whether the sentence for the crime shocks the conscience, was not met. Rather, the Court noted that it, as well as the United States Supreme Court, had recognized the need for harsh deterrents to protect the public from sex offenders. The Court further noted that the trial court had imposed the sentence established by the Legislature and, therefore, deference should be afforded to the imposition of a statutory sentence.

The Court also examined the second prong of *Cooper* which requires an analysis of the following factors: "(1) the nature of the offense; (2) the legislative purpose behind the punishment; (3) a comparison of the

punishment with what would be inflicted in other jurisdictions; and (4) a comparison with other offenses within the same jurisdiction." *Hoyle*, 836 S.E.2d at 831. The Court recognized that the offense was nonviolent but found that the legislative purpose was to impose a harsh punishment for subsequent offenses of failure to register. Examining the third factor, the Court concluded that the Legislature had imposed a strong punishment, but that the statute was not an anomaly and that other states had imposed similarly harsh sentences for this type of offense. Regarding the fourth factor, the Court observed that the Legislature had chosen to impose harsh penalties for sexual offenses. Therefore, the Court concluded that the sentence was not unconstitutionally disproportionate.

The defendant's final challenge was that the recidivist life sentence was disproportionate. The Court reviewed its prior decisions concerning recidivist convictions and held in a syllabus point that:

> For purposes of a life recidivist conviction under West Virginia Code § 61-11-18(c), two of the three felony convictions considered must have involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results. If this threshold is not met, a life recidivist conviction is an unconstitutionally disproportionate punishment under Article III, Section 5 of the West Virginia Constitution. Syl. Pt. 2, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817.

Applying the factors to the defendant's crime of failure to register, the Court concluded that there was no actual or threatened violence for the two failure to register offenses and that there was not any substantial impact on the victim. The Court, therefore, concluded that the recidivist life sentence was unconstitutionally disproportionate and reversed the sentence which was based upon the two prior offenses for failure to register as a sex offender.

In 2020, the Supreme Court addressed constitutional challenges involving convictions for failing to comply with registry requirements. *State v. Patrick C.*, 243 W. Va. 123, 792 S.E.2d 622 (2020). In *Patrick C.*, the defendant[24] was resentenced for appeal purposes so that he could advance his constitutional proportionality claims with regard to sentencing for failure to provide registry information. It should be noted that the underlying offenses involved failure to report the creation of two Facebook accounts and a change of address. At sentencing, the lower court

[24]The defendant was the same individual from *State v. Collins*, 238 W. Va. 123, 792 S.E.2d 622 (2016).

imposed a sentence of not less than ten nor more than 25 years in prison. On appeal, the defendant argued that his sentence violated his constitutional rights because it shocked the conscience and was disproportionate to the crime.

To address the argument, the Court noted that the following two tests should be considered:

> The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test[.] *Patrick C.*, 243 W. Va. at 263, 843 S.E.2d at 514 (quoting *State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983)).

With regard to the subjective test, the Court noted that the defendant had repeated criminal violations involving registry requirements. It expressly stated that "If this Court accepted the Petitioner's position on this issue, we would be agreeing with him that the Act's reporting requirements are procedural niceties that sex offenders can selectively comply with." *Patrick C.*, 243 W. Va. at 263, 843 S.E.2d at 515.

With regard to the objective test, the Court set forth the following guidance:

> In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction. *Patrick C.*, 243 W. Va. at 264, 843 S.E.2d at 518 (quoting Syl. Pt. 5, *State v. Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205 (1981)).

Applying these factors, the Court found that the Legislature had established the penalty of significant prison time for this type of offense. Secondly, the Court found that the Legislature had established increased

penalties for subsequent offenses for defendants who repeatedly offended. Third, the Court found that the West Virginia penalties were comparable to the penalties in other states. Fourth, the Court found that the penalties were comparable to other West Virginia offenses. For all of these reasons, the Court concluded that the defendant's sentence met the standard of constitutional proportionality.

C. Penalties for Offenders Required to Register for Ten Years

Under WVSORA, certain offenders are required to register as a sex offender with the West Virginia State Police for a period of ten years. An offender's obligation to comply with WVSORA is suspended if he or she is incarcerated or confined to a mental health facility; or ceases if the offender successfully petitions the court because his or her qualifying conviction has been reversed or vacated. W. Va. Code § 15-12-2(e)(1).

If an offender is required to register for a period of ten years and knowingly provides materially false information, refuses to provide accurate information, knowingly fails to register, or knowingly fails to provide notification of changes in required information, he or she is guilty of a misdemeanor. If convicted, the offender shall be fined a sum of not less than $250 nor more than $10,000, or confined in jail not more than one year, or both. W. Va. Code § 15-12-8(b). An offender who is convicted of a second offense under West Virginia Code § 15-12-8(b) is guilty of a felony and shall be imprisoned in a state correctional facility for a period of one to five years. An offender convicted of a third or subsequent offense under West Virginia Code § 15-12-8(b) is guilty of a felony and shall be imprisoned in a state correctional facility for a period of 5 to 25 years. Additionally, any offender convicted under West Virginia Code § 15-12-8(b) who is under the supervision of a probation officer or parole officer or is subject to some other sanction short of confinement, is subject to the immediate revocation of his or her probation or parole, and may be confined for the remainder of any suspended or unserved portion of his or her original sentence. W. Va. Code § 15-12-8(d). If the offender is serving a term of supervised release, a violation of the registration requirements will subject the offender to revocation of the term of supervised release, and the requirement to serve in prison all or part of the term of supervised release, without credit for time previously served on supervised release. W. Va. Code § 62-12-26(g)(3).

D. Penalties for Offenders Who Are Required to Register for Life

If an offender is required to register for life under WVSORA and he or she knowingly provides materially false information, refuses to provide

accurate information, knowingly fails to register, or knowingly fails to provide a notification of a change in required information, then he or she is guilty of a felony. W. Va. Code § 15-12-8(c). If convicted, the offender will be imprisoned in a state correctional facility for a period of not less than one nor more than five years. If convicted of a second or subsequent offense, the offender will be imprisoned in a state correctional facility for a period of not less than 10 nor more than 25 years. In addition to the above-listed penalties, the offender is subject to the immediate revocation of his or her probation or parole and may be required to serve the remainder of any unserved or suspended portion of his or her original sentence. W. Va. Code § 15-12-8(d). If the offender is serving a term of supervised release, a violation of the registration requirements will subject the offender to revocation of the term of supervised release, and the requirement to serve in prison all or part of the term of supervised release, without credit for time previously served on supervised release. W. Va. Code § 62-12-26(g)(3).

E. Penalties for Offenders Classified as Sexually Violent Predators

An offender who is classified as a sexually violent predator is subject to more stringent penalties for his or her failure to comply with WVSORA's registry requirements. West Virginia Code § 15-12-8(e) applies to offenders who are classified as sexually violent predators. Any person who is required to register as a sexually violent predator who knowingly provides materially false information, who refuses to provide accurate information, who knowingly fails to register, or who knowingly fails to provide notification of a change in any required information is guilty of a felony. If convicted, he or she shall be sentenced to a state correctional facility for a period of two to ten years. If convicted of a second or subsequent offense, he or she shall be confined in a state correctional facility for 15 to 35 years. W. Va. Code § 15-12-8(e). Additionally, any person convicted pursuant to West Virginia Code § 15-12-8(e) is subject to the immediate revocation of his or her probation, or parole, and may be ordered to serve the remainder of any suspended or unserved portion of his or her original sentence. W. Va. Code § 15-12-8(d). If the offender is serving a term of supervised release, a violation of the registration requirements will subject the offender to revocation of the term of supervised release, and the requirement to serve in prison all or part of the term of supervised release, without credit for time previously served on supervised release. W. Va. Code § 62-12-26(g)(3).

F. Penalties for Aiding and Abetting an Offender's Noncompliance with WVSORA

The Legislature has also provided criminal penalties for any person who aids and abets a sex offender's noncompliance with WVSORA. The applicable statutory provision provides:

> Any person who knows or who has reason to know that a sex offender is not complying, or has not complied, with the requirements of this section and who, with the intent to assist the sex offender in eluding a law-enforcement agency that is seeking to find the sex offender to question the sex offender about, or to arrest the sex offender for, his or her noncompliance with the requirements of this section:
>
> 1) Withholds information from, the law-enforcement agency about the sex offender's noncompliance with the requirements of this section and, if known, the whereabouts of the sex offender; or
>
> (2) Harbors, or attempts to harbor, or assists another person in harboring or attempting to harbor, the sex offender; or
> (3) Conceals or attempts to conceal, or assists another person in concealing or attempting to conceal, the sex offender; or
> (4) Provides information to the law-enforcement agency regarding the sex offender which the person knows to be false information is guilty of a misdemeanor. W. Va. Code § 15-12-8(f)(1)-(4), in part.

If convicted, the person will be fined $250 to $10,000, or incarcerated for a period not to exceed one year, or both. However, if the person assists an offender whose noncompliance constitutes a felony under West Virginia Code § 15-12-8, then he or she is also guilty of a felony. If convicted, the person will be incarcerated in a state correctional facility for a period of one to five years. W. Va. Code § 15-12-8(f)(4).

VII. Brief Overview of Federal Law Regarding Registration of Sex Offenders and Notification of Sex Offenders' Registry Information

On July 27, 2006, the Adam Walsh Child Protection and Safety Act ("Adam Walsh Act") was signed into law. Title I of the Adam Walsh Act is known as the Sex Offender Registration and Notification Act ("SORNA").[25]

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[25] SORNA is codified at 34 U.S.C. §§ 20901, *et seq*.

SORNA replaces the Jacob Wetterling Act which was enacted in 1994. It makes some significant changes to federal law regarding the minimum registration requirements that jurisdictions must institute, and it establishes more extensive requirements regarding what registry information is disseminated to the public. Finally, Subtitle B of SORNA amended Part I of Title 18 of the United States Code and established new federal crimes for an offender's failure to comply with SORNA.[26]

Jurisdictions, such as West Virginia, were required to be in "substantial compliance" with SORNA by July 27, 2010 or risk losing 10% of the funding received from the Byrne Grants administered by the Department of Justice. Compliance is monitored by the Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking Office,[27] or SMART Office.

The interpretation and implementation of SORNA are delegated to the Attorney General. 34 U.S.C. § 20912. On July 2, 2008, after a period of public comment, the Attorney General issued National Guidelines for Sex Offender Registration and Notification.[28] Supplemental SORNA Guidelines were issued by the Attorney General on January 11, 2011, and August 1, 2016. The main subject of the 2016 Supplemental Guidelines involved the implementation of SORNA's juvenile registration requirement and identification of what would be considered substantial compliance.

To date, 17 states have substantially implemented SORNA in accordance with the guidelines. National Conference of State Legislatures, Adam Walsh Child Protection and Safety Act, http://www.ncsl.org/research/civil-and-criminal-justice/adam-walsh-child-protection-and-safety-act.aspx (accessed May 20, 2021). West Virginia is among the majority of states that have not substantially complied with SORNA. In order to comply, West Virginia would need to amend Article 12 of Chapter 15. Generally speaking, the provisions of WVSORA that appear to be most impacted by the Adam Walsh Act include: the registration of juvenile offenders; the terms and conditions of registration, such as what information is collected; the monitoring of offenders, including how often an offender must report to verify his or her information; and the dissemination of registry information to the public.

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[26] See 18 U.S.C. § 2250.

[27] The SMART Office was established by Title I, section 146 of the Adam Walsh Act. See 34 U.S.C. § 20945.

[28] These Guidelines can be accessed at https://smart.gov/pdfs/SORNA-Juvenile-Guidelines-8-1-2016.pdf (accessed May 20, 2021).

Chapter 9

RESOURCES FOR VICTIMS IN WEST VIRGINIA

West Virginia Rape Crisis Centers
The Rape Crisis Centers listed below provide rape crisis services to victims 24 hours per day, seven days per week on a regional basis.

The National Sexual Assault Hotline A victim who contacts this national hotline will be routed to the nearest rape crisis center in West Virginia.	1-800-656-HOPE
West Virginia Foundation for Rape Information and Services, Inc. Fairmont, WV 26554	304-366-9500 Fax: 304-366-9501
CONTACT Huntington, Inc. 1230 Sixth Avenue PO Box 2963 Huntington, WV 25729	304-523-3447 Fax: 304-523-0558 Hotline: 1-866-399-7273/304-399-1111 Serves: Cabell, Lincoln, Logan, Mason, Mingo, and Wayne Counties
Centers Against Violence PO Box 2062 Elkins, WV 26241	304-636-8433 Fax: 304-636-5564 Hotline: 1-800-339-1185 Texting Line: 304-840-SAFE
Family Refuge Center 540 N. Jefferson St. Lewisburg, WV 24901	304-645-6334 Fax: 304-645-7368 Serves: Greenbrier, Mercer, Monroe, and Pocahontas Counties
Women's Resource Center PO Box 1476 Beckley, WV 25802	Office/24-Hour Hotline 304-255-2559 Toll Free: 888-825-7835 Fax: 304-255-1585
REACH Program-The Counseling Connection 1021 Quarrier Street, Ste. 414 Charleston, WV 25301	304-340-3676 Fax: 304-340-3688 Serves: Boone, Clay, Jackson, Kanawha, and Putnam Counties
Sexual Assault Help Center (SAHC) PO Box 6764 Wheeling, WV 26003	304-234-1783 Fax: 304-234-8231 Hotline: 1-800-884-7242 Serves: Brooke, Hancock, Marshall, Ohio, and Wetzel Counties

Rape & Domestic Violence Information Center (RDVIC) PO Box 4228 Morgantown, WV 26504	304-292-5100 Fax: 304-292-0204 Serves: Monongalia, Preston, and Taylor Counties
Hope Inc., Task Force on Domestic Violence PO Box 626 Fairmont, WV 26555	304-367-1100 Fax: 304-367-0362 Serves: Doddridge, Gilmer, Harrison, Lewis, and Marion Counties
Eastern Panhandle Empowerment Center (EPEC) 236 West Martin Street Martinsburg, WV 25401	Main Office/24-Hour Hotline: 304-263-8292 Fax: 304-263-8559 Serves: Berkeley, Jefferson, and Morgan Counties
Family Crisis Center, Inc. PO Box 207 Keyser, WV 26726	Main Office/24-Hour Hotline: 304-788-6061 Fax: 304-788-6374 Serves: Grant, Hampshire, Hardy, Mineral, and Pendleton Counties
Family Crisis Intervention Center of Region V, Inc. PO Box 695 Parkersburg, WV 26102	Main Office/24-Hour Hotline: 304-428-2333 or 1-800-794-2335 Serves: Calhoun, Pleasants, Ritchie, Roane, Tyler, Wirt, and Wood Counties
Stop Abusive Family Environments, Inc. (SAFE) PO Box 669 Welch, WV 24801	304-436-8117 Hotline: 1-800-688-6157 Serves: McDowell and Wyoming Counties

West Virginia Statewide Resources

Victim Information & Notification Everyday (VINE)	Web: www.vinelink.com Phone: 866-984-8463 (866-WV4-VINE)
WV Crime Victims Compensation Fund Bldg. 1, Room W-334 1900 Kanawha Blvd., East Charleston, WV 25305	Web: www.legis.state.wv.us/joint/victims/main.cfm Phone: 304-347-4850 Fax: 304-347-4915
WV Foundation for Rape Information & Services Fairmont, WV 26554	Web: www.fris.org Phone: 304-366-9500 Fax: 304-366-9501
WV Prosecuting Attorneys Institute 1124 Smith St., Suite 4500 Charleston, WV 25301	Web: http://www.pai.wv.gov Phone: 304-558-3348 Fax: 304-558-6008
WV State Police 725 Jefferson Road South Charleston, WV 25309-1698	Web: http://www.wvsp.gov Phone: 304-746-2100 Fax: 304-746-2230
WV State Police Sex Offender Registry	Web: http://www.apps.wv.gov/StatePolice/SexOffender Phone: 304-746-2133

National Resources

Organization	Contact
AEquitas – The Prosecutor's Resource on Violence Against Women 1000 Vermont Ave., NW Suite 1010 Washington, DC 20005	Web: www.aequitasresource.org Phone: 202-558-0040 Fax: 202-393-1918
National Sexual Violence Resource Center 2101 N. Front Street Governor's Plaza North, Building #2 Harrisburg, PA 17110	Web: www.nsvrc.org Phone: 877-739-3895 or 717-909-0710 TTY: 717-909-0715 Fax: 717-909-0714
RAINN – National Sexual Violence Hotline 1220 L Street, NW, Ste. 505 Washington, DC 20036	Web: www.rainn.org Phone: 800-656-HOPE or 202-544-3064 Fax: 202-544-3556
Sexual Assault Forensic Examination Technical Assistance 6755 Business Parkway, Ste. 303 Elkridge, MD 21075	Web: www.safeta.org Phone: 877-819-SART
Victim Rights Law Center Boston Office 115 Broad Street, 3rd Floor Boston, MA 02110	Web: www.victimrights.org Phone: 617-399-6720 Fax: 617-399-6722
International Association of Forensic Nurses (IAFN) 6755 Business Parkway, Ste. 303 Elkridge, MD 21075	Web: www.iafn.org Phone: 410-626-7805 Fax: 410-626-7804
Ending Violence Against Women (EVAW) 145 S. Main Street Colville, WA 99114	Web: www.evawintl.org Phone: 509-684-9800 Fax: 509-684-9801
International Association of Chiefs of Police (IACP) 44 Canal Center Plaza, Ste. 200 Alexandria, VA 22314	Web: www.theiacp.org Phone: 703-836-6767 or 800-THE-IACP
National District Attorneys Association (NDAA) 1400 Crystal Drive, Suite 330 Arlington, VA 22202	Web: https://ndaa.org/ Phone: 703-549-9222 Fax: 703-836-3195
The National Online Resource Center on Violence Against Women 6041 Lingletown Rd. Harrisburg, PA 17112	Web: www.vawnet.org Phone: 800-537-2238 TTY: 800-553-2508 Fax: 717-545-9456