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SURVEY OF DEVELOPMENTS IN WEST VIRGINIA LAW: 1981

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INTRODUCTION

This overview of West Virginia law covers cases decided from August 1, 1980 through August 1, 1981. Approximately 200 cases were decided by the West Virginia Supreme Court of Appeals during this period; approximately 50 are discussed in this survey.

Although West Virginia is said to have one of the lowest crime rates in the country, criminal law remains a significant area of growth and change. The commission of a single crime sets in motion hundreds of people in police, circuit court, and corrections agencies. The rules and procedures that must be followed by these people are set or passed upon by the supreme court. This year's decisions include important law in the area of juvenile justice and psychiatric defenses.

In contrast to criminal law, the active machinery of justice is only rarely set in full motion by a domestic relations case. Most are settled privately, with only the formal imprimatur of the circuit court. However, the rules that control the private resolutions are again set by the supreme court. This year's decisions on child custody and property settlements will be felt in hundreds of cases.

One senses from this year's cases that circuit courts have not been adequately equipped to handle employment issues. Therefore the supreme court has decided a number of cases that will provide "law to apply" in the lower courts and by employing agencies.

A far cry from a job dismissal, the proper search of an automobile, or a property settlement in a divorce, are issues like the statewide funding of schools, and the legislative veto of ad-
ministrative regulations. The court has spoken on these latter issues as well, issues going to the fundamental dynamics of our state government.

The work of the West Virginia Supreme Court of Appeals during the survey period is the strongest evidence of a healthy and vital pluralism in American jurisprudence. The decisions are intelligent, creative, and solid. It has been a pleasure to follow the court's work and to edit the comments of the overview writers.

Thomas W. Rodd
CRIMINAL LAW AND PROCEDURE

INVENTORY SEARCHES

Deciding an issue of first impression in West Virginia, the supreme court in State v. Goff1 established standards for determining when a warrantless search of a detained suspect's abandoned automobile satisfies constitutional protections against unreasonable search and seizure. According to the court, four factors must be present for the inventory search to pass muster: (1) the automobile must be lawfully impounded; (2) the driver must not be present at the time of the search to make alter-

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1 272 S.E.2d 457 (W. Va. 1980). The court confronted a recurring problem in State v. Goff besides the inventory search issue. That problem was the appropriate instruction to be given to the jury on the presumption of innocence which attaches to criminal defendants and the state's burden of proof. To lay the issue to rest, the court offered a standard instruction for future criminal proceedings:

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate"—with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should of course adopt the conclusion of innocence.

This instruction is almost identical to the widely used federal instruction, 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §11.14. 272 S.E.2d at 463 n.9.
native arrangements for the safekeeping of his belongings; (3) the inventory search must be necessitated by the presence of valuable items in plain view; and (4) the police must not be using the inventory motive as a pretext for an investigative search of the automobile.

Even when the foregoing are present, Goff limits the inventory search to those parts of the automobile which are unsecured. Exploration of locked trunks, sealed containers or other secured portions of the automobile are expressly prohibited. To the high court, the only legitimate purpose of the inventory search is to protect the property of the individual in custody. If a search extends beyond the reasonable means to achieve this purpose, then it is clearly violative of the suspect's constitutional rights.

Goff should be read as disfavoring the acquisition of incriminatory evidence through inventory searches. The court has made it clear in a number of recent decisions that any type of warrantless search runs afoul of the state constitution, unless it falls into a limited number of carefully defined exceptions. These exceptions are "jealously and carefully drawn"2 and require "a showing by those who seek exemption... that the exigencies of the situation [make] that course imperative."3 The class of exceptions includes a search incident to an arrest; a search of materials found in plain view of the officer; and a search culminating from a lawful stopping of an automobile which reveals probable cause to believe the automobile contains illegal materials.4

All the recognized exceptions to the warrantless search prohibition are premised on the existence of exigent circumstances which make securing a warrant impractical. In the case of impoundment, where the vehicle is under the dominion of police authorities, the exigent circumstances for justifying an intrusion into a constitutionally protected realm are not present.5 Thus,

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3 Id.
before engaging in inventory searches which have even an incidental investigatory purpose, Goff would counsel acquiring the proper search warrants to save any evidence found in the automobile from exclusion at the trial.

Warrants Obtained through Confidential Informants

In State v. Dudick,6 decided six years ago, the supreme court set the standard for the issuance of search warrants on the basis of representations made by confidential informants. The Dudick standard requires that search warrants set forth facts both supporting the reliability of the informant and detailing how that reliability was established. In the court's mind, this information on the face of the warrant is necessary to ensure that the issuing party makes an independent determination on the existence of probable cause before the intrusion into the suspect's privacy was authorized.

The supreme court ran afoul of its Dudick standard in the recent case of State v. White.7 There, a magistrate had issued a search warrant for marihuana and other controlled substances based on the representations made by a reliable informant to a deputy sheriff. Although the warrant stated that the informant had personally viewed a quantity of the illegal substances, it contained no facts bearing on the reliability of the informant or on the means employed to independently determine reliability. The high court, nevertheless, upheld the validity of the search warrant. In a seeming departure from Dudick, the court said that "an averment that the informant was an eyewitness to particular criminal activities involving particular individuals in a particular place is alone sufficient to permit the issuance of a valid search warrant."8

White is more accurately characterized as a stumble by the court rather than a retreat from Dudick. The decision makes it clear that a search warrant which details the reliability of the informant is still the preferred model and that no degree of facial completeness will save a warrant where the issuing party has failed to independently determine probable cause. Thus the basic protections of Dudick are preserved, even though the court is apparently now prepared to accept a lesser degree of technical completeness in some cases.

8 Id. at 118.
PSYCHIATRIC DEFENSES

The issue of a defendant's sanity is critical at three stages of the criminal proceeding: (1) the time of the offense; (2) the time of the trial; and (3) the time of sentencing or, in the case of a defendant found not guilty by reason of insanity, the time of the involuntary commitment procedures. During the survey period, the West Virginia Supreme Court of Appeals decided an unusually large number of cases involving the procedural rights of defendants at these critical stages. Consistent with its activist reputation, the court broke new ground on the rights of fugitives to pre-extradition mental evaluations, liberalized procedural rules with respect to the insanity defense, and reaffirmed controversial decisions requiring the prosecution to prove a defendant's sanity beyond a reasonable doubt. But for all its labors, the court failed to still the turbulence set in motion by its earlier decisions overhauling West Virginia's law with respect to the insanity defense. The recent decisions provide some signposts for prosecutors, trial judges and defense attorneys, but the signposts mark dark and unfamiliar highways.

Mental State at the Time of the Offense

Prior to the Edwards v. Leverette\(^1\) ruling in 1979, West Virginia considered insanity to fall within the class of affirmative defenses. A defendant seeking to avoid criminal responsibility by reason of insanity was required to prove by the preponderance of the evidence that he suffered from 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 law."\(^2\) To carry the burden of persuasion on mental deficiency, the defendant essentially had to admit to the illegal act, and then seek to justify or excuse the offense because of insanity. This combination of a heavy burden of proof and a virtual confession on the material elements of the crime made insanity an unattractive defense.

Leverette significantly revised the operation of the insanity defense. Relying on United States Supreme Court rulings,\(^3\) the

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1 258 S.E.2d 436 (W. Va. 1979).
West Virginia high court in *Leverette* lowered the standard of proof required to make a defense of insanity from preponderant evidence to "some evidence fairly raising doubt on the issue of insanity." Although it did not define the boundaries of this new evidentiary standard, the court made it clear that, once this burden is satisfied, the presumption of sanity disappears and the prosecution must prove "beyond a reasonable doubt that the defendant was sane at the time of the offense."5

During the survey period, the court decided two cases clarifying its revised position on the insanity defense. In *State v. Grimm* and *State v. Daggett,* the court applied the *Leverette* standard retroactively in reversing the convictions of two defendants found guilty of murder and first degree sexual assualt, respectively. The trial judge in both *Grimm* and *Daggett* had given jury instructions which had characterized West Virginia law as requiring preponderant proof on defendant insanity before the offense could be excused. Upon review, the high court reaffirmed *Leverette,* holding that once the defendant fairly raises doubt on the issue of insanity, the state must prove criminal responsibility. Noting that *Leverette* was not the law at the time of the trials in *Grimm* and *Daggett,* the high court restricted the retroactive effect of the *fairly raising doubt* standard to those earlier cases where the defense counsel properly objected to the delivered instructions on the insanity defense and thus preserved the issue for appeal.6

In neither of the above cases has the court clarified what the

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4 258 S.E.2d at 440. Citing *City of Collins v. Tennessee* 506 S.W.2d 179 (Tenn. App. 1973) with approval, the court said that if any evidence is introduced fairly raising doubt on the issue of defendant's sanity at the time of the offense, the presumption of sanity disappears and the state has the burden to prove sanity beyond a reasonable doubt. The court expressly held this to be the new rule in West Virginia, but limited its retroactive effect to those cases where an objection to the instructions on the burden of proof in making an insanity defense was properly raised.

5 Id.


boundaries of the *fairly raising doubt* standard are. *Grimm* and *Daggett* both involved expert psychiatric testimony that was introduced by defendants who thought the burden of persuasion was on their shoulders. But it is not clear that future defendants need go this far to shift the responsibility of proving sanity to the state. If the court adheres to standards it has formulated in the analogous setting of pretrial competency hearings,⁹ it may be possible for a defendant simply to produce lay testimony on anomalous behavior or to introduce documentation of past mental treatment to destroy the presumption of sanity. The *fairly raising doubt* standard is even broad enough to be satisfied by the mere allegation of mental deficiency by the defendant.

Whatever definition the court ultimately gives to the revised standard of proof on insanity, the present uncertainty surrounding its application to the criminal trial is certain to encourage the use of the defense of insanity. Tactically, the more the state has to prove, the better the chance for acquittal; hence, defense attorneys will likely see the criminal responsibility issue as a means of strapping the prosecution with an additional element to prove. This increasing usage of the insanity defense is certain to produce some adverse effects on the criminal justice system. Trials, for example, will be lengthened because of the time required to subject defendants to routine psychiatric evaluations. The cost of trials will also significantly increase as expert medical testimony becomes an integral part of the inquiry into the sanity of the defendant. Finally, the jury will be asked to routinely step beyond the fact-finding realm to evaluate complex and often contradictory medical evidence bearing on the mental capacity of the defendant.

Longer trials, added court costs and an expanded role for the jury are largely matters of convenience. Though important

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⁹ In State v. Demastus, 270 S.E.2d 649 (W. Va. 1980), the court ruled that a trial judge must order a pretrial psychiatric evaluation when he knows that a criminal defendant has a history of mental illness. The court went on to enumerate an exhaustive list of the ways a trial judge may be made aware of a defendant's possible mental incompetency, including a lawyer's representation concerning the competence of his client, documented proof of mental disturbance, or psychiatric and lay testimony about anomalous behavior. Since this type of information is sufficient to trigger psychiatric evaluation at pretrial, the court is likely to see these same sources of information as sufficient to fairly raise doubt on the issue of criminal responsibility at the time of the offense.
in a practical sense, they are not the types of institutional effect which deserve consideration before making a significant change in our insanity law. But the court's recent decisions do more than inconvenience judges and deplete public coffers; they chart a dramatically different course for our penal system. For at the heart of the court's overhauling of the insanity defense is an apparent sociological judgment that criminal behavior is indicative of mental deficiency. The relaxation of the standard of proof for making a valid insanity defense, and the recent decisions making a pretrial psychiatric evaluation a virtual right for every criminal defendant, are clear evidences of this judgment. In these decisions the court has expressed a preference for treatment over punishment and for hospitalization over incarceration. The danger created by this preference is not that hardened criminals will be able to use the revised insanity defense as a shovel for burrowing under the prison wall. Rather, it is that the court is transferring the same problems which plague our penal system—overcrowding, understaffing, lack of meaningful training programs and inappropriate rehabilitation attitudes—to the state hospital.

**Competency at the Time of the Proceedings**

The circumstances under which a trial judge must order a pretrial psychiatric examination has been the subject of several important decisions during the survey period. Prior to these decisions, the law permitted the trial judge to exercise his discretion regarding pretrial inquiry into the competency of a criminal defendant. The recent decisions continue to recognize the trial court's discretion, but provide clearer guidelines on when psychiatric evaluations are required.

**Pretrial Evaluations**

The lead case in this area is *State v. Demastus.* There, the trial court refused a motion for a pretrial psychiatric evaluation, even though the defendant had a history of mental treatment. In reversing the conviction, the supreme court ruled that "[w]henever a court knows that a criminal defendant has a recent history of mental illness, it is an abuse of its discretion not to afford him or her an opportunity for psychiatric evaluation." According to

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10 270 S.E.2d 649 (W. Va. 1980).
11 *Id.* at 656.
the court, a trial judge may be made aware of problems relating to defendant competency from a range of sources, including the defendant's attorney, anomalous behavior observed by the judge or professional and lay testimony introduced to support the claim of mental deficiency.

Demastus moved the court in the direction of requiring mental evaluation for all criminal defendants. A further step in this direction was taken in a later case, State v. Pauley. There, the trial judge refused a motion by the defense attorney which would have allowed the defendant to undergo psychiatric evaluation. Illustrating the breadth of its Demastus ruling, the supreme court of appeals awarded a new trial in Pauley, even though the only evidence bearing on the mental deficiencies of the defendant was his attorney's request for psychiatric evaluation.

Read together, Demastus and Pauley greatly restrict the trial judge's discretion with respect to ordering mental evaluations. The emerging rule compels an inquiry into the competence of a criminal defendant when the trial judge has any reason to doubt the defendant's ability to actively and ably participate in his defense. The new rule not only specifies under what conditions the trial judge's discretion will be preempted, but it also imposes an affirmative duty on the judge to insure all defendants are competent to understand the nature and object of the criminal proceedings. Although the boundaries of this duty have yet to be defined, the supreme court has said that the trial judge is under no obligation to force an unwilling defendant to submit to psychiatric testing, where there is no evidence to suggest that his refusal flows from a mental defect.

Evaluations Before Extradition

Equating the extradition hearing with a criminal trial, the court in State ex rel Jones v. Warmuth extended the right of prehearing psychiatric evaluation to fugitives facing extradition. Historically, West Virginia has followed guidelines set out by the United States Supreme Court, limiting the asylum state

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12 272 S.E.2d 446 (W. Va. 1980).
to the consideration of four factors during the extradition hearing: (1) whether the extradition documents are facially complete; (2) whether a crime has been alleged in the demanding state; (3) whether the detainee is the person named in the extradition request; and (4) whether the person was in the demanding state at the time of the offense. In Warmuth, the West Virginia high court recognized that, despite the limited scope of the asylum state's inquiry, the extradition court must nevertheless accord the fugitive procedural rights commensurate with his threatened liberty interests. If the asylum state should determine that the detained person was not in the demanding state at the time of the alleged offense or that a mistake in identity has occurred, the extradition hearing could result in his release from custody. To the state supreme court, this potential for exoneration through the extradition hearing amounts to a substantial liberty interest which entitles the fugitive to participate competently in the proceedings.

The Warmuth decision represents new law in West Virginia. Fugitives may now contest their ability to participate in extradition hearings to the same extent that criminal defendants may challenge their competency to stand trial. In practical terms, this means that any time a fugitive or his attorney raises the issue the extradition court must order prehearing psychiatric evaluations. If these evaluations satisfy the court by preponderant evidence that the fugitive is unable to understand the nature of the proceedings or to confer effectively with counsel, then the hearings may be delayed until the fugitive regains his sanity. In the interim, the state may seek to commit the fugitive under the state's involuntary civil commitment statute.

**Competency Hearings**

Pretrial inquiries into the defendant's ability to understand the nature of the proceedings against him inevitably reveal something about his mental state at the time of the offenses. The pretrial psychiatric findings are usually the building blocks of the insanity defense. In recognition of this relationship between the pretrial competency hearing and the ultimate defense of insanity, the high court ruled in Walton v. Casey\(^\text{16}\) that a criminal trial is unwarranted when the pretrial hearing clearly

\(^{16}\) 258 S.E.2d 114 (W. Va. 1979).
reveals that the accused lacked the requisite competency to be criminally responsible for his offense. Under *Casey*, a trial judge had a duty to determine initially whether the defendant had a bonafide insanity defense and to dismiss the charges if, by preponderant evidence, such a defense was found to exist.

In *State ex rel. Smith v. Scott*, the supreme court retreated from the *Casey* directive. Pointing to civil commitment sections of the West Virginia Code, the high court distinguished between a hearing to determine defendant competency and a proceeding to decide the defense of insanity. A competency hearing, the court said, is largely a medical inquiry into the defendant's ability to understand the object and nature of the criminal proceedings. A proceeding to determine whether a defendant is criminally responsible for his actions, on the other hand, is more than a medical inquiry; it involves a weighing of moral, legal and social considerations in addition to the medical factors. Its purpose is to determine culpability, not competency, which makes it a decision properly reserved for the trial. To the high court in *Scott*, this distinction in functions is sufficient to justify a trial court's refusal to consider the validity of a defense of insanity in advance of the actual trial.

**The Time of Sentencing**

Until recently, trial judges retained total control over the disposition of criminal defendants raising the insanity defense. Requests for instructions to the jury on the disposition of insane defendants were routinely denied on the grounds that the jury's role was confined to deciding the merits of the insanity defense, while the trial court was left to decide what the law requires once the defense is proved. *State v. Knuckolls* changed this practice. Equating its new position on disposition instruction with its recently announced rule on parole eligibility, the supreme court in *Knuckolls* said that defense counsel must be allowed "to argue the consequences of finding a defendant not guilty by reason of insanity." As part of its presentation of this argument, the defense is entitled to an instruction which correctly states the law and which presents the proposition in a

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18 12.
20 273 S.E.2d 87 (W. Va. 1980).
manner favorable to his claim of insanity. The request for such an instruction is a tactical decision for the defense, which the trial court must grant if the proffered instruction comports with the law.

Knuckolls will be criticized because it thrusts the jury into a province formerly reserved for the court. But the intrusive dimensions of the Knuckolls case are outweighed by its potential for creating a climate in which an intelligent consideration of the insanity defense can proceed.

In cases where the insanity defense is raised, juries can decide to acquit, to find guilty or to find not guilty by reason of insanity. The implications of the first two verdicts are not lost on jurors, even without the benefit of elaborate instructions. But the implications of the insanity verdict can be a source of genuine confusion. Without appropriate instructions, jurors are left to speculate about the fate of the defendant should a not guilty by reason of insanity verdict be returned. They may incorrectly believe that such a verdict means the defendant will be immediately re-introduced into the community or that he will be denied the medical treatment he would otherwise receive if incarcerated. In either case, the confusion which attaches to the insanity verdict predisposes jurors to reject it in favor of the more easily grasped guilty or not guilty verdicts. This pre-disposition creates the danger that jurors will vote for conviction in close cases, even though the defendant was not criminally responsible for his acts.

Knuckolls does little more than remove jurors' tendency to vote for what they understand over what they do not understand. Viewed in this light, the decision does not represent an encroachment on a trial judge's authority as much as an attempt to ensure that the criminal defendant gets a fair and informed consideration of his insanity defense.

Summary

The high court's decisions during the survey period have wrought some fundamental changes in the operations of the criminal justice system. A trial judge must now grant psychiatric examinations upon request as part of his duty to ensure a criminal defendant's competency to assist counsel in the preparation of

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the case. This same right of mental evaluation has been extended to fugitives contesting extradition and, presumably, to all other individuals facing state initiated proceedings which could result in a significant deprivation of personal liberty. Once in the trial, the defendant may also argue the consequences of an insanity verdict to the jury, which sharply departs from the former practice restricting this consideration to the trial judge. Finally, the defendant need only fairly raise doubt on his mental state at the time of the offense to destroy the presumption of sanity which attaches to every criminal defendant and to force the state to prove the element of criminal responsibility beyond a reasonable doubt.

William Flanigan

PRISONER'S RIGHTS

Last year, the West Virginia Supreme Court of Appeals dealt with the recurring problem of protecting prisoner's rights in accordance with federal and state constitutional requirements. The first of three noteworthy cases in this area, Harrah v. Leverette, came before the court in the form of a habeas corpus petition arising out of a 1978 riot (and subsequent "action" taken by the state) at the Huttonsville medium-security prison. Petitioners were inmates of the facility seeking unconditional release for deprivation of "due process" and "cruel and unusual punishment" protections.

The situation, stated simply, involved a riot instigated and conducted by unknown inmates and alleged indiscriminate, unconstitutional measures taken by administrators, correctional officers, and other employees against the inmate population. After recounting the details of the ensuing brutality and denial of rights, the opinion by Justice Harshbarger focuses on three significant issues: 1) What are the constitutional due process requirements in a prison setting? 2) What are the circumstances justifying the use of physical force against inmates? 3) What are the remedies available to those inmates deprived of guaranteed rights?

To satisfy due process requirements, the court held that

1 271 S.E.2d 322 (W. Va. 1980).
2 Id. at 325.
3 Id. at 327-31.
disciplinary proceedings must adhere to the same standards earlier prescribed for the prison setting with regard to placing prisoners in administrative segregation and to transfers within the penal system. These requirements are: a) written notice of the claimed violation, b) disclosure to the inmate of the evidence against him, c) opportunity to be heard and to present witnesses and documentary evidence, d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation), e) a neutral and detached hearing body, f) a written statement by the fact-finders of the evidence relied on and reasons for discipline, and g) the right to counsel if the state is represented by a lawyer. While the court did not offer this list of protections as a comprehensive guide to afford due process in all situations, it did find that the inmates in the instant case were denied these requirements and that the disciplinary proceedings were, therefore, unconstitutional and void.

Addressing the allegations of cruel and unusual punishment, the court reiterated an earlier prohibition of unnecessary physical force. After condemning the prison administrators' "extraordinary dereliction," the court forcefully concluded that there can be no use of physical force on inmates "absent imminent present danger of harm to others, themselves, or state property."

Finally, the court considered the judicial remedies for deprivation of rights. Although the reluctance to resort to intervention was acknowledged, "the preservation of the rights vested in every person by our constitution and the federal constitution" provided the necessary incentive to overcome that reluctance. While the court propounded several remedies, there appear in that list two rather unconventional measures: 1) reduction in the extent of or time of confinement and 2) mandatory

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7 Id. at 327-28.
8 Id. at 330, citing State ex rel. K.W. v. Werner, 242 S.E.2d 907 (W. Va. 1978).
9 Id.
10 Id. at 330-31.
11 Id. at 331 (emphasis added).
psychological testing of correctional officers. These remedies are deemed necessary because of the demonstrated ineffectiveness of previous remedial action, such as injunctions and admonitions, and the unresponsiveness of the state Department of Corrections. More specifically, the court stated, "[w]e have already exhibited as much tolerance of official abuse of prisoners as we are capable of."13

The outstanding feature of Harrah is the judicial imposition of remedies previously only threatened. The case marks an extension of the court's role in protecting prisoner's rights into the complexities of structuring the prison system to meet those needs. Justice Harshbarger notes the incongruity in releasing individuals for reasons that have little or no connection with the charges for which they were imprisoned.14 What is not discussed is how the court intends to factor into its decisions the substantial public interest in keeping criminals incarcerated.

While Harrah is, admittedly, an unusual factual situation, the scenario may become more familiar as our correctional systems become more overcrowded and inadequate. Accordingly, the conflict between the interest of the prisoners and the interest of society is likely to intensify.

In a second prisoner's rights case, Losh v. McKenzie,15 the West Virginia Supreme Court of Appeals was asked to consider the applicability of res judicata principles in habeas corpus proceedings. In considering the numerous grounds upon which habeas corpus relief may lie, the court construed the habeas corpus statute16 as contemplating that a person convicted of a crime shall have: 1) a fair trial, 2) an opportunity for appeal, and 3) one omnibus post-conviction habeas corpus hearing to raise collateral issues which have not been "fully and fairly litigated."17 The opinion by Justice Neely specifically provides that when an issue has been "fully and fairly litigated during the trial and a record of the proceedings is available . . . a court may apply rules of res judicata . . . ."18 Losh does not provide a further

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12 Id. at 332-33.
13 Id.
14 Id. at 333.
17 277 S.E.2d at 609.
18 Id. (emphasis added).
definition or suggested test for what will constitute full and fair litigation, but the habeas corpus statute provides for a petition if and only if those issues to be raised in the petition "have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence. . . ." Moreover, a previous and final adjudication occurs "only when at some point in the proceedings which resulted in the conviction and sentence . . . there was a decision on the merits thereof after a full and fair hearing thereon. . . ."20

The most informative, helpful features of Losh come in the court's recognition of three narrow exceptions where subsequent habeas corpus relief may not be summarily denied21 and a recommended check-list of issues which may be raised in support of habeas corpus relief.22 These guidelines can be used by counsel to fully inform the defendant and, in doing so, avoid the most prevalent of the three narrow exceptions to summary denial of subsequent successive petitions, ineffective assistance of counsel. The court suggests that the trial judge may inquire on the record whether counsel has discussed all the grounds which might apply to the petitioner's case and that a form containing a list of those grounds explicitly waived may be provided.23

In another case decided this year, the court dealt with two of the remedies prescribed for use by aggrieved prisoners in Harrah.24 The appellant in Mitchem v. Melton25 challenged a denial of class action standing in a purported civil rights action brought in Kanawha County Circuit Court pursuant to federal law.26 The case turned on the West Virginia Supreme Court of Appeals' interpretation and classification of the action as a section 1983 suit rather than a habeas corpus petition.27 Mitchem

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20 Id. § 53-4A-1(b).
21 277 S.E.2d at 611. The exceptions include: 1) ineffective assistance of counsel, 2) newly discovered evidence, and 3) favorable change in the law, which may be applied retroactively. Id.
22 Id. The opinion here includes a 53-item list, admittedly over-inclusive, of grounds which may be considered sufficient to support a petition.
23 Id. at 612.
24 See note 1 supra.
26 Id. at 896. The trial court perceived the action as a habeas corpus petition rather than a civil rights action pursuant to 42 U.S.C. § 1983.
27 Id. at 898.
demonstrates the importance of strategic procedural considerations in selecting the most favorable of the Harrah remedies. Had the court agreed that the action constituted a habeas corpus petition, the trial court's attendant denial of class action standing would not have been an appealable order.\textsuperscript{23}

The foregoing prisoner's rights cases follow a common pattern: the court is continuing to broaden and extend its protection of rights and, accordingly, is being increasingly put upon to prescribe conduct and monitor compliance to effectuate its objectives.\textsuperscript{29} The need for such extensive judicial involvement might be an indication that the court is on an excursion into an area of questionable judicial expertise.\textsuperscript{30} While such action can easily be justified by the interest in protecting inmates' constitutional rights\textsuperscript{31} (an indisputable premise), one might ask whether such a summary conclusion has been preceded by a thorough evaluation of the hazards of judicial intervention in this area. At the very least, these considerations should serve as a caution flag for the court.

\textsuperscript{23} In the West Virginia Rules of Civil Procedure, Rule 23 (Class Actions) is excluded from the enumeration of rules which apply to "Extraordinary remedies". A habeas corpus petition is expressly classified as an extraordinary remedy. W. Va. R. Civ. P. 81(a)(5). Since the denial of class action standing is a discretionary ruling by the trial court and "the failure to permit maintenance of a class action by the trial court can have as grave procedural consequences to the parties who are denied class participation as if a final judgment has been rendered against them on the merits", the Mitchem court held that such a denial is an appealable order. 277 S.E.2d at 901.

\textsuperscript{29} E.g., the imposition of psychological testing of guards and mandatory reductions in confinement in Harrah, 271 S.E.2d at 332-33; the extensive guidelines and checklists provided in Losh, 277 S.E.2d at 611; and the provisions for appeal of a denial of class action standing in Mitchem, 277 S.E.2d at 901.

\textsuperscript{30} See, e.g., the United States Supreme Court's limitations on judicial intervention into prison administration practices, Bell v. Wolfish, 441 U.S. 520 (1980), holding that

\[ \text{the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.} \]

\textit{Id.} at 457.


\textsuperscript{31} Harrah v. Leverette, 271 S.E.2d at 331.
DOUBLE JEOPARDY

A recent decision by the West Virginia Supreme Court of Appeals has further clouded the unsettled status of the double jeopardy rule in West Virginia. State ex rel. Watson v. Ferguson\(^1\) comes on the heels of two recent decisions in the same area, State ex rel. Dowdy v. Robinson\(^2\) and State ex rel. Johnson v. Hamilton,\(^3\) both of which attempted to clarify and apply the rule. The decision in Dowdy was based on the court's holding that a defendant is entitled to assert a claim of double jeopardy under the "same evidence" or the "same transaction" test and the test which afforded the defendant the greater protection would be applied.\(^4\) In Johnson, the court reiterated the Dowdy holding, but qualified its application by recognizing that although a single trial could be required for multiple offenses arising from the same transaction, separate punishments might, nevertheless, be imposed.\(^5\) In light of Dowdy and Johnson, the decision in Watson offers little consistency in its treatment and application of the double jeopardy rule.

In Watson, the defendant was convicted on one of four charges of first degree murder, after the trial court refused a request for a unitary trial on all four charges. When the trial court set the date for the second trial, the defendant sought a writ of prohibition on the ground that double jeopardy barred a second trial.\(^6\) The majority held that, 1) the Dowdy-Johnson joinder requirement is a procedural rather than a constitutional rule,\(^7\) 2) the "same transaction" and "same evidence" alternatives are still available to a defendant,\(^8\) and 3) since swinging a metal bar

\(^1\) 274 S.E.2d 440 (W. Va. 1980).
\(^2\) 275 S.E.2d 167 (W. Va. 1979).
\(^3\) 266 S.E.2d 125 (W. Va. 1980).
\(^4\) 257 S.E.2d at 170.
\(^5\) 266 S.E.2d at 128. This protection against multiple trials is referred to as a "joinder" requirement. Watson, 274 S.E.2d at 441, quoting State ex rel. Johnson v. Hamilton, 266 S.E.2d 125 (W. Va. 1980).
\(^6\) 274 S.E.2d at 441.
\(^7\) Id. at 444.
\(^8\) Id. at 445. While the court acknowledged the Dowdy-Johnson formulation, it qualified the usefulness of the alternative tests. Explaining the difficulty in applying the rule, the court said that Dowdy and Johnson "did not attempt to answer [the double jeopardy] question except in a most general way. . . ." The court elaborated:

It is probably not possible to formulate any detailed test for determining what constitutes the same offense for double jeopardy purposes.
four times is not the "same volitive act", each swing constitutes a separate offense under the "same transaction" test.9

Except for the characterization of the joinder rule as procedural rather than constitutional, Watson makes no change in the law. The court simply distinguished the facts of the case to avoid double jeopardy under the Dowdy-Johnson test. This strained application leaves a gaping hole in the protection set up in Dowdy and renders the Johnson joinder requirement virtually a matter of discretion (with little guidance) for the trial courts. The question now becomes one of determining the status of double jeopardy in light of Watson.

An interesting feature of the Watson case is the division of the justices on the decision. Justice Neely had written the majority opinions in both Dowdy and Johnson. In Watson, however, Justice Miller, who had dissented on the legal reasoning in Johnson, wrote the majority opinion and Justice Neely offered a terse but enlightening opinion in dissent. Perhaps, as Justice Neely suggests, Watson might best be discounted as a misapplication of an otherwise acceptable rule.10 By taking this approach, future decisions can be made, untrammeled by the inconsistency of Watson. Whatever the reasons for the shifting factions and perspectives, their presence will be noteworthy in future double jeopardy cases. Given the continued unsettled status of the rule, those cases should be forthcoming.11

THE RETREAT RULE

The retreat rule, a long-recognized aspect of self-defense, has been expanded and clarified in State v. W.J.B.1 The case came before the West Virginia Supreme Court of Appeals on an appeal from an adjudication of delinquency by the trial court, based on the finding that the juvenile had committed voluntary delinquency.2


Certainly courts and commentators are in disagreement not only as to the exact formulation for such tests but also as to the basic policies underlying the double jeopardy clause.

Id. at 449.


9 274 S.E.2d at 448.
manslaughter. Challenging the sufficiency of the evidence, the appellant argued that the state had not met its burden of proof in rebutting his evidence that the killing was in self-defense. The court, in an opinion by Justice Miller, agreed.²

The retreat rule is not a new concept in West Virginia; its basic form had been recognized and adopted by the beginning of this century.³ A general statement of the historically-recognized rule was "that a person in his own home who is subject to an unlawful intrusion and placed in immediate danger of serious bodily harm or death has no duty to retreat but may remain in place and employ deadly force to defend himself."⁴ The facts in W.J.B., however, did not fit neatly into this statement of the rule. The victim had directed threats and assaults toward the juvenile's home and family rather than toward the juvenile himself.⁵ The issue was whether the individual seeking the protection of the retreat rule must be in fear of personal serious bodily harm or death before he may employ deadly force. The court had no trouble extending the limits on the use of deadly force to include situations where the occupant reasonably believes that the intruder is threatening imminent violence⁶ to others.

Although earlier cases had recognized this wider latitude of protection, the application had been inconsistent and vague. Decisions appeared to turn on the court's view of the provocative nature of the victim's conduct rather than the state of mind of the defendant.⁷ The situation in W.J.B. provided the ideal factual pattern for a finding that the defendant had acted reasonably; the provocation was clear and the juvenile had obviously exercised restraint by attempting to avoid a confrontation before employing deadly force.

The opinion lists three reasons for this change in the retreat rule: 1) continued vitality of the ancient English rule that a man's home is his castle, 2) the presumption that an intruder would expect his unlawful entry to be met by force relative to the nature of his contemplated act, and 3) the status of the "re-

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² Id. at 551.
³ See State v. Manns, 48 W. Va. 480, 37 S.E. 613 (1900).
⁵ Id. at 551-52.
⁶ Id. at 555-56.
⁷ Id.
treat" rule as a mere extension of the concept of self-defense. Society's interest in minimizing the use of deadly force, whether by reasonable or unreasonable people, is apparently out-
weighed.  

Under W.J.B., reasonableness is to be measured "in the light of the circumstances in which [the defendant] acted at the time. . . ." Though not characterized as such by the court, this hybrid objective-subjective standard is essentially the same test prescribed in the Model Penal Code for determining culpability or justification based on the defendant's state of mind. The adoption of this standard is an apparent attempt to make the determination more flexible. Whether that flexibility will have counterproductive effects on efforts to balance the interests of society as against the interests of those seeking safety in their own home, remains to be seen. From the perspective of the potential intruder or the newly-fortified occupant, the immediate effect is obvious and perhaps, ominous.

VOIR DIRE

A new and stronger requirement of essentially unrestricted voir dire has been prescribed in State v. Peacher: The West Virginia Supreme Court of Appeals considered an appeal from a homicide conviction, one of the grounds of which was the trial court's refusal to grant a motion for a change of venue. The court, in an opinion by Justice McHugh, found that the defendant had been denied the requisite latitude in conducting voir dire to allow him to show a "present hostile sentiment" to sup-

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8 Id. at 556.
10 See Model Penal Code § 3.04(2)(c) (1962), which provides, in pertinent part, that "a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do or abstaining from any lawful action." Id. (emphasis added).
11 Consider the inherent difficulty in subjectively assessing the defendant's perception of the particular circumstances (presented perhaps in both friendly and hostile testimony) and in determining whether his reaction to that perception was reasonable. This academic blend of subjective and objective standards is a concept which may defy application by those persons unfamiliar with its premise, yet charged with its use.

port a change of venue. More specifically, the court held that "[w]here a trial court's restriction of the scope of voir dire undermines the rights sought to be protected by the voir dire process it will be held to be an abuse of discretion and reversible error." This holding is an extension of the protection which had previously existed.

The court had previously held that "[i]t is reversible error for the court to fail to discharge a juror who is obviously objectionable." Peacher, going further, requires the trial court to leave the defendant unfettered in his attempt to ascertain that the jury is free from bias or prejudice. Using a convincing syllogism, the court reasons that since a fair trial is a fundamental, protected right requiring a fair and impartial jury, it naturally follows that any process designed to protect that fundamental right must be given full meaning and effect. To so limit the questioning of potential jurors as to infringe upon the defendant's ability to protect his right to a fair trial is, therefore, enough to constitute reversible error.

Although the conviction in Peacher was overturned on just the voir dire error, the opinion goes on to consider questions raised on appeal which did not require a ruling but were found to "merit discussion." The balance of the opinion may prove valuable in its discussion of two important areas: 1) the prejudicial effect of security precautions taken at trial and 2) application of the suppression sanction for evidence unlawfully or unconstitutionally obtained. While these guidelines are prescribed in dicta, the court's extensive discussion entitles them to greater weight.

INDICTMENTS

An important change in prosecutorial technical work has been effected by the West Virginia Supreme Court of Appeals' recent decision in State v. Petry. The issue before the court

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1 273 S.E.2d 346 (W. Va. 1980).
2 Id. at 568, quoting State v. Siers, 103 W. Va. 30, 136 S.E. 503 (1927).
3 Id. at 570.
5 280 S.E.2d at 569-70.
6 Id. at 571.
was whether the common-law requirement of specifically charging an accused as either a principal in the first degree or principal in the second degree (recently applied in State v. Bennett),\(^2\) compelled an acquittal of the appellant for the incorrect designation in the indictment. The court ruled that an acquittal was required,\(^3\) but seized the opportunity to make a change in the requirement. Effective prospectively only, the court abolished the technical distinction between principals in the first and second degree. In an opinion by Chief Justice Neely, the court supported its decision by pointing out that "such technical distinctions serve no meaningful purpose to defendants and merely allow the guilty to go free."\(^4\)

The benefit to prosecutors and assistants is obvious; the indictment drafting procedure is greatly simplified. If the proof available at the indictment stage is inconclusive as to the accused's role in the alleged crime, the prosecutor need not decide between expending more time and effort to garner proof or taking a chance on a faulty indictment. Now, a general indictment as a principal in the first degree will suffice to sustain a conviction for a criminal act in the role of perpetrator, aider and abettor, or accessory before the fact.\(^5\)

Recent decisions have liberalized the rules for discovery in criminal cases in West Virginia. For example, the details of the state's case outside the indictment may be discovered by applying for a bill of particulars.\(^6\) This and other discovery methods serve the purpose for which the technical distinction between principals was intended. As Petry points out, this liberalization relegated the distinction to an unpredictable loophole in the indictment procedure through which many an underserving defendant has managed to slip.\(^7\) By closing the loophole, the court has shown that its liberalization of the procedural rules is being applied with an interest in justice and fairness and that there is no room for provisions that work to the contrary.

\(^3\) 273 S.E.2d at 347.
\(^4\) Id., citing State v. Fitch, 263 S.E.2d 889 (W. Va. 1980).
\(^5\) Id. at 352.
\(^7\) 273 S.E.2d at 348.
PROMISSORY FRAUD

In State v. Moore,1 the traditional elements of the crime of obtaining money or goods by false pretenses were expanded to include a new crime—promissory fraud.

Although promises are not explicitly excluded from false pretenses,2 the traditional view has been that the crime contemplated only statements or representations pertaining to "existing facts or past events".3 This majority rule has been supported by the argument that to permit prosecutions for false promises to perform in the future would encumber business affairs by subjecting debtors to the threat of criminal penalties, allow disgruntled creditors to retaliate with criminal prosecutions, and require the trier of fact to look backwards from the failure to complete the performance to ascertain intent.4 Notwithstanding these arguments for embracing the majority rule, the West Virginia Supreme Court of Appeals jumped ship, following the lead of California. Quoting Justice Traynor in People v. Ashley,5 the court was persuaded that "[p]ersons guilty of nothing more than innocent breaches or ordinary defaults are protected from criminal prosecution by the requirement that the state prove beyond a reasonable doubt the fraudulent intent of the defendant at the time the promise was made."6 This break from the traditional view is justified as an effort to shield the public "from the prospect of being unable to try and punish those who practice fraud and deceit in an artful manner."7

In Moore, the court treated and disposed of only one of the three reasons expressed in decisions embracing the traditional view. Certainly, as Justice McGraw maintains, criminal burden-of-proof requirements will protect the innocent from conviction.8 But the opinion in Moore, much like the progressive authorities

1 273 S.E.2d 821 (W. Va. 1980).
3 273 S.E.2d at 824.
6 273 S.E.2d at 825.
7 Id.
8 Id.
it relies upon, does not adequately address the possibility of disgruntled creditors bringing retaliatory charges or the inherent difficulty in looking backward to ascertain intent. *Moore* only says that the trier of fact will be charged with the responsibility of determining the existence of fraudulent intent, and the innocent will thereby be protected.⁹

The court provides a questionable characterization of the interests at stake. Apparently, the court believed that the public would be protected from the artful con-artist at the minimal expense of a remote chance that a bungling debtor might be criminally convicted.¹⁰ The test might be more appropriately characterized as weighing the interest of society in deterring and punishing those who would deal in bad faith (beyond the traditional civil remedies) against the interest of those who may find themselves subjected to criminal proceedings for an ordinary breach or default on a promise, and relying on a trier of fact to look backward and recognize a lack of fraudulent intent. Had the court addressed all the arguments for retention of the traditional view, the new law might have been more difficult to justify.

In any event, *Moore* is a new development which merits continued scrutiny. The case may have created a formidable legal weapon and a new line of criminal litigation in an area previously limited to civil remedies.

*William Galeota*

**JUVENILE TRANSFER HEARINGS**

Legislation concerning transfer of juvenile offenders to adult criminal court has changed rapidly and substantially in the last several years. The cases coming before the Supreme Court during this survey period reflect these changes.

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⁹ *Id., quoting* People v. Ashley, 42 Cal. 2d at 263, 267 P.2d at 282. This discussion fails to address the detriment to a party in being forced to defend against the criminal charges through the proceedings to that point where the determination of guilt or innocence is made. The threat of criminal charges is, in and of itself, sufficiently serious to be factored into the balancing of interests. Assuming, arguendo, that the defendant in *Moore* lacked the requisite fraudulent intent, his situation vividly demonstrates the burden of being forced to defend against a criminal charge, regardless of the outcome.

¹⁰ 273 S.E.2d at 825.
In 1975, the transfer statute\(^1\) required circuit courts to hear cases involving persons under 18 in a juvenile capacity, unless the alleged crime was a capital offense. In *Thomas v. Leverette, Warden*,\(^2\) Thomas was 16 years old when he was arrested for armed robbery. He pleaded guilty to one count and was sentenced to the State Penitentiary for 15 years. He received this sentence because the circuit court had determined that Thomas was not entitled to a transfer hearing; that he fell within the capital offense exception to juvenile jurisdiction. The supreme court reversed on the grounds that armed robbery is not a capital offense\(^3\) and, more significantly for later statutory developments, that "due process requires that a juvenile be afforded a hearing to determine whether he or she is statutorily excluded from the juvenile jurisdiction of the circuit court."\(^4\) The circuit court could only remove the juvenile to the criminal division if probable cause existed to believe that the juvenile had committed the alleged offense.

In 1977, an amended transfer statute\(^5\) allowed the juvenile court to waive its jurisdiction only upon presentation of clear and convincing proof that: 1) there was probable cause to believe that the juvenile had committed the offense and 2) that there were no reasonable prospects for rehabilitation of the child. The statute also provided that the testimony of a child at a transfer hearing would not be admissible in a criminal proceeding or at the adjudicatory hearing.\(^6\) In *State v. R.H.*,\(^7\) the defendant was 17 years old when he was charged with murder. While his transfer petition was pending, the 1978 Amendments, which withdrew some of the juvenile law’s protections, went into effect. The circuit court determined that the 1978 law should apply, that pro-

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1. W. Va. Code § 49-5-3 (1975) provided in material part: "Except as to a violation of law which if committed by an adult would be a capital offense, the court shall hear and determine criminal charges in the manner provided in [article 5 of the juvenile laws]."
3. The court held that the legislature did not intend to include armed robbery as a capital offense since it did not specifically provide for a penalty of life imprisonment, but left this within the discretion of the trial court.
4. 273 S.E.2d at 369.
bale cause existed and that no reasonable prospects existed for the rehabilitation of the child. R.H. was transferred to adult criminal court. He appealed, claiming that the 1978 amendments were unconstitutional because they did not require the court to make findings on the issue of reasonable prospects for rehabilitation, thereby denying the juvenile a meaningful hearing on transfer. The defendant also claimed that the application of the 1978 amendments to his transfer was, in effect, an ex post facto law because he could no longer testify in his own behalf without fear that the statement could be used against him in subsequent proceedings.

The supreme court granted R.H. a new transfer hearing, holding that the 1978 amendments should not have been applied, because the deprivation of the chance to testify for himself was a prejudicial denial of a substantial statutory right. Although the 1978 amendments did not apply to this case, the court took the opportunity to discuss their constitutionality. Although the new statute eliminated the requirement for inquiry into prospects for rehabilitation, the court believed that this does not preclude consideration of the personal factors suggested by the U.S. Supreme Court in Kent v. U.S., and adopted by this state in State ex rel. Smith v. Scott. The court held that the 1978 amendment included several of these factors as an absolute minimum and that this, together with the court's earlier recognition of the other factors, establishes firm guidelines for a "meaningful transfer hearing" as required by due process.

The court reaffirmed its commitment to consideration of the personal factors in State v. G. B. G., in which the trial court's consideration of the juvenile's individual background was approved as being "the proper exercise of its sound judicial discretion."

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8 W. Va. Code § 49-5-10 (f) allows a juvenile to directly appeal a decision of the circuit court to waive its juvenile jurisdiction.
11 The 1978 amendment requires consideration of the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar factors.
12 The Kent criteria, adopted by the court in Smith included: seriousness of the offense, element of violence, whether the offense was against persons or property, the maliciousness or deliberateness of the act and previous acts of delinquency.
14 Id. at 923.
Due process protections do not, however, include a jury trial for the transfer hearing. In *In Re: E. H.*, the defendant raised this issue of jury trials and the issue of the required standard of proof of commission of the crime in appealing his transfer to adult court on charges of kidnapping, armed robbery, and grand larceny. The court refused to require a jury trial at the transfer hearing, holding that the wording of the statute and substantial precedent supported the conclusion that a jury is required only at an adjudicatory hearing. The court also held that the State must establish probable cause that the juvenile committed the crime. General grounds for transfer must be proven with clear and convincing evidence. A transfer hearing requires a meaningful opportunity to be heard, to present witnesses and evidence and to cross-examine; but the hearing need not conform to all of the formal requirements of a criminal trial.

While the court refused to extend extra protections to juveniles by granting jury trials on transfer issues, it did grant extraordinary protection regarding waiver of counsel. Faced with a statute expressly allowing "knowing waiver of counsel" in preliminary juvenile hearings, and also faced with transcripts of hearings in which waivers were wholly inadequate, the court in *State ex rel. J. M. v. Taylor* held that a juvenile cannot waive his right to counsel except on the advice of counsel. The court rejected a standard of review for waivers of counsel based on an analysis of the "totality of circumstances" under which the waiver was made. They also rejected a test which would invalidate waivers secured without the presence of a guardian,

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16 W. VA. CODE § 49-5-6 and § 49-5-10.
18 276 S.E.2d at 558.
19 The waiver of counsel issue is not restricted to transfer hearings, but also arises at probation revocation hearings and adjudicatory and preliminary delinquency hearings.
20 W. VA. CODE § 49-5-9 (a)(2).
22 The "totality of circumstances" test involves a consideration of such factors as age, maturity, previous experience with police or courts, advice of parent or counsel, methods of detention, education, knowledge of the charge and nature of the right to be waived to determine whether the waiver was knowingly made. See, e.g., Haley v. Ohio, 332 U.S. 596 (1948).
parent or interested adult, because of the difficulties in establishing who is sufficiently interested. The more admirable view, according to Chief Justice Harshbarger, is that a juvenile's right to counsel is non-waivable and this view is consistent with other proceedings involving children in which the right to counsel cannot be waived. But the legislature provided for the waiver in juvenile criminal proceedings, and so the court went as far as possible to protect juveniles: requiring that counsel be present before counsel can be waived.

In the same case, the court held that admissions of guilt are to be judged by the standards that validate an adult guilty plea: an admission is invalid because unintelligently made when the court fails to apprise the juvenile fully of the charges, the penalties and the consequences of pleading guilty, including the rights which would be waived by such a plea.

After all this expansion, definition and protection of juvenile rights in transfer hearings, the court abruptly reversed itself in State ex rel. Cook v. Helms. The defendant, 17 years old, was charged with cooperating with two adults in a shotgun murder. A petition to waive juvenile jurisdiction was granted, after a transfer hearing in which the juvenile court heard testimony from probation officers, psychologists, and directors of youth services agencies. The transfer order stated:

[The court finds that she has average intelligence, is competent to stand trial in this matter, and has heard no evidence to indicate to the court that if found guilty of the charge of murder in this case, that she should be given any special treatment simply because she was several months short of her eighteenth birthday.]

The trial court had also found probable cause to believe that the defendant had committed the crime of murder.

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23 For example, the parents of one of the juveniles involved in this case had filed multiple petitions alleging delinquency against him.
24 This recommendation was made by the IJA/ABA Juvenile Justice Standards Project, Standards Relating to Adjudication, § 1.2 (1977).
25 Some other proceedings cited in which a child may not waive counsel are: civil suits where the minor is a plaintiff or defendant, eminent domain proceedings, will probate in solemn form, and neglect proceedings. 276 S.E.2d at 203.
27 Id. at 2.
Helms appealed on the grounds that the court had failed to make a finding that she was unsuitable for rehabilitation within the juvenile system. The supreme court held that when there is probable cause that a juvenile has committed one of the crimes specified in W. Va. Code § 49-5-10 (d)(1) (1978), a transfer to adult court may be granted without further inquiry. This holding overruled State v. R. H. (in which the court had established the constitutionality of the 1978 amendments) and State v. C. J. S.

The court based its decision on a re-examination of the words of the statute, and of the changes made between 1977 and

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28 The defendant also appealed on the ground that the transfer hearing did not take place within seven days of the filing of the transfer petition as required by W. Va. Code § 49-5-10(a) (1978). The court held that the continuance allowed reasonable notice to the child, parents and counsel, and had therefore been granted for good cause.

29 W. Va. CODE § 49-5-10(d) provides:

The court may, upon consideration of the child’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors, transfer a juvenile proceeding to criminal jurisdiction if there is a probable cause to believe that:

(1) The child has committed the crime of treason . . ; the crime of murder . . ; the crime of robbery involving the use or presenting of firearms or other deadly weapons . . ; the crime of kidnapping . . ; the crime of first degree arson . . ; sexual assault in the first degree . . ; and in such case, the existence of such probable cause shall be sufficient grounds for transfer without further inquiry; or

(2) A child has committed an offense of violence to the person which would be felony [sic] if the child were an adult; Provided, that the child has been previously adjudged delinquent for the commission of an offense which would be a violent felony if the child were an adult; or

(3) A child has committed an offense which would be a felony if the child were an adult; Provided, that the child has been twice previously adjudged delinquent for the commission of an offense which would be a felony if the child were an adult; or

(4) A child, sixteen years of age or over, has committed an offense of violence to the person which would be a felony if committed by an adult; or

(5) A child, sixteen years of age or over, has committed an offense which would be a felony if committed by an adult: Provided, that such child has been previously adjudged delinquent for an offense which would be a felony if the child were an adult.

30 273 S.E.2d 578 (W. Va. 1980).

31 263 S.E.2d 899 (W. Va. 1980).
1978. Because subsection (d)(1)\textsuperscript{32} contained the phrase "without further inquiry", unlike any other subsection of the transfer statute, the court concluded "that the Legislature intended to relieve courts from making any inquiry into the juvenile's personal factors when the court believes that the seriousness of the crime alone warrants the child's being treated as an adult."\textsuperscript{33} Writing for the majority, Justice Neely explained that the Legislature was eliminating the impossible burden of proof that had previously been required of the state: "producing clear and convincing proof there are no programs, facilities or institutions available to the court which would offer reasonable prospects for rehabilitating the juvenile. To prove this, the evidence must show consideration has been given to every feasible alternative to which the court could possibly refer the juvenile."\textsuperscript{34}

Elimination of this impossible burden, according to Justice Neely, also insulated trial courts from a "subjective review concerning whether there was sufficient evidence to support their conclusion to transfer,"\textsuperscript{35} while leaving them with discretion on whether to consider personal factors. The court commended the juvenile judge for his thorough inquiry into Teressa Helm's case.

It is unclear from the decision why the court took the drastic step of eliminating mandatory consideration of personal factors in a transfer hearing in this case: only the failure to make a finding of suitability for rehabilitation was at issue. It is clear, however, that the court has redefined a "meaningful transfer hearing" for a small group of juveniles.

For the juveniles whose crimes fit within § (d)(1) of the transfer statute,\textsuperscript{36} the transfer hearing now becomes a probable cause hearing. This altered approach, which covers an expanded number of crimes, results in less protection than was afforded by the 1975 statute.\textsuperscript{7} It is not at all clear, under a comparative examination of the statutes, that this is what the Legislature intended. The 1978 statute specifically provides that a court may

\textsuperscript{32} Text at supra note 29.
\textsuperscript{33} No. 92-81 at 5.
\textsuperscript{34} State v. M. M., 256 S.E.2d 549, 555 (W. Va. 1979).
\textsuperscript{35} No. 92-81 at 6.
\textsuperscript{36} Text at supra note 29.
transfer, upon consideration of the child’s mental and physical condition, maturity, emotional attitude, home or family environment, school experience and similar personal factors, and if there is probable cause. The statute further says that if there is probable cause that the child has committed treason, murder, armed robbery, kidnapping, arson or sexual assault, probable cause is sufficient grounds for transfer without further inquiry. If “without further inquiry” is intended to eliminate consideration of the above factors, the court should at least require a clearer statement of intent from the Legislature, or better yet, should step in to protect individual rights from what may be a public reaction to high crime rates.

Important rights are afforded to juveniles through the juvenile system; e.g., right to treatment with goals of rehabilitation and behavior modification rather than punishment, a right to closed records, a right to continuing disposition by the court. “The right to be treated as a juvenile is a substantial right.” It is extremely unlikely that the child’s best interests will be served by prosecution in adult court. The Helms decision does not allow the juvenile a chance to show that his or her best interests lie within the juvenile system, and does not require the court to give reasons why it has waived its jurisdiction. Thus, a child is deprived of substantial rights due to an irrebuttable presumption that commission of any of the enumerated crimes removes that child from the rehabilitative purposes of the juvenile law.

In overruling State v. R. H., the court failed to discuss how the analysis in that case of the constitutionality of the statute was affected. The court in R. H. had concluded that “W. Va. Code § 49-5-10 does not violate the due process provisions of our state and federal constitutions because the juvenile court must vindicate the standards set forth by the United States Supreme

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37 Text at supra note 1.
40 256 S.E.2d 549.
42 273 S.E.2d 578 (W. Va. 1980).
Thus, if the statute was read together with the standards set forth in *Kent v. U.S.* and adopted by West Virginia in *State ex rel. Smith v. Scott,* due process requirements for a "meaningful hearing" were satisfied. Under *Helms,* the juveniles whose crimes fit the § (d)(1) description are transferred on the basis of probable cause, rather than on a consideration of the child's amenability to juvenile jurisdiction. The purposes and meaningfulness of the transfer hearing are thwarted, and due process is not achieved. Further discussion of how the statute comports with due process and equal protection is needed.  

Admittedly, the court did not totally eliminate consideration of the personal factors: the trial judge has total discretion as to whether such evidence will be considered. He may hear the evidence and not consider it, he may not hear it, he may hear it but not decide on the record. Disparate treatment will result, and the transfer will be unreviewable by the Supreme Court of Appeals because there will be no standards by which to judge the exercise of transfer power. Justice Neely recognized this when he declared that "trial courts are now insulated from a subjective review." Rather than granting such broad and arbitrary power, the court could have established firmer guidelines to ensure that each trial court considers the best interests of the child, the family and society, and that only extraordinary juveniles in extraordinary factual situations are transferred to adult courts.

**MISCELLANEOUS JUVENILE ISSUES**

In *State ex rel. Washington v. Taylor,* the court gave an ex-
expansive reading to W. VA. CODE § 49-5-13 (b)(5), which grants to the director of industrial schools the discretion to discharge a committed child and return him to the court for further disposition. To avoid being transferred to adult criminal court on charges of conspiracy to commit armed robbery, Washington, age 17, entered into a plea bargain: he would serve one year at the industrial school, in return for being treated as a juvenile delinquent. Washington completed the rehabilitative program at the school before the end of the year and the director, in accordance with his statutory duty, developed a home release plan and requested the circuit court to accept Washington for further disposition. The circuit court judge refused, deferring to the prosecutor's recommendation that Washington finish out his year.

The Supreme Court of Appeals found this to be a close case: the best interests of the child had been served by allowing the plea bargain in the first instance, but when a maximum degree of improvement has been reached, the child's best interests lie in being released from a therapeutic program. The specificity of the Code and the purposes of the juvenile law tipped the balance: "Since juvenile institutions are structured in such a way that release is the primary reward for the inmates' [sic] behavior modification, it is quite likely that a rule which would permit courts to sentence children for a definite term would confound the rehabilitation and behavior modification program of the institution."5

This holding supports the statutory purposes of the juvenile law: rehabilitation of the child and maintenance of the family.

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2 W. VA. CODE § 49-5-13 (b)(5) (1980) provides:

Upon a finding that no less restrictive alternative would accomplish the requisite rehabilitation of the child, and upon an adjudication of delinquency pursuant to subdivision (1), section four, article one of this chapter, commit the child to an industrial home or correctional institution for children. Commitments shall not exceed the maximum term for which an adult could have been sentenced for the same offense, with discretion as to discharge to rest with the director of the institution, who may release the child and return him to the court for further disposition.

3 An adjudication of delinquency replaced the transfer, in order to allow the commitment to the Industrial School for Boys.

4 Text at note 2 supra.

5 273 S.E.2d at 86.
Hopefully, it will not have a deleterious effect on prosecutuors' willingness to plea bargain, or on a juvenile court's refusal to transfer the child to adult court.

The child's best interests were further protected in Jeffrey v. McHugh, in which the court refused to allow disclosure to the county prosecutor of the juvenile records of a 17 year old who had hanged himself in the county jail. W. VA. CODE § 49-5-17(d) allows opening of the records in only five enumerated exceptions, which do not include a prosecutor checking into circumstances of death. Although a constitutionally compelling reason might have allowed the court to expand upon these exceptions, the court found no such reason in this case. M. D. J.'s case ended upon his death, and there were no existing circumstances which could force the juvenile record open.

Joan Mooney

**Speedy Trial**

The right to a speedy trial is guaranteed by the sixth amendment and is applicable to the States by the fourteenth amendment. The Constitution of the State of West Virginia also guarantees a speedy trial in art. III, § 14. The remedy for violation of the constitutional right is dismissal of charges against the

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6 273 S.E.2d 837 (W. Va. 1980).
7 The five enumerated exceptions in W. VA. CODE § 49-5-17(d) are:

1. A court having juvenile jurisdiction has the child before it in a juvenile proceeding;
2. A court exercising criminal jurisdiction over the child requests such records for the purpose of a presentence report or other dispositional proceeding;
3. The child or counsel for the child requests disclosure or inspection of such records;
4. The officials of public institutions to which a child is committed require such records for transfer, parole, or discharge considerations; or
5. A person doing research requests disclosure, on the condition that information which would identify the child or family involved in the proceeding shall not be divulged.

1 The sixth amendment to the United States Constitution reads in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."
defendant; therefore, it has seldom been successfully asserted on appeal of a conviction or in a writ of habeas corpus. Recently, the West Virginia Supreme Court of Appeals considered two West Virginia statutes which require the defendant to be tried within a certain period of time. One statute was held to define the "constitutional" right; another was held to create a statutory right.3

In *State ex rel. Shorter v. Hey,*4 relators were indicted during the May, 1980, term of the Circuit Court of Kanawha County. At a pre-trial hearing, the judge, on his own motion, continued the case to the September, 1980, term of court. The judge's trial docket was filled for the remainder of the May term. At the end of that term he was going to attend a seminar and then take a vacation.5 The relators filed a petition asserting that their cases were moved without good cause beyond the term of their indictment. Accordingly, the relators, relying upon W. Va. Code § 62-3-1 and its interpretation in *State ex rel. Holstein v. Casey,*6 sought to be discharged from further prosecution.7 In *Holstein,* the court said that a criminal defendant is denied his right to a speedy trial if he is not tried within the term of his indictment unless good cause is shown for continuance.8 According to *Holstein,* violation of W. Va. Code § 62-3-1 requires the dismissal of charges against the defendant.9 The *Shorter* case overrules the *Holstein* interpretation of W. Va. Code § 62-3-1, then clarifies W. Va. Code § 62-3-1 and distinguishes it from the other speedy trial statute, W. Va. Code § 62-3-21.

The "one term rule," W. Va. Code § 62-3-1, provides that a criminal defendant shall be tried in the same term of court in which he was indicted, unless good cause exists for a continuance to a later term.10 The "three term rule," W. Va. Code

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5 Id. at 2.
8 285 S.E.2d at 530.
9 Id. at 533.
10 W. Va. Code, § 62-3-1, provides, in part, as follows: "When an indictment is found in any county, against a person for a felony or misdemeanor, the accused, if in custody, or if he appear in discharge of his recognizance, or voluntarily, shall, unless good cause be shown for a continuance, be tried at the same term."
§ 62-3-21, provides that, subject to enumerated exceptions, a
criminal defendant must be discharged from prosecution if not
tried within three regular terms of court after presentment on
indictment or appeal from an inferior tribunal.\(^{11}\)

According to Shorter, W. Va. Code § 62-3-1 does not define
the defendant's constitutional right to a speedy trial; rather, it
provides the defendant with a statutory right to be granted a
trial in the term of his indictment.\(^{12}\) Therefore, because W. Va.
Code § 62-3-1 is a statutory right lacking a specific stated penalty,
it is not to be interpreted as requiring the extreme remedy of
dismissal of defendant's charges, but as providing the defendant
the right to compel a trial by mandamus.\(^{13}\) "[I]t is W. Va. Code
§ 62-3-21, rather than W. Va. Code § 62-3-1, which is the
legislative adoption or declaration of what ordinarily constitutes
a speedy trial within the meaning of U.S. Const., amend. VI and
W.Va. Const., art. III, § 14."\(^{14}\)

According to Justice Thomas Miller, dissenting in Holstein,
"the two statutes were designed to complement each other."\(^{15}\)

\(^{11}\) W. VA. CODE, § 62-3-21, provides as follows:
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 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 prosecu-
tion for the offense set forth in the warrant against him, if after his hav-
ing 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 the proceedings on indict-
ment.

\(^{13}\) 265 S.E.2d at 536-37 (Miller, J., dissenting).
\(^{14}\) Shorter, No. 15068, slip op. at 8 (W. Va. Mar. 17, 1981); State ex rel. Smith
\(^{15}\) 265 S.E.2d at 535 (Miller, J., dissenting).
W. Va. Code § 62-3-1 requires that a defendant is to be tried within the indictment term unless good cause is shown for a continuance. If good cause is shown for continuance, W. Va. Code § 62-3-21 provides a limit to the time trial may be delayed and still meet the constitutional requirement regarding a speedy trial.\footnote{\textit{Id.}}

\textit{Shorter} implies that "good cause" to continue a trial beyond the term in which the indictment was issued is a broad concept which a wide variety of circumstances may satisfy. Although the standards for determining good cause are committed to the trial judge's discretion, \textit{Shorter} emphasizes the importance of stating the reasons for which the continuance was granted in order to make appellate review of the decision easier and more fair.\footnote{\textit{Id.} at 15.} In determining what is good cause, judges are no longer required to distinguish between single and multi-judge circuits. A trial judge in a multi-judge circuit may consider a congested docket as good cause for continuing a trial beyond the term of indictment without having to inquire whether another judge in the circuit can try the case within the indictment term.\footnote{\textit{Id.} at 10.} Furthermore, a continuance of trial beyond the indictment term may be made on the court's own motion.\footnote{\textit{Id.} at 16.}

Although \textit{Shorter} adopts a liberal interpretation of "good cause," it does not support unnecessary delay of criminal trials.\footnote{\textit{Id.} at 17.} In fact, where the trial court believes "the State has deliberately or oppressively sought to delay a trial beyond the term of indictment, and such delay has resulted in substantial prejudice to the accused, the trial court may, pursuant to W. Va. Code § 62-3-1, finding that no good cause was shown to continue the trial, dismiss the indictment with prejudice."\footnote{\textit{Id.}}

It was well recognized that dismissal of criminal charges is an extreme remedy. Even in interpreting W. Va. Code § 62-3-21, West Virginia has not followed a "restricted time view."\footnote{\textit{Id.} 265 S.E.2d at 536 (Miller, J., dissenting).} For example, the term at which the indictment is returned is not to

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\begin{itemize}
\item \textit{Id.}
\item \textit{Id.} at 16.
\item \textit{Id.} at 17.
\item \textit{Id.} at 10.
\item \textit{Id.}
\item \textit{Id.} at 16.
\item \textit{Id.}
\item \textit{Id.} at 15.
\end{itemize}
be counted in favor of the defendant. Also, any court terms which pass while the defendant is without the jurisdiction of the court are not to be counted as terms within W. Va. Code § 62-3-21. Furthermore, "terms" in W. Va. Code § 62-3-21 has been interpreted to mean whole terms, not parts of a term. Even if the defendant is brought into the jurisdiction of the court on the day following the beginning of the term of court, the term in which the defendant is returned is not to be counted in his favor.

In State v. Young, a defendant was found guilty of burglary after a twenty month delay between indictment and arraignment. The defendant appealed his conviction, asserting that he was not tried within the proper time after his indictment pursuant to W. Va. Code § 62-3-21.

The "constitutional" rule provides that delay of trial is justified if caused by the defendant's

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. . . .

The prosecution was unable to justify the delay of trial by application of any of the statutory exceptions. Furthermore, the record indicated that except for the period of time between January, 1977, and May, 1977, the defendant did nothing to delay the trial.

Although the defendant did not object to continuance of the burglary trial to later terms, it is the affirmative duty of the State to provide the accused with a speedy trial and the accused is not prejudiced by omitting to demand a speedy trial. Therefore, in order to give effect to the accused's constitutional right

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24 Id. at 535, 120 S.E.2d at 505.
25 Id. at 538-39, 120 S.E.2d at 506-07.
27 Id. at 105.
28 W. VA. CODE § 62-3-21 (1977 Replacement Vol.).
29 280 S.E.2d at 107.
30 Id. at 108; State ex rel. Stines v. Locke, 220 S.E.2d 443, 446 (W. Va. 1975).
to a speedy trial and the mandatory provision of W. Va. Code § 62-3-21, the court reversed the defendant’s burglary conviction.\(^{31}\)

In *State v. Rhodes*,\(^{32}\) the court applied one of the exceptions of W. Va. Code § 62-3-21 in order to permit the delay of trial after defendant’s indictment. The defendant was indicted for armed robbery in May, 1968. He then fled the State until January, 1971.\(^{33}\) At that time the court decided that there was question as to the defendant’s sanity.\(^{34}\)

The time between May, 1968, and January, 1971, when the defendant was without the jurisdiction of the court, is not to be counted in determining whether the defendant is entitled to discharge from prosecution.\(^{35}\) Neither was the January term to be counted because the defendant’s insanity prevented the State from trying him in this term.\(^{36}\) Insanity of the accused is one of the specific exceptions under W. Va. Code § 62-3-21. After it was determined that the accused had regained his sanity, the court held that he was tried within three regular terms of court.\(^{37}\)

*State v. Young* and *State v. Rhodes* seem to say that if the State is able to point to one of the specific enumerated exceptions set forth in W. Va. Code § 62-3-21 to justify the delay of trial, then the court will hold that the accused was granted a speedy trial, regardless of the time span between indictment and trial.

Nevertheless, W. Va. Code § 62-3-21 remains more protective of the defendant than the Sixth Amendment to the United States Constitution. The United States Supreme Court, rather than applying a set time span, has adopted a balancing test in which the following factors are considered in deciding the constitutional right to a speedy trial: (1) the length of delay; (2) the reason for the delay; (3) the defendant’s assertion of his right; and (4) the prejudice to the defendant.\(^{38}\) Unfortunately, legisla-

\(^{31}\) 280 S.E.2d at 108.
\(^{33}\) 274 S.E.2d at 923.
\(^{34}\) Id. at 924.
\(^{35}\) Id.
\(^{36}\) Id. at 925.
\(^{37}\) Id.
tion which attempts to adopt the speedy trial right by establishing a time limit fails to consider two things: (1) possible delays caused by the State's good faith attempt to gather evidence; and (2) the highly congested court dockets throughout the State. The finality of the remedy of discharge and the accompanying possibility of a dangerous criminal defendant going free without a determination as to his innocence should incline courts to find a deprivation of the right to a speedy trial in only the most certain cases.

One application of W. Va. Code § 62-3-21 is set forth in State v. Foddrell. West Virginia uses the Supreme Court’s balancing test to determine whether to inquire further into the State’s due diligence in seeking defendant so as to provide him a speedy trial.

In Foddrell, the appellant was not brought to trial until more than six years after he had been indicted, during which time the defendant made no effort to hide from authorities. The appellant alleged that the State had denied him his right to a speedy trial pursuant to W. Va. Code § 62-3-21.

W. Va. Code § 62-3-21 is interpreted as requiring the State to exercise reasonable diligence in procuring the defendant for trial, once the defendant’s out-of-state location is known. If the State fails to exercise reasonable diligence, the defendant may count the terms in which the State was inactive in determining whether he is entitled to be discharged from prosecution.

The statute clearly distinguishes between a defendant who flees the State and one who remains available for trial. Before the accused can rely upon the provisions of W. Va. Code § 62-3-21 he must not have resisted the State’s attempts to return him for trial.

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30 269 S.E.2d 854 (W. Va. 1980).
31 Id. at 858.
32 Id.
33 269 S.E.2d at 857; W. VA. CONST. art. III, § 14; U.S. CONST. amend. VI.
34 State ex rel. Boso v. Warmuth, 270 S.E.2d 611, 613 (1980).
37 Id. at 634.
In establishing terms to be counted in favor of the accused under W. Va. Code § 62-3-21, West Virginia has adopted a balancing test in which the conduct of both the prosecution and defendant are weighed.\(^4\) The elapsed period of time determines whether there is a necessity to inquire into the other factors. A recent West Virginia case stated that a time span of 2-1/2 years between indictment and trial was sufficient to warrant further inquiry.\(^4\) The court should assess such factors as "(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."\(^5\)

The court decided that further inquiry was required since six years passed between Foddrell's indictment and trial. The case was remanded to determine whether the State had provided the defendant a speedy trial.\(^6\)

In *State ex rel. Rogers v. Casey*,\(^*\) the court emphasized that the defendant's constitutional right to effective assistance of counsel is concurrent with the defendant's right to a speedy trial.

The relator was indicted during the January, 1979, term of court. At the time he was confined at Huttonsville Correctional Center. Near the end of the January, 1980, term of court, the State scheduled the case for the following day. The next day defendant's counsel stated that he was not given adequate time to prepare because of the short notice of the trial date. The defense did not, however, move for a continuance. The judge upon his own motion continued the case to the next term of court. The relator, relying on the "three term rule," W. Va. Code § 62-3-21, seeks discharge from further prosecution.\(^7\)

In *Rogers* the State argued that "trial" within the meaning of W. Va. Code § 62-3-21 was provided and the case was continued solely because the defendant's attorney was not prepared to represent the accused at trial.\(^8\)

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\(^4\) 269 S.E.2d at 858.

\(^5\) State v. Cox, 253 S.E.2d 517, 519 (W. Va. 1979) (The court stated that "a delay of approximately two and one-half years between indictment and trial clearly warrants further inquiry.")

\(^6\) 269 S.E.2d at 858; Barker v. Wingo, 407 U.S. 514, 530 (1972).

\(^7\) 269 S.E.2d at 859.

\(^8\) 273 S.E.2d 356 (W. Va. 1980).

\(^*\) *Id.* at 358.

\(^\dagger\) *Id.* at 359.
In accordance with art. III, section 14 of the West Virginia Constitution, a criminal defendant "shall have the assistance of counsel and a reasonable time to prepare for his defense." The State fails to provide the defendant his right to effective assistance of counsel when counsel is denied sufficient time to adequately prepare for trial.

The interest of the State in providing the defendant his right to a speedy trial cannot be allowed to abrogate the defendant's concurrent right to effective assistance of counsel and a fair trial. Clearly, there is a substantial relationship between the time to prepare for criminal trial and the effective representation provided by defense. In West Virginia there is a constitutional right to a continuance if the defendant is not provided a reasonable time to prepare his defense.

Although there is no rule by which to determine what is a "reasonable" time to prepare for trial, recent West Virginia cases suggest that twenty-four hours is not enough time. Requiring counsel to prepare for a criminal trial in less than twenty-four hours has the effect of denying the accused effective assistance of counsel.

In Rogers, the defendant's counsel was not provided sufficient time to adequately prepare for defense. Therefore, the continuance of trial to a following term was "necessary to protect the relator's right to effective assistance of counsel and a fair trial." When the State is unable to justify its failure to try the

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55 Art. III, § 14, W. Va. Const., reads in pertinent part:
In all such trials, the accused . . . shall have the assistance of counsel, and a reasonable time to prepare for his defense . . . (Emphasis added.)
56 State ex rel. West Virginia-Pittsburgh Coal Co. v. Eno, 135 W. Va. 473, 63 S.E.2d 845, 850 (1951).
59 See State v. Bush, 255 S.E.2d 539, 544 (W. Va. 1979) (a weekend was insufficient time to prepare); Housden v. Leverette, 241 S.E.2d 810, 811 (W. Va. 1978) (one day was insufficient time to prepare); State ex rel. West Virginia-Pittsburgh Coal Co. v. Eno, 135 W. Va. 423, 63 S.E.2d 845, 851 (1951) (one day was insufficient time to prepare).
60 State ex rel. West Virginia-Pittsburgh Coal Co. v. Eno, 135 W. Va. 473, 63 S.E.2d 845, 851 (1951).
61 273 S.E.2d at 359.
defendant within three terms by any of the exceptions set forth in W. Va. Code § 62-3-21, the relator must be discharged from prosecution.62

Sartin v. Bordenkircher63 addressed the issue of whether the denial of effective assistance of counsel which prevented a timely appeal would warrant an unconditional discharge.

The relator was confined in the penitentiary for a conviction of the crime of second degree sexual assault. It was not disputed in Sartin that the relator was twice denied his right to appeal.64 The relator corresponded with the attorneys and judge, and the court concluded that he had reason to believe that his appeal was being prosecuted.65 If a defendant fails to inform the court of appointed counsel's inaction, then any delay will not be considered extraordinary dereliction on the part of the State.66

In West Virginia, an indigent criminal defendant has the right to effective assistance of counsel on appeal.67 "[T]o deny adequate review to the poor means that many of them may lose their life, liberty, or property because of unjust convictions which appellate courts would set aside."68 When failure to prosecute a timely appeal has not resulted in actual injury, except in the case of extraordinary dereliction, the court should not discharge the defendant but take immediate steps to provide prosecution of an appeal.69

Whether there have been facts constituting extraordinary dereliction by the State sufficient to warrant unconditional release depends upon the individual case.70

Factors which are relevant include the following: the clarity and

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62 Id. at 360.
63 272 S.E.2d 243 (W. Va. 1980).
64 Id. at 244.
65 Id. at 245.
67 W. VA. CONST. art. III, § 10; Ross v. Moffitt, 417 U.S. 600 (1974), suggests in dicta that the primary constitutional ground for the right of an indigent defendant to counsel on appeal is the Equal Protection Clause of the fourteenth amendment to the Federal Constitution.
diligence with which the relator has moved to assert his right of appeal; the length of time that has been served on the underlying sentence measured against the time remaining to be served; whether prior writs have been filed or granted involving the right to appeal; and the related question of whether resentencing has occurred in order to extend the appeal period.\textsuperscript{7}

The facts in \textit{Sartin} established extraordinary dereliction on the part of the State, and the relator was discharged from confinement.\textsuperscript{2}

\textit{Susan Donahoe}

\textbf{PROBATION}

Probation is a significant part of the criminal justice system, and during the survey period the court considered several aspects of probation. One such aspect is the revocation of probation, whereby probation is revoked and the probationer returned to prison.

Probation revocation may be reviewed either by direct appeal or by a writ of habeas corpus to the Supreme Court of Appeals.\textsuperscript{1} The court may then determine whether the revocation was proper.

In \textit{State v. Ketchum},\textsuperscript{2} the probationer, Ketchum, contended that the revocation of his probation was improper since it was based on criminal charges that were subsequently dismissed by the prosecuting attorney. Ketchum had been criminally charged with passing two bad checks. Although the prosecuting attorney ultimately decided to dismiss those charges, the State presented evidence of the bad checks as a violation of probation at a revocation proceeding.

In finding the revocation proper, the court held that dismissal of criminal charges will not prevent the subsequent use of those charges in a probation revocation proceeding.\textsuperscript{3}

\textsuperscript{7} \textit{Id.}

\textsuperscript{2} 272 S.E.2d at 246; The rule of extraordinary dereliction was also applied in \textit{Johnson v. McKenzie}, 235 S.E.2d 138 (W. Va. 1977) to require an unconditional discharge of relator.


\textsuperscript{3} \textit{Id.} at 5.
In support of its holding, the court cited Sigman v. Whyte, a West Virginia case which addressed a related issue. In Sigman, the court held that probation could be revoked based on the defendant's committing a criminal offense even though a criminal trial had not occurred. Thus, probation can be revoked without an underlying criminal conviction.

Although this rule may seem harsh, the court's perception of the probation system justifies the result. In a revocation proceeding a probationer is not determined guilty or innocent of a criminal offense. Rather, the court determines whether the facts indicate by a preponderance of the evidence that a criminal offense has been committed. If so, the court concludes that the rehabilitative and other purposes behind probation have failed and probation is revoked.

The court has previously held that a dismissal of criminal charges does not operate as a bar to a new trial on the same charges. Thus, if a dismissal does not prevent a reindictment on the same charges, neither should it prevent the use of such charges in a revocation proceeding. This seems justifiable in that a probation revocation proceeding has fewer procedural safeguards than a criminal trial, due to the probationer having more limited rights than the unconvicted population at large.

The court commented in a footnote that probation should not be revoked on a minor technical violation of probation. It appears that only a factual determination of a criminal offense is sufficient to revoke probation.

In Hughes v. Guinn, the court discussed the fourth and fifth amendment rights of a probationer. The probationer in ques-

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4 268 S.E.2d 603 (W. Va. 1980).
5 Ketchum, No. 14301 at 3.
7 Ketchum, No. 14301 at 7 n.6.
8 No. 15060 (W. Va. March 17, 1981). Justice Neely wrote the Hughes opinion, with Chief Justice Harshbarger and Justice Miller concurring, and Justice McGraw dissenting. Justice McHugh did not participate in the decision. At the time of publication, the concurring and dissenting opinions had not been filed.
9 The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures; the Fifth Amendment provides for due process of law and protection against self-incrimination.
Hughes, was charged with writing bad checks while on probation. In conversations with her probation officer, Hughes admitted writing the checks knowing that she had insufficient funds to cover them. Additionally, the probation officer allegedly read Hughes' mail which contained numerous notices from her bank. The probation officer presented this information at the revocation proceeding and probation was revoked.

Hughes contended that her probation revocation was improper because: (1) she was not provided counsel during conversations with her probation officer; (2) the evidence of her admissions was obtained in violation of the *Miranda* rule; and (3) the opening of her mail constituted an illegal seizure.

The court denied Hughes' contentions by emphasizing the limited rights of a probationer, saying that probationers do not have the same rights enjoyed by defendants before conviction.10

In West Virginia a probationer is provided with counsel at both preliminary and final probation revocation hearings.11 However, this right to counsel does not extend beyond the proceeding, for the court believes that interposition of counsel could ruin the relationship between probationer and probation officer.12 Similarly, if the probationer were entitled to a *Miranda* warning upon every meeting with the probation officer, the relationship would be strained.13

Beyond the concern for a good working relationship is the realization that the probationer has waived certain constitutional rights in return for continued liberty. Acceptance of probationary status infers acceptance of the probation officer in place of counsel in many respects.14

Although a probationer is protected from unreasonable searches and seizures, her status as a probationer is a significant factor in determining probable cause to search and seize.15 For the

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10 Hughes, No. 15060 at 2.
11 *See* Louk *v.* Haynes, 223 S.E.2d 780, 787 (W. Va. 1976), where the court held that counsel is required at each hearing at which the terms of probation are modified.
12 Hughes, No. 15060 at 5.
13 *Id.* at 7.
14 *Id.* at 6.
15 *Id.* at 9.
protection of the probationer, however, not all evidence allowed at a probation revocation hearing is admissible in a subsequent criminal prosecution. Furthermore, evidence must be suppressed in a revocation hearing if there is evidence of police harassment.\textsuperscript{16} Despite these protections, the probationer has clearly waived certain constitutional rights for the benefit of probation.

In \textit{State v. Cooper},\textsuperscript{17} the probationer, Cooper, was charged with possessing and delivering marijuana in violation of probation. The state failed to present evidence of the marijuana transaction at the preliminary revocation proceeding, but was subsequently allowed to present the evidence at the final hearing. Probation was revoked and Cooper argued that evidence of the marijuana charge should not have been permitted in the final proceeding. The court disagreed with Cooper for the following reasons:

First, the initial probation revocation notice contained the marijuana charge, properly notifying the probationer.

Second, the state was unable to deal with the charge at the preliminary revocation hearing because the marijuana had not yet been tested at the State Police Laboratory. Thus, the state had a bona fide explanation for its actions.

Third, there were other charges presented at the preliminary hearing which warranted detaining the probationer for a full hearing, lessening the necessity of presenting the marijuana charge at the preliminary proceeding. Likewise, if probation were revoked on one valid charge, the fact that other charges proved to be invalid would not prevent upholding the revocation.

Fourth, the state filed a disclosure prior to the final revocation hearing which supplied the probationer with the marijuana charge.\textsuperscript{18}

By sanctioning the state's actions in \textit{Cooper}, the court did not intend to approve such procedure in all cases.\textsuperscript{19} It appears that the state's bona fide actions and written disclosure statement were influential in the court's decision.

\textsuperscript{16} \textit{Id.} at 10-11.
\textsuperscript{17} 280 S.E.2d 95 (W. Va. 1981).
\textsuperscript{18} \textit{Id.} at 99.
\textsuperscript{19} \textit{Id.}
In *Spencer v. Whyte*, the court concluded that a circuit judge is not empowered to order a period of incarceration as a condition of probation.

Spencer was indicted for robbery by violence and conspiracy to commit robbery. The trial court approved a plea bargain agreement with Spencer. Under the terms of the agreement, Spencer's sentence was suspended and he was placed on probation. As a condition of probation, Spencer served one year in the county jail and began serving a one-to-five year sentence in the state penitentiary. Thereafter, Spencer contended in a habeas corpus writ that he had been illegally detained. The court agreed with Spencer, recognizing probation as a system for release and not for confinement.

CRIMINAL SENTENCING

Proportionality of Sentences

The concept of proportionality prohibits a court from imposing a sentence that is grossly disproportionate to the severity of a crime. Proportionality is an outgrowth of the Eighth Amendment to the United States Constitution. While the eighth amendment does not contain an explicit statement of the proportionality principle, the Supreme Court has recognized that the principle is implicit in its prohibition against cruel and unusual punishment.

Article III, Section 5 of the West Virginia Constitution contains the cruel and unusual punishment counterpart to the eighth amendment. In addition, it contains an express proportionality principle: "Penalties shall be proportioned to the character and degree of the offence." Thus, by means of the constitu-

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21 Id. at 594.

1 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.
2 Rummel v. Estelle, 445 U.S. 263 (1980). In *Rummel*, the Court recognized that the eighth amendment does contain a proportionality element; however, the Court refused to apply it in this case because the proportionality principle had previously been recognized only in cases dealing with the death penalty and certain outrageous sentences.
tion an individual sentence can be struck down as disproportionate.\(^5\)

In *State v. Houston*,\(^4\) the defendants argued that their sentences of thirty years and forty years were disproportionate to their crime of robbery by violence, and therefore unconstitutional.

Both of the defendants were convicted of robbing a homeowner at pistol-point. The statutory sentence for robbery by violence, with a firearm, provides that upon conviction a defendant "shall be confined in the penitentiary not less than ten years."\(^5\) The statute contains no maximum limit of punishment and is consequently referred to as an open-ended sentencing statute.

Defendants sentenced under this open-ended sentencing statute may challenge the length of their sentences by a timely motion to the trial court.\(^6\) If the sentencing judge does not reduce the previously imposed sentence, then the defendants may appeal to a higher court. Both of the defendants in *Houston* appealed to the supreme court.

When the *Houston* court began to review the lower court's sentence, it found the record inadequate because it did not explain why each defendant received his particular sentence.

The supreme court ordered that an appropriate record be made in all future cases where a sentence for robbery by violence is handed down. The court specified certain items that must be included in the record:

- The sentencing record should include the pre-sentence report and any other diagnostic reports used as and aid in imposing the sentence. The court shall also permit statements relevant to the sentence to be made on the record by the defendant, his attorney, and the prosecuting attorney. . . . Where sentence is pronounced on a guilty plea, the transcript of the guilty plea shall also be included. Finally, the sentencing judge

\(^4\) 273 S.E.2d 375 (W. Va. 1980).
\(^6\) 273 S.E.2d at 379.
shall state on the record his reasons for selecting the particular sentence. . . .

The case was remanded to the trial court to permit a sentencing record to be developed.

The court dealt with similar contentions in Smoot v. McKenzie.8 The appellant, Smoot, was sentenced to forty years in the state penitentiary for armed robbery, while three co-defendants received lesser terms. Smoot alleged that the forty year sentence was unconstitutionally disproportionate to the sentences imposed upon his co-defendants.

The court found it "impossible to say from the transcript of the appellant's trial what factors the trial court considered in sentencing the appellant."9 Therefore, the court reversed the judgment of the lower court and remanded the case for development of a record in light of Houston.

In Smoot, the court recognized an additional factor to be considered in the appellate review of criminal sentences: whether co-defendants who are similarly situated have received grossly disparate sentences.

Wanstreet v. Bordenkircher10 indicates the importance of proportionality standards to life sentences imposed under habitual criminal statutes.

Wanstreet was indicted in 1951 for forging a check in the amount of $18.62. While on probation in 1955, he was found guilty of arson for burning a hay barn and sentenced to the penitentiary. Out on parole in 1963, he was found guilty of driving a motor vehicle without a license and his parole was revoked. While on parole in 1967, he was found guilty of forging a $43.00 check and was then given a recidivist life sentence under § 61-11-18 of the West Virginia Code.11

On appeal, Wanstreet contended that the life sentence he

7 Id.
9 Id. at 625.
11 W. VA. CODE § 61-11-18 (1977 Replacement Vol.). "When it is determined . . . that such person shall have been twice before convicted in the United States of a crime shall be sentenced to be confined in the penitentiary for life." Id.
received was disproportionate to the felonies he had committed. The supreme court agreed and Wanstreet was discharged from further confinement.

In its opinion, the court established more definite proportionality standards for use in review of a life recidivist sentence. These standards focus primarily on the nature of the offenses committed. The controlling standard is whether the felonies created a threat of potential or actual violence. Violent crimes have traditionally carried more serious penalties. Thus, if one or more of the offenses were violent, the life sentence would appear to be justified.12

By considering the nature of the offenses, the court can be discretionary in issuing a life recidivist sentence. This seems to be the most fair and just method of approaching the possibility of sentencing someone to the penitentiary for life. However, it may be argued that the habitual criminal statute is mandatory and precludes discretion by the court, because the statute provides that anyone convicted of three felonies shall be confined in the penitentiary for life.

The court responded to this argument, saying that the underlying purpose of the statute is to confine the dangerous criminal who repeatedly commits serious crimes.13 The imposition of a mandatory life sentence for the felony of forgery goes beyond this purpose and creates a disproportionate sentence. Furthermore, such a reading of the statute ignores the principle that penalties should be set according to the severity of the offense.14

The court cited Hart v. Coiner15 in support of its decision. The court places special emphasis on Hart's four-factor test which analyzes: "(1) [t]he 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)

12 276 S.E.2d at 214.
13 Id. at 211.
14 Id. at 214.
15 483 F.2d 138 (4th Cir. 1973). Hart involved a West Virginia life recidivist who had prior convictions for three non-violent offenses. The court of appeals held the life sentence to be disproportionate under the eighth amendment.
a comparison of punishment with other related offenses within the same jurisdiction."\textsuperscript{16}

Theoretically, the proportionality principle applies to any criminal sentence. However, proportionality standards are basically applicable to those sentences imposed under an open-ended statute; or a habitual criminal statute, due to the higher risk of disproportionate sentences in those two areas.\textsuperscript{17}

\textsuperscript{16} 276 S.E.2d at 210.
\textsuperscript{17} Id. at 211.
TORT

LIBEL AND DEFAMATION

The West Virginia Supreme Court of Appeals dealt with tortious communications and libel, and questions of first amendment rights in *Webb v. Fury.*

In *Webb*, the petitioners included Rick Webb, Braxton Environmental Action Programs, Inc., and Mountain Stream Monitors. Webb served as principal managing agent of the Braxton corporation, and was an active directing member of the Mountain Stream association. Both the corporation and the association were concerned with coal mining and development in West Virginia. The respondent, DLM Coal Corporation, was engaged in coal mining in West Virginia.

The controversy between petitioners and respondent arose after Webb communicated with different federal agencies concerning DLM practices. These communications included an administrative complaint lodged with the Office of Surface Mining (OSM), and a request for an evidentiary hearing before the United States Environmental Protection Agency (EPA). Webb, either acting as an individual or on behalf of the corporation or association, asserted that DLM was in violation of the Surface Mining Control and Reclamation Act, and the Clear Water Act.

In addition, Mountain Stream Monitors published a newsletter which referred to DLM in an editorial about responsible coal development. Although DLM was not specifically mentioned, the editorial article and corresponding maps allowed for easy recognition of DLM.

DLM filed a defamation action against the petitioners. The petitioners sought to prohibit the circuit court from proceeding with this defamation action. The petitioners based their argument on constitutional grounds, and in particular, on the constitutional guarantee of the right to petition. This right to petition the government for a redress of grievances is embodied in

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the First Amendment to the United States Constitution and in Article III, Section 16 of the Constitution of West Virginia.

The petitioners asserted that their activities (the newsletter and the communications) were petitioning activities, and therefore absolutely privileged. Furthermore, it was contended that the mere pendency of the defamation action threatened the petitioners' free exercise of their right to petition the government.

The court found merit in the petitioners' constitutional arguments, and accordingly awarded them a prohibition against the respondent's defamation action. The court made the following conclusions:

First, everyone has a clear constitutional right to petition the government. If someone chooses to exercise that right, any resulting lawsuit based on those activities will be barred.

Second, in petitioning the government, an attempt to influence public sentiment concerning the passage and enforcement of laws is acceptable.

Third, people have the right to inform government representatives of their desires by petition, regardless of their intent in doing so. Thus, even if the intent behind a petition is malicious, the petition is considered to be privileged and will not give rise to a cause of action. This is reasonable since there is no way of determining intent without first infringing upon someone's right to petition.

Fourth, a cause of action may arise if one party's conduct prevents another party from participating in the policy-making functions of government. This type of conduct is not considered petitioning activity and is not protected under the right to petition.

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2 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

3 "The right of the people to assembly in a peaceable manner, to consult for the common good, to instruct their representatives, or to apply for redress of grievances, shall be held inviolate." W. Va. Const. art. 3, § 16.

4 Webb, No. 14975 at 19.

5 Id. at 30.

6 Id. at 25.

7 Id. at 21.
These legal principles support a democratic society where people can express their will and freely exchange ideas. The court's decision to prohibit the defamation action is a clear protection of constitutional rights, and in the long run, a protection of the democratic system.

Another case dealing with defamation issues was Mauck v. Martinsburg. Mauck discussed insulting words and analyzed the insulting words statute, § 55-7-2 of the West Virginia Code.

Mauck was cashier for the City of Martinsburg during a period of time in which $10,000 was embezzled from city funds. A local jury determined Mauck not guilty of embezzling the missing funds. However, Mauck was dismissed from her job as cashier by the city manager, Dunworth. Mauck received a letter from Dunworth which asserted, '1 An embezzlement of some $10,000 occurred while you were city cashier. This indicates, at the least, incompetence and inefficiency in the performance of your duties. (2) You have demonstrated carelessness and negligence in the use of property of the city.' Dunworth sent a copy of his letter to the members of the City Council and the City Attorney, in accordance with the City of Martinsburg's Personnel Rules and Policies.

Thereafter, Mauck brought suit against Dunworth and the City of Martinsburg. She alleged both breach of her employment contract and insulting words under § 55-7-2. In Mauck, the supreme court dealt with the issue of insulting words.

The insulting words statute creates a cause of action separate and distinct from traditional libel and slander actions. The statute differs from the common law of libel and slander in two ways: (1) lack of a publication requirement; and (2) giving a cause of action for insulting words which tend to violence and a breach of the peace. In all other respects they are the same.

The court then discussed the common law defense of qualified privilege, and its use in defamation cases. "A qualified privilege exists when a person publishes a statement in good
faith about a subject in which he has an interest or duty and limits the publication of the statement to those persons who have a legitimate interest in the subject matter."

The court concluded that Dunworth's letter to Mauck was protected by a qualified privilege since Dunworth had acted in strict accordance with the rules and procedures of the City of Martinsburg. Dunworth had also acted in compliance with his duties as city manager.

The court questioned whether Dunworth had abused his qualified privilege, either by over-publicizing the letter or by acting out of malice. Finding no evidence of abuse, the court affirmed the judgment for Dunworth.

**WRONGFUL DEATH**

The court addressed the issue of what damages may be recovered in an action for wrongful death in *Bond v. Huntington*. In its opinion, the court traced the history of West Virginia's Wrongful Death Act, and noted the change in the amount of recovery possible under the statute over the years.

The statute has been amended several times. The most recent amendment occurred in 1976 and brought about significant changes. First, the statute was substantially broadened to remove the maximum limit on the amount of recovery. Second, the elements of recoverable damages were expanded. Third, the dependent distributee limitation was largely removed in certain family relationships. Thus, damages can be distributed to family relations without a showing of dependency upon the decedent.

The 1976 act is very liberal in its scope. However, the wrongful death action in *Bond* was brought prior to the 1976 amendment.

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12 *Id.* at 221.


2 West Virginia's Wrongful Death Act actually consists of three statutes: W. VA. CODE § 55-7-5 (creation of the cause of action); W. VA. CODE § 55-7-6 (damages that are recoverable); and W. VA. CODE § 55-7-7 (how such claim may be comprised). *Bond*, 276 S.E.2d at 539 n.1. Section 55-7-6, concerning damages, is the primary statute referred to in *Bond*.

3 276 S.E.2d at 541.
amendment, and thus, fell under the terms of the 1965 Wrongful Death Act.4

The facts of the case show that Cheryl Bond, age eighteen, was killed in an automobile collision in 1975. While driving through an intersection, Cheryl was struck and killed by a City of Huntington police car driven by a city patrolman. Her parents brought a wrongful death action under the 1965 Act against the patrolman and the City of Huntington. They attempted to collect general damages, punitive damages, and funeral expenses, and recover for pecuniary loss. However, the trial court ruled that they were only entitled to $10,000 in general damages plus funeral expenses. “Recovery for loss of services, punitive damages, and prejudgment interest was not allowed.”5 Cheryl’s parents appealed to the supreme court.

In Bond, the court approached each possible recovery separately. First, it dealt with recovery for pecuniary loss. Under the 1965 Wrongful Death Act, the maximum amount of recovery for pecuniary loss was $100,000. Furthermore, recovery itself turned on the question of whether or not the distributee was dependent upon the decedent. At the time of the accident, Cheryl Bond was employed and living with her parents. Thus, she did have some type of income, even though she did not directly support her parents.

The court held that a showing of either legal or factual dependency at the time of death would allow recovery for pecuniary loss. “[F]actual dependency can be shown by evidence that the deceased rendered services for which a monetary value can be estimated.”6 Therefore, Cheryl’s services to her parents would allow them to recover for pecuniary loss.

The court also held that punitive damages may be recovered, when the facts of the case warrant their award. In other words, if death resulted from the malicious, reckless or intentional act of the defendant, then punitive damages are allowed.7

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5 276 S.E.2d at 540.
6 Id. at 544.
7 Id. at 545.
Next, the court considered the recovery of prejudgment interest. This type of recovery permits the injured party to collect interest on any of his own money that was spent prior to trial. This would include money spent on expenses such as hospital and medical bills, or any other expense that could reasonably be calculated. The purpose of awarding interest is to compensate the injured party for the loss of the use of his own money.8

The court decided to adopt a rule that permits recovery of prejudgment interest on pecuniary losses incurred prior to trial. This is important to note since it represents a new element of damages in tort actions. The rule allows recovery of interest from the date the expense was incurred up to the date of the trial. However, interest will not be allowed on future pecuniary losses nor on any punitive damages that might be awarded. Additionally, the court concluded that full retroactivity should be given the new prejudgment interest rule.9

The Bond opinion is important for two reasons. First, it establishes guidelines for what can and cannot be recovered in a wrongful death action. In addition, the new prejudgment interest ruling may give defendants an incentive to cooperate in getting the case to court or in achieving a settlement. Failure to cooperate could delay the trial, resulting in higher costs to the defendant.

LAST CLEAR CHANCE

Ratliff v. Yokum1 is a noteworthy tort case because of the court's decision to abolish the doctrine of last clear chance. The last clear chance doctrine is primarily used by a plaintiff to recover damages from a defendant, in spite of the plaintiff's contributory negligence. The necessary elements of the doctrine are: (1) the plaintiff placed himself in immediate peril; (2) the plaintiff was unable to remove himself from the peril; (3) the defendant discovered or should have discovered the dangerous situation; (4) the defendant failed to exercise reasonable care to prevent the accident; and (5) the defendant had the last clear chance to prevent the accident.

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8 Id. at 547.
9 Id. at 549.

The original purpose of the doctrine was to modify the harshness of the contributory negligence rule. In other words, it was meant to moderate the plaintiff's contributory negligence. For this reason, most courts refused to extend the doctrine to the defendant's negligence.

The lawsuit in Ratliff arose out of a motor vehicle accident. At the trial court level, the defendant was allowed to utilize the last clear chance doctrine to insulate his negligence, and the plaintiff objected. On appeal, the supreme court agreed with the plaintiff and went on to abolish the doctrine altogether. The court held that the historical reasons supporting the doctrine no longer existed in West Virginia, since West Virginia adheres to a comparative negligence rule rather than one of contributory negligence. In addition, the court noted the confusion often surrounding the application of the doctrine. For these reasons, the doctrine was abolished.²

Tara Campbell

² Id. at 589.
DOMESTIC RELATIONS

PARTITION OF REALTY

In Stillings v. Stillings, the court held that a divorce decree award of exclusive possession of realty does not create a common law property interest in the party receiving such an award. Therefore, a petition for partition of such realty is not automatically defeated by a showing of decreed exclusive possession.

Mrs. Stillings had been awarded exclusive possession and use of the jointly owned realty in question by divorce decree. Mr. Stillings petitioned to have this realty partitioned by sale in a subsequent action. The partition action was dismissed by the circuit court upon the finding that the award of exclusive use and possession of the realty deprived Mr. Stillings of the requisite possessory interest to bring the partition action. Mr. Stillings appealed from this order.

The Supreme Court of Appeals rejected Mr. Stillings' contention that the right to partition by sale is absolute and, instead, indicated that the party desiring such partition must demonstrate that partition in kind is not convenient, that the interests of one of the parties will be furthered by the sale, and that the interests of the other parties will not be prejudiced by such sale. The court also rejected Mrs. Stillings' contention that an award of exclusive possession alone denies a nonpossession party the requisite possessory interest needed to bring a partition action. By analyzing West Virginia precedent on partition, the court indicated that only a present right of possession is necessary to entitle a party to a partition by sale if the above-mentioned standards are met. The court refused to recognize any common law property interest created by an exclusive possession award, the rationale being that such an interest would

3 280 S.E.2d at 690.
4 Id. at 690, citing Consolidated Gas Supply Corp. v. Riley, 247 S.E.2d 712 (1978), and its analysis of the requirements for partition by sale under W. Va. Code § 37-4-3.
allow the awarded party to defeat the purpose of such possession by renting the property.\(^6\)

The court thus found that partition by sale of jointly owned realty is available as a modification to divorce decrees awarding exclusive possession of one of the spouses and, therefore, reversed and remanded. However, Justice Neely's concurrence again indicated that this holding does not state that the right to partition by sale is absolute in the instant situation. Such possession by the woman provides her with a degree of security that the ex-husband will not leave the jurisdiction, making other aspects of their divorce decree more easily enforceable. Neely therefore sets out factors to be considered in such a partition request bearing on the risk of loss of all support if the partition is granted. These include past reliability of the husband in making timely, undisputed payments, his general solvency, and the risk of his departure upon partition.\(^7\)

**CONSTRUCTIVE TRUSTS**

In *Patterson v. Patterson*,\(^1\) the court ruled that jurisdictional limitations preventing circuit courts from joining divorce actions and actions involving equitable claims in realty titled to one spouse are no longer valid, and, therefore, such actions may be joined. Also, the court set out guidelines for the imposition of constructive trusts on realty in the limited situation where title is solely in one spouse and other spouse has contributed separate funds or direct business services to the acquisition thereof.

It should be noted that the court's decision on the joinder issue does not convert West Virginia into a community property state. The general law in West Virginia continues to disallow realty conveyances in lieu of or in addition to alimony and child support.\(^2\) In the constructive trust context, a spouse's contribution in the form of domestic services will not support the imposi-

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\(^6\) 280 S.E.2d at 692. The purpose of such an award of possession of property is to allow its use by spouse and children as a living situs.

\(^7\) Id. at 692-93.


\(^2\) Id. at 711.
tion of such a trust. These services have their remedy in alimony. When contribution of services is asserted as the basis for the claim of trust imposition, only business participation, like that of an employee or partner, will be sufficient to support the imposition, and then only to the extent that the spouse seeking the trust was not adequately compensated for his business participation.

**PRIMARY CARETAKER PRESUMPTION**

In *Garska v. McCoy*, the court adopted a primary caretaker presumption to control the disposition of child custody issues involving children of tender years, thus modifying the court's previous presumption favoring maternal custody for children of tender years.

In February of 1978 Gwendolyn McCoy moved from her grandparents' home in Logan County, West Virginia, to her mother's residence in North Carolina. McCoy was 15 years old at the time. McCoy became pregnant by Michael Garska, her mother's live-in companion. In March, McCoy returned to her grandparents' home. McCoy received no support from Garska during the pregnancy.

After birth, the child developed a respiratory infection that required much medical attention. McCoy's grandfather, Stergil Altizer, attempted to have the child treated under the medical provisions of his union benefits. He was informed that such benefits would be given only if he adopted the child. Therefore, in October of 1979, McCoy consented to the adoption of the child by the Altizers. The Altizers petitioned for adoption in the Logan County Circuit Court in November of 1979. Garska filed a petition for habeas corpus to secure custody of the child in the

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3 *Id.* at 712.
4 *Id.* at 716.
2 W. VA. CODE § 44-10-4 (1966) provides that a minor child aged 14 or older has an absolute right to nominate his own guardian. In the instant case, the court indicates that a minor below age 14 may also be granted such a preference if he demonstrates to the trial judge the ability to intelligently express a voluntary preference for one parent. 278 S.E.2d at 363. Thus, the tender years concept discussed by the court encompasses all remaining custody situations.
3 278 S.E.2d at 359.
Logan court in January of 1980. These proceedings were joined by the Logan court. The Altizers' adoption petition was dismissed because the child had not resided with them for the requisite statutory period of six months. The court then awarded custody to Garska upon findings that he was generally more economically, intellectually, and socially capable of caring for the child. McCoy appealed, claiming the court had erred in not applying the tender years presumption of maternal custody.

The presumption of maternal custody for children of tender years articulated in *J.B. v. A.B.* awarded custody to the mother upon a determination that she met a minimum objective standard of fitness. However, West Virginia statutory law has been subsequently modified to disallow any presumption as between the father or mother in determining custody of children of tender years. The court indicated that this modification was not due to legislative dissatisfaction with the use of presumptions generally in the area of custody determinations but, rather, indicated dissatisfaction with gender-based presumptions. The court, therefore, adopted a primary caretaker standard for determinations of custody of children of tender years. This presumption operates to grant custody in the parent who is adjudged to be the primary caretaker and who also meets the minimum, objective standard of fitness.

The court's insistence on the use of mechanical rules in the custody area is based on practical considerations perceived by the court in this area. Firstly, the court indicates that in the general child custody dispute between competent parents it is generally not judicially possible to effectively discern the most

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4 W. VA. CODE § 48-4-1(c) (1980 Replacement Vol.). "No petition for an adoption shall be made or presented until after the child sought to be adopted shall have lived in the home of the adopted parent or parents for a period of six months."

5 278 S.E.2d at 359.


7 278 S.E.2d at 362 n.9, citing provision of emotional support, routine cleanliness, and nourishing food to the child as requirements for fitness.

8 W. VA. CODE § 48-2-15 (1980 Replacement Vol.) states, in relevant part: In making any such order respecting custody of minor children, there shall be no legal presumption that, as between the natural parents, either the father or the mother should be awarded custody of said children, but the court shall make an award solely on the best interest of the children based upon the merits of each case.

9 278 S.E.2d at 361.
fit parent for custody due to the lack of any clear empirical guidelines in this area. In this context, a presumption acts to discourage useless litigation. Secondly, on the assumption that the primary caretaker parent is closer emotionally to the child and generally in an inferior financial position as compared with the other parent, the court states that the primary caretaker parent is willing to compromise alimony and support agreements to retain custody. With a clearly defined presumption in operation, the custody issue is generally predetermined; so, the alimony and support issues can be decided on their merits. Finally, a clearly defined presumption provides guidance to parties who opt to privately determine custody issues.

When applying the primary caretaker mechanism, a trial court must first make a determination as to the identity of the primary caretaker parent. The Supreme Court of Appeals articulated several factors to be considered in this analysis. If this process reveals that both parents shared "in an entirely equal way," then no presumption exists and the trial court must then further inquire into the individual fitness of the parents. But where the process does result in the identification of a primary caretaker parent, it must be further shown that such parent also meets the minimum, objective standard of a fit parent. Where these two elements exist, then the trial court must award custody of the child to the primary caretaker parent.

INTERSPOUSAL PROPERTY TRANSFERS

In Marshall v. Marshall, the court held that merely meeting statutory requirements of lawfulness and validity in the area of

11 278 S.E.2d at 361-62.
12 Id. at 363, citing the factors of planning and preparation of meals; bathing, grooming and dressing; purchase, care and cleaning of clothes; medical care; arranging for social interaction with peers; arranging alternative care; putting the child to bed, attending to him at night, waking the child; disciplining the child; educating the child; teaching of rudimentary skills, i.e., reading, writing.
13 Id.
14 Id.

2 W. VA. CODE § 48-3-7 (1980 Replacement Vol. states, in relevant part: [A]ny conveyance or transfer of property, or any interest therein ex-
interspousal property transfers is not sufficient to sustain such transfers; the benefitting party of such transfers must also meet the fiduciary relationship requirement of "scrupulous good faith"\(^3\) in such transactions.

The case arose out of the couple's marital breakup. While they were still together Mrs. Marshall was diagnosed as suffering from emotional distress and was prescribed medication for the condition. The couple separated but agreed to attempt a reconciliation. However, Mr. Marshall, an attorney, required, as a prerequisite to such a reconciliation, that Mrs. Marshall transfer all her interests in their co-owned stocks and realty to him. This transfer was made with little negotiation or outside consultation afforded Mrs. Marshall. Their reconciliation failed, and Mr. Marshall filed for divorce. The Cabell County Circuit Court granted Mrs. Marshall a divorce on her counterclaim of divorce. However, the trial court found that the pre-divorce property transfers at issue were valid since Mr. Marshall had met the statutory burden of showing that these transfers were lawful and valid. From this latter holding Mrs. Marshall appealed.\(^4\)

The supreme court rejected Mr. Marshall's contention that his forbearance on a valid claim of divorce was sufficient consideration for the property transfers at issue to meet the statutory requirement of legality since he eventually did file for divorce.\(^5\) The court went on to indicate that the statutory requirements for interspousal property transfers articulated in W. Va. Code § 48-3-7 do not take into account the common law relationship of confidence and trust that exists between spouses and the corresponding requirement of application of fiduciary standard to judge the correctness and fairness of such transfers. The statutory requirements of lawfulness and validity alone are insufficient to uphold such transfers. The spouse benefitting from


\(^4\) Id. at 362.

\(^5\) Id. at 363.
such transfers must also show that he exercised "scrupulous
good faith" in these dealings with the other spouse. The court
reversed and remanded, holding that Mr. Marshall did not meet
this broader test and, therefore, denied the validity of the trans-
fers at issue.  

CONTINUING PERSONAL JURISDICTION

In *State ex rel. Ravitz v. Fox,* the court adopted the "con-
tinuing personal jurisdiction" doctrine allowing a West Virginia
circuit court with initial personal jurisdiction over a divorce pro-
ceeding to bind those parties in all subsequent actions growing
out of the original cause of action. Thus, the removal of a party
to another jurisdiction will not defeat the court's ability to bind
that party in subsequent divorce modification proceedings.

The Ravitzs were residents of Monongalia County, West
Virginia, when they were granted a divorce in 1975. Following
the divorce, the wife moved to Florida while the husband re-
mained to complete his education at West Virginia University.
Mr. Ravitz then moved to New Jersey where he resided to the
time of the instant proceedings. In September, 1979, Mrs. Ravitz
initiated a modification proceeding in the Monongalia County
Circuit Court. Notice was given Mr. Ravitz by certified mail,
return receipt requested. Mr. Ravitz appeared specially to con-
test the personal jurisdiction of the court. His motion to dismiss
for lack of jurisdiction was denied, and the circuit court re-
quested information to be submitted for purposes of modifica-
tion. Mr. Ravitz then sought a writ of prohibition to bar the cir-
cuit court judge from further proceedings. The Supreme Court
of Appeals then issued a rule to show cause.

This question of whether W. Va. Code § 48-2-15 gives a cir-
cuit court power to exercise continuing personal jurisdiction
over parties in a divorce proceeding where both parties reside
outside the state is one of first impression in West Virginia. The
court held that continuing personal jurisdiction is proper under

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6 372 S.E.2d at 363.
7 273 S.E.2d at 363.

1 273 S.E.2d 370 (W. Va. 1980).
2 Id. at 371-72.
W. Va. Code § 48-2-153 and that such jurisdiction continues in all subsequent proceedings arising out of the original divorce action. In the related area of notice, the court held that in situations involving continuing personal jurisdiction, under W. Va. Code § 48-2-15 due process is satisfied by notice in the form of certified mail.4 Since jurisdiction was recognized and notice sufficient, petitioner's writ was denied.

Jay Leon

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3 W. Va. Code § 48-2-15 (1980 Replacement Vol.) states in relevant part: [T]he court may, from time to time [after the ordering of a divorce] . . . revise or alter such order concerning the maintenance of the parties, or either of them, and make a new order concerning the same . . . and the court may also from time to time afterward . . . revise or alter such order concerning the care, custody, education and maintenance of the children, and make a new order concerning the same . . .

4 273 S.E.2d at 373.
EMPLOYMENT ISSUES

RACIALLY DISCRIMINATORY SENIORITY SYSTEMS

Facially neutral seniority systems that freeze employees in an inferior position as a result of a previously discriminatory seniority system may unlawfully perpetuate the discrimination in violation of the West Virginia Human Rights Act.¹ In *State Human Rights Commission v. United Transportation Union*,² seventeen black railway yardman or former yardmen of Norfolk and Western Railroad Company charged their union and employer with racial discrimination because their seniority system relegated black employees to inferior positions with less benefits. Prior to 1956, the collective bargaining agreement designated blacks as “nonpromotable” yardmen, regardless of how much seniority they had accumulated. White employees, however, with less seniority than some of the black employees were promoted over the blacks. The union, which had limited membership to “white males, sober and industrious”, did nothing to prevent racial discrimination and, apparently, encouraged it. Even when some of the black employees were eventually promoted in the late 1960s, in seniority they were behind all of the previously junior white employees who had been promoted earlier. Those blacks who were still employed by the railroad when the complaint was filed with the Human Rights Commission continued to be “bumped” from jobs or outbid for jobs by the white employees.

After the Human Rights Commission found probable cause to credit the complainants’ allegations, the railroad agreed to settle by drawing up a new seniority list in which the blacks would be in their rightful place. The union, by majority vote, rejected the settlement and the case ultimately proceeded to the supreme court.

*State Human Rights Commission v. United Transportation Workers*³ essentially raised two questions regarding the West Virginia Human Rights Act: 1) whether facially neutral seniority

¹ W. VA. Code § 5-11-1, et seq. (1979 Replacement Vol.).
³ Id.
systems which have a racially discriminatory impact are unlawful?; and 2) when does the ninety day statute of limitations begin to run in such cases?

According to the Human Rights Act, it is an unlawful discriminatory practice "for any labor organization because of race, religion, color, national origin, ancestry, sex, age or blindness of any individual . . . to discriminate against such individuals with respect to hire, tenure, terms, conditions or privileges of employment or any other matter, directly or indirectly, related to employment." 4 Seniority plans obviously effect the terms, conditions or privileges of employment.

The court looked to federal cases under Title VII of the Civil Rights Act of 1964 5 for guidance concerning what constitutes a discriminatory seniority system. In Griggs v. Duke Power Co., 6 the United States Supreme Court "recognized that seniority systems can violate Title VII by perpetuating discriminatory practices even if there was no proof of intent and the practices were facially neutral." 7

The West Virginia Supreme Court of Appeals held, "The Griggs rationale is consistent with the purpose of our State act to eliminate employment discrimination. Current practices, regardless of intent, that operate to lock employees into a status fixed by prior discrimination by perpetuating its effects, violate the West Virginia Human Rights Act." 8

The West Virginia act and the federal act differ in one important aspect. Even though there may be a prima facie case of discrimination under Title VII, it may not be a violation because the federal act exempts bona fide seniority systems 9 which may

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4 W. Va. Code § 5-11-9(c) (1979 Replacement Vol.).
7 280 S.E.2d at 656.
8 Id.
9 "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(h) (1964).
have a discriminatory impact but do not have discriminatory intent. The Griggs principle was reitered in International Brotherhood of Teamsters v. United States, but the Court found that the bona fide seniority exemption applied.

Under the West Virginia Human Rights Act, however, there is no corresponding exemption. The court found that the plaintiffs in this case are in "frozen positions" because "they were denied promotions and consequently the same seniority as their white counterparts, because of their race. Their inferior rank persisted. No matter how neutral the seniority system appeared, it was not neutral because the discriminatory base into which employees originally were cast was therefore always perpetuated."

The court also found that remedying the discrimination by granting the black employees seniority commensurate with their years of service does not violate a vested property interest in seniority of white employees who gained their superior advantage as a result of an unlawful system.

The second major issue addressed was when a complaint must be filed with the Human Rights Commission. The Human Rights act requires complaints to be "filed within ninety days after the alleged act of discrimination." But when did the alleged act of discrimination occur in this case? The court found that the discriminatory act did not cease when blacks become promotable. "[A] seniority system super-imposed on a 'locked-in' status of discriminatory policies is a continuing violation of the Act. There is no evidence that these black employees are still classified 'nonpromotable'; but they continuously suffer because their seniority system has never compensated them for initially putting them in inferior positions."

The court used a three factor test from Montgomery Ward

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11 "It shall not be unlawful discriminatory practice for an employer to observe the provisions of any bona fide pension, retirement, group or employee insurance, or welfare benefit plan or system not adopted as a subterfuge to evade the provisions of this subdivision." W. Va. CODE § 5-11-9 (1979 Replacement Vol.).
12 280 S.E.2d at 657.
13 W. Va. CODE § 5-11-10 (1979 Replacement Vol.).
14 280 S.E.2d at 658.
v. Fair Employment Practices Commission\textsuperscript{16} to identify a continuing violation:

‘(1) Showing that employee was an actual victim of the discriminatory act.
(2) This discrimination placed employee in an inferior status due to subsequent application of an employment policy such as seniority, and
(3) That the effects of the past discrimination continued at least to a date within the limitation period before the filing of the charge.’\textsuperscript{16}

Describing the court’s use of the notion of “continuing violation” as a “metaphysical manipulation of the statute of limitations”,\textsuperscript{17} Justice Neely vehemently dissented. He compared the discriminatory act with a tort for which the statute of limitations starts running once the injury occurs regardless if the pain lasts indefinitely.

Chief Justice Harshbarger, writing for the majority, criticized Justice Neely’s analogy by stating that this is not “one tortious act that resulted in one injury that simply kept hurting... Everytime this seniority system is applied to plaintiffs’ status as defined by their former inclusion in a racially discriminatory job classification, there is a new injury.”\textsuperscript{16} Justice Harshbarger suggested that a more apt analogy is false imprisonment where every moment of wrongful restraint generates a new basis for suit. Thus, the operative fact in determining when the limitations period begins to run is the date on which the statutory violation ceases.

The significance of this case is that it allows a State cause of action which is unavailable under the corresponding federal statute by not allowing non-intentionally discriminatory seniority systems to be exempt from the Human Rights Act. Furthermore, it extends a remedy to those harmed by such seniority systems for an indefinite period of time so long as the harm is a result of a “continuing violation”.

\textsuperscript{16} 280 S.E.2d at 659.
\textsuperscript{17} \textit{Id.} at n.5.
\textsuperscript{16} Id. at 664.
PUBLIC EMPLOYEE UNION LIABILITY

In the absence of legislation permitting or prohibiting collective bargaining for public employees, the court found there is no common law cause of action for an employer to recover damages when there is a peaceful, public employee strike. The court also found that public employee unions which are unincorporated associations cannot be sued, although a representative group of members may be sued.

In *Fairmont v. Retail, Wholesale, and Department Store Union*, a group of nurses and other technical employees of Fairmont General Hospital, a municipally-owned hospital, wanted to organize collectively and be represented by Local 1199 of the National Union of Hospital and Health Care Employees. The employees and the union's business agent requested a meeting with the hospital management to present a petition signed by 156 employees affirming their desire to be represented by Local 1199. After the management refused to meet, the employees voted to strike, 145 to nine. Although the employees offered to establish an emergency care committee, management declined their offer and decided to close the hospital, except for emergency and out-patient services.

The work stoppage occurred and the employees peacefully conducted informational picketing at the hospital without obstructing ingress or egress. The hospital, after unsuccessfully seeking a temporary injunction, sued the union, the business agent, and Jane and John Doe for damages.

The cause of action asserted was that the "work stoppage constituted a tortious interference with its business relations or was a public nuisance in view of the fact that a public employees' strike is illegal." The hospital argued that since public employees have no right to strike, strikes are illegal, and, therefore, damages are recoverable.

The Circuit Court of Marion County, denying there was a cause of action, certified five questions to the supreme court,

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2 *Id.*
3 *Id.* at 5.
which restated the questions as: "First, whether as a matter of law the facts present a substantive cause of action for damages. Second, whether a labor union may be sued as an entity." The court responded negatively to both questions.

Since there is no legislation concerning public employee collective bargaining, the court relied on common law and the first amendment protection of the right to free speech, association and assembly. Although the court recognized that public employers are not obligated to bargain collectively, employees do have the right to organize, seek voluntary union recognition, and strike.

We conclude that where public employees who have no employment contracts with their employers, engage in a work stoppage which is peaceful and directed only against the employer with no attempt to interfere with his customers or bar ingress to other employees there is no common law right to damages. In this context, the work stoppage is not 'illegal' in the sense that it gives rise to a common law action for damages.\(^4\)

Responding to the hospital's use of the word "illegal", the court quoted Justice Holmes, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."\(^5\) According to common law principles, a public employee strike is not "illegal" in the sense that an employee incurs liability for damages.

Although the court never explicitly discussed the potential impact of deciding against the union, it is worth noting that a different decision might have had significant implications for all future public employee labor relations. Had the court found unlimited liability on the part of unions and individual employees, the chilling effect on public employee organizing might well have resulted in the demise of all attempts of unionization in the public sector. While the court's decision does not encourage public employee strikes, a contrary decision would clearly prevent them.

Concerning the suability of a labor union as an entity, the

\(^4\) Id. at 2.
\(^5\) Id. at 13.
\(^6\) Id. at n. 7 [quoting Towne v. Eisner, 245 U.S. 418, 425 (1918)].
court reviewed several potentially applicable statutes but found that none applied to unincorporated associations of public employee unions. As stated in State ex rel. Glass Blowers Association v. Silver, suits against unincorporated associations are allowed simply by joining a representative group of its members.

Although this case clearly protects public employees and their unions from tort liability for peaceful strikes, there are several related issues that were not addressed: (1) may a public employer discharge or replace strikers?; (2) is there a cause of action to "protect" the public interest for an injunction to stop public employee strikes, even though there is no cause of action for damages?; and (3) whether the court would find a statute prohibiting public employee strikes an unconstitutional violation of the right to free speech, association, and assembly. It is clear that even in the absence of some form of public employee legislation, the court is hesitant to develop its own complete public policy on the issue.

**POLITICAL RIGHTS OF DEPUTY SHERIFFS**

By upholding the constitutionality of West Virginia's rough equivalent of the Federal Hatch Act for deputy sheriffs, the supreme court essentially rewrote the statute, attempting to make it consistent with the United States Supreme Court's decision in United States Civil Service Commission v. National Association of Letter Carriers.

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1. The court reviewed: a) Fed. R. Civ. P. 17(b), which allows suits against unincorporated associations for the purpose of protecting substantive rights created by federal law or the Constitution; but there is no corresponding provision in the W. Va. R. Civ. P. protecting state created rights; b) the Labor Management Relations Act for the Private Sector, W. Va. Code § 21-1A-1, et seq. (1981 Replacement Vol.), which allows suits by and against private sector unions, but does not apply to the public sector; c) the National Labor Relations Act, 29 U.S.C.A. § 141, et seq., which also does not apply to the public sector.
3. slip op. CC911 at 15.

The West Virginia statute reads, in part, that "... no deputy sheriff covered by the provisions of this article shall engage in any political activity of any kind, character or nature whatever, except to cast his vote at any election or shall act as an election official in any municipal, county or state election."  

Recognizing that the statute could be considered overbroad by violating an employee's first amendment rights, the court found that it would not be unconstitutional if given "the appropriate narrow interpretation." Thus, the broad language of W. Va. Code § 7-14-15(a) was interpreted to proscribe nine political activities:

(1) holding a party office; (2) working at the polls; (3) acting as a party paymaster for other party workers; (4) organizing a political party or club; (5) actively participating in fundraising activities for a partisan candidate or political party; (6) becoming a partisan candidate for, or campaigning for, an elective public office; (7) actively managing the campaign of a partisan candidate for public office; (8) initiating or circulating a partisan nominating petition or soliciting votes (i.e., campaigning) for a partisan candidate for public office; and (9) serving as a delegate, alternate or a proxy to a political party convention.  

In *Weaver v. Shaffer*, the petitioner, a deputy sheriff, was dismissed from his position because he participated in the campaign of a candidate for sheriff of Boone County. After the opposing candidate won the election for sheriff, he discharged the petitioner under W. Va. Code § 7-14-15(a). Weaver argued that the statute "denies his constitutional right to free political expression because it is both vague and impermissibly broad in its scope."  

Writing for the court, Justice Neely reviewed the United States Supreme Court's use of the overbreadth doctrine and determined that the first consideration is whether there is a legitimate governmental interest here in restricting individual rights. Citing *United Public Workers v. Mitchell*, Justice Neely

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5 204-80 at 4-5.  
6 Id. at 16.  
7 Id. at 15-16.  
8 Id. at 3.  
found there is a legitimate state purpose because "such restrictions are designed to insure advancement based on merit in the government service and to protect employees from improper political influence."\textsuperscript{10}

Although there is a legitimate governmental interest in an efficient civil service, the statute "could be erroneously construed to proscribe more than that allowed."\textsuperscript{11} To avoid an erroneous construction, the court was presented with a choice of "whether this statute can be cured by judicial construction or must be struck down in its entirety."\textsuperscript{12}

The court reviewed the Supreme Court's application of the overbreadth doctrine to strike down statutes and concluded that the Supreme Court has almost entirely retreated from such a drastic remedy. The court asserted\textsuperscript{13} that since \textit{Young v. American Mini Theatres},\textsuperscript{14} there was only one case in which the Court used overbreadth to avoid a statute, \textit{Village of Schaumberg v. Citizens, etc.}\textsuperscript{15} Because the court is reluctant to strike down a statute, it looked to a less drastic remedy to cure the potentially unconstitutional interpretation. Applying essentially the same prohibitions as the Supreme Court allowed in \textit{Letter Carriers}, the court narrowed the statute's prohibitions to nine, more specific, activities.

The analysis of the state constitutional issue under art. III, § 7 was similar to the analysis of the federal constitutional issues. Justice Neely applied the "doctrine of the least intrusive

\textsuperscript{10} 204-80 at 4. Once a legitimate governmental interest has been established, courts generally look to whether the approach taken is the least restrictive alternative in interfering with individual rights, \textit{e.g.}, \textit{Elrod v. Burns}, 427 U.S. 347 (1976). The supreme court, however, did not conduct such an analysis after finding there was a legitimate governmental interest. It appears, however, that the goal of an honest, efficient civil service which is protected from conflicts of interest may be achieved by only punishing those individuals who abuse their position rather than preventing all deputy sheriffs from engaging in all political activity. There may be several less restrictive alternatives.

\textsuperscript{11} \textit{Id.} at n. 2.

\textsuperscript{12} \textit{Id.} at 5.

\textsuperscript{13} \textit{Id.} at 8.

\textsuperscript{14} 427 U.S. 50 (1976).

\textsuperscript{15} 444 U.S. 620 (1980). However, there seem to be several cases since 1976, when \textit{Young v. Mini Theatres} was decided, where the Court voided statutes and ordinances for overbreadth. \textit{e.g.}; First Nat'l Bank of Boston v. Belloti, 435 U.S. 765 (1978); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 95-97 (1977).
remedy, an easily understood principle which permits a statute which is unconstitutional on its face to be saved from total destruction by judicial construction."

The court justified limiting the construction of the statute by noting that the Deputy Sheriff's Civil Service Act contains a severability clause requiring that only unconstitutional provisions be struck without finding the entire Act invalid. The court asserted that if the job protection afforded in other sections of the Act is maintained while the prohibitions on political activity are struck, there would be a "classified civil service which is entirely free to participate in the most robust manner in the political process and, through that process, achieve increases in salary, lavish perquisites, and opulent working conditions through political extortion." While the court recognized that the legislature could pass a new statute to replace W. Va. Code § 7-14-15(a), Justice Neely found there is a small chance that it would because of (1) the now unrestricted lobbying of civil servants, (2) legislative inertia, and (3) the lack of an organized pressure group to support such legislation. He concluded, therefore, that it is the job of the court to construe the statute in a constitutional manner.

In Justice Caplan's dissent, he argued that W. Va. Code § 7-14-15(a) is "overbroad and vague and should therefore by voided in its entirety." Although there may be a legitimate governmental interest in restricting political activities of civil servants, the statute must be sufficiently clear and specific to provide a reasonable standard for guidance, "adequate warning of what activity is proscribed."

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15 204-80 at 10.
17 W. VA. CODE § 7-14-21 (1976 Replacement Vol.)
19 204-80 at 11.
19 Id. at 12. Assuming, arguendo, that the legislature would not pass a new statute, the court fails to explain why it is, therefore, the proper role of the judiciary to legislate in such a case.
20 As the time of writing this Overview, the case has not been published.
The court's opinion represents only Justice Neely; Justice Caplan dissented; Justice McGraw dissented and reserved the right to file a dissenting opinion; Justice Harshbarger and Justice Miller concurred and reserved the right to file concurring opinions.
21 204-80, dissent at 1.
22 Id.
Restrictions on first amendment rights, in particular, warrant the greatest degree of judicial scrutiny and must always be narrowly drawn and narrowly interpreted. "Overbreadth and vagueness in the first amendment area must be strictly curtailed because ambiguity and the broad sweep of a statute may inhibit citizens from exercising their fundamental constitutional rights."23

Justice Caplan distinguished W. Va. Code § 7-14-15(a) from the statutes involved in Broadrick v. Oklahoma24 and United States Civil Service Commission v. National Association of Letter Carriers25 because the latter two were more narrowly drawn and were supplemented by administrative pronouncements.

W. Va. Code, 1931, 7-14-15(a), as amended, regulates political activity in a much broader sweep and with less specificity than the Act construed in Broadrick and Letter Carriers. If the Supreme Court can characterize the Broadrick statute, § 818 as "slightly overbroad," then Code 7-14-15(a) is clearly substantially overbroad. It prohibits the universe of a deputy sheriff's conceivable political activities except voting. None of the factors mentioned in Broadrick or Letter Carriers providing limitations or guidelines are found here. There are no limiting regulations; there is no body of doctrine; there is no office for interpretive guidance; and, most importantly, no judicial construction of the section can eliminate its overbreadth and also provide the requisite degree of clarity without transgressing into the legislative function.26

The Weaver decision still leaves several issues unresolved. The nine categories of prohibitions may need to be interpreted further before it is clear just what deputy sheriffs are allowed to do. Additionally, because of the wide disparity between the plain meaning of § 7-14-15(a) and the court's interpretation of it, there may be increased confusion resulting in a significant chilling effect on deputy sheriffs' exercise of their first amendment rights.27

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23 Id. at 2.
26 204-80, dissent at 5.
27 For an analysis and critique of Weaver, see generally Brief for Petitioner, Larabee v. Raleigh County Civil Service Comm., currently before the supreme court, challenging § 7-14-15(a) in part on the argument that Weaver was wrongly decided.
OCCUPATIONAL DISEASE

In two occupational disease cases decided in the survey period, the court discussed the legal and medical definitions of occupational disease as well as the distinction between occupational disease and injury. The court also continued its trend in applying the "liberality rule" by construing evidence in a manner most favorable to the claimant.

In Powell v. State Workmen's Compensation Commissioner the court held that lung cancer caused by occupational exposure to asbestos is a compensable occupational disease "even though it can also be an ordinary disease of life which occurs in the general public."

To recover under the Workmen's Compensation Act for an occupational disease which may also be a non-occupational disease, it must be:

apparent to the rational mind, upon consideration of all the circumstances (1) that there is a direct causal connection between the conditions under which work is performed and the occupational disease, (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, (3) that it can be fairly traced to the employment as the proximate cause, (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment, (5) that it is incidental to the character of the business and not independent of the relation of employer and employee, and (6) that it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.

Using these six criteria, when an employee suffers from a disease which may occur in the general population, the employee

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3 273 S.E.2d 832 (W. Va. 1980).
4 Id. at 833.
5 W. VA. CODE § 23-4-1 (1981 Replacement Vol.)
must provide "sufficient proof that it was contracted in the course of and as a result of employment," but "it is not claimant's burden to negative all possible non-occupational causes of his injury."

The court also discussed the difficulty in proving causality where there is a long latency period between exposure to a hazard and the manifestation of the disease. Causality in such a case is much more difficult to prove than in an occupational accident case. Proof of causality depends on the current state of scientific knowledge. "If studies and research clearly link a disease to a particular hazard of a workplace, a prima facie case of causation arises upon a showing that the claimant was exposed to the hazard and is suffering from the disease to which it is connected." Once medical science begins to define a disease as potentially occupationally-related, it may be compensable as an occupational disease under the definition in the Act.

It is unclear from the court's opinion how much scientific evidence is required to raise the presumption, especially where there is considerable debate over whether a particular disease may be occupationally-related. Although the court cites the six statutory criteria, it goes on to formulate its own test of causality. Apparently, if the claimant can show any studies or research finding, it may be sufficient to raise the presumption if the exposure and medical requirements are met.

The court reversed the Workmen's Compensation Appeal Board's final order denying benefits to the claimant in Donaldson v. State Workmen's Compensation Commissioner because the Appeal Board mistakenly evaluated the employee's claim as an accident claim rather than an occupational disease claim resulting from repeated exposure to toxic chemicals in the workplace. There was evidence that the types of chemicals to which claimant was exposed are known to produce liver damage and that the claimant did suffer from liver damage.

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7 Id. [citing Myers v. State Workmen's Comp. Comm'r. 239 S.E.2d 124, 127 (W. Va. 1977)].
8 Id. at 837.
10 Id. at 2.
Although there was conflicting medical evidence in the case, the court applied the "liberality rule" that the evidence be "construe[d] in the light most favorable to the claimant." Even though claimant's expert was outnumbered five to one, the quality of the opinions was more important than the quantity.

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DUE PROCESS IN DISMISSALS

The developments in this area over the past year appear to follow the analysis used in the court's previous due process decisions. When a property interest is involved, the extent of due process protection afforded to a person asserting the right hinges upon three considerations: (1) the private interests that are affected; (2) the risk of an erroneous deprivation through the procedures used, and whether there exists a more substantial procedural safeguard; and (3) the government's interest in terms of fiscal and administrative burdens involved. The court has been fairly liberal in determining what a property interest is, extending it to "benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings."

In Evans v. West Virginia Board of Regents a student at the West Virginia School of Osteopathic Medicine was granted a one year leave of absence for medical reasons, after he had already completed two and one-half years of schooling. However, Evans did not inform the school of his desire to resume his education until about two months after his medical leave had expired; thereupon, the Dean informed him that he would have to reapply. He did but was denied admission. The court ruled that the appellant had "a sufficient property interest in the continua-

1 Id. at 8.


3 Waite v. Civil Service Commission, 241 S.E.2d at 165.

4 271 S.E.2d 778 (W. Va. 1980).
tion and completion of his medical education to warrant the imposition of minimal procedural due process protections."5 The court rejected the idea that Evans had forfeited his property rights and was reduced to the same level as an original applicant to the school. After two and one-half years of attendance and attainment of a B+ average, he had a reasonable expectation that he would be permitted to complete his education, absent a showing of reasons to the contrary.6 Since no reasons, procedures or hearing were given to Evans, the court ordered his immediate reinstatement; but if the school should still deny his admission, the court laid out the procedures that must be afforded to him. These included: (1) a formal notice of reasons; (2) a sufficient opportunity to prepare a defense; (3) the opportunity to have counsel present at any hearing; (4) the right to confront accusers and present his own evidence; (5) a fair tribunal; and (6) an adequate record of the proceedings.7

In Clarke v. West Virginia Board of Regents,8 the court considered for the first time what procedures are due a tenured professor when he is being dismissed. First of all, the conclusion was quickly reached that a substantial property and liberty interest was involved that warranted due process protection. Appellant argued that since the rights involved were substantial, the notice9 he received as to the charges against him lacked the requisite specificity to meet the high standards required by

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5 Id. at 780.
6 The court distinguishes this case from Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, where no procedural due process violation occurred when a student was dismissed for academic reasons (as distinguished from disciplinary reasons) without any type of formal hearing. The Court in Horowitz said due process safeguards are not pressing when a student is dismissed for academic reasons; since Evans ostensibly was not dismissed for academic reasons, Horowitz and Evans are dissimilar.
7 These requirements come from North, where a student was expelled from Medical School at WVU after he was accused of giving false information on his entrance application. The court there concluded that a student's "interest in obtaining a higher education with its concomitant economic opportunities, coupled with the obvious monetary expenditure in attaining such education, gives rise to a sufficient property interest to require procedural due process on a removal." 233 S.E.2d at 415.
9 Notice of the charges was also a necessary requirement in North and Evans.

https://researchrepository.wvu.edu/wvlr/vol84/iss2/10
Snyder v. Civil Service Commission.\textsuperscript{10} Even though the notice to Clarke did not contain dates and names, the court found it to be adequate since the specific acts in question were "so singular in nature that there can be no doubt as to the activity in question."\textsuperscript{11} Also, other charges against Clarke pertained to a continuing course of conduct which would be almost impossible to particularize, e.g., not spending enough time on campus. It was apparent that Clarke was aware of all the facts and charges against him as evidenced from his answers and denials. The court considered the administrative burden involved in documenting all of the details and did not strictly require the rote following of standards. The ultimate test of the sufficiency of the notice is whether the employee was informed with reasonable certainty of the nature of the charge. Although the court held the notice to be sufficient in this case, it remarked that the notice was far from exemplary and should ideally be sufficient on its face, thereby avoiding protracted litigation.

The next major argument advanced by Clarke was that the hearing examiner's report was inadequate, since neither the evidence relied upon nor any reasons were given to support the examiner's conclusion that petitioner should be dismissed. (It should be noted that the hearing itself was not challenged as insufficient.)\textsuperscript{12} The court agreed. Although neither statute nor the Policy Bulletin expressly requires the hearing examiner to state on the record the reasons for his decision, the court found that the Policy Bulletin clearly contemplates such a requirement. Two reasons were given for requiring an adequate statement of the grounds for the decision. First, it is essential that the appellate court, in order to perform its reviewing function, have a

\textsuperscript{10} 238 S.E.2d 842 (W. Va. 1977). This case dealt with a defective notice due to its lack of specificity. There, an employee was charged with falsifying travel expenses, but the notice did not indicate when this occurred in particular. The court stated that the notice must contain the date, unless there is no question of when the conduct occurred. Also, if persons or property are involved, these must be identified.

\textsuperscript{11} Clarke, 279 S.E.2d at 176.

\textsuperscript{12} It should be remembered that this (administrative burden) is the third criteria regarding due process mentioned in the first paragraph of this section.
record to review. If none exists, no review can be made. Second, a record gives the person seeking review a basis upon which he can assert his ground for review and upon which he can allege error with particularity. The court remanded the case in order for the hearing examiner to state the reasons and evidence he relied upon in making his recommendation.\textsuperscript{14}

The last issue faced in Clarke was whether a post-dismissal hearing could be legally sufficient. The court held that the Policy Bulletin intended a pre-deprivation hearing, and also reasserted the position that "due process must generally be given before a deprivation occurs unless a compelling public policy dictates otherwise."\textsuperscript{17} The court recognized that pre-deprivation hearings may be forgone if the person presents some sort of danger, threat, or disruption to the academic process. Here, the interest of the college in protecting the educational process was said to outweigh Clarke's liberty interest in pursuing his occupation. However, the college's interest did not justify depriving him of his property interest (e.g., his salary). Therefore, the court came to a compromise whereby Clarke could be suspended with pay.

\textbf{SCHOOL EMPLOYEES}

In reviewing county school board decisions regarding employees, the court during the survey period has been adamant in applying the principle that an administrative body must abide by the procedures it has properly established. The court has also stressed that school personnel laws are to be strictly construed in favor of the personnel.

Central to many school board dismissal cases is Policy No. 5300(4)(a) of the \textit{Policies, Rules and Regulations} of the West Virginia Board of Education. This section says that any decision concerning promotion, demotion, transfer, or termination should

\textsuperscript{14} Justice Neeley disagreed. In his dissent he saw no reason to require a record containing the evidence relied upon, since it is unnecessary and not required by either statute or case law. He considers a record to be part of a "maze of technical regulations and procedures" that must be performed "without a single slip." He feels the ability of the college president to dispose of incompetent professors has been removed due to the court's creation of "'Simple Simon' and 'Mother May I' procedures." 279 S.E.2d at 182.

\textsuperscript{15} North, 233 S.E.2d at 417.
be based upon an evaluation made known to the employee on a regular basis and, furthermore, that the employee be given an opportunity for improving job performance prior to the termination or transfer.¹

In *Mason County Board of Education v. State Superintendent of Schools,*² the school board dismissed a high school principal for incompetence and willful neglect of duties. Pursuant to W. Va. Code § 18A-2-8,³ the principal appealed to the State Superintendent of Schools, who overruled the school board's decision. The Board then appealed to the circuit court which ruled that the Board did not have standing to seek judicial review; however, the Supreme Court of Appeals ruled that the county school board did have standing.⁴ Upon remand, the circuit court held that despite 5300(6)(a), W. Va. Code § 18A-2-8 clearly empowered a board of education to dismiss a school employee. This code section provides in part: "Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty . . ." (emphasis added).

On appeal in *Mason County Board of Education,* (the case under review here), the Supreme Court of Appeals limited the seemingly broad powers delegated to the school board by W. Va. Code § 18A-2-8;⁵ and based upon *Trimboli v. Wayne County Board of Education,*⁶ held that a school board was prohibited from dismissing for incompetency without following the evalua-

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¹ § 5300(6)(a) states:

"Every employee is entitled to know how well he is performing his job, and should be offered the opportunity of open and honest evaluation of his performance on a regular basis. Any decision concerning promotion, demotion, transfer, or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his job performance prior to the termination or transferring of his services, and can only do so with assistance of regular evaluation."

² 274 S.E.2d 435 (W. Va. 1980).

³ This section provides *inter alia* that "when the board is not unanimous in its decision to suspend or dismiss, the person so suspended or dismissed shall have the right of appeal to the state superintendent of schools."


tion procedure of Policy No. 5300(6)(a) of Policies, Rules and Regulations of the West Virginia Board of Education. Trimble held that 5300(6)(a) must be followed if the circumstances forming the basis for suspension or discharge are "correctable." The court then said, "[w]hat is 'correctable' conduct does not lend itself to an exact definition but must . . . be understood to mean offense or conduct which affects professional competency." Policy No. 5300(6)(a) does not apply to conduct which is irremediable or permanent.

In sum, in every proceeding under W. Va. Code § 18A-2-8, for the dismissal of a school employee due to incompetence or misconduct, West Virginia Board of Education Policy No. 5300(6)(a) must be followed. This policy provides for (1) evaluation of job performance and (2) an opportunity to improve existing inadequacies. Failure to follow these procedures prohibits the board from demoting, transferring or discharging an employee. In addition, the court made clear that such evaluations must be conducted by someone qualified to do so and that board members are not qualified. A proper evaluation is one made by a professional supervisor such as a county superintendent.

When the school board has the authority to decide whether to suspend or dismiss an employee (assuming Policy No. 5300(6)(a) has been complied with or does not apply), W. Va. Code § 18A-2-8 provides *inter alia* that when the board is not unanimous in its decision, the employee shall have the right of appeal to the state superintendent. The question raised in *Eskew v. Kanawha County Board of Education* was whether the employee, after appealing to the state superintendent, also has a right to judicial review of the board's decision by way of cer-

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7 Mason County Bd. of Educ., 274 S.E.2d at 439 *quoting* Trimble, 254 S.E.2d at 567.
6 J. Neeley does not agree. He feels it created unnecessary burdens on public school administration. He also believes Policy No. 5300(6)(a) does not create a duty to provide any employee with an evaluation and an opportunity to improve: that its wording lacks any mandatory language. Furthermore, he would rather see the board of education handle personnel matters, because the board is controlled by the electorate. As he puts it, "I still believe that the vote means something." Trimble v. Bd. of Educ., 257 S.E.2d 561 (W. Va. 1979) (Neely, J., dissenting opinion).
tiorari in the circuit court pursuant to W. Va. Code § 53-3-2.\textsuperscript{11} The court, after citing a previous decision which granted the board of education the right to seek judicial review of an adverse administrative decision by a state school superintendent,\textsuperscript{12} now has extended this right to employees. Thus, a person dismissed by the board by less than a unanimous vote can now appeal to the state superintendent pursuant to W. Va. Code § 18A-2-8, and then upon an adverse ruling, appeal to the circuit court.

The court in \textit{Wayne County Board of Education v. Tooley}\textsuperscript{13} held that when an employee has a right to a hearing, the school board can make no decisions prior to the hearing. Here, the board voted to accept the county school superintendent’s recommendation to discharge the employee because the position of secretary at the bus garage was no longer needed. Subsequently, the employee was notified by the superintendent of his recommendation and informed of her right to a hearing before the board pursuant to W. Va. Code § 18A-2-6. A hearing was held, but the vote was against the employee. She appealed to the state superintendent, who ruled that the board had improperly dismissed her. The board sought review in the circuit court, which found that W. Va. Code § 18A-2-6 was complied with. In reversing the circuit court, the Supreme Court of Appeals said that in order for a hearing to be meaningful the board must not make any prior decision concerning the employee before the hearing is held.

In \textit{State ex rel. Hawkins v. Tyler County Board of Education},\textsuperscript{14} the issue before the court was whether a school board had acted arbitrarily and capriciously in attempting to transfer a teacher for refusing to assume certain extracurricular activities. The court recognized that school boards and superintendents have great discretion to transfer and assign teachers pursuant

\textsuperscript{11} W. VA. CODE § 53-3-2, reads in pertinent part: “In every . . . proceeding before . . . an inferior tribunal, the record of proceeding may, . . . after any judgment or order therein abridging the freedom of a person, be removed by a writ of certiorari to the circuit court of the county in which such judgment was rendered.”


\textsuperscript{13} 276 S.E.2d 826 (W. Va. 1981).

\textsuperscript{14} 275 S.E.2d 908 (W. Va. 1980).
to W. Va. Code § 18A-2-7, and that teachers have no vested right to be assigned to any particular school in a county. However this discretion is not unlimited, but must be exercised in a reasonable way and in the best interests of the school. Since extracurricular activities play such a vital role in the educational process, a school board is justified in reassigning a teacher for refusal to participate. But the board's power to assign these duties in the first place must be exercised in a reasonable manner; that is, it cannot be discriminatory or require excessive hours and should relate to the teacher's interest and expertise. Also, the assignment must not interfere with the teacher's primary instructional duties or classroom efficiency. At this point, because evidence was lacking whether the duties in question would have interfered with classroom teaching abilities, the court remanded the case for further findings. If classroom efficiency would have been adversely affected, then the board acted arbitrarily; if no adverse effects, then the reassignment was legitimate.

In response to the board's assertion that the activity in question (coaching) was part of the teacher's employment duties, the court said that for this assignment to be be valid there must be sufficient provisions in the actual employment contract; absent any such provisions, the board cannot transfer, suspend, or dismiss on contractual grounds for refusal to perform additional duties.  

Finally, the court held that Policy No. 5300(6)(a) does not apply here since no allegations of misconduct or incompetency were made.

In State ex rel. Wilson v. Truby, 15 the court gave effect to Part III of the West Virginia Department of Education Employee Handbook. Here, petitioner applied for the vacant position of

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15 J. Neeley dissents. He stresses that the boards of education and superintendents must be given room to run thorough and efficient schools. Also, "schools should be run for the benefit of the children and not for the benefit of the administrators or employees in the system." Hawkins, 275 S.E.2d at 918, (Neely, J., dissenting opinion).


17 Part III provides in part: "Applicants for professional positions will be interviewed and recommended by the Bureau Assistant Superintendent. Final decision regarding approvals will be made by the State Superintendent. . . ." Wilson, 281 S.E.2d at 235.
assistant state superintendent. Upon notice that he was not selected for an interview, he requested reasons for the rejection, relying on Policy No. 5300(6)(a). The State Superintendent responded by contending that No. 5300 only applies to county school personnel and that the West Virginia Department of Education Handbook covers State Department of Education personnel. In essence, the court agreed with the State Superintendent, but found Part III of the Handbook to entitle applicants with objective qualifications to an interview.\footnote{\textit{Bob Goldberg}}

Although the court did enforce the Handbook procedures, it also took into consideration possible administrative burdens and thus limited the interview entitlements to only those applicants objectively qualified. This is consistent with an earlier case where a teacher who satisfied objective eligibility standards for tenure adopted by a state college was deemed to have more than a unilateral expectation, therefore requiring a certain degree of procedural due process.\footnote{McLendon v. State ex. rel. Morton, 249 S.E.2d 919 (W. Va. 1978).} In \textit{Wilson}, the court declared that in providing interviews for department professional employees, the State board had gone beyond those rights which are constitutionally required; but, nevertheless, the board must follow its own Handbook.

The trend of the court is to expand procedural due process rights of school employees. With its constructions of various statutes and policies, and by insisting that board decisions must not be arbitrary or capricious, the court is curtailing much of the discretion previously enjoyed by county school boards.

\textit{Bob Goldberg}

\footnote{18 The court did not explicitly state whether Policy No. 5300(6)(a) applies here or not, but simply said the Handbook applies.}
CONSTITUTIONAL LAW

SEPARATION OF POWERS

Recently, in a landmark decision in administrative law, the West Virginia Supreme Court of Appeals held that sections of the Administrative Procedures Act, which empowered a legislative rule-making review committee to veto rules and regulations otherwise validly promulgated by State agencies, violated the separation of powers doctrine embodied in the State Constitution.²

In 1976, in an effort to enhance administrative accountability and responsiveness,³ the Legislature amended the West Virginia Administrative Procedures Act, creating a new legislative body: the Legislative Rule-Making Review Committee.⁴ This committee was a bi-partisan body, consisting of six members of the Senate and six members of the House of Delegates. The President of the Senate and the Speaker of the House, who were ex-officio, non-voting members, designated the co-chairman of the committee and appointed its members. Staff personnel were provided to supply the expertise necessary to deal with the complexity of the rules and regulations being reviewed. The mission of the committee was to “review all rules or regulations of the several agencies following the proposal thereof . . .”⁵

To give teeth to this review mechanism, the committee was given plenary power to veto administrative rules and regulations, subject only to reversal by the entire legislature: “No adoption, amendment or repeal of any rule or regulation . . . shall be effective until . . . approved by the rule or regulation committee.”⁶ After presentation of the proposed rule by the agency, the

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⁵ W. VA. CODE § 29A-2-1 (1980 Replacement Vol.).
⁶ Id.
⁷ Id.
committee had six months within which to approve or disapprove, in whole or in part, the proposal. The committee's failure to act within this time period was deemed approval. After agency approval or disapproval, the Legislature had thirty days to reverse the committee's decision; upon expiration of this period the rule or regulation automatically became effective. However, formal approval by the Legislature was only required in the limited circumstance of committee disapproval of a rule designed to implement "a federally subsidized or assisted program," otherwise approval or disapproval by the Legislature was discretionary.

The case arose when certain rules and regulations promulgated by the Director of Mines governing surface mine safety were disapproved by the committee, whose decision was not reversed by the Legislature. Barker, who was a surface miner, contended that the provisions of the Administrative Procedures Act creating the committee were unconstitutional and void, and thus, the Secretary of State had a nondiscretionary duty to file the rules and regulations, thereby giving them the force and effect of law. After dealing with preliminary issues of justiciable controversy,8 mootness,9 the propriety of declaratory judgment proceedings,10 standing,11 the need to join an indispensable

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8 Id.
9 The court determined that the petition set forth facts sufficient in quantity and substance to state a justiciable controversy." 279 S.E.2d at 628.
10 Although the rules and regulations had been filed at the time of the decision, they were classified as "obsolete." The court concluded that because "the relief requested is that they be filed as 'final' and in force and effect,' the claim that the relief sought has been granted is specious on its face." Thus, the case was not moot. Id.
11 The court held that a declaratory judgment action was not appropriate since "the need for a definitive resolution is apparent." Id. The court added: "'[W]e find in the case before us that the alleged deprivations of petitioner's rights are capable of being repeated under numerous variations of a basic recurring factual pattern, in spite of all other available administrative and legal remedies if no definitive resolutions of these issues are provided by this Court.'" [Quoting Walls v. Miller, 251 S.E.2d 491, 495-96 (W. Va. 1978)].
12 The court rejected the contention that "direct injury" or "special or pecuniary interest must be shown by individuals who sue in this capacity,'" [Quoting State ex rel. Brotherton v. Moore, 230 S.E.2d 638, 640-41 (W. Va. 1976)]. "In the present case the relator, in addition to being a citizen and a taxpayer, is a coal miner on a surface mine operation." Id. at 629.
party, and the nature of the controversy as a political question. Justice McGraw, writing for the court, held that the statutory rule-making review mechanism violated the separation of powers doctrine embodied in article V, § 1 of the West Virginia Constitution.

Justice McGraw's opinion continues the court's staunch preservation of the separation of powers within this state: "This constitutional provision which prohibits any one department of our state government from exercising the powers of the others is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." The court's strict scrutiny yielded two grounds of unconstitutionality. First, after examining the powers and the duties of both the legislative and executive branches, the court found that this mechanism of legislative veto permitted the Legislature to exercise power properly exercised by the Governor. Closely resembling the Governor's veto power, this legislative veto power "reverses the constitutional concept of government whereby the Legislature enacts the law subject to the approval or veto of the Governor." Second, after analyzing the strict substantive and procedural constitutional limitations placed upon the power of the Legislature to enact law, the court concluded that "these constitutional provisions clearly limit the power of the Legislature to give the binding effect of law to its actions. It may create law only by following the formal enactment process. Where it seeks to give legal force to its informal actions, the Legislature exceeds the limits of its constitutional authority."  

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13 The court also rejected the contention that the failure to join the Director of the Department of Mines invalidated the petition for failing to join an indispensable party; concluding that while "[h]e is an interested and concerned party ... in the context of this litigation he is not a necessary or indispensable party." Id. at 630.
14 Rejecting the contention that the suit represented a political question, the court stated: "Our determination of the issues in this case does not represent a political policy choice by the Court. Indeed, for our purposes the specific content of the rules in question is immaterial." Id.
15 Id. at 636.
17 279 S.E.2d at 630.
18 Id. at 632.
19 Id. at 633.
In attempting to increase its control over the State bureaucracy, the Legislature attempted to make an end run around these formal constitutional enactment requirements. However, this attempt to free itself of these constitutional restraints and to step into the shoes of the administrative agencies through an "extra-legislative control device" violated the separation of powers.

The court identified three tendencies of the legislative review mechanism which could foster legislative dominance and erode executive power: 1) the tendency to usurp the traditional executive role of filling in the details of general legislative enactments; 2) the tendency to lessen the legislative incentive to draw statutes narrowly to effect intended policy; and 3) the tendency to centralize power in the hands of a few legislators. However, the court left open the question of whether these tendencies could be corrected by a more narrowly drawn statutory mechanism. It was suggested, however, that constitutional alternatives do exist. But the court's emphasis on the formal constitutional limitations imposed upon the Legislature in enacting law indicates that the court may hold unconstitutional any mechanism that does not meet formal constitutional requirements such as the requirement of three readings, the prohibition against legislation embracing more than one object, and the necessity for the Governor's approval. If the Legislature is limited to these requirements, it is unlikely that the Rule-Making Review Committee mechanism will be resurrected in a more limited form.

Legislatures already have the weapons of appropriation, standing committees, oversight committees, investigatory powers and participation in the appointment process. The

21 Id.
22 Id., see Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 CAL. L. REV. 983 (1975).
23 Id. at 635-36.
24 Id. at 635 (citing Note, Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge, 1976 DUKE L.J. 285; Newman and Keaton, Congress and the Faithful Execution of Law—Should Legislators Supervise Administrators?, 41 CAL. L. REV. 569 (1952); Watson, supra note 21; see also Neely, supra note 3.
25 W. VA. CONST. art. VI, § 51 (1978 Replacement Vol.).
26 W. VA. CONST. art. VI, § 30 (1978 Replacement Vol.).
almost plenary power to revise, reshape or repeal statutory law also serves as a powerful check on administrative agencies. Agency actions and priorities can be reversed through the utilization of all of these legislative control mechanisms. But the mechanism provided in the 1976 amendments stretched the Legislature's supervisory powers beyond these traditional modes of control. "The power of the Legislature in checking the other branches of government is to legislate... when it exercises that power it must act as a legislature through its collective wisdom and will, within the confines of the enactment procedures mandated by our constitution."\(^{27}\)

Although not specifically addressed in this decision, there are many other practical considerations which limit both the effectiveness and the desirability of this type of legislative review mechanism. First, the burdensomeness and impracticality of giving meaningful review to a plethora of complex and detailed rules and regulations, especially by a part-time legislature, decreases the mechanism's utility. Second, an administrative agency which pursues its duties aggressively is likely to make political enemies along the way; the fear of crossing a few key legislators, such as members of a rule-making review committee, could have a distinct chilling effect on an agency's activities. Third, there is a potential crippling psychological effect on agency morale caused by the uncertainty concomitant with a process in which rules and regulations formulated must stand strict legislative scrutiny. Fourth, such a mechanism simply gives lobbyists one more shot at gutting or stopping entirely needed regulations. Fifth, the waste of time, energy, and ultimately, the taxpayers' money in re-formulating rules and regulations which took a great deal of time to promulgate, can be very costly. Sixth, by requiring administrators to spend time justifying their regulations before the legislative rule-making review committee rather than doing their administrative duties, an agency's functioning can be seriously impeded. Seventh, the focus on the short-term appeasement of the legislative review committee could result in the sacrifice of long-term, sequential, and comprehensive administrative rule-making.

The issues of the constitutionality and the practicality of legislative veto mechanisms involve not only state concerns, but

\(^{27}\) 279 S.E.2d at 634, n.7.
federal concerns as well. The constitutional problems raised in this case have also been raised elsewhere.28 However, there is by no means agreement as to the validity of these mechanisms.29 The United States Supreme Court, when it has had an opportunity to address the issue, has declined to do so.30 However, this recent decision by the West Virginia Supreme Court of Appeals will do a great deal to fuel the fires of those who look upon strict legislative review of administrative actions with disfavor.

FUNDING FOR EDUCATION

In State ex rel. Board of Education v. Rockefeller,31 the court significantly expanded its protection, and even its paternalism,2


30 In Buckley v. Valeo, supra note 1, provisions of the Federal Election Campaign Act of 1971 which provided that before a rule of the Election Commission could go into effect, it must first be submitted to the Senate or to the House, which then had the power of disapproval, were challenged. The Court responded:

"Appellants make a separate attack on this qualification of the Commission's rulemaking authority, which is but the most recent episode in a long tug of war between the Executive and Legislative Branches of the Federal Government respecting the permissible extent of legislative involvement in rulemaking...Because of our holding that the manner of appointment of the members of the Commission precludes them from exercising the rulemaking powers in question, we have no occasion to address this separate challenge of appellants."

424 U.S. at 240.

of public education. The court held that, despite having the statutory authority, the Governor may not reduce expenditures for public education in the absence of a compelling factual record indicating the necessity of such reduction.\textsuperscript{3}

On April 2, 1981, as a result of the coal strike's alleged deleterious effect on state revenues, the Governor issued a memorandum to all state agencies requiring a 10% reduction in fourth quarter expenditures.\textsuperscript{4} This order was made pursuant to West Virginia Code § 5A-2-23,\textsuperscript{5} which provides for "pro rata" reduction in appropriations to avoid a deficit in the general fund.

As in its recent decision in \textit{Pauley v. Kelly},\textsuperscript{6} the court interpreted the "thorough and efficient" clause found in the West Virginia Constitution\textsuperscript{7} as affording public education a "constitutionally favored status" in this State.\textsuperscript{8} This status, the court stated, required "adequate funding" of public education.\textsuperscript{9} Thus, in order for the pro rata provisions of the statute to allow for reductions in public education, the court stated that "the State must develop a factual basis to show that there will be a deficit in the general revenue fund substantial enough to necessitate the reduction in expenditures for public education."\textsuperscript{10} The court went on to analogize this factual showing to the showing required by the United States Supreme Court decisions\textsuperscript{11} placing an affirmative duty on school officials to demonstrate the elim-

\textsuperscript{3} 281 S.E.2d at 136.
\textsuperscript{4} Id. at 132.
\textsuperscript{5} W. VA. CODE § 5A-2-23 (1979 Replacement Vol.), provides:

If the governor determines that the amounts, or parts thereof, appropriated from the general revenue cannot be expended without creating an overdraft or deficit in the general fund, he may instruct the commissioner to reduce equally and pro rata all appropriations out of general revenue in such a degree as may be necessary to prevent an overdraft or deficit in the general fund.
\textsuperscript{6} 255 S.E.2d 859 (W. Va. 1979).
\textsuperscript{7} W. VA. CONST. art. XII, § 1, provides:
The legislature shall provide, by general law, for a thorough and efficient system of free schools.
\textsuperscript{8} 281 S.E.2d at 133.
\textsuperscript{9} Id.
\textsuperscript{10} Id. at 135.
ination of segregation. Unlike the United States Supreme Court,\textsuperscript{12} however, the Supreme Court of Appeals found that public education is a fundamental right upon which the State may not impinge absent the showing of a compelling state interest.\textsuperscript{13}

In 1959, in \textit{Board of Education v. Board of Public Works},\textsuperscript{14} the court dealt with the issue of the constitutionality and applicability to public education of the predecessor statute to West Virginia Code § 5A-2-23. The court in that case held the statute both constitutional and applicable to public education. However, the court in \textit{Rockefeller} rejected the contention that this prior decision was controlling because the issue there was one of separation of powers, rather than the priority standing of public education. However, in \textit{Board of Public Works}, though not couched in terms of "priority standing", the plaintiff challenged not only the constitutionality of the statute, but also its applicability to public education.\textsuperscript{15} The \textit{Board of Public Works} court found, that despite the severe effects of the pro rata reduction in expenditures to public education,\textsuperscript{16} that the appropriation to public education, "having been made from the general revenue, is subject to the provisions of . . ."\textsuperscript{17} the statute authorizing the pro rata expenditure reduction scheme.\textsuperscript{18}


\textsuperscript{13} 281 S.E.2d at 135.

\textsuperscript{14} 144 W. Va. 593, 109 S.E.2d 552 (1959).

\textsuperscript{15} "The petition . . . alleges . . . that if the provisions of the statute are valid they do not extend or apply to appropriations made by the Legislature for state aid to schools." 109 S.E.2d at 555.

\textsuperscript{16} "The order . . . has in fact disrupted the school program originally adopted by each plaintiff during the fiscal year, has prevented the normal and customary operation of the schools, and has caused each plaintiff to revise and alter its original school program. It has required each plaintiff to shorten its school term, or decrease the salaries of its teachers, or reduce its teaching force and other personnel, or eliminate essential parts of its curriculum and activities. It has also subjected the schools operated by each plaintiff to the possible loss of accreditation and has produced uncertainty and confusion in the administration of the schools under the management and control of each plaintiff." \textit{Id.} at 558.

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} The court stated that "[t]he legislative intent in enacting that statutory provision was to prevent a deficit in the State treasury which was the primary purpose of the adoption of Article VI, Section 51, of the Constitution." In order to fulfill this constitutional mandate, and pursuant to the necessary and proper clause found in article VI, § 51(d), the \textit{Board of Public Works} court found this statutory scheme both constitutionally permissible and applicable to public education expenditures. \textit{Id.} at 558-69.
The court found that the record presented by the Governor did not factually demonstrate the financial necessity of the reduction in school expenditures. Specifically, the court cited the record's failure to: 1) identify the specific sources of revenue loss; 2) demonstrate the current state of general revenues in relation to projected revenues; 3) show that the General Revenue Fund could not be supplemented from other sources; and 4) identify the relative position of all state spending units with regard to the percentage of their appropriations already expended.\footnote{281 S.E.2d at 136.}

Chief Justice Harshbarger, joined by Justice McGraw, concurred with the majority's judgment,\footnote{Id. at 137.} but felt that the statutory scheme was an unconstitutional violation of the separation of powers.\footnote{Id. at 138.} He cited three provisions of the State Constitution providing legislative mechanisms for remedying budget deficits,\footnote{W. VA. CONST. art. VI, § 51(B)(5) (1978 Replacement Vol.) providing: The legislature shall not amend the budget bill so as to create a deficit but may amend the bill by increasing or decreasing any item therein . . . W. VA. CONST. art. X, § 5 (1978 Replacement Vol.), providing: The power of taxation of the legislature shall extend to provisions for payment of the state debt, and interest thereon . . . but whenever any deficiency in the revenue shall exist in any year, it shall, at the regular session thereof held next after the deficiency occurs, levy a tax for the ensuing year, sufficient with the other sources of income, to meet such deficiency, as well as the estimated expenses of such year. W. VA. CONST. art. X, § 4 (1978 Replacement Vol.) providing: No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.} and felt that these mechanisms were all-inclusive. Drawing a sharp distinction between the appropriation and the expenditure of funds, Chief Justice Harshbarger felt that the interpretation of the statute in Board of Public Works\footnote{144 W. Va. 593, 109 S.E.2d 552 (1959).} "defined a governor's power to expend in a way that usurped that of the
legislature to appropriate;" thus this interpretation should be overruled and that statute held unconstitutional.

Justice Neely, dissenting, criticized the majority for turning "upside-down traditional rules about burden of proof" and for "indefensible court intervention." Instead of requiring the petitioning boards of education to show that the reduction in expenditures would result in inadequate funding, the majority required the Governor to prove that his actions were necessary. Justice Neely felt that this procedural hurdle was a "classic method" of judicial interventionism, and that this shifting of the burden of proof was particularly unjustified given "the universally accepted maxim that unless proved otherwise there is a presumption of the validity of acts done by a political officer."

While Justice Neely agreed that the constitutional primacy of public education was a "reasonable conclusion", he stated that "what is not a reasonable conclusion is that a two percent reduction in educational expenditures . . . will cause a previously thorough and efficient school system to become less than thorough and efficient." He felt that the majority's analogy to the school desegregation cases was inappropriate because in those cases the petitioners bore and met the burden of proving a *prima facie* case of state sanctioned segregation. No such showing was required by the majority.

Justice Neely also felt strongly concerning the majority's encroachment upon the authority of the executive and legislative branches: "It is the Court, not the Governor, which is acting illegally." He felt that both the separation of powers and political question doctrines should have prevented the judicial dilution of the Governor's authority. He stated that "the Court today throttles both the legislative and executive branches by breaching the separation of powers and substituting a judicial preference for education over a legislative and executive pre-

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24 281 S.E.2d at 138.
25 Id. at 139.
27 281 S.E. 2d at 138.
28 Id.
29 Id.
30 Id. at 141.
ference for equality”; and while judicial review might be appropriate in the context of an administrative agency decision “in this case we are dealing neither with an administrative decision nor a decision made by an unresponsive, non-elected official. The decision in this case was made by the Governor, the State’s foremost democratically elected official . . . in the exercise of the discretionary authority granted him by a democratically elected legislature.” Thus, the conflict was a political one, and the remedy for the petitioning school boards was the political process, and not the judiciary.

He also felt that the majority’s position violated “fundamental principles of equal protection.” The statutory scheme prevents the gubernatorial reordering of legislative priorities by requiring “the Governor to treat all recipients of the State’s bounty equally.” While Justice Neely felt that equal protection justifiably serves to protect the “politically powerless”, this case involved not the judicial protection of the politically powerless, but of a “well-organized, vested interest’s raid on the State Treasury at the expense of other legitimate, but unorganized, powerless . . . constituencies.” The interest of equal protection was the foundation upon which this pro rata reduction scheme was based, and Justice Neely felt that this interest was subverted by the majority’s position.

Even accepting, arguendo, that the constitutional preference for public education requires “adequate funding”, the majority’s analysis gives no indication of what level of funding is adequate. Although in Pauley v. Kelly, the court defined in great detail what it meant by “a thorough and efficient system of schools”, these explicit criteria were not used in addressing the issue of whether, in fact, the proposed reduction in expenditures would

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32 Id. at 140.
33 Id. at 141.
34 Id.
35 Id.
prevent the achievement of any of the objectives or the provision of any of the supportive services spelled out in Pauley.\textsuperscript{57} Apparently, the State school system operates at only a minimally "adequate funding" level, if any reduction in expenditures will result in inadequate funding.

\textbf{Ancil Ramey}

\textsuperscript{57} "We may now define a thorough and efficient system of schools: It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.

Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency." \textit{Id.} at 877.