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Survey of Developments in West Virginia Law: 1978

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SURVEY OF DEVELOPMENTS IN WEST VIRGINIA LAW: 1978

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ADMINISTRATIVE LAW

I. RIGHTS OF PUBLIC EMPLOYEES

In three recent cases, the West Virginia Supreme Court of Appeals considered the extent to which classified civil service employees have a property interest in their jobs giving rise to corresponding due process procedural rights.

In Waite v. Civil Service Commission, the court fashioned new procedural safeguards for public employees who are suspended from work for short periods of time, holding that the West Virginia Code provisions and Civil Service Commission regulations failed to provide adequate due process protections for such employees. Under the applicable statute and regulations, procedural

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1 State ex rel. Knight v. Public Service Comm’n, 245 S.E.2d 144 (W. Va. 1978), which dealt with the validity of public utility rate increases, is discussed in the section entitled CONSTITUTIONAL LAW at 291.

Any employee in the classified service who is dismissed or demoted after completing his probationary period of service or who is suspended for more than thirty days in any one year, may, within thirty days after such dismissal, demotion or suspension, appeal to the Commission for review thereof.

Article XI, Section 3 of the Rules and Regulations of the West Virginia Civil Service System provides:

The Appointing Authority may, upon notice confirmed in writing or by written notice, suspend any employee without pay for delinquency or
rights of an employee suspended for 30 days or less in any one year are limited to written notice of the suspension. While it upheld the statute insofar as it limited appeals to the Civil Service Commission to cases involving suspensions totalling more than 30 days, the court ruled that employees suspended for shorter periods were deprived of a significant property interest, and must first be given written notice of the reasons for the suspension and an opportunity to reply either orally or in writing. If the suspension arises in a situation where there is a continuing danger to persons or property or to the orderly conduct of the affairs of the agency, immediate suspension is permissible, but it must be followed as soon as practicable by the necessary notice and rudimentary hearing.

The standard for sufficiency of notice when disciplinary action is based on employee misconduct was discussed in Snyder v. Civil Service Commission, in which the court ruled that the notice must "set out sufficient facts about the alleged misconduct so that its details are known with some particularity." The notice must be specific enough to leave the employee with no reasonable doubt as to the date of the misconduct and the identity of any persons or property involved.

The property interest recognized by the court in Waite and Snyder ceases to exist, however, when the legislature decides that the position should no longer be covered by civil service tenure. In Baker v. Civil Service Commission, the court upheld the right of the legislature to remove from civil service coverage positions which had been placed under the civil service system by executive order of the governor, against challenges that the legislative action violated both the separation of powers doctrine and the prohibition of bills of attainder, and denied employees their procedural due process rights. Finding no procedural rights in the abolishment of a civil service position, as distinguished from the discharge of an employee from such a position, and finding no suggestion that the individuals in the abolished positions formed an identifiable group

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4 The court rejected an equal protection attack on § 29-6-13, holding that procedures distinguishing between minor disciplinary punishments and major ones are rationally related to the state's legitimate interest in dealing quickly and inexpensively with routine personnel matters.


6 Id. at 844.

against whom the legislature could have been motivated to act, the court upheld the legislative action as within its power both to create and to abolish public offices.

II. ADMINISTRATIVE PROCEDURE

In Weirton Ice and Coal Supply Company v. Public Service Commission,\(^8\) the court apparently retreated from its recent insistence that administrative agencies state the underlying reasons for their decisions in some detail,\(^9\) holding that the only finding which must be articulated in a Public Service Commission order granting a certificate of convenience and necessity to operate as a common carrier is the conclusory statement that "the public convenience and necessity requires the service."\(^10\)

West Virginia Code § 24A-2-5(a) requires that the commission, before granting such a certificate, find that the service furnished by existing transportation is inefficient or inadequate, and to find "from the evidence that the public convenience and necessity require the proposed service." Section 24A-2-5 does not specifically require the commission to state its findings of fact as part of its order, and the agency is exempt from the general requirement of such a statement included in the Administrative Procedures Act.\(^11\) The court in Weirton Ice accepted the agency's ultimate finding of public convenience and necessity as proof that the commission had found sufficient facts to support the conclusion, after considering the factors required by the statute. Although it noted that a transcript of the hearing held by the commission supported the belief that the agency had thoroughly considered the adequacy of existing services, the court emphasized that the commission has no duty to distinctly state its findings, or the underlying facts supporting them.

The court was forced to go to some lengths to distinguish Mountain Trucking v. Public Service Commission,\(^12\) which held that an order granting a permit to operate as a contract carrier must contain specific findings of fact, rather than conclusory statements, to withstand judicial scrutiny. It rested the distinction on

\(^8\) 240 S.E.2d 686 (W. Va. 1977).
\(^10\) 240 S.E.2d at 689.
\(^11\) W. VA. CODE § 24A-2-5(a) (1976 Replacement Vol.) exempts the Public Service Commission from all of the requirements of the Administrative Procedures Act.
\(^12\) 216 S.E.2d 566 (W. Va. 1975).
the fact that the statutory provision relating to contract carriers required the applicant to show that his proposed service would not have a negative effect on the use, condition or safety of highways, and would not impair the efficient service of existing common carriers. The court noted that the applicant in Mountain Trucking had not proven its case, perhaps indicating that the real distinction between the two cases is the support provided in the record for the agency's decision.

The court stated that a lack of findings or reasons in the order would not impede judicial scrutiny of the order, since the commission is required to file a statement of its reasons with the court on appeal, and a transcript of the evidence considered by the agency is also available to the court. However, the court did not deal with the argument in Justice Miller's dissent that findings are also required to provide the disappointed party with knowledge of why he lost his case, both for his own satisfaction and to allow him to adequately prepare for a rehearing or judicial review. The court also ignored its own statements in Citizens Bank of Weirton v. West Virginia Board of Banking & Financial Institutions, that the expression of detailed reasons for agency action is necessary to assure that the action has a rational basis.

The constitutionality of West Virginia's implied consent law, deeming operation of a motor vehicle to be consent by the driver to chemical tests to determine intoxication, was affirmed by the court in Jordan v. Roberts. West Virginia Code § 17C-5A-1 authorizes suspension of a driver's license for a six month period if the driver refuses to submit to a breath or urine test incident to a lawful arrest by an officer with reasonable grounds to believe that the driver was driving on a public highway while intoxicated. The Commissioner of Motor Vehicles is required to suspend the license upon receipt of the officer's sworn affidavit that (1) he had reasonable grounds to believe the person was driving while under the influence of intoxicating liquor; (2) the person was lawfully placed under arrest for the offense of driving while under the influence of intoxicating liquor; (3) the person refused to submit to the test;
and (4) the person was told that his license would be suspended for a period of six months if he refused to submit to the test. The driver has a right to a hearing before the commissioner, and may appeal the commissioner's ruling to the courts. The agency hearing must comply with the provisions of the Administrative Procedures Act, West Virginia Code §§ 29A-5-1 through -5, and the suspension order is stayed once the hearing procedures are invoked.

The court concluded that although the suspension of a driver's license is a substantial deprivation and must therefore be judged according to the North standard, the procedural safeguards contained in the statute satisfy that standard. However, the court explicitly reserved an opinion on the constitutional questions arising from the use in a criminal trial of test results obtained under the implied consent law.

III. UNEMPLOYMENT COMPENSATION

In London v. Board of Review of the Department of Employment Security, the court struck down an agency regulation which required individuals to actively seek employment in order to prove their availability for work and, thus, their eligibility for unemployment compensation benefits. In ruling that the Department was without authority to add the work-seeking requirement to the general statutory requirement that the individual be "available for full-time work," the court held that "registration with the state employment office would attest to and establish

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19 Id.
20 North v. Board of Regents, 233 S.E.2d 411 (1977), requiring the following due process procedures where deprivation of substantial rights is involved:
   . . . a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf; an unbiased hearing tribunal; and an adequate record of the proceedings.
21 233 S.E.2d at 417.
22 244 S.E.2d 331 (W. Va. 1978).
23 Regulations of the Commissioner, § 13.03 establishes, as a condition of eligibility, that the applicant "was unemployed, able and available for full-time work and was seeking work." (emphasis added).
24 The applicable provision of W. Va. Code § 21A-6-1 (1978 Replacement Vol.), requires that to be eligible for benefits, the claimant "is able to work and is available for full-time work for which he is fitted by prior training or experience."
prima facie proof of availability; and that until a claimant refuses a referral to work or otherwise demonstrates that he or she is not available, his registration is proof enough.”

IV. DISCRIMINATION

The powers of the state Human Rights Commission were expanded in *West Virginia Human Rights Commission v. Pearlman Realty Agency*, which held that the commission has the authority to award damages for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity to a victim of discrimination in the sale of housing, even where the individual has sustained no other loss due to the discriminatory action.

The commission’s power to award compensatory damages was first established by the court’s ruling in *West Virginia Human Rights Commission v. Pauley*, which limited such awards to actual monetary losses. In *Pearlman Realty* the court abandoned that restriction, holding that the commission can award damages for emotional distress even where there had been no other loss, if the award is purely incidental to its use of other powers vested in it by statute.

Dismissing the defendant’s claim that such awards infringed upon the constitutional right to a jury trial, the court noted that judicial review of the agency action was available, and that it could “comprehend no material difference between an expenditure of $1,000.00 to compensate a person aggrieved, humiliated and embarrassed by a discriminator and the financial expenditure which will result from the discriminator’s compliance with the other directives of the cease and desist order, such as notifying employees and others of the commission’s order, keeping the records required by the order, adjusting advertising, and such.”

In dicta, the court suggested the availability of a civil remedy when alleged damages are too extensive to fall within the commission’s jurisdiction. The establishment of such a remedy for emo-

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24 244 S.E.2d at 338.
26 Opinions of other courts regarding whether a state human rights commission possesses incidental power to award compensatory damages, absent specific statutory authorization, are divided. See Gutwein v. Easton Publishing Co., 272 Md. 563, 325 A.2d 740 (1974) and cases cited therein.
28 239 S.E.2d at 147.
29 Id. at 148.
tional distress caused by discrimination could be a significant extension of the *Monteleone* doctrine, which limits damages for emotional distress to cases involving intentional torts.

**ATTORNEY-CLIENT**

In *State ex rel. Moran v. Ziegler,* the court granted a writ of prohibition staying the prosecution of a criminal defendant on the grounds that his motion to disqualify the private prosecuting attorney had been improperly denied by the circuit court. The relator claimed that immediately following the incident for which he was being prosecuted, he had spoken on the telephone to the attorney who subsequently prosecuted him. In that conversation the relator had purportedly sought representation from the lawyer, who had represented him before in other matters. The relator insisted that at that time he also discussed with the attorney the facts and circumstances of the incident. A subsequent meeting was planned, but never occurred.

On the basis of these allegations, the relator claimed that the lawyer's subsequent prosecution of the case was both a violation of the Code of Professional Responsibility and a denial of relator's due process right to a fair trial. Noting that both of these claims rested on the assumption that an attorney-client relationship existed, the court was unable to agree with the relator's legal arguments. While admitting that the telephone call had taken place, the private prosecutor denied that any communications as to the facts or circumstances of the case had taken place during that conversation. Instead, the attorney claimed that in the telephone conversation the relator told him that there had been a shooting, and that he was being sought by the police, but nothing more. A subsequent meeting was arranged, at which the relator failed to appear. Faced with such conflicting evidence, the court was unable to hold that an attorney-client relationship existed.

The court focused on the *appearance* of an attorney-client relationship. Ruling that the private prosecutor must be held to the same high standards of fairness as a public prosecutor, the court extended the holding of *State v. Britton* "to cover situa-

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31 244 S.E.2d 550 (W. Va. 1978).
32 Id. at 552.
33 203 S.E.2d 462 (W. Va. 1974). The court held that the general rule forbidding
tions where there is the appearance of an attorney-client relationship between the accused and the prosecutor, either public or private.\footnote{24} While there was no finding of impropriety on the part of Mr. Jones, the court stated there was the "appearance of impropriety in the nature of a conflict of interest which has a potential capacity to taint the record."\footnote{35} Accordingly the court held that the prosecution of the relator could not proceed until the private prosecutor was disqualified.

The court pointed out that unlike the Britton rule, the holding in State ex rel. Moran v. Ziegler does not rest on due process guarantees, but rather "is based on the exercise of [the courts'] inherent powers to administer the judicial system, in which, as stated above, the prosecution occupies an important quasi judicial position."\footnote{35}

CONSTITUTIONAL LAW

I. PRISONER'S RIGHTS

In the past year, the West Virginia Supreme Court of Appeals was confronted with several cases involving constitutional issues in the context of the treatment of prisoners after their conviction. In Tasker v. Griffith,\footnote{37} a prisoner serving a one to ten year sentence was administratively segregated on two separate occasions. Such segregation involved isolation of the prisoner from the rest of the inmate population and at least some deprivation of participation in normal activities and privileges. At the time of the first segregation, which lasted for four days, the prisoner was told that he was under investigation for involvement in certain acts of violence which had occurred at the Huttonsville Correctional Center where he was imprisoned. At the beginning of the second segregation, which lasted three days, he was told that he was under investigation for receiving a contraband substance through the mail. He brought a writ of habeas corpus contending that the procedure followed in administrative segregation violated his rights to due process.

\footnote{24} 244 S.E.2d at 553.  
\footnote{31} Id.  
\footnote{35} Id. See also State v. Britton, 203 S.E.2d 462, 467 (W. Va. 1974).  
\footnote{37} 238 S.E.2d 229 (W. Va. 1977).
The court first held, as a matter of procedure, that a writ of habeas corpus included within its proper scope a prisoner's challenge to additional restrictions on his liberty imposed because of conduct unrelated to his original conviction. The court, again as a matter of procedure, held that a release of the prisoner prior to a hearing on the writ does not deprive the courts of jurisdiction to hear the case and to grant what amounts to prospective declaratory relief. The court noted that if such jurisdiction were destroyed by early release, any meaningful challenge to the procedure would be rendered impossible.

Turning to the substantive issues, the court first distinguished this situation from that in which formal disciplinary procedures have been initiated against the prisoner. Noting that this case involved administrative segregation before such proceedings were initiated, the court recognized that the rights to be afforded the prisoner are also somewhat different. The court then outlined the safeguards it considered necessary to protect due process before placing a prisoner in administrative segregation. First, prison authorities must advise the prisoner that he is under investigation for misconduct and the specific misconduct must be disclosed, unless such disclosure would be hazardous to the integrity of the investigation. Second, when the investigation is concluded, the authorities must advise the inmate whether he was exonerated or whether formal disciplinary proceedings will be initiated against him. The court stated that administrative segregation should not be used as punishment when the safety of the institution, its inmates, staff or property or the integrity of the investigation is not at stake. The court required that officials have specific reasons for determining that effective investigation requires the isolation of an inmate and further stated that if no specific reason can be articulated, administrative segregation is inappropriate. If administrative segregation is imposed, the prisoner should be afforded all privileges and comforts possible as if he were not segregated. Finally, in order to prevent such segregation from being used as punishment while still allowing adequate investigation, the court limited the segregation period to a maximum of three days.

In Woodring v. Whyte the court considered another habeas corpus proceeding in which seven inmates of the Huttonsville

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23 Id. at 231.
24 Id. at 232.
25 Id. at 234-35.
Correctional Center alleged that the warden had done nothing to implement a statutory scheme providing for partial commutation of sentence for good behavior. The legislation provided that, for each institution, a classification committee was to be created to classify "as soon as practicable" all prisoners into one of three classes according to "industry, conduct and obedience."

The court first agreed with the relators that the statute was mandatory because of the word "shall" in its language. The court then upheld the statute against the warden's claims that it constituted an unconstitutional delegation of legislative powers because it failed to set adequate standards for each of the three classifications. The court stated that "to be unconstitutional, the delegation must be of purely legislative power." The court also pointed to the modern trend of allowing the legislature to set standards broadly and to require less exactness in those standards. The court held that the statutory standards of "industry, conduct and obedience" were sufficient.

The court, however, refused to apply the statute to the entire sentence of prisoners who had served time before the statute had been passed. The court said that application of the statute to prestatute time would be a retroactive application and was not warranted by the equal protection arguments of the relators. Concluding that the right to time off for good behavior is a statutory right rather than a constitutional one, the court noted that only a rational basis was needed to justify a distinction between time served before the statute and time served after the statute. Because this new system was designed to provide an incentive for a prisoner to alter his behavior and because such an incentive did not exist under the old system, the court concluded that the statutory distinction involved here had a rational basis.

In Conner v. Griffith the court sustained a constitutional challenge to a statute which permitted the Board of Probation and Parole to re-imprison a parole violator without crediting the time served on parole against the original sentence. After having

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43 Id.
44 242 S.E.2d at 242.
45 Id. at 244.
46 Id. at 243.
47 Id. at 244.
48 Id. at 245-46.
served part of a sentence for grand larceny and spending twenty-one months on parole, the petitioner was arrested for a parole violation and returned to Huttonsville Correctional Center to serve the remaining portion of his original sentence without credit for the twenty-one months served on parole. The petitioner brought a writ of habeas corpus alleging that the statute violated the double jeopardy clause of the West Virginia Constitution by failing to require credit for time served on parole.

In sustaining the petitioner's contentions, the court viewed parole as a continued, albeit reduced, restraint on the parolee's freedom. The court also pointed out that, absent revocation, time spent on parole is counted toward the original sentence. Finally, the court concluded that the effect of not crediting time spent on parole toward the original sentence is to increase the total time the parolee is subject to serving. Because the violation of the terms of parole cannot furnish the grounds for additional punishment unless the act is criminal in nature, the court deemed this effect to be multiple punishment for the same offense and violative of the double jeopardy clause.

In State v. Hersman the court again dealt with a challenge to another statute based upon the double jeopardy clause of the West Virginia Constitution. The court held that a person sentenced as a youthful male offender under West Virginia Code § 25-4-6 is constitutionally entitled to credit for time spent at a correctional center. Upon a plea of guilty for possession of marijuana, petitioner was sentenced to the custody of the Commissioner of Corrections as provided for under the challenged statute. After having spent six months at the Davis Center, the superintendent recommended that he be released and put on probation. This recommendation was subsequently withdrawn and the petitioner was transferred to the Anthony Center presumably because of some misconduct by the petitioner. One and one-half months later the superintendent of Anthony Center informed the circuit court that the petitioner had been found unfit under § 25-4-6 and requested that he be returned to the circuit court for sentencing. Pursuant to § 25-4-6 petitioner was sentenced to ninety days in the Wood

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51 W. VA. CONST. art. III, § 5.
52 238 S.E.2d at 534.
54 W. VA. CONST. art. III, § 5.
55 242 S.E.2d at 561.
County jail without credit for the time spent at the correctional centers.

Although the statute left to the court's discretion the question whether an "unfit" prisoner is to be given credit for time already served, the court found it in conflict with the prohibition against multiple punishment for the same offense embodied in the double jeopardy clause. The court relied on past cases where time spent on parole was found deserving of credit. Justification for such credit is even stronger in a case like this where there are even greater restrictions on the freedoms of the prisoner.

The court decided still another case involving the double jeopardy clause and the sentencing of a prisoner in *Martin v. Leverette.* The petitioner had been given a life sentence under the Habitual Criminal Statute on the basis of three felony convictions, the last of which was for burglary in 1970. One of the prior convictions underlying the application of the Habitual Criminal Statute was voided by the United States District Court. The life sentence was also voided and the petitioner was resentenced to one to fifteen years for the burglary conviction and five years for another prior felony conviction, to run consecutively. Although given credit for time spent in jail serving the life sentence, petitioner was not credited for the time spent prior to and after trial on the burglary charge. He brought a writ of habeas corpus charging a violation of the double jeopardy and equal protection clauses of the West Virginia Constitution.

The court noted that the case was one of first impression and that the statute under challenge left to the court's discretion the question whether time spent in jail prior to and after trial was to be credited against the sentence. Pointing to the modern trend, the court stated that the failure to so credit a prisoner would constitute time spent in prison in excess of the sentence. As such, the statute was violative of the constitutional prohibition against multiple punishments for the same offense. The court also found that the discretion vested in the circuit courts was in violation of the

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55 244 S.E.2d 39 (W. Va. 1978).
57 The failure to give such credit was permitted by W. Va. Code § 61-11-24 (1977 Replacement Vol.).
59 244 S.E.2d at 41.
60 *Id.* at 42.
equal protection clause of the state constitution in that it makes possible unequal treatment of people in the same or similar circumstances with no apparent justification.\(^6\)

Finally, in *K. W. v. Werner*\(^4\) the court considered the contentions of two juveniles that their incarceration in the West Virginia Industrial School for Boys at Pruntytown violated their right to due process and the prohibitions against cruel and unusual punishment in the state and federal constitutions.\(^6\) At the time the petitions were filed, disciplinary practices at the institution included confinement, floor time, bench time and the use of mace. While it was admitted that the petitioners had been subjected to some of these practices, it was also noted that such practices had been abolished.

The court held that the use of bench time, floor time, and mace was cruel and unusual punishment and therefore forbidden.\(^6\) The court could find no adequate explanation why these practices should be permitted when practiced by an institution when the court would not hesitate to remove the child from such treatment if practiced by a parent. Regarding confinement, the court stated that "[s]olitary confinement is not to be used as a routine disciplinary procedure, but only in instances when physical restraint and isolation of a juvenile are absolutely necessary to enable him to gain personal control over himself."\(^7\)

The court held, however, that there was too severe a lack of evidence to find incarceration at Pruntytown in itself unconstitutional.\(^8\) The court seemed unwilling to take such drastic action in the absence of a positive showing of serious shortcomings.

II. **UTILITY RATE INCREASES**

In *State ex rel. Knight v. Public Service Commission*\(^9\) a customer of a public utility unsuccessfully challenged the constitutionality of a statute allowing public utilities to file rate increases with the West Virginia Public Service Commission and to place the increase into operation after 30 days, or after an additional 120

\(^{12}\) Id.
\(^{5}\) U.S. CONST. amends. VIII, XIV; W. VA. CONST. art. III, §§ 5, 10.
\(^{6}\) 242 S.E.2d at 911.
\(^{7}\) Id. at 916.
\(^{8}\) Id. at 915.
\(^{9}\) 245 S.E.2d 144 (W. Va. 1978).
The statute provided, however, that a bond be posted to guarantee a refund with interest to customers for that portion of the increase which might ultimately be disapproved by the commission. The commission had failed to conclude hearings on the reasonableness of a rate increase filed by Monongahela Power Company within the 150 day suspension period and the increase went into effect. The customer sought to prevent the commission from following a statutory scheme which he contended violated the constitutional provisions protecting his right to substantive and procedural due process.

With regard to the petitioner's substantive due process claims, the court agreed that there was a common law right to reasonable rates charged by state-created monopolies, but pointed out that the legislature was at liberty to choose any reasonable method available to it to protect that right. The court drew a strong analogy between the statute challenged here and similar provisions in the Interstate Commerce Act. In both statutes the suspension period for a rate increase was limited in order to protect the utility from losing large amounts of revenue that could not be recouped. To protect its customers, the utility is required to post a bond for repayment of that part of the increase later found to be unjustified. The court pointed out that irreparable harm could be done to utilities, especially small ones, if they are not allowed rate increases subject to refund. If severe enough, this harm could cause an interruption of vital services to a great number of people. Finally, too much of a delay in effectuating rate increases would have the effect of distributing present utility costs among future users rather than present users. Thus, the court found the statutory scheme reasonable.

Turning to the petitioner's procedural due process argument, the court relied on the three-part test as enunciated in North v. Board of Regents. First, the more valuable the right to be deprived, the more safeguards will be interposed. The court found that the amount of the petitioner's money at stake here was not large even in comparison to his $600 per month income. Second, due process protection must be afforded before deprivation unless a compelling public policy dictates otherwise. The court consid-

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73 245 S.E.2d at 152.
ered the policy of protecting utilities to insure their continued operation a sufficiently compelling public policy to justify denying the ratepayer his money pending termination of the proceedings. Third, temporary deprivation may not require as large a measure of due process protection as will permanent deprivation. The court pointed out that the deprivation in this case was only temporary and that provision was made in the statutory scheme to correct it. The court concluded from the North test, as applied to the facts of this case and the challenged statute, that the petitioner’s claims of unconstitutionality were not sufficient.75

III. JUDICIAL BUDGET—DISQUALIFICATION OF JUSTICES

In State ex rel. Bagley v. Blankenship,76 the court was faced with an unusual constitutional issue involving the power of the legislature over the budget of the judiciary. The Supreme Court of Appeals had submitted the judicial budget request to the state auditor and it had been processed through the Department of Finance and Administration. The request was then submitted to the legislature with the rest of the budget bill by the governor. The judicial budget, as finally passed by the legislature, showed a decrease in five of the line items and reflected a total reduction of approximately $1.7 million from the original request. Two attorneys subsequently sought a writ of mandamus to compel the clerk of the House of Delegates to publish a constitutionally correct budget bill without the decreases attempted by the legislature. The mandamus was predicated on the state constitutional provision which prohibits the legislature from decreasing line items relating to the judiciary.77

Before the substantive issues were considered, the court was faced with what might be termed a procedural issue of constitutional dimensions. Four of the five justices had disqualified themselves from deciding the case and the panel had been reconstituted by retired judges and other eligible jurists for the purpose of deciding this case.78 The respondent in the action had requested that the remaining justice, Darrell V. McGraw, disqualify himself or, in the alternative, be disqualified by the court under

75 245 S.E.2d at 153. For further discussion of State ex rel. Knight v. Public Service Comm’n see Case Comment, 81 W. VA. L. REV. 139 (1978).
77 W. VA. CONST. art. VI, § 51.
78 The panel was constituted in accordance with the provisions of W. VA. CONST. art. VIII, § 8.
Article VIII, section 8 of the state constitution because of bias, prejudice, partiality and due process violations. Justice McGraw could find no reason to disqualify himself, and the temporary panel deferred to the court in the resolution of this question. The court could find no authority in the provision to disqualify a judge or justice in any particular case such as this even in light of comments made by the justice before the case was heard. Although the court suggested that restraint be exercised in commenting on legislative action out of which future litigation might develop, it refused to limit the right to comment on matters of public interest. The court also stated that the disqualifications of a judge or justice to hear and determine the issues in any particular litigation would be considered under the Judicial Code of Ethics promulgated by the court. Finally, the court pointed out that the salaries of the justices were not in question in this particular case since they were set by statute and are independent of the budget request. Thus, the potential for personal interest is substantially reduced.

Turning to the main issue, the court gave little credence to the respondent’s contention that, because the state auditor never certified the judicial budget request, it was never constitutionally before the legislature during the 1978 regular session. The court pointed out that the request was transmitted to the state auditor, processed through the Department of Finance and Administration and submitted by the governor to the legislature as part of the state budget. The court concluded that the legislature’s acceptance of the request and the extensive review given to it showed that the legislature considered the request constitutionally before it.

The respondent’s assertion that to void the decreases would be to violate another constitutional provision prohibiting the causing of a budget deficit was also rejected by the court. It was not shown, but only asserted, that such action by the court would cause such a deficit. Moreover, the court pointed out that the judicial budget comprised only a small part of the entire state budget and that it was unlikely that this small part could be the determining cause of a deficit in so large a budget.

Finally, the court emphatically rejected the respondent’s contention that the judicial budget request was improper, unreasonable and constituted an abuse of discretion and had thus lost any constitutional protection it might have had. The court noted that

77 246 S.E.2d at 106. As to this issue, Justice McGraw disqualified himself.
78 W. Va. Const. art. VI, § 51.
the 1974 Judicial Reorganization Amendment gave the Supreme Court of Appeals general supervisory control over the state’s entire court system.\textsuperscript{81} The court pointed to increased services, better administration, expanded educational programs and other factors as justifying the budgetary increase. Finally, the court pointed to the express language of the constitutional provision which precludes any legislative decrease in the judicial budget as evidence of a clear intent on the part of the framers and the people who adopted it to preclude both legislative and executive alteration of the judicial budget once the request is submitted to the state auditor. The court recognized the large degree of independence the holding in this case gives the court over its own budgetary matters, and pointed out only that the justices must ultimately answer to the electorate.

As a final matter, the court held that the duty of the respondent clerk of the House of Delegates is clear and non-discretionary.\textsuperscript{82} As such, mandamus was deemed to be proper to require the discharge by a public officer of a non-discretionary duty.\textsuperscript{83}

IV. FIRST AMENDMENT

In \textit{State ex rel. Daily Mail Publishing Co. v. Smith}\textsuperscript{84} two newspapers had printed stories naming a juvenile charged in the fatal shooting of a student at a local junior high school. The prosecuting attorney sought and obtained indictments against the newspapers for violating West Virginia Code § 49-7-3 which forbids any newspaper from publishing the name of a child in connection with any juvenile proceeding without the permission of the trial court. The newspapers initiated proceedings to prohibit the respondent judges of the Circuit Court of Kanawha County from prosecuting the petitioners under the code provision. The petitioners contended that the statute constituted a prior restraint on publications and was repugnant to article III, § 7 of the West Virginia Constitution which is the state counterpart to the first amendment of the United States Constitution.

Although the normal course would be to decide the constitu-
tional question on state grounds, the court preferred to rely on the well-developed body of federal law rather than on an essentially non-existent body of state law on the subject. The court noted that the idea that state constitutional law is ordinarily to be used to afford broader protection than that afforded by federal law was not applicable in this case because federal law in this area is already quite broad in the protection it provides. In addition, the court preferred to use federal law because of the interrelationships among the various news media some of which are governed primarily by federal law. The use of state law might result in a loss of uniformity in the resolution of these issues throughout the United States.

With regard to the petitioners' challenge to the statute, the court first pointed to the United States Supreme Court's statement of the rule regarding prior restraint of free speech as stated in *Nebraska Press Assn. v. Stuart.* In that case the court said "any prior restraint comes to this court with a 'heavy presumption' against its constitutional validity." The court in *Daily Mail* clearly intended to follow this language. Indeed, the court suggests that the United States Supreme Court would probably go so far as to say that, except for pornography, there is no governmental interest sufficiently compelling to justify a prior restraint in times of peace.

The court rejected the state's argument that a child's interest in anonymity and the state's interest in assuring him a future free from prejudice are sufficiently compelling to permit the statute under review to withstand constitutional scrutiny. The court stated that the United States Supreme Court has consistently held that private interests were not sufficiently compelling to permit a prior restraint. For example, the court pointed to *Oklahoma Publishing Co. v. District Court* in which a state court enjoined the news media from publishing the name or photograph of a juvenile pending a proceeding in the juvenile system under a statute similar to the one under review here. The United States Supreme Court held the prior restraint unconstitutional despite the interests of the youth in maintaining his anonymity. The court also referred to *Cox Broadcasting Corp. v. Cohen* in which the United States Supreme

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Court held that a tort action for invasion of privacy grounded upon a newspaper's publication of the name of a rape victim (which was a matter of public record) was an unconstitutional restraint in spite of the legitimate state interest in protecting innocent people from embarrassment. Thus relying on these precedents, the court held the statute in question unconstitutional.

CONTRACTS

In *Snodgrass v. Sisson's Mobile Home Sales, Inc.*, the Supreme Court of Appeals decided the appropriate statute of limitations for a suit to collect a penalty for usurious interest and the time when the appropriate statute begins to run. The plaintiffs purchased a mobile home on an installment payment contract dated September 15, 1972. The contract provided for ninety-six monthly payments, the first payment falling due on October 30, 1972. The plaintiffs instituted a suit against the seller of the mobile home, its manufacturer, and General Electric Corporation, the financer, on May 3, 1974, alleging that the contract for the loan was made at a greater rate of interest than that permitted by law.

The circuit court granted summary judgment against the plaintiffs, holding that a one year statute of limitations was applicable and that the statute began to run on the date of the agreement; thus the suit was barred since it was filed more than one year after the date of the agreement. The court unanimously agreed that a one year statute of limitations was applicable, but reversed the circuit court's decision as to when the statute began to run, ruling that the debtor has the right to bring suit under West Virginia Code § 47-6-6 at any time until one year after the last payment is due or made on the usurious contract.

The court reasoned that the recovery allowed on a usurious contract was correctly characterized as a penalty since (1) recovery

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89 244 S.E.2d 321 (W. Va. 1978).
90 Id. at 322.
91 W. VA. CODE § 47-6-6 (1976 Replacement Vol.) provides in part: "All contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than is permitted by law shall be void as to all interest provided for in any such contract or assurance, and the borrower or debtor may, in addition, recover from the original lender or creditor or other holder not in due course an amount equal to four times all interest agreed to be paid and in any event a minimum of one hundred dollars."
92 244 S.E.2d at 322.
93 Id.
94 Id. at 327.
is statutorily created and is imposed as punishment for a specific act made unlawful by the statute and (2) the amount authorized as a penalty ordinarily bears no relationship to the harm done.  

At the time the suit was instituted there was no specific statute of limitations applicable to the collection of penalties. The court reasoned that a suit to collect a penalty is a personal action, possessing neither common law survivability nor statutory survivability; therefore the controlling statute of limitations is West Virginia Code § 55-2-12(c), providing for a one year limitation on the right to bring the suit.

The court then brought West Virginia into the majority position regarding when the statute begins to run.  Even though the cause of action accrues on the date the usurious agreement is signed, the court held that the statute of limitations did not begin to run until the last payment is due or made on the usurious contract. The court felt a liberal rule construing the statute in favor of the debtor was warranted since usury is against public policy and the legislative intent supports such a construction.

CRIMINAL LAW AND PROCEDURE

I. SEARCH AND SEIZURE

The court has shown its concern for the guarantee against unreasonable searches and seizures in three recent opinions. In order to assure the vitality of this guarantee the court emphasized and strengthened the procedural requirements for a valid search.

The defendant in State v. McKinney appealed his conviction for first degree murder and assigned as one of the errors the trial court's refusal to suppress evidence obtained through a war-
rantless search of his home and place of business. Although he had 
signed a consent to the search, the trial court failed to make a 
determination as to the voluntariness of this consent. In reversing 
the conviction and remanding for a new trial the court said:

Such determination is of vital importance in the absence of a 
search warrant. We are of the opinion that, as in the case of a 
confession, the trial court must, even in the absence of a specific 
request, determine the voluntariness of a consent to search exe-
cuted by the defendant before the evidence obtained by the 
search can be introduced.\textsuperscript{103}

The mandatory requirement for a hearing, with or without a 
request by the defendant, is a break from the rule set out in \textit{State 
v. Harr}\textsuperscript{104} that a hearing on the admissibility of evidence is neces-
sary \textit{only} when the defendant challenges the lawfulness of the 
search. By surrounding a signed consent to search with the same 
procedural protection that surrounds the admission of a confes-
sion, the court is apparently adopting the position of \textit{State v. 
Wills}\textsuperscript{105} that evidence obtained in a search can amount to and be 
as damaging as a statement made by the defendant. Before admit-
ting into evidence any matter obtained directly from the defendant 
the court wants to be certain that the defendant voluntarily sur-
rendered that matter.\textsuperscript{106}

The issue in \textit{State v. Frisby}\textsuperscript{107} was whether the initial stopping 
of the defendant’s automobile was legal. City police stopped his 
van because it bore a license plate which did not appear to have a 
state-of-origin identification.\textsuperscript{108} While the police were checking the

\textsuperscript{103} \textit{Id.} at 810.

\textsuperscript{104} 156 W. Va. 492, 194 S.E.2d 652 (1973).

\textsuperscript{105} 91 W. Va. 659, 114 S.E. 261 (1922).

\textsuperscript{106} It is interesting to note that the cases cited by the court to support its 
requirement of a hearing to determine voluntariness, \textit{State v. Boyd}, 233 S.E.2d 710 
Fortner}, 150 W. Va. 571, 148 S.E.2d 669 (1966), all dealt with hearings to determine 
the voluntariness of confessions. They required that the statements be voluntary 
in the \textit{Miranda} sense, \textit{i.e.}, that the defendant be advised of his constitutional rights 
and be given an opportunity to exercise them. One wonders whether the court 
intends to apply the same standard to consent to search cases and require that the 
defendant be informed that he has the constitutional right not to consent and to 
require a search warrant or whether it will continue to apply the rule in \textit{State v. 
Basham}, 223 S.E.2d 63 (W. Va. 1976), that a defendant does \textit{not} have to be so 
informed before he can grant a valid consent to search.

\textsuperscript{107} 245 S.E.2d 622 (W. Va. 1978).

\textsuperscript{108} The license plate had a number on it with the letters BLMO superimposed. 
Upon investigation it was learned that the letters stood for “beyond the limits of
registration one of them noticed a rifle in plain view inside the van and smelled marijuana. The defendant was arrested and a search warrant was obtained. The police found 175 pounds of marijuana in the vehicle. The defendant was convicted of possession of a controlled substance with intent to deliver.

The court said that although the police may stop a motorist to examine his license and registration without violating the prohibition against unreasonable searches and seizures, such a stop will be valid only if it is based upon a reasonable ground to believe that such an investigation is necessary or if it is done on a random basis according to a preconceived plan. Such a stop cannot be used as a pretext to make what would otherwise be an unwarranted intrusion.\textsuperscript{109} It held that in this instance the detention of the defendant was based on reasonable grounds because of the peculiarity of the registration plate with which the average police officer would not be familiar. Therefore the evidence seized as a result of the stop was not tainted.

This was a case of first impression in West Virginia on the question of when the police may legally stop an automobile. It is generally accepted that the stopping of a car to check the driver's license and registration is a seizure.\textsuperscript{110} Therefore, if the police are going to stop a car they must have reasonable grounds to believe that the occupants have committed a traffic violation;\textsuperscript{111} or have committed or are about to commit a crime;\textsuperscript{112} or the stop must be based on a nonarbitrary, uniform procedure for checking licenses and registrations.\textsuperscript{113} The court was obviously concerned with the use of motor vehicle licensing laws as a pretext for conducting what would otherwise be unlawful searches to discover evidence of violations of other laws. To avoid this possibility, the court decided to apply the \textit{Terry v. Ohio}\textsuperscript{114} standard to determine when there may

\begin{footnotesize}
\begin{itemize}
\item[109] See People v. Ingle, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975);
\item[111] State v. Johnson, 26 Or. App. 599, 554 P.2d 194 (1976);
\item[116] 392 U.S. 1 (1967). The police have to be able to point to specific facts which would cause a reasonable man to believe that the intrusion on the freedom of the
\end{itemize}
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be a warrantless stopping of an automobile.

In State v. McNeal, in which the defendant appealed his conviction of robbery by violence, the court strongly restated its requirement that a search in order to be reasonable and therefore lawful must be made, except in a few recognized exigent circumstances, pursuant to a search or arrest warrant. The police, after being informed that the defendant had been seen running from the vicinity of a robbery, went to a house looking for the defendant. They knocked on the door and then waited five or ten minutes until someone replied but refused to open the door. Believing that the person inside was the defendant, they requested and received permission from a superior officer to enter the house. They then proceeded to kick down the door and search the house. They seized a paring knife which was introduced into evidence at the trial.

The court reversed the conviction, stating that the defendant had been arrested unlawfully and therefore any evidence obtained pursuant to this unlawful arrest was inadmissible at the defendant's trial. Although the opinion is not clear as to whether the principle objection of the court is the failure to obtain a search warrant or the failure to obtain an arrest warrant, what is clear is that the police must have one or the other before they may conduct a lawful search. Only those exigent circumstances listed in State v. Duvernoy will excuse a warrantless search. Furthermore, the court indicates that it will define exigent circumstances very narrowly and if it appears that there is the opportunity to obtain a warrant (either a search warrant or an arrest warrant) then one must be obtained in order to conduct a lawful search.

II. Discovery

In State v. Sette the West Virginia Supreme Court of Appeals overturned the 1975 conviction of Laurence Hugh Sette as an individual is warranted and that the manner of the intrusion is appropriate to the circumstances.

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114 251 S.E.2d 484 (W. Va. 1978).
115 Id. at 489.
116 Id. at 488.
117 156 W. Va. 578, 584, 195 S.E.2d 631, 635 (1973). The exceptions are an automobile in motion, searches made in hot pursuit, searches around the area where the arrest is made, things that are obvious to the senses, property that has been abandoned, and searches which are consented to.
118 251 S.E.2d at 488-89.
accessory before the fact to murder in the first degree. In addition to dealing with issues concerning venue, the criteria to be considered in ruling on the admissibility of inflammatory evidence, and impeachment of prosecution witnesses by prior inconsistent statements, the Sette decision continued the court's liberal approach in protecting the rights of criminal defendants by holding that "absent compelling circumstances, once a prosecution witness has testified, a defendant upon proper motion is entitled to have, for the purpose of cross-examination, any written statements of the witness in the State's possession." The court went on to say that "the defendant must be given a reasonable opportunity to study the statements and prepare cross-examination."

The defense counsel had made several timely motions to obtain a written confession, implicating Sette as an accessory before the fact, signed by the state's primary witness. The trial judge examined the statement in chambers and concluded that it contained nothing which would exculpate the defendant. The trial court, therefore, denied each of defense counsel's motions to review the statement for the purpose of cross-examination.

Although pretrial discovery in criminal cases is within the sound discretion of the trial court, there have been substantial inroads into this discretionary area. In Sette the court agreed with the trial judge that the statement did not contain exculpatory material, noted that the statement had not been used to refresh the witness' recollection on the witness stand, but nevertheless found that defense counsel, not the trial judge, was the better party to determine whether the prior statement would be useful for cross-examination purposes.

111 Id. at 470-71.
112 Id. at 471.
114 Brady v. Maryland, 373 U.S. 83 (1963)(holding that the matters known to the prosecution which are obviously exculpatory in nature or which may be relevant and favorable to the defendant must be made available to the defendant); State v. Dudick, 213 S.E.2d 458 (W. Va. 1975)(holding that after a witness has testified from notes used to refresh his recollection, the defense is absolutely entitled to inspect the notes from which the witness testified and must be given a reasonable opportunity to prepare cross examination); State v. Smith, 156 W. Va. 385, 193 S.E.2d 550 (1972)(defendant has a right to a sample of confiscated contraband, alleged to have been in his possession, for independent scientific evaluation); State v. Cowan, 156 W. Va. 827, 197 S.E.2d 641 (1973)(failure of the prosecution to disclose a letter written by the defendant even though obtained during trial is grounds for a new trial when such non-disclosure is prejudicial).
The court made it clear that in West Virginia there is to be a liberal policy of discovery in criminal cases. The court noted that "[t]here are some circuits in this State in which there are almost no reversals of criminal trials, and that is because the trial judge grants every reasonable request relating to discovery, rulings in limine, evidence, and other discretionary matters during the trial."  

III. PRETRIAL IDENTIFICATION

In *State v. McNeal*, the defendant had been convicted of robbery by violence. He, along with another man, had allegedly robbed a gas station by sloshing gasoline through the window of the station and waiting with a knife for the attendant to exit. Sometime after the robbers had fled the scene the police went to the defendant's residence, kicked in the door, and handcuffed the defendant. Later, the attendant was brought to the house and spontaneously identified the defendant, who was sitting in a chair handcuffed with two other black men standing beside him.

The defendant's conviction was reversed by the court on grounds that evidence gained through unlawful search and seizure and a confession obtained in violation of the fifth and fourteenth amendments to the United States Constitution were admitted into evidence. The court agreed that the one-on-one showing of a handcuffed suspect, surrounded by police in a home forcibly entered, was suggestive and unnecessary, but rejected a *per se* rule of exclusion. The test applied was that adopted in *State v. Casdorph*:

> [W]hether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

The court, considering these factors in light of the facts of the case, held that there was no error in the admission of the evidence of the identification.

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125  242 S.E.2d at 473.
126  251 S.E.2d 484 (W. Va. 1978).
128  Id. at court syllabus point 3.
IV. INDICTMENTS

In *State v. Furner*, the defendant was indicted for assault and battery. The indictment read in relevant part: “Furner... in and upon one Fray Queen, Jr., an assault did make... and him, the said Fray Queen, Jr., did then and there strike, beat and batter, cut and wound, with intent him, the said Fray Queen, Jr., to maim, disfigure and kill.” At his trial, the defendant was found guilty of assault and battery.

The defendant moved to quash the indictment on the grounds that it averred that the victim, rather than the defendant, committed the offense, and that the omission of the defendant’s name from the charging part of the indictment was an incurable defect. The trial court denied the motion and the West Virginia Supreme Court of Appeals affirmed its action.

The court noted that the defendant did not allege that he was not plainly informed of the charges against him. The defense relied on *State ex rel. McCormick v. Hall* which had held a similar defect to be fatal and incurable. The court in overruling *McCormick* held “as long as the accused is plainly and fully informed that he is accused of a crime against a person named, the transposition of names in the videlicet clause of the indictment is not a fatal defect.”

The court noted that the indictment clearly stated the nature and cause of the accusation against the defendant which would enable him to prepare his defense and plead his conviction as a bar to later prosecution for the same offense. The court went on to state: “In the past, courts often voided convictions in cases like these, while overlooking the most sensitive and flagrant abuses of citizens by their governments. We intend to correct this misdirection, wherever possible, hoping that we always recognize it.”

V. IMPEACHMENT

When a witness testifies, the credibility of his testimony is subject to challenge by the introduction of evidence of prior state-
ments made by the witness which are inconsistent with his testimony at trial. 138 Prior to the decision of State v. Sette, 137 the rule in West Virginia provided that the impeachment of a witness by prior inconsistent statements could be accomplished only when the proper foundation had been laid during cross-examination of the witness.139 Establishing the proper foundation consisted of informing the witness of the alleged statement and the circumstances under which it was said to have been made with sufficient certainty to enable the witness to identify the particular occasion.139

At trial, the defendant attempted to introduce certain testimony by Denman Kelley. The proffered testimony was, in effect, that the state's witness Kathy West had told him that Sette had nothing to do with the murder. The statement was alleged to have been made while Kelley and West were incarcerated in the Monongalia County jail. The trial court sustained objections by the state to the introduction of the testimony on the grounds that counsel for Sette had failed to establish the foundation for such testimony during cross-examination of Miss West. Justice Neely, writing for the court, stated: "We disagree that such a foundation was essential as a precondition to the admission of this evidence, which was highly probative of the most important secondary fact in issue, namely whether Kathy West was a liar."140

In support of the foundation requirement, it has been said that it: (1) avoids unfair surprise to the accused; (2) saves time, in that an admission by the witness may make the proof unnecessary; and (3) gives the witness a fair chance to explain the alleged discrepancy.141 However, as the courts have expanded the quest for full development of all relevant evidence on the issues, the requirement of confrontation on cross-examination has been attacked as a cumbersome procedural restriction on the development of pertinent evidence.142 As a result of these attacks on the foundation requirement, the rigid application of the requirement has been relaxed and made discretionary in some instances.143 The adoption

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139 State v. Carduff, 142 W. Va. 18, 93 S.E.2d 502 (1956).
139 Id.
140 242 S.E.2d at 471-72.
141 MCCORMICK, EVIDENCE § 37 (2d ed. 1972).
142 3A WIGMORE, EVIDENCE § 1027 (Chadbourn rev. 1975).
143 The UNIFORM RULE OF EVIDENCE 22(b) provides: Extrinsic evidence of prior contradictory statements whether oral or writ-
of Rule 613 of the Federal Rules of Evidence reflects the modern flexible approach to confrontation, in that the witness must merely be afforded an opportunity to explain and the opposing party an opportunity to examine on the inconsistent statement without regard to the sequence of these events. The majority of jurisdictions retain the rigid confrontation on cross-examination requirement, however.

With its decision on the confrontation foundation requirement in *Sette*, the West Virginia court appears to go beyond the modern trend reflected in Rule 613 to a complete abolition of the necessity to lay a foundation for subsequent impeachment of a witness during the cross-examination of such witness. It is significant to note that the court does not mention Rule-613 or any other authority for its decision to abolish the foundation requirement but in doing so it summarily overrules a long line of case precedent in West Virginia without much discussion of the impact of its decision. The treatment of the issue appears cursory in comparison to the discussion of the other issues which influence the ultimate decision. With such minimum comment by the court on this issue, it is difficult to ascertain the full extent to which the court abolished the requirement of laying a foundation for impeachment of a witness during cross-examination.

While the *Sette* decision apparently removes a procedural requirement from counsel, the practical impact of the decision on the development of impeachment evidence may be somewhat limited. Even though under *Sette* counsel is no longer required to lay the foundation for impeachment during cross-examination, it may nevertheless be desirable to do so. The impeachment value of the testimony which contradicts the witness may be heightened if preceded by a denial of the statement by the witness. An explanation following a denial is likely to be more damaging to the credibility of the witness than an explanation subsequent to confrontation with the statement where the witness was not questioned about the statement on cross-examination.

ten, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement.

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144 *Fed. R. Evm. 613, Comment (b).*

145 *See 98 C.J.S. Witnesses § 599 (1957).*

VI. EVIDENCE

A. Voluntary Confession

The court in 1977 and 1978 handed down several decisions intended to clarify prior decisions on the admissibility of guilty pleas and evidence rather than to break new ground. In *Thomas v. Leverette* the petitioner appealed the denial of his writ of habeas corpus which he had filed after he had pleaded guilty to second degree murder. One of the grounds for appeal was the trial court's failure to meet the requirements of *Call v. McKenzie* when it accepted his guilty plea. In accepting his plea, the trial court conducted a rather perfunctory questioning of the petitioner before accepting his plea as being voluntary.

The court reversed and remanded the case for further hearings because from the record it could not determine whether the petitioner's guilty plea was knowingly and voluntarily made. It stated that under the due process clause of the West Virginia Constitution, in order for a defendant to enter a plea of guilty he must understand the nature of the charge against him. The court is required to explain all the elements of the crime charged, including intent. Failure to do so will mean that the defendant does not have a complete understanding of the charge against him and consequently his guilty plea cannot be voluntary.

West Virginia has long required that before a guilty plea is accepted the trial court must be sure that the defendant is entering the plea voluntarily and with a full understanding of the nature of the charge against him. *Call v. McKenzie* was intended to set out what information must be conveyed to the defendant to insure that he has the requisite understanding of the charges against him and of his constitutional rights. By requiring that the defendant be informed that intent is an element of the crime charged, this decision will help assure the defendant's full understanding. Further-

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147 239 S.E.2d 500 (W. Va. 1977).
148 220 S.E.2d 665 (W. Va. 1975). *Call* suggested that specific inquiries should be made of the defendant at the time his guilty plea is taken.
149 W. VA. CONST. art. III, § 10, which states "No person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers."
150 239 S.E.2d at 503.
more, it brings the state in line with the United States Supreme Court decision of *Henderson v. Morgan*.152

**B. Incriminating Statements—In Camera Hearing**

The court rendered what would at first appear to be two contradictory opinions on the necessity of an *in camera* hearing to determine the voluntariness of incriminating statements made by the defendant before allowing them to be introduced into evidence. *Wilhelm v. Whyte*153 was an original habeas corpus proceeding in which the petitioner sought to overturn his conviction for second degree murder. One of the alleged errors was that without first holding an *in camera* hearing to determine the voluntariness of the defendant's statements, the trial court allowed several witnesses to testify that the petitioner had stated at the scene of the crime that he had shot the decedent. Where the statements were made prior to any action taken by the police, the court held that based upon the rule established in *State v. Johnson*154 it was not necessary to hold an *in camera* hearing before admitting the spontaneous statements into evidence.155 Therefore no error had been committed and the writ for habeas corpus was denied.

In *State v. Sanders*,156 however, the court held that the trial court had erred by failing to hold an *in camera* hearing to determine the voluntariness of incriminating statements. The defendant had appealed her conviction for first degree murder and assigned as one of the errors the failure of the trial court to hold a hearing on the question of the voluntariness of statements she made to a friend. At the time the statements were made the defendant was in a hospital, under police custody, being treated for an attempted suicide. She had been diagnosed by a hospital psychiatrist as "suicidally depressed and mentally ill."157 The court stated that based on several of its prior decisions158 an *in camera* hearing

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152 426 U.S. 637 (1976). The Supreme Court held that a guilty plea to second degree murder was involuntary and therefore constitutionally defective as a denial of due process because the state court had failed to inform the defendant that intent was an element of the crime.


155 In *Wilhelm*, the court after citing *Johnson* said: "There, we held that a spontaneous statement by a defendant prior to any action by a police officer and before an accusation, arrest or any custodial interrogation is made or undertaken, may be admitted into evidence without first holding an *in camera* hearing to determine its voluntariness." 239 S.E.2d at 740.


157 Id. at 556.

158 State v. Johnson, 226 S.E.2d 442 (W. Va. 1976); State v. Starr, 216 S.E.2d
on the voluntariness of admissions or confessions of a defendant was required. It specifically held that:

In a trial for murder where the defendant raises insanity as the sole defense, the court upon request should conduct an in camera hearing to determine whether incriminating statements made by the defendant to a third party while in a hospital emergency room shortly after committing the homicide, attempting suicide, and having been diagnosed by the attending staff psychiatrist as “suicidally depressed and mentally ill,” were voluntary and admissible into evidence.\(^{159}\)

It would at first appear rather difficult to reconcile some of the language used by the court in State v. Sanders with the decision in Wilhelm v. Whyte. In Sanders the court rather emphatically said that in camera hearings on voluntariness of incriminating statements are mandatory regardless of to whom they are made. In Sanders, however, the defendant was in police custody when she made the incriminating statements. In State v. Johnson the court had specifically held that it was this fact of police custody that made the difference between whether or not an in camera hearing was required.\(^{160}\) Therefore, based on this difference in circumstances between Wilhelm and Sanders and the court’s statement in Wilhelm that Johnson was directly applicable, it is evident that the court is not willing to change its position that a hearing on voluntariness is not mandatory when incriminating statements are made before the police have taken any action in regard to the defendant. The more difficult problem is trying to reconcile the holding in Sanders with prior decisions. The holding certainly indicates that an in camera hearing is required only if the defendant requests it and that absent such a request the trial court is not required to hold one on its own motion. This goes against the very strong statements in State v. Smith,\(^ {161}\) State v. Starr,\(^ {162}\) and State


\(^{159}\) 242 S.E.2d at 557 (emphasis added).

\(^{160}\) 226 S.E.2d at 445-46.

\(^{161}\) “Such a determination [the voluntariness of a confession] must be made by the trial court before a confession may be heard by a jury whether the defendant requests the hearing or not.” 212 S.E.2d at 762. “[I]n relation to the admissibility of statements made by one being interrogated by the police, . . . no distinction can be drawn between statements which are direct confessions and statements which amount to admissions of part or all of an offense.” Id. at 763.

\(^{162}\) “Whether this statement constitutes a confession or an admission is insignificant . . . . In either event, it is the mandatory duty of the trial court to deter-
v. Johnson that when a defendant makes an incriminating statement while in police custody a hearing on the voluntariness of that statement is mandatory. The only possible explanations for the court’s statement in Sanders are either that it did not actually mean what it said or that it is creating an exception to the mandatory requirement for cases where insanity is the sole defense. Clarification will have to await future decisions.

C. In Court Identification

State v. Pratt is the only case in the area of admissibility of evidence in which the court established new ground. The defendant was identified in court by witnesses who had also identified him before trial from photographs shown them by the police. The defendant requested that there be a hearing out of the presence of the jury to determine whether the photographic display used by the police was overly suggestive so as to taint the in court identification. He also asked to be allowed to examine the display book. The trial court denied both requests.

The court, after stating that there was no authority on point in West Virginia, adopted the view that a trial court must hold an in camera hearing on the admissibility of an in court identification when it is challenged as being tainted by a pretrial identification made under constitutionally impermissible conditions. Furthermore, the defendant must be allowed to examine the photographs used in the pretrial identification.

Although the court did not discuss what would be constitutionally impermissible conditions, presumably it will apply the same standards to a photographic identification as it has applied to line-up and show-up identifications.

mine, out of the jury’s presence, the voluntariness of incriminating statements made by the defendant, prior to admitting the same into evidence.” 216 S.E.2d at 248 (emphasis added).

“he was definitely in the custody of a police officer and was then subject to the pressures of such arrest and custody. In these circumstances the failure of the trial court to provide the defendant with a voluntariness hearing outside the presence of the jury constitutes reversible error.” 226 S.E.2d at 446.

For further discussion of State v. Sanders see Case Comment, 81 W. Va. L. Rsv. 133 (1978).

244 S.E.2d 227 (W. Va. 1978).

Id. at 234.

Id. at 235.

D. Collateral Crimes

The issue in *State v. Spicer*\(^{169}\) was the admissibility of evidence of other crimes. The defendant appealed his conviction for armed robbery of three dollars on the ground that the evidence of collateral criminal acts was so extensive and excessive that it prejudiced him and denied him a fair trial. At the trial the defendant's victim testified in great detail about her abduction and rape which were committed in conjunction with the armed robbery. Over the defendant's objection the trial court allowed into evidence the testimony of two doctors who confirmed that the victim had engaged in sexual intercourse within the time she alleged she had been raped. The prosecuting attorney maintained that their testimony was necessary to corroborate the victim's testimony. He also dwelled on the rape in his opening and closing statements.

The defendant claimed that although some evidence of the abduction and rape was admissible under the fourth exception established in *State v. Thomas*,\(^{170}\) here the evidence of rape, which was immaterial, irrelevant, and prejudicial, was so excessive that it denied him a fair trial. The state conceded that the defendant was denied due process because the evidence of the rape was so extensive that it amounted to trying him for a crime for which he had not been charged. However, the court disagreed with the state and said that the issue was not whether the defendant had been tried for a crime not charged but "whether the defendant has been denied a fair trial as a result of the evidence and prosecutorial comments thereon."\(^{171}\) It stated that the doctor's testimony was not necessary to corroborate the victim's testimony since it had already been corroborated. Even if there were such a need, a less prejudicial means should have been used. Furthermore, the testimony as to the details of the rape and the testimony of the doctors was inadmissible because it did not serve to show any element of...
the crime being tried and was not necessary for the jury's understanding of how the crime was committed. The court held that the indiscriminate admission of evidence of the rape combined with the remarks of the prosecuting attorney was prejudicial and denied the defendant a fair trial.\textsuperscript{172}

In \textit{State v. Thomas} the court had given two reasons why a trial court might not permit otherwise admissible evidence of collateral crimes: (1) the evidence of other crimes might prejudice the jury so as to believe the defendant guilty of the crime charged; and (2) it forces the defendant to defend himself against charges not named in the indictment.\textsuperscript{173} The court in \textit{Spicer} shows that it is the problem of prejudice that is the real concern. The means of avoiding possible prejudice is to apply the balancing test set out in \textit{Thomas}: "(1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will . . . (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury . . . ."\textsuperscript{174} After \textit{Spicer}, however, a court perhaps no longer has any discretion regarding the exclusion of such evidence; it might now be required to exclude all evidence except that which is absolutely necessary and even that evidence must be tailored so that it will be presented in the least prejudicial manner.

\textbf{VII. INEFFECTIVE ASSISTANCE OF COUNSEL}

In the area of ineffective assistance of counsel, defendants often allege that their attorney did not have time to adequately prepare a defense. This allegation is usually presented in one of two ways: counsel was appointed too late; or, although retained or appointed well in advance of trial, counsel failed to expend the necessary effort to prepare the defense.

It is a well established rule in West Virginia that the refusal to allow defense counsel sufficient time to prepare for trial is a denial of the right to effective assistance of counsel.\textsuperscript{175} On the other hand, there had never been any guidelines as to what constituted a sufficient time.\textsuperscript{176} In \textit{Housden v. Leverette},\textsuperscript{177} however, the court

\textsuperscript{172} Id. at 927.

\textsuperscript{173} 203 S.E.2d at 456.

\textsuperscript{174} Id.

\textsuperscript{175} State ex rel. West Virginia Pittsburgh Coal Co. v. Eno, 135 W. Va. 473, 63 S.E.2d 845 (1951).

\textsuperscript{176} Both the United States Supreme Court and the Supreme Court of Appeals of West Virginia had rejected any per se rule, even where counsel had less than a
adopted the Fourth Circuit rule\textsuperscript{178} that there is a rebuttable presumption of ineffective counsel where there is an interval of one day or less between the appointment of counsel and trial or the entry of a guilty plea. This presumption is completely rebutted by evidence showing competent representation.\textsuperscript{179}

Another claim of incompetent counsel often arises from the defendant's constitutional right to appeal. In \textit{Turner v. Haynes},\textsuperscript{180} the attorney told his client that he would take the necessary steps to perfect an appeal. After reviewing the record, however, the attorney concluded that an appeal would be frivolous. Consequently he wrote the defendant that if the defendant still wanted to appeal, he would request the court to appoint a new attorney for that purpose.\textsuperscript{181} The attorney never filed an appeal.

The court held that counsel's failure to file an appeal, even though counsel believed that such an appeal would not be meritorious, constituted ineffective assistance of counsel. The court stated that it was for the court alone to determine the merits of an appeal. Since the attorney had usurped the responsibility of the court, he had failed in his duty to the defendant. "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client."\textsuperscript{182}

\textit{Turner} effectively changes the attorney's duty from simply advising his client regarding the right and manner of appeal\textsuperscript{183} to forcing the attorney, whenever requested, to attempt an appeal. Although the court does acknowledge the possibility of withdrawal where counsel finds the appeal to be "wholly frivolous,"\textsuperscript{184} even then counsel must still support his client's appeal until the court permits withdrawal.\textsuperscript{185}

\textsuperscript{177} 241 S.E.2d 810 (W. Va. 1978).
\textsuperscript{178} Id. at 811 (cases cited therein).
\textsuperscript{179} Id. at 812. E.g., Garland v. Cox, 472 F.2d 875, 879 (4th Cir.), cert. denied, 414 U.S. 908 (1973).
\textsuperscript{181} The attorney never received any reply from the defendant and assumed the defendant did not want to press an appeal.
\textsuperscript{182} 245 S.E.2d at 630, \textit{quoting} Anders v. California, 386 U.S. 738, 744 (1967).
\textsuperscript{183} Nelson v. Peyton, 415 F.2d 1154 (4th Cir. 1969).
\textsuperscript{184} 245 S.E.2d at 631.
\textsuperscript{185} Id. The attorney must file a brief highlighting all possible issues which
The West Virginia court also considered whether a criminal defendant was entitled to new counsel where he did not "get along" with his court appointed attorney. In *Watson v. Black,* the court recognized the defendant's right to retain counsel of his own choice, but rejected any contention that an indigent defendant has a right to court appointed counsel of his own choosing. An indigent could demand a different court appointed lawyer if the defendant could demonstrate "good cause." Good cause, however, is not satisfied by the mere failure to get along with defense counsel. "In order to establish good cause the defendant must show: (1) conflict of interest; (2) a complete breakdown in communication with his counsel after exhaustion of good faith efforts to work with counsel; or (3) an irreconcilable conflict which might lead to an unjust verdict." The court failed to sufficiently describe what is necessary to satisfy any of these criteria, but the court held that if any one of these three is suggested, the trial court should hold a hearing on the matter and dispose of it on the record.

In *State v. Pratt,* the court considered whether the inexperience of trial counsel can in itself constitute lack of effective counsel. In *Pratt,* the appointed attorney moved the court to appoint a more experienced attorney and the trial court refused. Although indicating that inexperience alone is not proof of ineffectiveness, the court did warn that the trial court should see that "oppression does not occur in criminal cases because of prosecutorial overmatch with defense counsel."

**VIII. Presumptions**

Presumptions in the criminal law were once again considered by the court in *Jones v. Warden, West Virginia Penitentiary.* In *Jones,* the court entertained the question of whether the rule in...
State v. Pendry should be applied retroactively. Pendry had held that the state was required to prove beyond a reasonable doubt every material element of the crime and that the state could not be aided in this task by a presumptive instruction.

In Jones the court held the Pendry rule to be fully retroactive, allowing it to be used in a collateral attack against a final conviction. "Safeguarding the integrity of the fact-finding process..." was the purpose behind the court's decision. The court expressed the view that when applying a new constitutional doctrine such as Pendry, which was designed to overcome interference with the trial court's truth-finding function and which could possibly raise serious questions as to past guilty verdicts, the only means of accomplishing the purpose of the doctrine would be to give the doctrine complete retroactive effect.

Although the retroactivity of Pendry holds interesting implications for the attorney, interest in the case also arises over the possibility of the application of the harmless error rule in these cases. Justice Neely in his concurring opinion stressed the need for such an application, while Justice Miller opposed that view. Justice Neely looked to the possible effect of the retroactivity of Pendry and lamented the potential wholesale release of criminals. Justice Neely felt that by applying the harmless error rule the potential impact on the administration of justice would be lessened and the defendant's rights still protected. He would apply the harmless error rule to dismiss a collateral challenge to a prior conviction "[w]here it appears that the evidence is so overwhelmingly against the defendant; his defense is so utterly unrelated to any of the intricacies of the question of intent which is the subject of the offending instruction; and, the defective instruction..."

227 S.E.2d 210 (W. Va. 1976). The court specifically stated that the rule was to be "applied to all criminal cases now in trial or appellate process and should not otherwise be retroactive." Id. at 224.

The Pendry and Jones cases were both decided in response to cases decided by the United States Supreme Court. Pendry incorporated into West Virginia law Mullaney v. Wilbur, 421 U.S. 684 (1975), regarding presumptive instructions. After Pendry was decided, the United States Supreme Court then held in Hankerson v. North Carolina, 432 U.S. 233 (1977), that Mullaney was to be applied retroactively. The court is merely adopting the effect of Hankerson in Jones.

241 S.E.2d at 210.

Id. See also Ivan V. v. City of New York, 407 U.S. 203 (1972); Williams v. United States, 401 U.S. 646 (1971).

241 S.E.2d at 916 (concurring opinion).

Id.
was harmless error in all other regards beyond a reasonable doubt. . . .201 Justice Miller based his opposition to the applica-
tion of the rule on the reasoning that the presumptive instruction
substantially impairs the truth-finding function and is thus always
so significant that it cannot be found harmless.202

The interesting and perplexing factor for the attorney is that
each theory as to the application of the harmless error rule has two
supporters within its ranks.203 The West Virginia bar will have to
await further decisions to determine the full ramifications of
Pendry.

IX. Plea Bargaining

In 1978, the West Virginia Supreme Court of Appeals decided
three cases which dealt with plea bargains between criminal defen-
dants and prosecuting attorneys. In State v. Wayne204 the defen-
dant, who had been convicted of first degree murder by a jury,
contended on appeal that the trial judge had erred by not accept-
ing his proffered guilty plea to second degree murder pursuant to
a plea bargaining agreement with the prosecuting attorney. The
record in the case did not disclose the consummation of a plea
bargaining agreement. The court noted that the record did not
disclose a written bargain, that the terms of the alleged bargain
were not shown by the record, that the defendant had shown no
evidence of reliance, and that the defendant had not shown that
his position was irrevocably altered. No error was found in the trial
court’s refusal to enforce what was apparently more of a discussion
of a plea than an actual agreement. In Wayne the court pointed
out that although there was no requirement that a plea bargain
agreement be in writing, there was a requirement that there be
substantial evidence that the bargain was, in fact,205 a consum-
mated agreement, and not merely a discussion.206

201 Id.
202 Id. at 919-20 (concurring opinion).
203 Mr. Chief Justice Caplan joined in Justice Neely’s concurring opinion, while
Justice Harshbarger joined Justice Miller, leaving Justice McGraw as the unde-
clared swing vote.
205 Id. at 840 n. 1, wherein the court stated that the fact that the defendant
has performed his part of an alleged plea bargain to his substantial detriment was
alone compelling but not conclusive evidence that an agreement did, in fact, exist.
206 As pointed out in the opinion, it is advisable to have court approval, whether
formal or informal, to a plea bargain. See W. VA. CODE § 62-2-25 (1977 Replacement
Vol.).
In *Brooks v. Narick*, the court considered another facet of the problem. In *Brooks* the defendant, after being indicted for delivery of marijuana, entered into a plea bargain and agreed (1) to plead guilty, (2) to go to a correctional center for a sixty-day evaluation and diagnostic study, (3) to begin his confinement on July 12, 1976, and (4) to pay court costs of $656.90. The state's agreement to drop all charges pending against him in the county and to recommend probation was contingent upon a favorable presentence report. If the report was unfavorable, the state was to recommend that the court take whatever action it felt appropriate. The defendant then pleaded guilty and was returned to court for sentencing. Both the court and the prosecutor considered the report to be neither favorable nor unfavorable, so counsel's motion for probation was denied when an assistant prosecuting attorney affirmatively opposed it. Defendant moved to withdraw his guilty plea on the grounds that the government had breached the agreement and the motion was granted. When seven new indictments were returned against him, he moved the court to specifically enforce the plea bargain by dismissing the seven new indictments. The trial court overruled both motions and denied the defendant's motion to reconsider. The defendant petitioned for prohibition, and the court held:

Where a defendant, having performed his part of a plea bargain is coerced by the government's violation of the bargain into withdrawing his guilty plea, he has the option of standing trial on the not guilty plea and suffering whatever other consequences may result from his being in the original position, or reinstating his guilty plea and requiring specific performance by the government of the bargain.

The court pointed out that Brooks could not be restored to his former position by withdrawal of the guilty plea in that he had already spent sixty days at Huttonsville Correctional Center.

In *State ex rel. Gray v. McClure*, the defendant, who had been indicted for rape and sodomy, had reached an agreement with an assistant prosecuting attorney whereby the defendant would plead guilty to sodomy and be given credit for time served in the county jail on these charges if the prosecution would enter a nolle

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208 Id. at 842.
prosequi to the rape charge. There was sufficient evidence to show that an agreement had, in fact, been consummated and approved by the court. Subsequently, a new prosecuting attorney was elected and the case was transferred to another judge. The new prosecuting attorney refused to honor the plea agreement and the new judge refrained from enforcing it. Gray sought a writ of mandamus compelling the new judge and prosecutor to honor the plea bargain approved by their predecessors.

The court held that "a prosecuting attorney or his successor is bound to the terms of a plea agreement once the defendant enters a plea of guilty or otherwise acts to his substantial detriment in reliance thereon." The court, however, pointed out that if the defendant has not yet acted to his detriment, the state is not bound to the terms of an inchoate plea agreement.

X. Habitual Criminal Offender Statute

In 1978, the Supreme Court of Appeals of West Virginia in State v. McMannis and State v. Pratt reasserted a number of principles in clarifying the habitual criminal statutes. In Martin v. Leverette, another case involving a circuit court misinterpretation of the habitual criminal law, the court dealt with the issue of credit for pre- and post-trial jail time.

In State v. McMannis, the court stated that it had consistently overturned, for lack of jurisdiction, any additional sentence imposed under the authority of the habitual criminal statute where a defendant proved that the prior convictions were not for offenses committed after each preceding conviction and sentence. After

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211 Id. at 707, citing Shields v. State, 374 A.2d 816 (Del. Super. Ct. 1977) as the governing rule (emphasis by the court).
213 244 S.E.2d 227 (W. Va. 1978).
217 Id. at 574. The statute requires that when a person is convicted of an offense punishable by penitentiary confinement and it is determined that he had once previously been convicted of a crime punishable by such confinement, five years must be added to the term of the sentence of imprisonment. If he were twice previously so convicted, his sentence must be for a life term. W. Va. Code § 61-11-18 (1977 Replacement Vol.). After the prosecuting attorney files a written information alleging such prior convictions and identity of the prisoner, and upon the silence or plea of the prisoner denying that he is the same person as alleged to have been convicted of the prior offenses, a jury must be impanelled to find the truth of the allegations. W. Va. Code § 61-11-19 (1977 Replacement Vol.).
declaring that none of those opinions had discussed the question of whether the state or the defendant carried the burden of proof, or what degree of proof would be required, the Supreme Court of Appeals held that the state must carry the burden of proving the jurisdiction of the court beyond a reasonable doubt.²¹⁸ Where a prisoner remains silent or denies being the same person previously convicted, the circuit court has no jurisdiction to impose a greater sentence under the habitual criminal statute unless the state proves that each penitentiary offense was committed subsequent to each conviction and sentence.²¹⁹

Despite the court’s assertion that none of the decisions upon which it relied in McMannis had discussed the issue of burden of proof,²²⁰ it appears that other prior cases had been dispositive of the issue.²²¹ Although the cases relied on in the case at bar were decided after the 1943 amendment to the statute and the cases cited in note 121 were pre-1943 decisions, the amendment merely changed the relevant time of meeting the burden of proof. It appears that the language relating to proof was not changed and that the amendment did not abrogate the prior holdings of the court on the question of the burden of proof.²²²

In State v. Pratt,²²³ the court reminded the trial courts and prosecutors that the habitual criminal statute is clear in its language requiring that enhanced sentences under its authority are not to be imposed consecutively.²²⁴ The additional five-year term for the second conviction is to be added to the primary term so that, for example, a sentence of one to ten years becomes one sentence for a term of one to fifteen years.²²⁵ Upon the third convic-

²¹⁸ 242 S.E.2d at 575.
²¹⁹ Id. at 575.
²²⁰ Id. at 574. The authorities cited were State ex rel. Yokum v. Adams, 145 W. Va. 450, 114 S.E.2d 892 (1960); State ex rel. Medley v. Skeen, 138 W. Va. 409, 76 S.E.2d 146 (1953); Dye v. Skeen, 135 W. Va. 90, 62 S.E.2d 681 (1950). The burden of proof was not in issue in these cases and as the court declared in McMannis, it was not discussed.
²²¹ State v. Lawson, 125 W. Va. 1, 22 S.E.2d 643 (1942); State v. Stout, 116 W. Va. 393, 180 S.E. 443 (1935). In State v. Lawson, the court stated, citing Stout, that “[a] charge of former conviction . . . is submitted to the . . . jury. The charge . . . must be proved with the same degree of certainty as the charge of the substantive offense . . . .” 125 W. Va. at 3, 22 S.E.2d at 644.
²²³ 244 S.E.2d 227 (W. Va. 1978).
²²⁴ Id. at 236.
tion, and adjudication of the recidivist issue, it is the trial court's mandatory duty to impose only one sentence of life imprisonment in the penitentiary upon the prisoner.226

The petitioner in Martin v. Leverette,227 in addition to his other allegations of error, argued that he was constitutionally entitled to credit against his ultimate sentence for time spent in jail awaiting trial and after trial awaiting sentencing. The trial court had refused to grant credit for either.228 The statute allowed the judge to exercise discretion in granting credit for pretrial jail time.229

The claim was one of first impression in the Supreme Court of Appeals of West Virginia. The court held that in light of recent opinions of the Supreme Court of the United States, the Fourth Circuit Court of Appeals, and its own recent holding in Conner v. Griffith,230 a prisoner has a right to credit for such time spent in jail.231 While recognizing that the former cases were based on the United States Constitution, the court preferred to hold that the double jeopardy and equal protection clauses of the West Virginia Constitution, article III, §§ 10 and 17, are the sources of the right in West Virginia. The court left open, as did the federal courts, the question of the extent of the right where nonbailable offenses are involved.232

DOMESTIC RELATIONS

In J.B. v. A.B.233 the court reexamined the tender years presumption234 applied in child custody proceedings. The appellant wife had filed for divorce, alleging cruelty. The husband answered

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(1977 Replacement Vol.).

228 Id. at 41.
231 244 S.E.2d at 41-42.
232 Id. at 42.
233 242 S.E.2d 248 (W. Va. 1978). With this decision the court begins a procedure of styling domestic relations cases with "embarassing" facts by the initials of the parties rather than by name. See n. 1 at 250.
234 "In a divorce proceeding where custody of a child of tender years is sought by both the mother and the father, the court must determine in the first instance whether the mother is a fit parent, and where the mother achieves the minimum, objective standard of behavior which qualifies her a fit parent, the trial court must award the child to the mother." Id at 250, court syllabus point 2.
and counterclaimed for a divorce on the same grounds. The circuit court granted a divorce to the husband and awarded him custody of the child after finding that the mother was not a fit person to have permanent custody of the child. The trial court's finding of the mother's unfitness was based upon one incident of sexual misconduct which occurred during a period of separation between the parties. The court held that the mother's misconduct was insufficient as a matter of law to constitute unfitness and that in the absence of the mother's unfitness the trial court must apply the presumption that it is maternal custody that best serves the interests of a child of tender years. The court remanded the case with directions to award custody to the mother.

In considering the constitutionality and wisdom of the tender years presumption, Justice Neely relied upon sociological, biological and evidentiary reasons to sustain the constitutionality and soundness of the presumption. The presumption obviously involves a gender-based determination, but in the absence of compelling evidence of a superior alternative, the court sustained the presumption, relying on the socialization patterns of the traditional roles of mothers and fathers, the physical dependency of an infant upon its mother, and the idea that the presumption will achieve greater justice over a wider spectrum of cases than the alternative of endless hearings about issues which cannot be satisfactorily resolved by the adversary system. Thus the essence of the court's position is that the mother should always be awarded custody of children of tender years unless she is found to be unfit.

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23 Id. at 250. The trial court apparently followed the rule that when marital misconduct is the grounds for the divorce, the law generally favors the award of custody to the innocent spouse. Rohrbaugh v. Rohrbaugh, 136 W. Va. 708, 722, 68 S.E.2d 361, 369 (1951).
24 242 S.E.2d at 251.
25 Id. at 256.
26 Id. at 253. The court points out that the presumption is nondiscriminatory in nature since the rule operates only where both parents are fit. Such reasoning seems circular. Beginning from a point of "equality" of fitness does not mitigate the later disparate treatment once the presumption is applied.
27 Id.
28 Id.
29 Id. at 254.
30 See 242 S.E.2d at 253 for a brief discussion of the meaning of "tender years."
31 Id. at 252. Where immoral conduct is the basis of unfitness, "the only workable standard for the rebutting of the presumption is that the conduct must be so outrageous that reasonable men cannot differ about its deleterious effect upon the child." Id. at 256.
By ignoring relative degrees of parental competence and mechanically applying a rule favoring a "fit" mother, the court may be ignoring the best interests of the children involved in such situations.\(^{244}\) Relying on tradition and expediency in place of a fact-finding determination as to which parent is more competent and thus capable of better serving the child's best interests seems to be an inconsistent method of accomplishing the court's stated objectives.\(^{245}\)

At issue in \textit{J.M.S. v. H.A.}\(^{246}\) was whether a circuit court has jurisdiction to award or deny visitation rights to a father of an illegitimate child, a question of first impression in West Virginia. J.M.S., the father of three illegitimate children by H.A., filed a complaint seeking visitation privileges. H.A. answered, acknowledging that J.M.S. was the father of the children, but asserting that visitation by the father would be detrimental to the best interests and welfare of the children. The circuit court denied relief and dismissed the complaint, holding that it lacked jurisdiction since there had been no marriage alleged or proved and no right of visitation given the determined father by statute or common law.\(^{247}\)

The court reversed, unanimously holding that to deny a parent visitation rights without a hearing would constitute a denial of due process and equal protection afforded by both the state and federal constitutions.\(^{248}\) The court relied on statements by the United States Supreme Court in \textit{Stanley v. Illinois}\(^{249}\) that the father of an illegitimate child must receive the same treatment and consideration as that received by any parent with respect to the termination of his parental rights. The court also relied on its own recent finding that the right of a parent to the custody of his or her child, while not absolute, is founded in natural law and will not be taken away unless the parent is found to be unfit.\(^{250}\) Recognizing that these cases dealt with custodial rights, the court reasoned that, because such rights conferred more authority over the

\(^{244}\) This is particularly important since the welfare of the child is to be the "polar star" guiding the court. \textit{See} Green v. Campbell, 35 W. Va. 698, 702, 14 S.E. 212, 214 (1891); Funkhouser v. Funkhouser, 216 S.E.2d 570 (W. Va. 1975).

\(^{245}\) A growing number of jurisdictions now apply a test of competency rather than a rigid presumption. It is not likely the court has put the issue to rest. For further discussion of \textit{J.B. v. A.B.} \textit{see} 81 W. VA. L. Rev. 149 (1978).

\(^{246}\) 242 S.E.2d 696 (W. Va. 1978).

\(^{247}\) \textit{Id.}

\(^{248}\) \textit{Id.} at 698; U.S. Const. amend. XIV and W. VA. Const. art. III, § 10.

\(^{249}\) 405 U.S. 645 (1972).

child than visitation rights, the courts should also have jurisdiction to determine visitation privileges.\[^{251}\]

**Evidence**

I. Exculpatory Evidence

In *Wilhelm v. Whyte*,\[^{252}\] an original proceeding in habeas corpus, the petitioner unsuccessfully challenged his second degree murder conviction, claiming that the prosecutor failed to disclose certain exculpatory material and thus violated the trial court's general discovery order.\[^{253}\] At issue was a ballistics report containing possible exculpatory material involving the murder weapon. The report was not furnished to defense counsel prior to trial; the defense attorneys learned of the report's existence only when the trooper who had conducted the ballistics tests began testifying at the trial. The defense attorneys then moved for a mistrial. The prosecutor maintained that he had learned of the report's existence only the day prior to trial. The court took the motion under advisement, ordering that a copy of the report be furnished to the defense counsel and that the ballistics witness remain subject to recall.\[^{254}\]

The court found that late delivery of the exculpatory material did not constitute a denial of due process.\[^{255}\] In doing so, the court adopted the Fourth Circuit's position outlined in *Hamric v. Bailey*\[^{256}\] and later refined in *United States v. Anderson*.\[^{257}\] To determine when failure to furnish exculpatory material in a timely manner will constitute a denial of due process, it will be necessary to examine the circumstances of the case. If disclosure is made in

\[^{251}\] 242 S.E.2d at 697. Such jurisdiction is also implicitly given to circuit courts by W. Va. Const. art. VIII, § 6.

\[^{252}\] 239 S.E.2d 735 (W. Va. 1977).

\[^{253}\] Id. at 736.

\[^{254}\] Id. at 737.

\[^{255}\] Id. at 739.

\[^{256}\] 386 F.2d 390 (4th Cir. 1967). In *Hamric*, the habeas corpus petition was granted when it was discovered that the state had withheld exculpatory evidence until after the jury retired. The court concluded that disclosing the evidence after the jury retired was a violation of due process since such disclosure would be of little value to the defendant. The court's holding was based on *Brady v. Maryland*, 373 U.S. 83 (1963), and mandates that disclosure must be made before the taking of the accused's evidence is complete. 386 F.2d at 393.

\[^{257}\] 481 F.2d 685 (4th Cir. 1973), aff'd, 417 U.S. 211 (1974). *Anderson* suggests that, in order to avoid error, exculpatory evidence should be disclosed prior to trial in a situation which is more complicated and where the exculpatory evidence would have a material bearing on defense preparations. Id. at 690 n.2.
time for the defense attorneys to "capitalize" on the evidence, regardless of whether the evidence is made available prior to or during the trial, then no violation of due process occurs.\textsuperscript{258}

The petitioner also contended that he was denied a fair trial because the trial court overruled his motion for a continuance.\textsuperscript{259} The motion was based on two grounds: (1) late production of discovery materials and (2) the absence of a material witness.\textsuperscript{260} Regarding the first ground, argument was made that the lateness itself constituted a denial of a fair trial. The court rejected this argument, stating that "late production alone will not suffice to reach the constitutional level of denial of fair trial."\textsuperscript{261} The court also felt the second ground, relating to the absence of a witness whose testimony was material on the issue of self-defense, was insufficient when assessed from the standpoint of whether the lack of the evidence resulted in a denial of a fair trial.\textsuperscript{262} Thus the court held that denial of the continuance was neither a violation of due process nor of the state constitutional guarantee\textsuperscript{263} of a reasonable time to prepare a defense.\textsuperscript{264}

\section*{II. Instructions and Verdicts}

The court clarified the meaning of \textit{State v. Pendry}\textsuperscript{265} in the more recent case of \textit{State v. Starkey}.\textsuperscript{266} Pendry had held that the

\textsuperscript{258} 239 S.E.2d at 739. Since the report here was not unduly technical and did not require a complex analysis, and since the trial court gave the defense attorneys the time to examine the report and the opportunity to recall the witness, the court felt there was no reason why the defense was unable to capitalize on the report. \textit{Id.}

\textsuperscript{259} \textit{Id.}

\textsuperscript{260} \textit{Id.}

\textsuperscript{261} \textit{Id.} The court noted that a less rigid rule is applicable where the matter is raised on direct appeal. \textit{See State v. Cowan}, 156 W. Va. 827, 197 S.E.2d 641 (1973). A different result might also be indicated if the state were in possession of physical evidence crucial to the determination of the defendant's involvement in the crime when the evidence must be subjected to scientific analysis to assist in determining the defendant's guilt or innocence. \textit{See State v. McArdle}, 156 W. Va. 409, 194 S.E.2d 174 (1973); \textit{State v. Harr}, 156 W. Va. 492, 194 S.E.2d 652 (1973).

\textsuperscript{262} 239 S.E.2d at 739.

\textsuperscript{263} W. VA. CONST. art. III, § 14.

\textsuperscript{264} 239 S.E.2d at 740. A further holding of the court discussed in the section entitled CRIMINAL LAW AND PROCEDURE was that a spontaneous statement made by a defendant prior to any action by a police officer and before an accusation, arrest or any custodial interrogation is made or undertaken may be admitted into evidence without first holding an \textit{in camera} hearing to determine its voluntariness. \textit{Id.}

\textsuperscript{265} 227 S.E.2d 210 (W. Va. 1976).

\textsuperscript{266} 244 S.E.2d 219 (W. Va. 1978).
state is required to prove beyond a reasonable doubt every material element of the crime and that the state could not be aided in this task by a presumptive instruction. In *Starkey* one of the errors assigned on appeal was that the state's instruction on the use of a deadly weapon was erroneous. The court held that the instruction was not violative of *Pendry* since the instruction was "not couched in the mandatory language of a presumptive or conclusive finding." Neither did the instruction contain language indicating the defendant had any burden of proof to negate an essential element of the crime. Thus an instruction which allows the jury to draw an inference after a finding that there was no "excuse, justification or provocation" will not violate *Pendry*.

The defendant also contended that the verdict was not supported by the evidence. The court took the opportunity to combine prior cases and announce an integrated rule:

In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

After reviewing the facts surrounding the crime and applying the new standard, the court found sufficient evidence to support the verdict.

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237 The challenged instruction read: "The Court instructs the jury that malice and intent can be inferred by the jury from the defendant's use of a deadly weapon, under circumstances which you do not believe afforded the defendant excuse, justification or provocation for his conduct." *Id.* at 226, n.9 (emphasis added).

238 *Id.* at 226.

239 *Id.*

240 *Id.* at 220.

241 Prior to this case, the court had used two standards of review. One standard required that the evidence be "manifestly inadequate." See State v. Bias, 156 W. Va. 569, 195 S.E.2d 626 (1973), court syllabus point 1. The other required "substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt." See State v. Johnson, 226 S.E.2d 442 (W. Va. 1976), court syllabus point 4.

242 *Id.* at 224. The defendant raised two additional errors: (1) that the trial court erred in refusing his self-defense instruction and (2) that the judge made prejudicial remarks about him in front of the jury. *Id.* at 220. The court reaffirmed
III. DUTY OF COURT REPORTERS

State v. Bolling\textsuperscript{24} was an appeal taken from a conviction of arson. The defendant assigned as error suppression of exculpatory evidence by the state.\textsuperscript{25} Essentially, the defendant claimed he was denied an opportunity to impeach a state's witness who was not called to testify. The court noted that the "core of the doctrine of suppression of evidence is that it must relate to some evidence that would be relevant to an issue at the trial."\textsuperscript{26} Since the witness never testified, her credibility was never at issue and introduction of impeachment testimony could not have been proper.\textsuperscript{27}

The defendant also asserted that the prosecuting attorney made several prejudicial remarks to the jury in his closing argument and, as a result of the court reporter's failure to record the closing arguments, prejudicial error occurred.\textsuperscript{28} The West Virginia Code controls what must be reported in a criminal trial.\textsuperscript{29} The court viewed these broad provisions as similar to the federal act\textsuperscript{30} and concluded that a rule similar to the one evolved by the federal

earlier positions, ruling (1) that the duplication of instructions is unnecessary and undesirable and therefore no error was committed since the court gave a proper self-defense instruction which had been submitted by the state, and (2) that failure of defense counsel to make known to the court his objection to the court's conduct resulted in the point not being preserved for appeal. Id. 226-27.

\textsuperscript{24} 246 S.E.2d 631 (W. Va. 1978).

\textsuperscript{25} Id. at 634. The court briefly discussed the state's duty to turn over exculpatory evidence to the defendant, citing Wilhelm v. Whyte, 239 S.E.2d 735 (W. Va. 1977). Id. See notes 252-58 supra, and accompanying text.

\textsuperscript{26} 246 S.E.2d at 635.

\textsuperscript{27} Id.

\textsuperscript{28} Id.

\textsuperscript{29} W. VA. CODE § 51-7-1 (1966) provides in part:

The circuit courts of the several judicial circuits in this State, or the judges thereof in vacation, or the judges of any intermediate, criminal or common pleas court, are hereby empowered and authorized to appoint competent shorthand reporters to take and report, under such regulations as such judges, or any of them, may prescribe, the proceedings had and the testimony given in any case, either civil or criminal, or in any other proceedings had in such court, including the taking of testimony before the grand jury of such court for the use of the prosecuting attorney of the county, and in proceedings before the judge of such court in vacation, and otherwise to aid the judge in the performance of his official duties.

W. VA. CODE § 51-7-2 (1966) provides:

It shall be the duty of such reporter to take full shorthand notes of the testimony and proceedings in which his services may be required, and such notes shall be deemed and held to be official and the best authority in any matter in dispute.

courts was therefore required. Thus the court held that all proceedings occurring in a criminal trial are required to be reported;21 however, failure to report all of the proceedings may not in all instances constitute reversible error.22 While the court refused to adopt a mechanical rule to determine when failure to report will constitute reversible error, the court noted generally that the defendant must show some identifiable error or prejudice. Additional consideration will be given to the nature of the claimed prejudice or error. Thus the defendant will need to "demonstrate that some error or prejudice has resulted and this is directly related to the lack of a portion of the record."23 Bolling failed to do so and the trial court's judgment was affirmed.24

IV. PHOTOGRAPHS

At issue in State v. Dunn25 was whether the trial court erred in refusing to admit into evidence a photograph of the defendant. The defendant was convicted of delivery of a controlled substance. His defense was largely one of mistaken identity in which the defendant claimed that his brother, and not he, had made the delivery.26 He attempted to buttress this claim by introducing the photograph on his Ohio driver's license, issued one week before the alleged sale, showing the defendant with a well-developed beard. The state's evidence indicated that the deliverer did not have a beard at the time of the alleged delivery.

The defendant verified the photograph by identifying the license, its date of issue, and where and by whom the picture was taken.27 The defendant testified that the picture on the license

21 246 S.E.2d at 637. For a more specific statement of what should be reported, see 246 S.E.2d at 637 citing United States v. Piascik, 559 F.2d 545, 550-51 (9th Cir. 1977).
22 246 S.E.2d at 637.
23 Id. at 638.
24 The defendant had also assigned insufficient evidence to support the verdict as error. Id. at 632. The court found there was sufficient evidence and reiterated the rule recently announced in State v. Starkey, 244 S.E.2d 219 (W. Va. 1978). See notes 270-73 supra and accompanying text. The defendant also claimed as error the trial court's failure to give a requested instruction which would have told the jury that a co-indictee called by the state did not waive his immunity against self-incrimination and therefore could not later be prosecuted. 246 S.E.2d at 633. The court held that the tendered instruction was premised on an erroneous statement of law and of fact; therefore failure to give the instruction was not error. Id. at 634.
26 Id. at 249.
27 Id.
accurately reflected his appearance on the date the picture was taken and that he did not shave from the time of the photograph until the time of the alleged delivery. After laying this foundation, defense counsel moved that the driver's license be entered into evidence. The motion was refused. The court reversed, holding that the circuit court abused its discretion by failing to admit the picture under the "pictorial testimony" theory. The general rule in West Virginia is that photographs, once verified and shown by intrinsic evidence to be faithful representations of the objects they purport to portray, are "admissible in evidence as aids to the jury in understanding the evidence." The ruling on admissibility is, of course, discretionary. The court reasoned that the defendant had verified the photograph, that his appearance was critical to the claim of mistaken identity, and that, after the proper foundation had been laid, it was an abuse of the trial court's discretion to disallow the use of the photograph to depict his appearance. Since under the pictorial testimony theory a photograph is admissible only as an aid to understanding testimony already given rather than admissible as probative evidence in itself, it was not necessary that the photographer testify in order to establish admissibility.

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21 Id.
22 Id. The circuit court also refused to let the jury see the picture, refused to give the defense time to subpoena the photographer, and refused to allow the defense to vouch the record with regard to the picture.
23 Id. at 251. The court briefly discussed the two theories upon which photographs are entered into evidence. Under the "silent witness" theory the picture is independent, substantive and probative evidence of what it shows. Under the "pictorial testimony" theory, the photograph is admissible as the testimony of a qualified witness who adopts or sponsors the picture as a substitute for the witness' verbalization of what the picture portrays. West Virginia has not yet expressly adopted the "silent witness" theory. Id. at 250.
25 Id. at 251.
26 Id. The court further held that error was committed in refusing a defense request to see notes used by the principal state witness, a police officer, when testifying. The court noted that the issue was treated exhaustively in State v. Dudick, 213 S.E.2d 458 (W. Va. 1975), decided three months prior to this trial. Id. at 252.
PROCEDURE

I. IMPLEADER BY DEFENDANT

The issue on appeal in *Haynes v. City of Nitro* was whether one codefendant could appeal an erroneous directed verdict in favor of the other codefendant. The plaintiff in the case had sued both codefendants as joint tortfeasors, and no question of joinder was involved. The court held that the party prejudiced by the error—the codefendant who suffered the judgment—was entitled to appeal. The verdict was reversed and the case remanded. The opinion of the court, however, couched this ruling in terms of the right to contribution among joint tortfeasors, stating that the prejudiced codefendant in such a case is still entitled to seek contribution. The primary significance of the *Haynes* case is that it upset the long established West Virginia rule that a defendant was not permitted, on the basis of contribution, to implead a new party whom the plaintiff had not chosen to sue as codefendant or joint tortfeasor.

The prior West Virginia cases dealing with attempts to implead codefendants on the basis of contribution were consistent in holding that such joinder was impermissible. In *Rouse v. Eagle Convex Glass Specialty Co.*, the Supreme Court of Appeals stated that the West Virginia statute providing for joinder of parties whenever full justice and a complete and final determination of the controversy cannot be achieved without them could not be construed to permit a defendant to have an alleged joint tortfeasor made a party.

The practice is settled that the plaintiff in tort can sue one or all who have jointly wronged him, and if less than all, can select whom he will sue. The practice permitted [in the lower court] would allow a defendant to select in part those to be sued; would force the plaintiff into uncontemplated and perhaps undesired litigation with every added defendant . . . .

The *Rouse* decision was thereafter followed by the federal courts in determining whether the defendant could implead a joint

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Id. at 550.

122 W. Va. 671, 13 S.E.2d 15 (1940). The plaintiff had sued the glass company for injuries sustained as a result of a falling window pane which the company was replacing in a bank. The glass company moved to have the bank made a defendant, which motion was granted over bank's objection. The Supreme Court of Appeals reversed.

Id. at 672-73, 13 S.E.2d at 15-16.
tortfeasor under Rule 14 of the Federal Rules of Civil Procedure.\footnote{298} In \textit{Baltimore & O. R. R. v. Saunders},\footnote{299} the defendants argued that impleader of a third-party defendant was proper in order that they might have their right to contribution. Citing \textit{Rouse}, and two West Virginia statutes,\footnote{300} the Fourth Circuit held that the law of West Virginia was clear that the right of contribution could be asserted against a joint tortfeasor only after a joint judgment, and that the defendant could not compel the plaintiff to try his suit against a party he did not wish to join.\footnote{301}

The most recent West Virginia ruling on the issue of impleader of a joint tortfeasor came in \textit{Bluefield Sash & Door Co. v. Corte Construction Co.}\footnote{302} Justice Berry, speaking for the majority, stated that Rule 14(a) of the West Virginia Rules of Civil Procedure\footnote{303} allowed impleader by the defendant of a party who may be liable to him for all or part of the plaintiff's claim, but that the defendant must first have a substantive right to relief. "Under West Virginia law there is no right of contribution between joint tort-feasors in the absence of a joint judgment."\footnote{304}

The cases discussed above dealing with impleader of a third party by the defendant made it clear that West Virginia law would not permit such impleader on the basis of contribution. The recent

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\footnotetext[298]{\textit{Fed. R. Civ. P. 14.}}
\footnotetext[299]{159 F.2d 481 (4th Cir. 1947).}
\footnotetext[300]{W. VA. Code §§ 55-7-12, 13 (1966). Section 55-7-12 provides as follows: A release to, or an accord and satisfaction with, one or more joint trespassers, or tort-feasors, shall not inure to the benefit of another such trespasser, or tort-feasor, and shall be no bar to an action or suit against such other joint trespasser, or tort-feasor, for the same cause of action to which the release or accord and satisfaction relates. Section 55-7-13 provides as follows: Where a judgment is rendered in an action ex delicto against several persons jointly, and satisfaction of such judgment is made by any one or more of such persons, the others shall be liable to contribution to the same extent as if the judgment were upon an action ex contractu.}
\footnotetext[301]{The \textit{Rouse} and \textit{Saunders} decisions were followed by the United States District Court in \textit{Franklin v. United States}, 124 F. Supp. 953 (N.D. W. Va. 1954), and \textit{Wolfe v. Johnson}, 21 F.R.D. 280 (N.D. W. Va. 1958). Both cases refused to allow joinder by the defendant of an alleged joint tortfeasor whom the plaintiff had not sued. \textit{Wolfe} held squarely that "in cases applying West Virginia law, a defendant cannot implead as a third-party defendant an alleged joint tortfeasor on the theory of contribution." 21 F.R.D. at 282.}
\footnotetext[302]{216 S.E.2d 216 (W. Va. 1975).}
\footnotetext[303]{W. VA. R. Civ. P. 14(a).}
\footnotetext[304]{216 S.E.2d at 218.}
case of *Haynes v. City of Nitro*, on the other hand, concerns rights between two codefendants who have each been sued by the plaintiff. The problem with the *Haynes* opinion is that it delves into those cases dealing with attempts by defendants to implead new parties as joint tortfeasors, an issue not present in the *Haynes* case. The court seemed to believe it necessary to rule that West Virginia Code § 55-7-13 does not foreclose contribution between joint tortfeasors in the absence of a joint judgment, and thus expressly overruled *Bluefield* and *Rouse* on this point. It is difficult to understand why the court even dealt with these cases in *Haynes*, and even more difficult to understand why it felt they must be overruled in order to reach the right decision. The court cited the case of *Crum v. Appalachian Power Co.*, which allowed third-party joinder in federal court, contrary to the later rule in *Baltimore & O. R.R. v. Saunders*. The court failed to note, however, that after *Crum* was decided a fundamental amendment was made to Rule 14 of the Federal Rules of Civil Procedure. The Rule originally provided for impleader of anyone who was or may have been liable to the defendant “or to the plaintiff.” The quoted phrase was struck in 1948, and for this reason the case was no longer cited for its holding.

It is important to note that the actual ruling in *Haynes* is limited to cases where a plaintiff names two or more joint tortfeasors as defendants, and where a subsequent trial court error prevents the possibility of joint judgment. The court does not mention impleader, and nowhere states that a new party may be joined as joint tortfeasor by the defendant on the basis of contribution. The actual result reached in *Haynes* is therefore a correct one, with a basis both in precedent and policy. The imprecise reasoning of the opinion, however, and its broad dicta on issues not presented have confused the West Virginia law on impleader by a defendant.

Perhaps the most important issue confused by the *Haynes* ruling is whether a defendant tortfeasor can implead an alleged joint tortfeasor who has not been sued by the plaintiff or who has already settled with the plaintiff. Although, as discussed above, the facts of *Haynes* make its ruling inapplicable to this issue, its broad dicta and purported overruling of prior cases not on point lend themselves to an argument that such impleader should be

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Id. at 547, 550.


allowed. Several issues, however, which were not present nor discussed in *Haynes*, are important to a determination of whether a defendant should be allowed to implead another on the basis of contribution, especially when the other has settled with the plaintiff. For example, the policies of encouragement of settlements on one hand, and prevention of unequal shouldering of the burden among joint tortfeasors by reason of improper motives or collusion on the other, must be considered. It is therefore inappropriate to look to the *Haynes* decision as controlling on the issue of codefendant impleader.

II. PLEADINGS—LIBERAL CONSTRUCTION

After the adoption of the new West Virginia Rules of Civil Procedure, many hoped for a liberal construction of these procedural rules. At the same time, however, some also feared that the procedural technicalities of the old rules would lead to a strict construction. The West Virginia courts, however, have in case after case dispelled any notions of strict construction. Two recent West Virginia decisions demonstrate the liberal construction given to these procedural requirements.

In *John W. Lodge Distributing Co. v. Texaco, Inc.*, the court stated that pleadings should be liberally construed so as to do substantial justice. In that case, the complaint alleged both unconscionability of a termination provision in the contract between the parties and subsequent modification of the contract. The trial court sustained a motion to dismiss on the grounds that there were no factual circumstances stated in the complaint which could be construed as stating a proper claim against the defendant.

The Supreme Court of Appeals reversed, indicating that motions to dismiss are viewed with disfavor and should rarely be granted. All that is required is sufficient information to outline the elements of the claim or to permit inferences to be drawn that these elements exist. In addition, a motion to dismiss for failure to state a claim upon which relief can be granted should not be granted "unless it appears beyond doubt that plaintiff can prove..."
no set of facts in support of his claim which would entitle him to relief.\(^3\)

In *Johnson v. Huntington Moving and Storage, Inc.*,\(^4\) the trial court granted a motion to dismiss on the grounds that the plaintiff's counsel had misnamed the defendant in the summons and the complaint.\(^5\) The court reversed for two reasons. First, the court held that a misnomer is cured by a judgment by virtue of a curative statute and the harmless error rule.\(^6\) Second, the court stated that objection to a misnomer could not be raised by a motion to dismiss, but must be raised either by answer or by affidavit pursuant to the statute which provides that either party may amend a pleading by inserting the correct name.\(^7\)

These cases show the willingness of the courts to ignore the old procedural technicalities so as to allow a decision to be based upon the merits of the case and not on the talents of the pleader. Utilization of the liberal construction of the West Virginia Rules of Civil Procedure in this manner will result, as is required by the Rules,\(^8\) in greater justice for the parties.

**PROPERTY**

**I. IMPLIED WARRANTY OF HABITABILITY**

The law of landlord and tenant was the subject of the certified questions posed to the West Virginia Supreme Court of Appeals in *Teller v. McCoy*.\(^9\) Basically, the court was asked: (1) whether a warranty of habitability\(^10\) is implied in residential leases; (2) if so, whether this implied warranty of habitability and the tenant's covenant to pay rent are mutually dependent; and (3) what remedies are available to the tenant in the event the implied warranty

\(^{31}\) Id. at 159 (emphasis added). *E.g.*, Chapman v. Kane Transfer Co., 236 S.E.2d 207 (W. Va. 1977).

\(^{315}\) 239 S.E.2d 128 (W. Va. 1977).

\(^{316}\) The suit in Ohio was against Huntington Moving and Storage, d/b/a Columbus Household Movers while the defendant's true company name was Huntington Moving and Storage, Inc.


\(^{318}\) Id. at 131-32. W. VA. CODE § 56-4-29 (Cum. Supp. 1978).

\(^{319}\) W. VA. R. CIV. P. 8(f).

\(^{320}\) No. CC900 (W. Va. Dec. 12, 1978.).

\(^{321}\) Such a warranty would require the landlord, at the commencement of a tenancy, to deliver the dwelling unit and surrounding premises in a fit and habitable condition and thereafter maintain the leased property in such condition.
is breached by the landlord. The Supreme Court of Appeals, citing the inapplicability of the common law doctrine of caveat emptor to present day landlord-tenant realities, responded to the first two questions in the affirmative. The court then proceeded to outline the remedies available under the new warranty.

The court's discussion of tenant remedies is the single most important aspect of the Teller opinion. The actual adoption of the implied warranty of habitability by the court assumes a lesser degree of importance in view of the fact that the warranty was legislatively adopted a few months earlier on March 11, 1978. However, the statute did not address the important issue of what remedies were available to the tenant. This absence of officially recognized remedies served to undermine the actual value of the statute to the residential tenant subjected to unsafe or unhealthy living conditions. Though the tenant's rights were clear, the means of enforcing those rights remained an enigma. Hence, the importance of the Teller case is apparent. By specifying the precise routes available to the aggrieved tenant, the court clarified and strengthened the meaning of the implied warranty of habitability in West Virginia.

After recognizing that a residential lease is essentially a contract and that the tenant's duty to pay rent is dependent upon the landlord's fulfillment of the implied warranty of habitability, the Supreme Court of Appeals outlined the specific remedies available to the tenant in the event the implied warranty is breached. The court held that a tenant may vacate the premises, thereby terminating his obligation to pay rent, or the tenant may continue to pay rent and bring his own action or counterclaim to recover damages caused by the breach. Additionally, the court held that a breach of the implied warranty of habitability may constitute a defense to an action for unlawful detainer or to an action for rent or damages brought by the landlord. The only remedy specifically rejected by the Supreme Court of Appeals was the one that would allow a tenant, after notice to the landlord, to repair the defect and deduct the cost of such repairs from his rent. In support of its position the court noted that "the wide range of contract remedies

\[\text{No. CC900, slip op. at 1.}\]

\[\text{W. Va. Code § 37-6-30 (Cum. Supp. 1978). Since the cause of action in the Teller case arose prior to the effective date of the statute, it was necessary for the Supreme Court of Appeals to adopt the implied warranty of habitability in order for the tenants in the case to benefit from its protection.}\]

\[\text{No. CC900, slip op. at 23.}\]
The Supreme Court of Appeals then explained the measure of damages applicable to a breach of the implied warranty of habitability. The tenant's damages are to be measured by "the difference between the fair market value of the premises if they had been as warranted and the fair rental value of the premises as they were during the occupancy by the tenant in the unsafe and unsanitary condition." Additionally, the court held that damages for annoyance and inconvenience are recoverable by the tenant.

The Supreme Court of Appeals also addressed two incidental issues not mentioned in the certified questions. First, the court discussed the matter of escrow accounts. The court noted that the trial court, during pendancy of an action for breach of the implied warranty of habitability, may require the tenant to make future rent payments or part thereof into an escrow account, but only in limited situations, and then only upon the motion of the landlord and after notice and opportunity for a hearing on such motion. Finally, the court held that waiver of the implied warranty of habitability is prohibited as being against public policy. In so holding, the court stated that "[i]f tenants seeking the scarce available shelter are compelled to waive their rights and accept uninhabitable dwellings, then the protection afforded by the implied warranty and the statutes could become meaningless."

By recognizing the implied warranty of habitability, specifying responsive tenant-oriented remedies, and holding that the warranty cannot be waived, the West Virginia Supreme Court of Appeals has taken the initiative to augment the pronouncements of the state legislature and drastically improve the condition of the often maligned residential tenant.

II. EMINENT DOMAIN AND RESTRICTIVE COVENANTS

In *Huntington Urban Renewal Authority v. Commercial Adjunct Co.*, the court was faced with a novel factual situation

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225 Id. at 26.
226 Id. at 32.
227 Id. at 37.
228 Id. at 37.
arising out of an urban renewal authority's condemnation of a parking lot in downtown Huntington. While the authority's plans to condemn Commercial Adjunct's parking lot were pending, the authority acquired other nearby properties, displacing businesses and demolishing commercial buildings. Some of this real estate was developed into competing parking lots and garages. As a result, Commercial Adjunct's parking lot revenue declined. Since the decline of a lot's revenue generating capacity affects its fair market value, the question presented was whether the circuit court should have instructed the jury to disregard any decline in value for which the Urban Renewal Authority could be held solely and directly responsible.

It is settled that the measure of damages in condemnation cases is the fair market value of the property at the time of the taking, that is, on "the date when compensation is paid or secured to be paid." Commercial Adjunct argued persuasively that following this rule would lead to an unjust result in view of the especially detrimental impact of the authority's actions on the value of the lot.

The court first examined a potential analogy in the "general benefits rule" of Strouds Creek and Muddlety Ry. Co. v. Herold. Under that rule the landowner is entitled to the entire value of property taken even where that value has been augmented by the prospect of a public improvement. The court recognized that logic might dictate the application of a converse principle which would have the landowner accept the detrimental effects of governmental activity as well as the beneficial effects, but the court instead distinguished the "general benefits" rationale by noting that "[l]aying waste to large downtown areas do not produce disadvantages of such a general character that the converse of the rule on general benefits may fairly be applied." The court adopted a new rule similar to that set forth by the Ohio court in City of Cleveland v. Carcione.

The new rule, which the court expressly limited to governmental eminent domain activity of a nongeneral nature, waived the

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31 Id. at 563.
32 Id. at 563-64.
33 Id. at 564; Buckhannon R. Co. v. Great Scott Coal, 75 W. Va. 423, 431, 86 S.E. 1031, 1034 (1914).
34 131 W. Va. 45, 45 S.E.2d 513 (1947).
35 242 S.E.2d at 565 (emphasis added).
time-of-taking standard in applicable cases in favor of a rule allowing a more equitable evaluation of damages. The new rule entitles the property owner to an evaluation of his property's value in light of the peculiar facts and circumstances of his case when the condemnor activity, of a nongeneral character, has been responsible for the decrease in value. The relevant time of taking is limited only by the amount of depreciation specifically related to the project for which the land was taken. The circuit courts must allow adducement of evidence about declines in value prior to taking which resulted from urban renewal authority activity and the property owner is entitled to an instruction that the jury disregard the decline in making its compensation award. In concluding, the court stated, "[T]his case probably heralds our willingness to conceptualize condemnation for urban renewal projects as a distinct and separate area of the otherwise well settled law of eminent domain."

In West Virginia Department of Highways v. Sickles, a case involving the condemnation of private farmland for a highway construction right of way, the court liberalized its view of the meaning of "comparable" sales offered in evidence to prove the value of land taken. In this case the landowner, after testifying as to her estimate of the land's value, sought to justify that valuation by testimony concerning sales of other neighboring properties. The circuit court excluded this evidence, presumably because it believed the other sales were not comparable.

The Supreme Court of Appeals reiterated that a landowner's opinion of his land's value has long been recognized as admissible evidence. Since estimating the value of land is a somewhat complex task, the methodology used to arrive at the value is indispensable to the jury's task of assigning proper weight to the opinion. The court ruled that where the sales are comparable the witness is permitted to recite them.

Evidence of voluntary sales in the same general vicinity may be admitted to help the jury fix the value of the condemned land unless there is a lack of sufficient similarity. Where the land is

337 242 S.E.2d at 566.
338 Id. at 567.
340 Id. at 569.
341 Id. at 570-71.
dissimilar, the evidence is excluded by the court.\textsuperscript{342} The standard applied in determining whether the sales were sufficiently similar was taken from \textit{State Road Commission v. Ferguson},\textsuperscript{342} cited by the court as authority for its holding in the present case. In \textit{Ferguson}, the court wrote that comparable sales are those involving properties "similar in size, character, time of sale and location."\textsuperscript{341} While retaining this basic rule, the court appears to have adjusted the elements of the rule by holding that two of these elements, size and proximity in time of sale to the taking, are matters of weight rather than admissibility.\textsuperscript{345} Also, where the lands to be compared are similar in character,\textsuperscript{346} topography and value of improvements are also matters of weight for the triers of fact.\textsuperscript{347}

Furthermore, the court ruled that the landowner may ask the state's appraisal witness whether he has considered specific comparable sales and, if not, the appraiser may be required to consider them and answer whether his appraisal would be altered because of their inclusion in his analysis.\textsuperscript{348}

In \textit{Morris v. Nease},\textsuperscript{349} a decision regarding restrictive covenants, the Supreme Court of Appeals expressed its willingness to protect the unchanged portions of residential neighborhoods from commercial encroachment from within or without the original completely residential neighborhood. Dr. Nease's neighbors in Huntington brought suit and were awarded an injunction closing his chiropractic clinic which he had opened in a residential dwelling formerly used as a five-unit apartment house.\textsuperscript{350} In reversing, the court found that although the defendant had violated the restrictive covenant, the defendant's predecessor in title had also violated the covenant, by building the apartment house on the property. The court noted that the defendant's use of the property was restrained and dignified, and was essentially similar to the prior use. It therefore accepted the defendant's contention that the

\textsuperscript{342} Id.; \textit{State Road Comm'n v. Ferguson}, 148 W. Va. 742, 751, 137 S.E.2d 206, 212 (1964).
\textsuperscript{343} 148 W. Va. 742, 137 S.E.2d 206 (1964).
\textsuperscript{344} \textit{Id.} at 751, 137 S.E.2d at 211.
\textsuperscript{345} 242 S.E.2d at 570.
\textsuperscript{347} 242 S.E.2d at 570.
\textsuperscript{348} \textit{Id.} at 571.
\textsuperscript{349} 238 S.E.2d 844 (W. Va. 1977).
\textsuperscript{350} \textit{Id.} at 846.
plaintiffs' acquiescence in the prior violation was a defense to the present action. The court quashed the injunctions leaving open the possibility of a second suit should the situation change.\(^\text{351}\)

It is important to note, however, that the court did not invalidate the restrictive covenant. After restating the accepted rule in West Virginia that changes in a neighborhood's character can nullify restrictive covenants where they are so radical that they practically destroy the original plan, the court said that the original covenants may grant protection to as little as one block of the area. As long as existing violations within the neighborhood are not so severe as to indicate a complete abandonment of the restrictions, the remaining character and covenants of the neighborhood are still viable. When changes have occurred, the court stated, "[i]t does not follow . . . that the entire neighborhood is perforce released from the burden of restrictive covenants. On the contrary, every effort must be exerted to protect the unchanged portions . . . when businesses begin to encroach on the fringes."\(^\text{352}\)

TORT

I. RETALIATORY DISCHARGE

In Harless v. First National Bank,\(^\text{353}\) a former bank employee filed a complaint against the bank and its vice president. The first count of the complaint alleged that the plaintiff was discharged in retaliation for his efforts to require his employer to operate in compliance with the state and federal consumer credit and protection laws. The second court claimed that the employer's conduct surrounding the discharge amounted to intentional, malicious and outrageous conduct which caused the plaintiff severe emotional distress.

The defendants asserted that the plaintiff's employment was for no fixed term and therefore terminable at the will of either party, with or without cause. The trial court granted a motion to dismiss the complaint for failure to state a cause of action and certified its ruling to the West Virginia Supreme Court of Appeals. The West Virginia Supreme Court of Appeals reversed the trial court's ruling on the motion to dismiss and affirmatively answered the certified question, that the complaint stated a valid cause of action in both the first and second counts.

\(^{351}\) Id. at 848-49.
\(^{352}\) Id. at 847.
\(^{353}\) 246 S.E.2d 270 (W. Va. 1978).
In Harless the court recognized that the defendants' asserted defense was a well-established general rule. However, the rule was held not to be absolute. The right of an employer "to discharge an at will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge." As to the plaintiff's second count which sought damages for emotional injury as a result of the intentional, malicious and outrageous acts of the defendants, the court held that a cause of action had been stated. The court found that the claim fell within the rule that allowed recovery where there was no impact and no physical injury caused by the defendants' wrong, but an emotional or mental disturbance is shown to have been the result of the defendants' intentional or wanton wrongful act.

II. Interspousal and Governmental Immunities

In Coffindaffer v. Coffindaffer, the West Virginia Supreme Court of Appeals persisted in its trend towards the abolition of common law immunities as defenses to civil tort actions by holding that "the defense of interspousal immunity is not available in suits between spouses in this State." The plaintiff in Coffindaffer allegedly sustained personal injuries as she was operating her automobile on a public highway when it was struck by an automobile driven by her husband. Immediately following the collision, the defendant husband left his automobile and allegedly assaulted the plaintiff causing her further injuries. Mrs. Coffindaffer brought an

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355 246 S.E.2d at 275.
357 244 S.E.2d 338 (W. Va. 1978).
359 244 S.E.2d at 344.
action against her husband on two theories. The first sought damages for injuries allegedly sustained as a result of the husband's negligent operation of his automobile. The second sought both compensatory and punitive damages for the alleged intentional assault. The circuit court dismissed the complaint, ruling that the defense of interspousal immunity barred the action. The Supreme Court of Appeals reversed and remanded.

The court based its decision in part on what it perceived to be a decided trend in other jurisdictions to abolish or restrict the doctrine of interspousal immunity and in part on what the court perceived to be the intent of West Virginia Code § 48-3-19 dealing with married women's rights to sue. Although the statute had previously been interpreted as barring tort actions between spouses, the court rested the new interpretation on the fact that the conditions of society have changed. The Coffindaffer court also emphasized the significance of abolishing the immunity in relation to intentional torts. Labeling the immunity a "cruel paradox," the court stated:

Under the guise of promoting family harmony, it permitted the wife beater to practice his twisted frustrations secure in the knowledge that he was immune from civil liability except divorce, and that any criminal penalty would ordinarily be a modest fine. If nothing else, the knowledge of a monetary judgment with punitive damages may stay such violence.

The Coffindaffer decision is a progressive step towards abolition of those common law doctrines which are no longer supported by the intricate social structure of modern society. In keeping with this trend, Coffindaffer implies a ramification beyond the branch of interspousal immunity. Since the court has now rejected the family harmony and the insurance fraud theories as rationales for interspousal immunities, it can be postulated that the court might

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This section provides:
A married woman may sue or be sued alone in any court of law or chancery in this State that may have jurisdiction of the subject matter, the same in all cases as if she were a single woman, and her husband shall not be joined with her in any case unless, for reasons other than the marital relation, it is proper or necessary, because of his interest or liability, to make him a party. In no case need a married woman, because of being such, prosecute or defend by guardian or next friend.

341 244 S.E.2d at 342.

342 Id. at 343.

343 Id. at 343-44.
apply this same reasoning to reevaluate the parent-child immunity in West Virginia. In Lee v. Comer, the court partially abrogated the immunity so as to allow actions between unemancipated minors and their parents for injuries suffered as a result of negligent operation of a motor vehicle. It remains to be seen whether the court, in the shadow of Coffindaffer, will extend Lee one step further and completely abolish the parent-child immunity in tort actions.

Although there appears to be a trend in West Virginia towards the abrogation of immunities as defenses to civil tort actions, this trend is not without exception. In Boggs v. Board of Education, the West Virginia Supreme Court of Appeals held that county boards of education are immune from negligence suits, even though county commissions are not.

The Boggs case arose out of an accident in which an infant child fell from a footbridge while traveling to school. The infant and her father, as next friend, filed suit in the Circuit Court of Clay County against the County Court of Clay County and the Board of Education of Clay County, both of which governmental bodies, it was alleged, maintained control of the footbridge. The circuit court dismissed the complaint, with prejudice, on the basis of the doctrine of governmental immunity asserted by the defendants. The Supreme Court of Appeals reversed the dismissal of the claim against the county commission, holding that county commissions are fundamentally independent of the state and thus not covered by the immunity provided to the state by article 6, § 35 of the West Virginia Constitution.

In considering the applicability of governmental immunity, the court pointed out that the degree to which an agency is dependent upon the state coffers for its establishment, maintenance and operation is an important, although not controlling, factor. The

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244 S.E.2d 799 (W. Va. 1978).
W. VA. CONST. art. VI, § 35 which provides:
The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employer thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.
W. VA. CODE § 17-10-17 (1974 Replacement Vol.) (permitting suits against county commissions) was consequently found not to violate the constitutional provision.
244 S.E.2d at 802.
court found that the primary source of monies for the county court's operation is the county's proportional share of property tax. Recognizing that there was some funding from the state to the county level, the court pointed out that most of such funding was for the purpose of matching federal funds and did not establish dependency to a large degree. Other factors recognized by the court as indicative that county courts are not entitled to share in the state's constitutionally imposed sovereign immunity included the administration of funds at the county level, the fact that county funds are not deposited in the state treasury and the fact that the county owns its own property. Given this fundamental independence of the counties from the state, the court concluded that governmental immunity of the county is not of constitutional dimensions. Thus, the provision of the state code imposing liability upon the county under certain circumstances was held constitutional.

The court, applying the same type analysis, found that county boards of education are performing functions on behalf of the state itself, not merely on behalf of the various localities within the state. The court found that not only does the state provide for a comprehensive plan for state financial support of public schools, but that the county boards of education rely on state monies to pay their debts. Another factor which the court considered was the fact that county boards of education are also subject to extensive state control exerted by the West Virginia Board of Education and the State Superintendent. Therefore county boards of education are considered to be sufficiently a part of the state so that, unlike county commissions, they are entitled to share the protection of the immunity of the state.

WORKMEN'S COMPENSATION

I. Deliberate Intent

In Mandolidis v. Elkins Industries, three cases were consolidated by the West Virginia Supreme Court of Appeals in constru-
ing the "deliberate intent" exception of the West Virginia Workmen's Compensation Act. Under the section of the act being construed, an employer loses immunity from common law suits if injury or death results from "the deliberate intention [of the employer] to produce such injury or death." The three cases involved injuries arising from an employer's alleged recklessness with regard to safety. The trial courts ruled that recklessness was insufficient to constitute deliberate intent, granting summary judgment for the defendant in two of the cases, and a motion to dismiss in the third. All three cases were reversed by the supreme court allowing the claimants to proceed against their employers.

In its discussion of the substantive law, the court used language which may be viewed as substantially changing the application of the deliberate intent exception. The court stated that "[i]n light of the foregoing discussion, [a historical analysis of the exception and its relation to the purpose behind the act] the phrase 'deliberate intent to produce such injury or death' must be held to mean that the employer loses immunity from common law actions where such employer's conduct constitutes an intentional tort or wilful, wanton, and reckless misconduct." The court's justification for including "wilful, wanton, and reckless misconduct" is its belief that the ensuing harm "is no longer accidental in any meaningful sense of the word, and must be taken as having been inflicted with deliberate intention for the purposes of the workmen's compensation act."

The court concluded that the act was enacted to remove negligently caused industrial accidents from the common law tort system. A review of early case law convinced the court that those decisions excluding nonnegligent acts from tort immunity had been misread in subsequent decisions to appear to require a specific showing of deliberate intent.

Despite the expansive analysis undertaken by the court, it is conceivable that the holding of Mandolidis is much more limited, for it is important to note the procedural stance of the consolidated cases. One of these cases was decided on a motion to dismiss, the others on summary judgment. In light of the favorable inferences permitted to be drawn in favor of the plaintiffs on such motions,
and the court's language to that effect,\textsuperscript{379} it may be argued that the case stands for nothing more than the proposition that allegations of wanton and wilful conduct do not as a matter of law preclude the jury from finding the necessary deliberate intent.\textsuperscript{380} Thus the decision will undoubtedly prove to be elusive and of little value. Even if the decision is strictly interpreted as merely allowing the inference of deliberate intent, rather than lowering the standard, once a claim goes to trial, the "deep pocket" theory may almost assure recovery for the claimant. The jury will be well aware of the fact that if it is able to "infer" the necessary intent, the claimant will be able to recover from his employer. If this theory holds true, the effect will be the same as if wanton and wilful conduct alone were sufficient to overcome immunity. It is also unlikely that many employers will receive directed verdicts, as judges will most likely defer to the supreme court's view that it is for the jury to determine the presence of deliberate intent.

Under either interpretation of the decision, then, the court totally rewrote the law of workmen's compensation concerning the employer's immunity from suit. Although it makes a very strong argument in support of its view by outlining the historical purpose of the act, the court's decision did not fully address several contentions supporting the prior interpretation.

Every jurisdiction which has had its statute worded like West Virginia's has required a specific finding of deliberate intent.\textsuperscript{381} It is important to note that the penalty for such conduct is loss of immunity from suit.\textsuperscript{382} Other jurisdictions which incorporate the language "wanton and willful" do not provide such a harsh result. Instead, the amount recovered by the claimant is increased by a specified percentage.\textsuperscript{383} This approach seems more just when it is recognized that it is not only the business which will suffer if it is

\textsuperscript{379} Id. at 917-21.
\textsuperscript{380} In Mandolidis the court stated that "we do not believe that reasonable men could not infer the necessary intent from the facts . . . ." Id. at 918. In Snodgrass, the summary judgment was overturned because the court was unable to conclude "that reasonable men could not draw varying inferences from the facts of the record and . . . infer that the injuries and death complained of resulted from a deliberate intent . . . ." Id. at 919. In Dishmon the court was likewise unable to conclude that "reasonable men could not infer therefrom the intent necessary to overcome defendant's immunity." Id. at 921. It is thus unclear whether the court intends by its holding that "deliberate intent" must still be found but that it may be inferred, or whether it intends that the standard is to be lowered.
\textsuperscript{381} See generally 2 A. Larson, Workmen's Compensation § 70 (desk ed. 1978).
\textsuperscript{382} Id.
\textsuperscript{383} Id.
forced to fold because of crushing tort judgments; the employees will also suffer.384

The act has been amended in the past by the legislature, but the particular section under consideration has remained unchanged. "The strongest evidence that it [the statute] has been rightly explained in practice"385 is the fact that the former judicial interpretation has been allowed to stand for years without change by the legislature.386 The presumption is that the interpretation has legislative approval. Despite amendments to various sections of the act, the legislature has not changed the language in question.

The most troubling issue, however, was totally ignored by the court in making its decision on the three cases. The court sought to establish its interpretation based on legislative intent. However, if the legislature had intended the standard to be wanton and wilful conduct, it could have used those words. That such a standard was not intended is further supported by the fact that in the very same section the legislature used those type of words to describe the type of employee conduct which would bar a claimant from recovering under the act. It seems clear that the legislature intended to establish two different standards since it used different words.387 The court's decision in Mandolidis eliminates that distinction.

The type of conduct condemned by the court may fairly be characterized as reprehensible. An incentive may have been needed to induce employers to guard against such occurrences. How well the judicially created sanction will work remains to be seen.

II. ALLOCATION—MULTIPLE EMPLOYERS

Two cases were overruled by the Supreme Court of Appeals of West Virginia in Maynard v. State Workmen's Compensation

384 Id. Along with providing urgently needed protection, compensation, and economic aid to the employee, the act was intended to protect the employer from expensive and unpredictable litigation. See Jones v. Laird Foundation, 195 S.E.2d 821 (W. Va. 1973)(Sprouse, J., concurring); Maynard v. Island Creek Coal Co., 115 W. Va. 249, 175 S.E. 70 (1934).
385 Mann v. Mercer County Court, 58 W. Va. 651, 660, 52 S.E. 776, 779 (1906) citing SUTHERLAND STATUTORY CONSTRUCTION § 472.
386 Id.
387 W. VA. CODE § 23-4-2 (1978 Replacement Vol.).
Commissioner. In *Maynard* the court reinterpreted West Virginia Code § 23-4-1, which provides a method of allocating among employers the compensation paid to a claimant who develops occupational pneumoconiosis while employed by multiple employers. *Maynard* held that a claimant need not prove to what extent each employer contributed to the disease. In doing so it expressly overruled *Turner v. State Compensation Commissioner* and *Garges v. State Compensation Commissioner*.

The latter two cases had held that an employee, upon filing an initial claim for occupational pneumoconiosis when he had worked for multiple employers, was required to prove to what extent or degree each employer had contributed to the disease. Because the allocation is to be made only among the employers by whom the claimant was employed during the three years immediately preceding the date of last exposure, the inability to attribute specific aggravation of the disease to the most recent employer often meant that an employee could not recover at all. In *Turner*, since the claimant had failed to show any perceptible aggravation related to his last employment, the court held that he could not recover from that employer. Since the claimant's previous employment terminated beyond the statutory period for filing a claim, he was thus also barred from recovering from any previous employer. The *Garges* case involved a similar situation and based its holding on *Turner*.

In *Maynard*, the claimant worked for a mining operation which had changed ownership. Medical evidence indicated that he had developed occupational pneumoconiosis while working for his first employer in 1959, although he was unaware of it until 1970. Five months after United States Steel had assumed operation of the Thacker mine, x-rays revealed a perceptible aggravation of the condition. Medical testimony indicated that the aggravation probably could not have occurred in the five months claimant had worked for United States Steel.

United States Steel argued, based on *Turner* and *Garges*, that since Maynard could not prove a perceptible aggravation of his condition while in its employment, the company should not be

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338 239 S.E.2d 504 (W. Va. 1977).
341 W. VA. CODE § 23-4-1 (1978 Replacement Vol.).
charged for any portion of his compensation. In overruling *Turner* and *Garges* the court noted that, apart from an unpublished order citing no precedent and to which two judges had dissented, “[t]he principles and rationale of *Turner* [and, thus, of *Garges*] had little or no support in the law prior to the *Turner* opinion itself.”

The court outlined the requirements set forth in the code before a compensation award is to be disbursed. The relevant provision states:

> [T]he commissioner shall . . . disburse the workmen’s compensation fund to the employees of such employers in whose employment such employees have been exposed to the hazards of occupational pneumoconiosis . . . and in this State have contracted occupational pneumoconiosis . . . , or have suffered a perceptible aggravation . . . .

The two criteria, as characterized by the *Maynard* court, include employee exposure to dust during employment, and contraction or aggravation of the disease within the state. Apparently the court interpreted the criteria as not requiring that the exposure caused by the employer be proven to cause the contraction or aggravation. It is merely enough that the employer expose workers to the hazard.

The allocation of a recovery among multiple employers is generally statutorily mandated. The language of the West Virginia Code provision is susceptible to the court’s interpretation. Other jurisdictions, such as Virginia, which have held that proof of exposure is enough, have accepted as such “exposure” that which *could* have resulted in the aggravation, although the claimant is not required to prove that it did. Because evidence in *Maynard* showed that the aggravation could not have been caused by the claimant’s exposure while working for United States Steel, it appears that even under the Virginia rule the claimant in *Maynard* would not have recovered from United States Steel. However, the Virginia statute specifies “injurious” exposure and, therefore, provides the basis for the differing results. Absent such qualification in West Virginia Code § 23-4-1, the Supreme Court of Appeals of West Virginia appears to be justified in holding that “there is

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239 S.E.2d at 508.
24 239 S.E.2d at 506-07.
no requirement that an employee, upon filing an initial claim for occupational pneumoconiosis where he has worked for multiple employers, must prove to what extent each employer has contributed to his disease." The claimant will be required to prove perceptible aggravation "only . . . if he seeks additional disability compensation over and above that which he has received from a previously adjudicated occupational pneumoconiosis award."

The court also interpreted the statutory requirement that the award should be allocated to the employers "based upon the time and degree of exposure with each employer." It reversed the Commissioner's method which was to calculate the percentage of time the claimant had worked for each employer within the three year period alone. Following the Michigan method, the court concluded that the three year period determined who was liable, but once liability was found, it should be apportioned based on the total time worked for each employer.

Although the court's ruling may not square with notions of fault-based liability, it is more in line with the purposes of workmen's compensation than the holdings in Turner and Garges. Workmen's compensation is not a fault-based system: its major purpose is to provide protection, compensation and economic aid to the injured employee. The employer trades off the system of fault-based liability for advantages including immunity from common law actions. Given the trade off, and given the purposes of the act, the continuation of a rule of law which would result in non-compensable disability as in Turner and Garges would not serve the interests of the workmen's compensation system.

III. OCCUPATIONAL DISEASE—HEARING LOSS

In keeping with the "beneficent purpose" and "liberal construction" doctrines of workmen's compensation laws, the West Virginia Supreme Court of Appeals further expanded the scope of compensation coverage in Myers v. State Workmen's Compensation Commissioner. In Myers the court held that one suffering from a noise-induced gradual hearing loss has a compensable claim

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239 S.E.2d at 508.
Id.
Jones v. Laird Foundation, 195 S.E.2d 821 (W. Va. 1973)(Sprouse, J., concurring);
Maynard v. Island Creek Coal Co., 115 W. Va. 249, 175 S.E. 70 (1934).
under the workmen's compensation statutes. The injury suffered, diagnosed as "sensorineural," was found to be an "occupational disease" and, therefore, a compensable claim.

It was undisputed that the noise level where the claimant had worked over the years was sufficient to cause the hearing loss. By applying the standard that the evidence is to be construed liberally in favor of the claimant, the court concluded that the claimant's injury had indeed been caused by the noise to which he had been exposed while on the job. Although the claimant's injury was not the result of a "single, isolated, fortuitous occurrence," the court concluded that "an employee who suffers a noise-induced gradual hearing loss during the course of and resulting from his employment, sustains an occupational disease, by definition, a personal injury under the provisions of W.Va. Code § 23-4-1."

The court followed the same line of reasoning upon which it based its holding in *Lilly v. State Workmen's Compensation Commissioner*, wherein it held that a back injury gradually brought about by a "constant and repeated lifting and twisting motion" was an "occupational disease" within the meaning of the statute. In both cases, the injury fulfilled the statutory requirements: it occurred in the course of and as a result of employment; there was a direct causal connection between the injury and the claimant's working conditions; the injury could be seen as following as a natural incident of the work; and, it could be reasonably traced to the employment as the proximate cause.

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403 A sensorineural hearing loss is the type of hearing loss which occurs when the hearing nerve, or any part of it, is damaged or degenerates. *Id.* at 125.

404 *Id.* at 127.

405 The claimant had worked in an underground coal mine where, for three years, he was exposed to the noise from dynamite explosions; for another eighteen years he was exposed to the noises made by a pneumatic roof bolter and a continuous miner. *Id.* at 126.


407 See Jordan v. State Workmen's Compensation Comm'r, 156 W. Va. 169, 191 S.E.2d 497, 500 (1972), wherein it was held that "[e]xcept in cases of occupational disease, a claimant must prove an attributable work-related accident before his disability will be held compensable" and that "[a] compensable accident . . . is an injury incurred by an employee 'attributable to a definite, isolated, fortuitous occurrence.'" *Id.* (Citations omitted).


410 *Id.* at 216.

By considering a gradual hearing loss to be a compensable claim, West Virginia has joined several other jurisdictions which have compensated this type of injury.\footnote{New York, Wisconsin, Missouri, Georgia, Rhode Island, Louisiana, Arizona, and California. 1 A. Larson, Workmen's Compensation § 41.40 (1976).} The case is in keeping with the spirit of the workmen's compensation laws. As stated in Lilly, 

\"[t]o hold otherwise would operate to defeat certain valid claims merely because there was no ascertainable single, isolated, fortuitous event which caused the injury.\"\footnote{\textit{Lilly v. State Workmen's Compensation Comm'r}, 225 S.E.2d 214, 218 (W. Va. 1976).}

\section*{IV. Contractual Nature of Statute}

The West Virginia Supreme Court of Appeals, in \textit{Lester v. State Workmen's Compensation Commissioner},\footnote{242 S.E.2d 443 (W. Va. 1978).} made what at first appears to be a minor change in workmen's compensation law with regard to the statute of limitations. In order to make the change, however, the court was required to overrule what had been a very basic legal concept regarding compensation law. "Therefore, despite our course of decisions in this area of law, we are of the opinion that the rights and duties under our workmen's compensation statute are no longer contractual but grow out of the employer-employee status to which the law attaches certain duties and responsibilities."\footnote{\textit{Id.} at 450-51.}

The problem arose because a legislative enactment, which changed the time period for filing claims, was passed after the claimant's injury had accrued, but before the statute of limitations in effect when the claimant learned he had occupational pneumoconiosis had run. Although the claimant had failed to file within the time period of the previous statute, he had filed within the time period provided by the amended statute. The question facing the court was whether the new statute of limitations applied to the claimant's situation.

The court applied the liberal construction given workmen's compensation laws and held that the claim was timely filed under the amended statute. Considering the beneficent purposes of workmen's compensation, the court reasoned that the amendment was aimed at situations such as the claimant's where the injury or disease was of the type that could remain undetected until after
the prior statute of limitations had run. The court stated, citing ample West Virginia cases as authority, that "where a new statute deals with procedure only, prima facie, it applies to all actions—those which have accrued or are pending, and future actions." Pointing out that a substantial majority of jurisdictions hold that statutes enlarging the limitation period are merely procedural and, therefore, are applicable to claims accrued but not yet barred, the court stated that "[w]e believe the majority view is sound and we adopt it."

The court failed, however, to address the additional problems with statutes of limitations for statutorily created rights and causes of action. Such statutes of limitations are generally held to be part of the right itself and, as such, part of the substantive law governing the right. The running of the statute not only bars the remedy, but also extinguishes the right. Therefore, the amended statute of limitations was not a new statute dealing "with procedure only." The court addressed the issue by stating that the rule incorporating the statute of limitations into the workmen's compensation act is "unnecessarily rigid and contrary to the humanitarian purposes of workmen's compensation legislation and is expressly disapproved." What the court appears to have overlooked is that this "rigid rule" is not a rule of workmen's compensation law, but a rule of law governing statutes of limitations. By disapproving the rule, has the court overruled it for every statutorily created right or cause of action? Just as workmen's compensation laws are "humanitarian" in purpose, so are other statutorily created rights, such as wrongful death actions. If "humanitarian purposes" is sufficient reason and authority for overruling a rule of statute of limitations law with regard to workmen's compensation, conceivably it will justify changes in other areas of law as well.

The court additionally considered the contention that applying the amended statute would impair contractual rights in violation of U.S. Constitution art. I, § 10, and West Virginia Constitution art. 3, § 4, the contract clause. To avoid the constitutional

414 Id. at 445.
415 Id. at 446.
416 Id.
420 The question of contractual impairment had to be addressed because a long
attacks which were made when compensation laws were first enacted, legislatures drafted workmen's compensation statutes to make them dependent upon mutual consent of employers and employees. Being thus "elective," the acts did not impair the rights of employers and employees to enter into and agree upon the conditions and terms of the employment contract.

In Gooding v. Ott the court considered whether the coverage of the act extended to accidents occurring outside the state. The court concluded that since coverage of the act was optional and the parties "freely [entered] into the contract of employment with reference to the statute, the statute should be read into the contract as an integral part thereof." That workmen's compensation statutes are contractual in nature and considered a part of the employment contract had, until Lester, been a basic concept of compensation law in West Virginia. What the court points out in Lester is that the courts were erroneously striving to find an "elective" aspect to workmen's compensation in order to avoid constitutional attacks. As early as 1917 the United States Supreme Court held that workmen's compensation laws were a valid exercise of the state's police powers. The highest court in the land "discarded the notion that workmen's compensation legislation must be based ostensibly on contract."

Finding that past decisions unnecessarily reached for a "fiction" that workmen's compensation coverage was elective in order to read the laws as part of the employment contract, the court in Lester abandoned the notion that workmen's compensation laws were contractual in nature. Therefore, retroactive application of decisions, beginning with Gooding v. Ott, 77 W. Va. 487, 87 S.E. 862 (1916), held that the workmen's compensation statutes were to be read into the contract of employment between the employer and each employee. The apparent contention of the employer is that if the amended statute is applied to the claimant, the "agreement" under which he was employed has been legislatively modified.

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423 242 S.E.2d at 448.
424 See 242 S.E.2d at 448-49.
426 242 S.E.2d 443, 449, quoting 77 W. Va. 487, 492, 87 S.E. 862, 864.
428 242 S.E.2d at 449.
429 It is interesting to note that, almost as an afterthought, the court stated that the amendment enlarging the time period for filing occupational pneumoconiosis claims "is not retroactive legislation impairing vested rights." Id. at 452. The reason it gave was that the amendment did not, in the present case, fit the definition of "retroactive" as defined in the earlier case, Sizemore v. State Workmen's Compensation Comm'r, 219 S.E.2d 912 (W. Va. 1975). If what the court asserts is correct,
plication of the amended statute would impair no contract obliga-
tion.

The court also addressed the assertion that the employer had
a vested right, or a property right, in the limitation in effect at the
time of the injury. If so, the application of the amendment to the
claimant would unconstitutionally impair the employer's right.
The court dismissed the contention by stating that a person has
no vested right in the running of a statute of limitations "unless it
has completely run and barred the action."\(^{30}\)

West Virginia is now among the minority of jurisdictions
which regard workmen's compensation statutes as not being con-
tractual in nature.\(^{41}\) In addition, it appears to be in the minority
concerning retroactive application of amendments to limitation
periods. "[S]tatutory amendments changing limitation periods
are generally not applied retroactively, whether the effect of the
change would be to improve or worsen the claimant's position."\(^{42}\)
However, Larson himself commented upon the extremely strict
construction generally made of statutes of limitations in work-
men's compensation laws: "It is odd indeed to find, in a suppos-
edly beneficent piece of legislation, the survival of this fragment
of irrational cruelty surpassing the most technical forfeitures of
legal statutes of limitations."\(^{43}\) Although the effect in the Lester
decision was to mitigate a harsh result, it remains to be seen what
the repercussions are, if any, of the court's changes concerning
both statute of limitations law for statutorily created rights and
the contractual nature of workmen's compensation laws.

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it seems that the court's conclusion would be dispositive of the case without all the
foregoing analysis.

\(^{30}\) 242 S.E.2d at 452.

\(^{41}\) See 99 C.J.S. Workmen's Compensation, § 14 (1958) and cases cited therein.

\(^{42}\) 3 A. Larson, Workmen's Compensation § 78.80 (1976).

\(^{43}\) Id. § 78.40.