A Beginner's Guide to Defending Criminal Cases In West Virginia State Courts

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1. BEFORE MEETING YOUR CLIENT

A Circuit Judge enters an order appointing you to represent an indigent criminal defendant. That's an *order*, enforceable by contempt. Without a subsequent order relieving you as counsel, there is no way out!

You need to meet your client quickly. Footprints will smear with the next rain. An eyewitness is at the bus station. Your client is in jail, talking to a jailhouse snitch, and contemplating suicide. You need to meet her as soon as possible .

Before meeting your client, however, do four things: (1) call the clerk's office to find out when the next hearing is scheduled; (2) view the clerk's file, and copy *everything* not already in your file; (3) study the charging document; and (4) read the code section.

(a) Get the Next Hearing Date

Call the clerk's office (either magistrate or circuit) before you meet with the client to get the next hearing date. The client will appreciate knowing when she will next appear in court, and you can start to plan your schedule.

The usual case will fall within one of three different scheduling scenarios: (1) magistrate court criminal complaint - felony; (2) magistrate court criminal complaint - misdemeanor; and (3) circuit court indictment (felony or misdemeanor)

(1) *Magistrate Court Criminal Complaint - Felony*

If the client is charged with a felony by criminal complaint in magistrate court, then she made her first appearance before a magistrate during the booking process. During this appearance, the client did not "plead", but she filled-out a financial affidavit for indigent legal representation, and bond was set. A formal "plea" will occur in Circuit Court, after she is indicted by the grand jury. *See W.Va.R.Crim.P.*, Rule 5(c).

The client is entitled to a preliminary hearing within 10 days of her arrest if she is in jail, and within 20 days if she is free on bond. *W.Va.R.Crim.P.*, Rule 5(c); and *W.Va.R.Crim.P. for Mag. Cts.*, Rule 5(d). If the client does not receive a preliminary hearing within the 10 day period, file a bond reduction motion in magistrate court seeking a personal recognizance bond and schedule it before the assigned magistrate for an immediate hearing (i.e., on the 11th day). If the client does not receive a preliminary hearing within the 20 day period (your client is *not* in jail), then you can file a petition for writ of mandamus in circuit court seeking to "mandate" the magistrate court to hold a preliminary hearing. State ex rel. Rowe v. Ferguson, 268 S.E.2d 45 (W.Va. 1980); State v. White, 280 S.E.2d 114 (W.Va. 1981).

File a motion to reduce bond as soon as you return from the jail after your initial client interview. Get a hearing on the bond reduction motion *before* the preliminary hearing. If the client posts bond before the preliminary hearing, then the prosecutor can't use bond reduction as leverage to get her to waive the preliminary hearing. *W.Va.R.Crim.P.*, Rule 5(d) explains which magistrate has "jurisdiction" to hear the bond reduction motion.

(2) *Magistrate Court Criminal Complaint - Misdemeanor*

If the client is charged with a misdemeanor by criminal complaint in magistrate court, then, like the felony scenario, she made her first appearance before a magistrate during the booking process. In contrast to the felony scenario, the misdemeanor client pleads ("not guilty", I assume) at her first appearance before the Magistrate. *W.Va.R.Crim.P.*, Rule 5(b).

The second court appearance is the bench trial, which won't take place until *November*! If the client is in jail, that's a *l-o-n-g* time from now. File a bond reduction motion in magistrate court, and schedule it for a hearing. If you lose the motion, take it to circuit court. If you lose again, another bond reduction motion in a month or so alleging a change in circumstances (i.e., that your client has been in jail for another month and she *still* can't post bond).

If the client wants a jury trial, you must file a written demand within 20 days of the entry of your appointment order. *W.Va.R.Crim.P. for Magistrate Courts.*, Rule 5(c); and *W.Va. Code* 50-5-8(b). Begin formal discovery and schedule a pre-trial hearing to request compliance with discovery requests and for rulings on pre-trial motions.

There are three bodies of procedural law governing magistrate court criminal practice: (1) the rules of criminal procedure; (2) the rules of criminal procedure for magistrate courts; and (3) Chapter 50 of the West Virginia Code. Don't neglect Chapter 50. It contains important information regarding magistrate court jury trial and appeal practice.

(3) *Circuit Court Indictment (Felony or Misdemeanor)*

A direct indictment is an indictment that was *not* preceded by magistrate court proceedings. The client is a free person, and may be unaware of grand jury action against her. An indirect indictment is an indictment that follows a preliminary hearing in magistrate court. In either case, a circuit judge will order either a summons (a letter to the client ordering her to appear for arraignment on a date certain) or an arrest warrant or "capias" (an order to the police to arrest the client, lodge her in jail and cause her to appear for arraignment forthwith).

In the case of an indirect indictment, you and your client should be well into the attorney-client relationship, after the initial (and follow-up) client interview(s), a bond hearing, the preliminary hearing, and informal discovery. You may have even been in Circuit Court already on your motion to preserve evidence. Call the clerk's office to confirm the arraignment date, and meet with your client.

(b) Copy the Clerk's File

On your way to the jail, stop at the courthouse and view the clerk's file. There will be documents in the clerk's file that you do not have. Some of these documents may be important. In some cases, the clerk's file may contain a list of witnesses already subpoenaed by the prosecutor for the preliminary hearing or upcoming bench trial. You might also find bond information, a procedural rights form, the financial affidavit. Copy *everything* not already in your file.

Return to the clerk's office every couple of weeks to re-review the file. Interesting things slip into the clerk's file, such as *ex-parte* orders, letters from citizens to the Judge and the State's subpoena returns.

If there is a co-defendant, view his file periodically. The co-defendant's discovery responses will be important to your case. I once found the co-defendant's written confession in the clerk's file *on the same day* the Judge denied my motion for the production of that statement!

(c) Study and Copy the Charging Document and Code Section

Before you leave the courthouse to visit your client, sit down at a desk in the library and stare at the charging document (i.e., criminal complaint or indictment). Just *stare* at it for a few minutes. Pull Chapter 62 off the shelf and read the code section. Stick a copy of it in your file. You can't conduct an effective initial client interview without knowing the elements of the crime, possible defenses, and the punishment.

As you examine the charging document, make it a practice to look for two common motions to dismiss based on the language of the charging document. This will help ensure that you spend time studying the charging document.

The first motion to dismiss is based on defects in the language of the charging document. If the "four corners" of the indictment or criminal complaint fail to allege a material element, then you have grounds for a motion to dismiss. *See* "Pre-Trial Motions Practice," below.

The second common motion to dismiss is under Harman v. Frye, 188 W.Va. 611, 425 S.E.2d 566 (W.Va. 1992). This motion only applies when charges are brought by criminal complaint in magistrate court. Under Frye, there must be a (1) police investigation or (2) prosecutor's evaluation prior to the issuance of an arrest warrant or summons based on a criminal complaint. If it appears, from a reading of the complaint, that no such investigation or evaluation was conducted, then you *may* have grounds to dismiss under Frye. Nearly all criminal complaints are signed by a police officer (rather than a prosecutor), so the issue is whether the complaint suggests that some form of police *investigation* occurred - however informal or narrow. *See* "Pre-Trial Motions Practice," below.

Finally, your client will appreciate straight answers about the charge, possible defenses and the penalties. She might even begin to trust you.

2. WHAT TO TAKE TO THE INITIAL CLIENT INTERVIEW

Your business card.

Blank forms for the client to sign giving you the authority to obtain medical, psychiatric and school records.

You must give the client a copy of the charging document.

I once forgot a notepad. It was kind of silly to travel all the way to the jail and have nothing to write on.

Before you head for the jail, call the jail and ask about attorney visiting policies and to make sure your client hasn't already bonded out. You don't want to make a wasted trip to all the way to Flatwoods.

3. THE INTERVIEW

(a) Take Control of the Interview

Your client is nervous and upset. *"They didn't read me my rights or nothin',"* she blurts. This is no place to begin *your* interview. If you let the client take control of the interview, you might forget to ask her for important information, and you won't earn her respect. For some reason, I've found that if I get into the heart of the matter (legal issues and facts of the case) in the beginning of the interview, then it is psychologically draining for both me and the client to then turn to asking her questions about her social security number, date of birth, and her mother's maiden name. I find it better to obtain personal background information first, set the pace of the interview, calm you client as she talks about herself, and gain her trust as you show interest in *her*.

(b) What to Discuss at the Interview

There are (at least) five parts to an initial client interview, which are: (1) collecting identifying and other background information about the client; (2) explaining the charges and potential penalties; (3) getting the facts of the case; (4) explaining criminal law and procedure; and (5) advice and a plan of attack.

(1) *Personal Background Information*

I begin an initial client interview with a pencil in my hand, and I ask about identifying and personal information - beginning with how to spell her name. If I touch upon a sensitive topic at any time during the interview, my pencil drops and I sit back to

listen and ask follow up questions. For example, when I ask for her father's name, my pencil is in my hand and I'm taking notes. But when she tells me that her father is deceased, my pencil drops and I sit back to listen. When we finish discussing her father's tragedy, I pick up my pencil again, jot down notes about her father, and move on with the interview with pencil in hand. When I conclude the first part of the interview (collecting background/identifying information), I put my pencil down.

I don't hide my notes from the client. My notepad lies flat on my desk in plain view of the client, so she doesn't think I'm writing secret stuff about her.

Personal background and identifying information is important throughout the case. When you draft a motion to reduce bail, you need to include your client's age, prior arrest record, and her ties to the community. When you negotiate a plea bargain, you need to tell the prosecutor that your client *is* a contributing member of society, that she has a family and a job. When you prepare for opening statements and direct examination of the client, you need to craft questions that will let the jury know that your client is a wonderful, loving mother who would never do a thing like *that*. And at sentencing, you need to argue to the judge good points about your client's background. I usually tell the client why this information is important, "I'm not trying to pry into your personal life, but I need this information to help defend you, reduce your bond, or negotiate a settlement."

Identification information you should obtain from the client includes: (1) full name; (2) date/place of birth; (3) social security number; (4) residence, phone number and who she lives with; (5) education; (6) employment history; (7) military experience; (8) marital status and child custody/support issues; (9) physical and mental health history. If she has a mental health history, ask her to sign a waiver form, so you can get copies of records from mental health centers, hospitals and educational institutions.

Factors for setting or reducing bond are discussed later in this paper. State ex rel. Ghiz v. Johnson, 155 W.Va. 186 (1971), is the leading authority on factors a judge should consider in setting/reducing bond. Also review *W.Va. Code* 62-1C-1 and *W.Va.R.Cr.P.*, Rule 46. This information includes: : (1) ties to the community (i.e., family members, how long she has lived in the community, social activities, and other commitments your client has to the community); (2) your client's prior criminal record (dates and places of convictions); (3) whether your client has ever failed to appear in court before; and (4) financial information (you need to know how much bail your client can come up with). Compare the financial information she tells you to the copy of her financial affidavit from the clerk's file.

Ask your client about remaining bail information later in the interview, when you get into the facts of the case. This information will include (1) her conduct with authorities (i.e., did she resist arrest or attempt to flee); (2) the nature of the crime (i.e., does it involve violence or weapons); and (3) the strength of the State's case.

Write down names, addresses/phone numbers of all family members.

(2) *Explain The Charge(s) and Potential Penalties*

Give the client a copy of the charging document. Read it to her, and make sure she understands the elements of the charge. Pursuant to *W.Va.R.Crim.P*, Rule 10, the judge will ask the client at the arraignment whether she has received a copy of the indictment. Some clients do not read or write. If the client did not graduate from high school, or you otherwise suspect the client may not be able to read, ask *her* to read the indictment to you.

Tell the client the maximum penalty. Make no promises of anything less, but, if appropriate, give her hope, and reasons for, a better outcome.

(3) *Get The Facts of the Case*

Get the facts of the case from the client by using your direct examination skills. Put your pencil down, sit back and start at the chronological beginning with "who," "what," "where" "why" and "how" questions. For example, if the victim's name is John Smith, begin with questions like, 'who is John Smith' 'how do you know him' 'why were you with him on February 17, 1999'. Do as much fishing as you can. You want both harmful and helpful information.

Occasionally during the interview, you may want to pick up your pencil and make a note. Ask the client to back up, "what time was it?" "how do you spell that name?"

Defense lawyers have different opinions on whether to ask the client the ultimate question - did you do it? I always ask. I want to know whether the client did it, what she did, how she did it, and why. Work with the truth. You may ultimately decide the best defense is to put the client on the stand and have her tell the jury, "yes, I shot John Smith." Then *you* can present mitigating evidence and argue that this is a case of battery, not malicious wounding.

Pictures help. Put your pencil and a blank sheet of paper on your desk and ask the client to draw a picture of the crime scene. This will help her explain, and you understand.

Be sure to obtain detailed information about any possible suppression issue (i.e., a confession, the police seizure, or any identification procedure).

Write down names, addresses and phone of all potential witnesses.

(4) *Explain Criminal law & Procedure*

a. RULE 11 AND CALL V. MCKENZIE

W.V.R.Cr.P., Rule 11 (Pleas) and Call v. McKenzie, 159 W.Va. 191, 220 S.E.2d 665 (1975) outline basic law and procedure your client needs to understand.

Draw a timeline for the client, showing the major stages of the procedure - the preliminary hearing, the grand jury, the arraignment, pre-trial hearings, trial, sentencing and the filing of a notice of intent to appeal. A magistrate court timeline will be substantially easier to draw, but the client still needs to know when to expect what.

B. TERM RULES AND SPEEDY TRIAL

If your client is charged with a felony, she needs to understand: (1) the One Term Rule (*W.Va. Code* 62-3-1) (the right to be tried during the same term the indictment was returned, unless waived); (2) the Two Term Rule (Ex parte Blankenship, 93 W.Va. 408, 116 S.E. 751 (1923) and W.Va. Code 62-2-12) (the right to be released from custody if two full terms go by and your client is still not indicted; and (3) the Three Term Rule (*W.Va. Code* 62-3-21) (the right to a dismissal with prejudice if three full terms expire between the time the indictment was returned and trial).

C. DEMAND FOR A TRIAL BY *JURY* IN MAGISTRATE COURT

If your client is charged with a misdemeanor in Magistrate court, you and your client must decide whether to request a jury. If such a request is not made within 20 days of your appointment, the defendant permanently waives her right to a jury trial. W.Va.R.Crim.P for Mag. Cts., Rule 5(c); and *W.Va. Code* 50-5-8 (b).

(5) *Advice for the Client and Plan of Attack*

Advise your client to get (and keep) a job, quit hanging out in low places, and straighten out her life before trial. If your client gets (and remains) on the straight track early in the case, you'll be in a better position to negotiate a good deal, argue for probation or impress the jury. Put some of the burden on the client. "Don't blame me," I stress, "if we show up for sentencing and you're still unemployed. Heck, Flip burgers! I don't care . . . Just get to work."

For example: Suppose your client is charged with public intoxication, disorderly conduct, and destruction of property. She shows up to your office for the Initial client Interview - reeking of alcohol. You need to tell her two things. First, tell her that if she appears in court with alcohol on her breath, then *you* will tell the judge you can't proceed because your client is drunk. The judge might revoke her bond. I once asked the Circuit Judge to revoke *my client's* bond when he appeared for a suppression hearing in a drunken state -- after weeks/months of being unable to put together his defense because of his alcoholism. I figured if he's in jail before trial, at least he'll be sober and I can start to work with him to try to prevent years of imprisonment on a felony conviction.

Second, since his crimes were influenced by alcohol, he needs to get some treatment. Call your local mental health center for information on Alcohol Anonymous Meetings, 28 day in-patient programs and other treatment options for him. Explain to him that you will have an easier time negotiating his way out of jail if you can show the Magistrate or Prosecutor that he is addressing his problem.

For example: Suppose your client is charged with driving while suspended due to unpaid traffic citations. Advise her to go down to the Department of Motor Vehicles and do whatever it takes to get her license back before the trial. The magistrate or prosecutor may cut her a break if she has paid the unpaid citations and gotten her license restored.

For example: Suppose your client is charged with grand larceny of an automobile. The car was driven into the Elk River and is ruined. Tell your client that he should start saving restitution money.

Finally, **tell your client not to discuss her case with anyone but you!!** She can tell inquiring minds that *you*, her lawyer, told her not to discuss the facts of the case -- not even to family members. This is not advice to be taken or given lightly. On the third day of a recent jury trial, the prosecutor produced a letter my client had written from the jail to his lover. Certain that *my* client wouldn't have written an inculpatory letter from the jail, I asked from counsel table, "My I have a minute, Your Honor?" "Sure," said the judge," take all the time you need." Big mistake. I should have approached and requested time to review the letter *out* of the jury's presence, because it contained shocking inculpatory statements. The jury watched my face turn red and steam pour out of my ears to the tune of his "honey I did it" letter.

If your client is in jail, the prosecution *will find* any letter he writes that contains inculpatory statements. Count on it. The same rule applies if your client is not in jail. *Order* your client to keep her mouth shut.

B. INFORMAL DISCOVERY (*YOUR* INVESTIGATION)

1. VIEW THE SCENE

I keep a camera in my car. I am usually the photographer in my cases, but I like to take a witness with me. Under the rules of evidence, you can admit into evidence a photograph taken by *you*, the lawyer, so long as you can put a warm body on the witness stand who will testify that the photograph is an accurate depiction of the scene or item of evidence at the time. *See WVRE.*, Rule 901.

Get to the crime scene as fast as you can. Take a bunch photographs. Photos will help you remember the scene as you prepare for trial. Photos will help your client explain the facts to you. Photos will help the jury understand the case. Take close-ups of tire marks, and far away shots of the whole scene from a distance.

Viewing the scene gives the case personality. Taking photos makes you focus and think about the crime scene. Plus, your client will appreciate you if you take the time to visit the scene.

2. INTERVIEW WITNESSES

If you don't have access to an investigator, then you'll have to solve the case yourself. The lack of an investigator is no excuse for not conducting an investigation. Don't worry too much about making yourself a witness in your own case. Go to the crime scene promptly and knock on doors. Identify yourself, ask if anyone saw anything, and leave your business card. Witnesses must be interviewed. The crime scene must be viewed.

Imagine meeting a witness at the crime scene who tells you (the lawyer) the light was green. Great, you take notes and subpoena him for trial. At trial, she testifies that the light was *red*! If you can't put an investigator on the witness stand to impeach her (for changing her story from green to red), you can still do a pretty good job before the jury:

A: It was red, I say!
Q: We've met before, haven't we?
A: Uh?
Q: We've met before, haven't we?
A: No.
Q: We didn't have a conversation on March 31st in front the big blue house on Seventeenth Street around 9:00 in the morning while the school bus drove by?
A: Uh. Yea, I guess.
Q: I asked you about the traffic light.
A: So.
Q: You told me it was green.
A: I don't remember.
Q: You told me it was green.
A: Huh?
Q: You told me it was green.

Regardless of the witness' answer, you've impeached her. It would be even more fun if you could call an investigator to the witness stand if she denied having told the investigator the light was green. But the lack of an investigator is no excuse for not visiting the scene and searching for witnesses.

Don't take a tape recorder all over the place. I never use one. Witnesses don't like talking into a tape recorder, and a hidden tape recorder is bad business. Instead, put your notepad in your back pocket and just talk to witnesses. When you return to your car, then take some notes. If you need, pull your notepad out to write down names and addresses and phone numbers while you are interviewing the witness, but don't otherwise try to interview a witness at the crime scene with a pencil in your hand. Try to get important witnesses into your office as you get closer to the trial date.

3. PSYCHOLOGICAL/EDUCATIONAL RECORDS

At the initial client interview, you should determine whether the client's past educational or psychiatric history may be relevant. Such records might be helpful to prepare a psychiatric defense, to negotiate a deal with the prosecutor, or to argue for probation.

If relevant, ask the client to sign waivers, or forms, that give you permission to obtain relevant medical, psychological and school records. Order those records soon, because it may take months to get them.

C. MAKING BAIL

1. MAKE BAIL *BEFORE* THE PRELIMINARY HEARING

If the defendant is charged with a felony, by criminal complaint, get her out of jail *before* the preliminary hearing. Prosecutors often offer to reduce the bond if she waives the preliminary hearing. This offer is extremely attractive to an incarcerated client, but you will lose a major opportunity. The preliminary hearing gives you a chance to lock-in statements of state witnesses. It gives you a chance to size up the case You just never know what you might learn at the preliminary hearing -- even the most in the most straightforward appearing cases. Maybe the arresting officer didn't *really* see anything! Maybe your client forgot to tell you that she made a verbal confession. Waive the preliminary hearing, and you'll prepare your case blindfolded. If you forget to schedule the bond reduction hearing before the preliminary hearing, then it is *your* fault for putting the client in the position of having to choose between freedom or a preliminary hearing.

"Except as provided by Rule 5.2(d) of [W.Va.R.Crim.P.]," the bond reduction hearing "shall be held within 5 days of the date the motion is filed." *W.Va.R.Crim.P.*, Rule 5(d)(3). I've looked pretty hard and I can't find any "Rule 5.2(d)", so I don't know what the exception is. Regardless, you need to file your bond reduction motion *at least* five (5) days before the preliminary hearing to get a hearing before the preliminary hearing. Serve a copy on the prosecutor, and go to the clerk's office to schedule the hearing ASAP.

2. SAMPLE BOND REDUCTION MOTION

Before drafting a bond reduction motion, review *W.Va. Code* 62-1C-1 (Right to Bail); State ex rel. Ghiz v. Johnson, 155 W.Va. 186 (1971) (bail factors); and W.Va.R.Cr.P., Rule 46 (Release From Custody). Attach letters and/or affidavits to the motion from employers, teachers, family members and citizens who have good character information, although you may not have time to do this if you are trying to secure her release before the preliminary hearing. Focus on the Ghiz factors, and point out as many facts that support the Ghiz factors as you can.

Exhibit A of this paper, is a sample bond reduction motion.

3. WHERE TO FILE THE BOND REDUCTION MOTION

File your bond reduction motion (or motion to set bail) in the same court and before the same judge/magistrate where your case is pending. If your client is charged by criminal complaint (whether felony or misdemeanor), *W.Va.R.Crim.P. for Mag.Cts.*, Rule 5(d), tells you where and when to file your magistrate court motion. If you're not satisfied with the magistrate's ruling on your motion, then you should "petition" the Circuit Court for a bond reduction hearing (citing the magistrate's ruling). This hearing should be scheduled before the Circuit Judge who is on "priority" duty. The Clerk will tell you which judge is on priority duty.

After the preliminary hearing (usually the next day), the magistrate court clerk will transfer your case to the circuit court clerk. From that point on, your case is in circuit court. Before indictment, file a bond reduction motion in circuit court and schedule it for a hearing before the "priority" circuit judge. After indictment, your case will be assigned to a judge and any bond reduction motion(s) must be heard by the assigned judge.

If your client is charged by criminal complaint with an offense which is punishable by life imprisonment, you must file your motion to set bail directly in circuit court, whether before or after the preliminary hearing. *W.Va. Code* 62-1C-1(a).

4. WHAT TO DO AT THE BOND REDUCTION HEARING

At the bond reduction hearing, you have the burden of proof. Come to the hearing with character witnesses (if you can), who can testify about the client's strong ties to the community. The testimony you elicit from them should follow the bail factors set forth in the Ghiz case. *W.Va.R.Crim.P.*, Rule 46(h)(2), (3), (4) and (5) explain the procedural and evidentiary rules at the hearing (i.e., subpoenas, testimony, cross-examination, hearsay). Make a good record, because you can obtain Supreme Court review (before trial) of the Circuit Judge's ruling on your bond reduction motion by habeas corpus (*See* State v. Conrad, 280 S.E.2d 728 (W.Va. 1981) and *W.Va.R.Crim.P.*, Rule 62-1C-(c). Well, you can *try* to get the Supreme Court to review the matter.

5. DISCOVERY IS A BYPRODUCT?

Finally, one often overlooked by-product of a bond reduction hearing is discovery. Under the Ghiz case, one of the factors a Judge should consider in setting the amount of bail is the "strength of the State's case." This means that you can subpoena adverse witnesses to show the Judge just how weak the State's case really is. Of course, if it turns out that the State's case is stronger than you thought it was, you may lose on this issue, but you've gained valuable information to help you prepare for, and conduct, the trial.

D. FORMAL DISCOVERY

1. DISCOVERY IN CIRCUIT COURT

Exhibit B of this paper, is a sample Omnibus Discovery Motion. Cases, Code Sections and Rules are cited throughout this sample motion, and you should review all of this law.

File an omnibus discovery motion *before* the arraignment, or as soon thereafter as you can. At the arraignment, ask the judge to ***order*** that the State comply by a date certain. You need this order to protect your client. If the date passes without a response, then give the prosecutor a phone call and informally agree on a short extension. If that date passes and you still don't have discovery responses, then it is time to file a motion to compel, wherein you ask the circuit judge to ***order*** that the State either comply with your discovery requests forthwith, or, alternatively, that any evidence not properly disclosed be inadmissible before the jury. Schedule a hearing on the Motion to Compel. If you win the hearing and get your relief and the State *still* fails to answer, then file a "Second Motion to Compel" wherein you only ask for an ***order*** that the undisclosed evidence be inadmissible, or, alternatively, that the case be dismissed.

The first item of the sample omnibus discovery motion (exhibit B) is entitled "Bill of Particulars." Use the bill of particulars to clarify, and narrow, the indictment. For example, a malicious wounding indictment might allege that the defendant did "shoot, stab, cut and wound [the victim]." In this case, you may want to ask the question: "Is the defendant accused of shooting, stabbing, cutting or wounding the alleged victim?" You may want to further ask, "If the defendant is accused of "cutting" the victim, what instrument is the defendant alleged to have used to "cut" the victim (i.e., a knife, a broken bottle, etc.)?"

Item No. 18 of the sample omnibus discovery motion (exhibit B) requests that statements of state witnesses be produced *before* trial. Rule 26.2 does not require such disclosure until *after* the witness has testified on direct examination during trial, but the West Virginia Supreme Court of Appeals urges parties in criminal cases to exchange 26.2 statements *before* trial to avoid delays at trial. *See* State v. Gale, 177 W.Va. 337, 352 S.E.2d 87, 89-91 (W.Va. 1986); State v. Watson, 173 W.Va. 553, 318 S.E.2d 603 (1984); and State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990).

Many of the State's responses will trigger the need for you to file a motion to suppress or a motion in limine, and to schedule that motion for a pre-trial evidentiary hearing. If the State intends to introduce evidence guarded by the Constitution (a confession, evidence seized by the police, or identification evidence such as a line-up or a photo-spread) then you should file a *motion to suppress*. If the state intends to introduce evidence guarded by the Rules of Evidence, such as evidence of collateral crimes, evidence of flight or hearsay, then you should file a *motion in limine*.

2. DISCOVERY PRIOR TO PRELIMINARY HEARING

The West Virginia Supreme Court of Appeals has not yet addressed the issue of discovery prior to the preliminary hearing. *W.V.R.Cr.P.*, Rule 16, provides for discovery "upon request," and does not provide any arbitrary time periods before which discovery is not available. Additionally, Brady v. Maryland, 373 U.S. 83 (1963), and Rule 3.8 of the Rules of Professional Conduct require timely disclosure of all exculpatory information. Other appellate courts that have addressed this issue have required the discovery to be provided, but only in a limited, reasonable fashion (*e.g.*, People v. Kingsley, 530 P.2d 501 (Colo. 1975); Holman v. Superior Court, 629 P.2d 14 (Cal. 1981)).

Don't flood the prosecutor with discovery requests before the preliminary hearing (the judge will think you're just being unreasonable). Ask for a few specific items that you really need before the preliminary hearing, like a preliminary hearing witness list, tangible evidence that might need to be preserved, or the address of a witness who may flee.

3. DISCOVERY IN MAGISTRATE COURT MISDEMEANOR CASES

Rule 14 of the Rules of Criminal Procedure for Magistrate Courts, entitled "Discovery and Inspection," is "Reserved." What this means isn't entirely clear. It does *not* mean that discovery is limited or prohibited in any way in Magistrate Court.

Rule 1 of the Rules of Criminal Procedure states that, "These rules govern the procedure in all criminal proceedings in the circuit courts of West Virginia, . . .; and whenever specifically provided in one of the rules, to criminal proceedings before West Virginia magistrates."

There are discovery provisions in Chapter 62, such as 62-1B-1 (Bill of particulars) and 62-1B-2 (Defendant's statements; reports of examinations and tests; defendant's books, papers and tangible objects).

The federal and state constitutions apply to Magistrate Courts, and they require the disclosure of exculpatory material under Brady and its progeny.

There are at least eight discovery provisions that apply to Magistrate Court misdemeanor cases:

(1) Statements of State Witnesses: *W.V.R.Cr.P. for Mag. Cts.*, Rule 17(b), states that, in Magistrate Court, "Statements of witnesses shall be produced in accordance with the provisions of Rule 26.2 of the West Virginia Rules of Criminal Procedure."

(2) Bill of Particulars: The "Reporter's Note" under *W.V.R.Cr.P. for Mag.Cts.*, Rule 14, reads that "Statutory procedures regarding . . . bills of particulars are set forth in *W.Va. Code* 62-1B-1 . . ."

(3) Statements of the Defendant: The "Reporter's Notes" under *W.V.R.Cr.P. for Mag.Cts.*, Rule 14, reads that "Statutory procedures regarding discovery . . . are set forth in W.Va. Code 62-1B-1 to 62-1B-4." And section 62-1B-2 requires that the state provide, upon request, all statements of the defendant.

(4) Documents and Tangible Objects: *W.Va. Code* 62-1B-2, in conjunction with the "Reporter's Notes" to *W.V.R.Cr.P. for Mag. Cts.*, Rule 14, make discovery of documents and tangible objects (similar to *W.V.R.Cr.P.*, Rule 16), applicable to Magistrate Court misdemeanor cases.

(5) Reports of Examinations and Tests: *W.Va. Code* 62-1B-2, in conjunction with the "Reporter's Notes" to *W.V.R.Cr.P. for Mag. Cts.*, Rule 14, make discovery of reports of examinations and tests (similar to *W.V.R.Cr.P.*, Rule 16), applicable to Magistrate Court misdemeanor cases.

(6) Exculpatory Material: Rule 3.8 of the Rules of Professional Conduct, requiring timely disclosure of all exculpatory information, and Brady v. Maryland, 373 U.S. 83 (1963), certainly apply to Magistrate Court misdemeanor cases.

(7) Collateral Crimes Evidence: The Rules of Evidence apply to Magistrate Court trials. *W.V.R.Cr.P. for Mag.Cts.*, Rule 17(a). Therefore, *W.V.R.E.*, Rule 404(b), and cases regarding the use of collateral crimes evidence at trial, such as State v. McGinnis, 455 S.E.2d 516 (W.Va. 1994), apply to Magistrate Court misdemeanor cases.

(8) Evidence of Flight: Because the Rules of Evidence apply to Magistrate Court trials, Accord v. Hedrick, 176 W.Va. 154, 342 S.E.2d 120 (1986), requiring pre-trial notice of the state's intention to use flight evidence, and the right to a pre-trial hearing on the admissibility of such evidence, also applies to Magistrate Court misdemeanor cases.

Finally, because of the 1994 amendments to the Rules of Criminal Procedure for Magistrate Courts, eliminating the right to have a *de novo* jury trial on appeal in Circuit Court (*W.V.R.Cr.P. for Mag.Cts.*, Rule 20.1; *W.Va. Code* 50-5-13; and State ex rel. Collins v. Bedell, No. 22781 (W.Va. June 19, 1995), I recommend that you file as much discovery as you would in Circuit Court, whether your case is scheduled for a jury trial or a bench trial.

4. Enforcement of Discovery Requests

During the arraignment, ask the Judge for an order directing the State to respond to your discovery requests by a specific date. If this date passes, phone the prosecutor and, if appropriate, informally agree on a short extension. If *that* date passes, and the State has not fully complied with each of your discovery requests, file a "Motion to Compel," and schedule it for a hearing.

Don't let the State get away with answering your request for a bill of particulars with a statement like, "The indictment fully and fairly informs the defendant of what she is charged with."

In your Motion to Compel, ask for an order directing forthwith compliance with each discovery requests, and, in addition, ask for the sanctions set forth in *W.V.R.Cr.P.*, Rule 16(d)(2), for non-compliance. File a second motion to compel if the State continues to give inadequate answers to your discovery requests. Failure to bring your discovery motions on for hearing and to secure an order directing compliance with them will generally constitute a waiver on appeal of any claim of inadequate discovery. *See* State v. Baker, 287 S.E.2d 497 (W.Va. 1982); *W.V.R.Cr.P.*, Rule 12(b).

5. SAMPLE OMNIBUS DISCOVERY MOTION

Exhibit B of this paper is a sample omnibus discovery motion.

E. MAGISTRATE COURT MISDEMEANOR PRACTICE

1. ARRAIGNMENT IN MAGISTRATE COURT

The Prompt Presentment Rule contained in *W.Va. Code* 62-1-5 and *W.Va.R.Cr.P.*, Rule 5(a), requires that a criminal defendant be promptly brought before a Magistrate when she is placed under arrest. *See* State v. Rummer, 189 W.Va. 369, 432 S.E.2d 39 (1993). This means that your client's first appearance (or arraignment) in Magistrate Court was on the day of her arrest, and conducted without counsel. At this "prompt presentment," bail is set, and your client should have been asked if he wants to fill out a financial affidavit for the appointment of counsel.

If the client is charged, by complaint, with a felony, then she does not enter a "plea" before the magistrate. This is reserved for circuit court after indictment. If the client is charged with a misdemeanor, then the client pleads (hopefully "not guilty") before the magistrate.

2. SCHEDULING ISSUES IN MAGISTRATE COURT

Within a few days of your appointment to a misdemeanor case in magistrate court, you should receive a "notice of hearing" from the magistrate court clerk. This "hearing" is the bench trial, and you are expected to appear, with witnesses, ready for trial before the magistrate (there are no preliminary hearings in misdemeanor cases). I wouldn't wait to receive the notice in the mail, however. Call the clerk on the day you are appointed and ask when the case is scheduled for hearing.

Don't be afraid to file an omnibus discovery motion for a misdemeanor magistrate court bench trial. If the prosecutor doesn't comply with your request(s), then call the magistrate court clerk to schedule a pre-trial hearing for ruling(s) on your discovery requests, as well as any other motion you may want to file before trial.

3. MOTIONS PRACTICE IN MAGISTRATE COURT

With the elimination of the right to a *de novo* jury trial on appeal to the Circuit Court (*W.Va.R.Crim.P. for Mag.Cts.*, Rule 20.1; *W.Va. Code* 50-5-13; and State ex rel. Collins v. Bedell, 194 W.Va. 390, 460 S.E.2d 636 (1995), you must handle your misdemeanor case the same way you would handle a felony case in Circuit Court. Promptly file an omnibus discovery motion and request a pre-trial hearing to get an order from the Magistrate directing the State to answer your
discovery requests by a date certain. File any applicable motions to dismiss, motions to suppress, motions in limine, and trial-shaping motions. Schedule these motions for a pre-trial hearing.

You may feel some institutional resistance to pre-trial motions practice in Magistrate Court misdemeanor cases. "You want *what*!" I have found, however, that so long as your motions are reasonable and made in good faith, most magistrates will grant your requests for pre-trial hearings, read your motions and accompanying briefs, listen to your oral arguments and make reasonable rulings. You may even find that if you treat magistrates like you would treat a circuit court Judge, you will earn their respect.

Finally, Brown v. Dietrick, 444 S.E.2d 47 (W.Va. 1994), provides authority for your client's right to file motions to suppress in magistrate court misdemeanor cases.

4. JURY TRIAL IN MAGISTRATE COURT

The likelihood of an acquittal is almost always greater before a jury than it is before a judge or magistrate. There are many reasons for this. For example, a jury will not know about the defendant's prior criminal record unless the defendant first opens the door. *W.V.R.E.*, Rule 609(a)(1). Motions in limine to exclude unfairly prejudicial evidence are meaningless if the judge who rules on the motion is the finder of fact at trial. You can strike prospective jurors who you don't want on the jury. And most importantly, with effective voir dire, jurors will generally begin the trial with more of an innocent and open mind. As Justice William O. Douglas wrote, "[Clarence] Darrow knew that juries are more to be trusted than judges when it comes to the protection of the life and liberty of the citizen." William O. Douglas, Foreward to Clarence Darrow, ATTORNEY FOR THE DAMNED, vii-ix (Arthur Weinberg ed., Simon and Schuster 1957) (1957).

The right to a magistrate court jury trial is permanently waived if the defendant fails to file a written request for a jury within 20 days from the arraignment or the appointment of counsel, whichever is later. *W.Va.R.Crim.P. for Mag. Cts.*, Rule 5(c); *W.Va.R.Crim.P.*, Rule 20.1; *W.Va. Code* 50-5-13; State ex rel. Collins v. Bedell, 194 W.Va. 390, 460 S.E.2d 636 (1995). The 20 day magistrate rule also precludes a defendant from a jury in circuit court -- the defendant will not receive a jury trial on appeal in Circuit Court unless she timely files a written request for a jury at the magistrate level pursuant to *W.Va.R.Crim.P. for Mag. Cts.*, Rule 5(c).

You should seriously consider filing a request for a jury in any magistrate court misdemeanor case that doesn't settle within the first 20 days. Be cautioned that a defendant who loses a jury trial in magistrate court, or who settles her case on the day scheduled for jury trial, may be assessed an additional fee for the use of a jury. Ask the clerk about this fee, it may be $200.00.

You only get six jurors in magistrate court. Otherwise, conduct the magistrate court jury trial as you would a circuit court jury trial. Pursue motions practice, prepare a trial notebook, conduct voir dire and submit jury instructions.

5. APPEAL FROM MAGISTRATE COURT TO CIRCUIT COURT

If your client is dissatisfied with a verdict in magistrate court, appeal the case to circuit court. *W.Va.R.Crim.P. for Mag. Cts.*, Rule 20.1, and *W.Va. Code* 50-5-13, set forth the procedure for appealing your case to the circuit court. The filing of the appeal automatically stays the execution of the sentence, so your client can remain out on bond pending the Circuit Court appeal. *W.Va. Code* 50-5-13(a).

If your client is dissatisfied with a sentence in magistrate court, move for a stay of execution of the sentence under *W.Va.R.Crim.P. for Mag. Cts.*, Rule 21 (the magistrate must grant this motion). Then file a petition for modification of sentence in circuit court under (1) *W.Va. Code* 62-11A-1 and State v. Kerns, 394 S.E.2d 532 (W.Va. 1990) (work release); (2) *W.Va. Code* 62-11B-1 et seq. (home detention); (3) *W.Va. Code* 62-12-4 (probation); (4) *W.V.R.Cr.P.*, Rule 35 (reduction of sentence); or (5) any combination of these provisions. Scheduled for a hearing before the priority Circuit Judge. Attach a certified copy of the magistrate court criminal complaint and final order to the petition.

F. THE PRELIMINARY HEARING

1. RIGHT TO A PRELIMINARY HEARING

If your client is charged with a felony in magistrate court by criminal complaint, then she's entitled to a preliminary hearing. There are no preliminary hearings in misdemeanor cases. The preliminary hearing serves to protect a defendant who has been charged with a felony, but whose case has not yet been presented to a grand jury. Since the grand jury might not meet for several months, it is really not fair to hold a defendant in jail, or even on bond, when it is clear that she is innocent, or when there is no evidence against her. This is the reason a preliminary hearing is required to be held promptly -- within 10 days of arrest if the client is in jail, and 20 days from arrest if the defendant is free on bond. *W.Va.R.Crim.P.*, Rule 5.1.

W.Va. Code 62-1-8 also provides authority for the preliminary hearing, but the 10 and 20 day time periods are in rule 5.1.

At the preliminary hearing, the magistrate must find that there is probable cause to believe that a crime was committed, and the magistrate must find that there is probable

cause to believe that the defendant is the person who committed that crime. These are two separate issues, and you should treat them separately as you conduct the hearing. This is the same standard for the issuance of an arrest warrant based on a criminal complaint. At the preliminary hearing, though, the defendant is allowed to ask questions and present evidence, whereas the a finding of probable cause to support the issuance of an arrest warrant is limited to the "four corners" of the written complaint.

Once the grand jury meets and indicts, or issues a not true bill, then the preliminary hearing becomes moot. The cure for failure to afford a timely preliminary hearing is a writ of mandamus before indictment (filed in Circuit Court) to force the magistrate to hold a preliminary hearing, not reversal after conviction. State ex rel. Rowe v. Ferguson, 268 S.E.2d 45 (W.Va. 1980); State v. White, 280 S.E.2d 114 (W.Va. 1981).

A magistrate once prohibited me from presenting evidence at a preliminary hearing. I made my objection clear on the tape-recorded record in magistrate court. After the hearing, I requested a copy of the tape, had it transcribed, and then filed a petition for writ of mandamus in circuit court seeking a *meaningful* preliminary hearing. The circuit judge granted my request, finding that the preliminary hearing was not *meaningful*, and ordered a new preliminary hearing. By having two preliminary hearings, I was able to cross-examine state witnesses twice before indictment, and I was able to put my flighty witness' testimony to the test of prosecutorial cross examination - before trial. This helped me prepare a great trial notebook..

[The remainder of Section F of The Beginner's Guide comes from a paper written by George Castelle, Chief Kanawha County Public Defender, and distributed to new public defenders in West Virginia]

2. PURPOSE OF THE HEARING AND DEFENSE GOAL

The purpose of the preliminary hearing, as set forth in *W.Va.R.Crim.P.*, Rule 5.1, is for the Magistrate to determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it. The goal of the defense, however, is frequently a different matter.

The defense has two main choices for the goal of the preliminary hearing: (a) to minimize the introduction of evidence in hope of defeating a finding of probable cause, or (b) to maximize the introduction of evidence in preparation for the next stage of the proceeding (e.g., the suppression hearing, or the trial).

The traditional goal of trying to minimize the introduction of evidence in order to defeat a finding of probable cause will be appropriate in those few instances where it is likely to be successful and where it is likely to result in an end to further prosecution. The defense will regret this approach, however, even if no probable cause is found, if the defendant is subsequently indicted, re-arrested, and tried without ever having an effective, evidence-gathering preliminary hearing.

Ordinarily, the lawyer who has studied both options within the context of a particular case will prefer to use the preliminary hearing to prepare for the next stage of the proceeding.

As discussed below, the most effective way to use a preliminary hearing to prepare for the next stage (suppression or other pretrial motions, plea negotiations, trial) is to use the preliminary hearing to maximize discovery, to preserve favorable testimony, and to identify and isolate unfavorable testimony in order to develop impeachment opportunities at later stages.

3. STATE'S OBJECTIONS TO ENGAGING IN DISCOVERY

In maximizing the gathering of evidence, the defense lawyer will have to overcome prosecution objections that the defense is engaging in "pure discovery," or "fishing." In this regard the defense lawyer can properly argue that, as long as the inquiry has some bearing on the issue of probable cause, discovery is wholly permissible and is authorized by both the state Supreme Court and by the United States Supreme Court. Desper v. State, 173 W.Va. 494, 318 S.E.2d 437 (1984).

With the use of Desper, the defense lawyer can be prepared to justify each area of inquiry on cross-examination on the basis of its bearing on the issue of probable cause. For example:

CROSS-EXAMINATION (continuing):

DEFENSE COUNSEL: You testified that you were walking down the street when you saw Mr. Johnson coming out of the store. Who else saw this?

PROSECUTOR: Objection. This is pure discovery.

DEFENSE COUNSEL: It is not pure discovery. If the prosecution wants to use this witness as the basis for probable cause, then the defense is entitled to explore this witness' credibility, among other things--which bears directly on probable cause. The inability of this witness to answer the question "who else was present"--or conflicting statements in this regard--may very well establish this witness' credibility or lack of it. It may also bear on his ability or his inability to perceive. If discovery is a by-product of this questioning, then it is a permissible by-product. And that's straight from Desper v. State, page 498.

A second example:

DEFENSE COUNSEL: Before taking Mr. Johnson's statement, did you determine how long it had been since he had last slept?

PROSECUTOR: Objection, your honor. The defense is trying to attack the confession. Suppression belongs in circuit court, not here.

DEFENSE COUNSEL: This is not for suppression--these questions are important for probable cause. If the State is going to establish probable cause by use of Mr. Johnson's supposed statement, then we need to know how much weight to give to this statement. If Mr. Johnson hadn't slept for 48 hours, was dead drunk, coerced, and beaten senseless, then the amount of weight to give to this supposed statement is zero. Its not a matter for suppression at this stage, but it certainly is a matter for a finding of probable cause. Magistrate Court may not be able to suppress the statement, but in deciding probable cause the Court needs to know how much weight this statement deserves. And depending on what these answers are, it may deserve nothing.

4. OBJECTIONS TO STATE'S DIRECT EXAMINATION

If the defense has selected the goal of defeating a finding of probable cause, the defense should, of course, object to the introduction of all inadmissible evidence. In this regard, the three prerequisites of the admission of hearsay, as set forth in *W.Va.R.Crim.P.*, Rule 5.1, will be significant, and should be committed to memory. The lawyer should also have photocopies available in order to make the point more emphatic.

On the other hand, if the defense has selected the goal of preparing for the next stages of the proceeding, the defense will not want to object to inadmissible evidence: the defense instead will want to maximize the gathering of all evidence, admissible or not.

The more damaging the evidence, the more valuable it is for the defense to learn about it at the preliminary hearing, for several reasons: First, it is necessary to know the damaging evidence in order to prepare motions in limine and suppression motions in an effort to exclude this evidence at trial, when it really counts. Second, it is necessary to know the damaging evidence in order to be able to investigate its accuracy and discredit it if inaccurate. Third, it is necessary to know the details of damaging information in order to avoid surprise at trial. Fourth, it is necessary to know this information in order to develop means of minimizing its impact if admissible at trial. Fifth, the more detail a damaging witness provides, particularly a dishonest one, the more likely that the witness will become caught in contradictions at trial. And finally, it is necessary to know the damaging evidence in order to adequately weigh an offer of a plea agreement.

Consequently, in pursuing this goal, the defense should not object to questions or answers that are non-responsive, irrelevant, privileged, opinion, hearsay, or any other of the traditional grounds for objecting at trial, with one exception. The one exception is that questions that are leading should be resisted, because they impede, rather than enhance, the gathering of evidence from the witness.

5. CROSS-EXAMINATION OF STATE WITNESSES

(a) Eliciting Detail for Use at Later Proceedings

Particularly with a prosecution witness who is dishonest or exaggerating, the more detail that the defense lawyer can elicit, the greater the value in preparing for the next stage of the proceeding. A dishonest or exaggerating witness will tend to enhance facts in support of the immediate goal. At a later stage, when the goal has changed, the facts will be likely to change, and the transcript of the earlier proceeding will be enormously valuable.

For example:

(At the preliminary hearing, when the prosecution witness is trying to demonstrate the defendant's guilt)

DEFENSE COUNSEL: When you say Mr. Johnson appeared nervous, what do you mean?

PROSECUTION WITNESS: He was shaking like a leaf.

(Later in the same case, at the suppression hearing, when the prosecution witness is trying to demonstrate the voluntariness of the confession)

DEFENSE COUNSEL: When you began to question Mr. Johnson, how did he look?

PROSECUTION WITNESS: He was cool as a cucumber.

DEFENSE COUNSEL: By "Cool as a cucumber, what do you mean?"

PROSECUTION WITNESS: He was sitting in a chair, relaxed. He asked for a cigarette. We gave him one. He took a few drags, thought for a minute, and then told us he just wanted to clear the record, to get something off his chest, if we thought it would help him make bond. Cool as a cucumber.

DEFENSE LAWYER: Cool as a cucumber?

PROSECUTION WITNESS. Cool as a cucumber.

DEFENSE LAWYER: Not shaking like a leaf?

PROSECUTION WITNESS: No.

DEFENSE LAWYER: Do you remember testifying in the preliminary hearing in this case?

PROSECUTION WITNESS: Yes.

DEFENSE LAWYER: Do you remember being under oath?

PROSECUTION WITNESS: I guess.

DEFENSE LAWYER: And were you asked the following question and did you give the following answer. Reading from page 42. Quote: . . . . .

In addition to discrediting the dishonest or exaggerating witness at the suppression hearing, this type of contradiction creates strong defense advantages at trial. If the witness repeats the preliminary hearing testimony, the defense can impeach with the suppression testimony. If the witness repeats the suppression testimony, the defense can impeach with the preliminary testimony. The dishonest witness has been trapped in his own dishonesty.

Consequently, the more details that can be elicited on cross-examination, the more material the defense will have at trial.

(b) Traditional "Rules" of Cross-Examination

In an effort to elicit detail from prosecution witnesses, it is apparent that the traditional trial "rules" of cross-examination will not be productive.

For example, trial technique instructors will teach points for cross-examination such as:

- Do not ask a question if you don't already know the answer
- Never ask the question "why?"
- Don't allow the witness to explain an answer
- Use only leading questions
- Don't ask one question too many

In most preliminary proceedings, however, none of these directives will be helpful, because they limit the information that will be received. Such limiting efforts are trial goals, after all of the information is already gathered. In the information-gathering stage, open-ended questions like "why," "when," "who," "what," "where," and "how" can all be enormously productive. Once the answers are received, the questions that elicit favorable responses can then be repeated with confidence at trial, and the damaging responses can be avoided.

(c) Exploring Bias and Ability to Perceive

In addition to pursuing the details related to the charges against the defendant, it is also helpful on cross-examination at the preliminary hearing to pursue matters involving the weight to be given to the witness' testimony, such as bias and ability to perceive.

The following is an inquiry into the witnesses ability to perceive:

DEFENSE LAWYER: Exactly how far away were you?

PROSECUTION WITNESS: Not too far.

DEFENSE LAWYER: By "Not too far" what do you mean?

PROSECUTION WITNESS: I really can't tell. It was dark. There was just some shadows
moving in the dark.

DEFENSE LAWYER: How many shadows?

PROSECUTION WITNESS: Maybe two or three?

DEFENSE LAWYER: Two or three what?

PROSECUTION WITNESS: People, I guess.

DEFENSE LAWYER: What else could you see?

PROSECUTION WITNESS: Nothing, really.

Similarly, bias can be explored on cross-examination by non-leading questions, at least initially:

DEFENSE LAWYER: How did you know Mr. Johnson?

PROSECUTION WITNESS: We used to date.

DEFENSE LAWYER: When you say "used to date," what do you mean?

PROSECUTION WITNESS: We went out, you know, and sometimes he spent the night.

After developing these personal details with open-ended questions, concluding with leading questions can seal the point more dramatically:

DEFENSE LAWYER: So you really hate him?

PROSECUTION WITNESS: Well, wouldn't you?

DEFENSE LAWYER: Does that mean "Yes"?

PROSECUTION WITNESS: Yes.

6. DIRECT EXAMINATION OF DEFENSE WITNESSES

Ordinarily there are no advantages to calling favorable defense witnesses in the preliminary hearing, unless winning the hearing and foreclosing further prosecution is a realistic goal, or unless there appears to be a need, and no better means, of preserving favorable testimony (as will sometimes be the case with police officers that the prosecution will not be willing to produce themselves).

It is almost always a terrible idea to call the defendant as a witness at the preliminary hearing. Even the most honest of witnesses will likely tell a slightly different version of events at a jury trial nine months later, which means that you would be handing the prosecution quality impeachment material, even if your client is telling the truth. Don't do it.

On the other hand, there is a significant discovery value in calling unfavorable witnesses, even if they serve to strengthen the prosecution's case for a finding of probable cause. Desper v. State supports the right of the defense to call police officers who have relevant information that the State, for whatever reason, chooses to withhold. Desper v. State, 173 W.Va. 494, 501, 318 S.E.2d 437 (1984).

Calling the victim as a defense witness is a different matter, at least in regard to child victims and victims in emotionally sensitive matters. The prosecution will often try to shield a victim from defense questioning, in part because the prosecutor knows that victims may misrepresent or overstate the case against the defendant and that skillful cross-examination at a preliminary hearing will often provide impeachment material at trial.

Consequently, where the victim's statements are essential to a showing of probable cause, the prosecutor will often try to introduce the victim's statements in hearsay form, through the testimony of a police officer or other key person.

The defense can sometimes overcome this obstacle by a hearsay objection to such testimony and by the defense's own subpoena of the victim. The same rules apply in such instances as apply to all hearsay in preliminary hearings--that is, such hearsay is admissible if the proponent of the hearsay meets the three criteria in Rule 5.1 of the Rules of Criminal Procedure:

(1) that the source of the hearsay is credible;
(2) that there is a factual basis for the information furnished; and
(3) that it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing.

With child victims, or victims in emotionally sensitive cases, the prosecution's claim of an "unreasonable burden" can be difficult to overcome. Peyatt v. Kopp, 189 W.Va. 114, 428 S.E.2d 535 (1993) (defense subpoenas of child victims quashed, police officer and social worker permitted to testify to hearsay).

7. MORE DISCOVERY ISSUES

(a) Writing Used to Refresh Memory

Rule 612 (a) of the Rules of Evidence provides that "If, while testifying, a witness uses a writing or object to refresh memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying."

Consequently, if a police officer refers to notes, the police report, statements of witnesses, statement of the defendant, or any other matter while testifying at the preliminary hearing, the defense is entitled to review it at that time.

(b) 26.2 Statements

It appears that the West Virginia Supreme Court of Appeals has never addressed the issue whether *W.V.R.Cr.P.*, Rule 26.2 (Statements of State Witnesses), applies to Magistrate Courts. Prosecutor's often argue that it does not apply, because Rule 26.2 falls, in the Rules, under the heading "Trial," and a preliminary hearing is not a trial.

But consider this: *W.Va.R.Crim.P.*, Rule 26.2, is patterned after Rule 26.2 of the Federal Rules of Criminal Procedure. Federal Rule 26.2 includes a specific list of proceedings where 26.2 applies, and this list does not include preliminary hearings. Rule 26.2, therefore, probably does not apply to preliminary hearings in Federal Court, because, generally, "where a statute expressly designates certain subjects, those which are not so designated are excluded by implication from the scope of the statutory designation." State v. Underwood, 281 S.E.2d 491 (W.Va. 1981). State Rule 26.2, however, does not contain such a list.

8. DON'T WAIVE THE PRELIMINARY HEARING

All of the benefits, set forth above, that can be gained from an effective preliminary hearing are also reasons why the prosecution may want to prevent the preliminary hearing from ever occurring in the first place.

Consequently, with rare exceptions, the defense should carefully weigh prosecutorial inducements to waive the preliminary hearing and should waive only when the prosecution offers something in return that is greater in value than the trial preparation opportunities that the defendant will be sacrificing by abandoning the right to a hearing.

Traditional offers--such as providing the defense with some item of discovery in exchange for waiving the preliminary hearing--appear to be relatively valueless because the defendant ordinarily is already entitled to what is being offered anyway, without any sacrifice in return.

Other offers are more difficult to assess--such as an agreement to reduce bond for a person unable to post bond and unlikely to receive a reduction of bond by any other means. This type of offer requires in-depth consultation with the client because the value of temporary freedom is best understood by the client while the value of the preliminary hearing as a trial preparation device is best understood only by the lawyer.

A few types of preliminary hearings, on emotionally charged but relatively minor matters (such as juvenile incorrigibility proceedings), may sometimes wisely be waived because of disadvantages inherent in the proceeding itself. Such circumstance will arise if the very nature of the hearing (involving family members condemning each other) is likely to be destructive of the client's ultimate goal (such as family reconciliation).

Even in these unusual proceedings, it may be wise to waive the hearing only in exchange for something roughly comparable. Roughly comparable benefits for the defense may include such matters as agreements for immediate defense interviews with the complaining witnesses. In courthouse interviews with hostile family members, the defense might gain as much or more information than would be acquired in the preliminary hearing, and in only slightly less useful form.

In any event, waiver will be appropriate only when the gain for the client clearly outweighs the loss.

6. ARRAIGNMENT IN CIRCUIT COURT

Generally, there are six things that happen at your client's arraignment before a circuit judge: (1) counsel is appointed; (2) the Judge reads the indictment in open court, unless waived, (3) a plea is entered into the record; (4) a trial date is scheduled; (5) discovery deadlines are set; and (6) your client's bond is set. *W.Va.R.Crim.P.*, Rules 10 and 11.

1. COUNSEL IS APPOINTED

An "indirect indictment" is an indictment that follows a criminal complaint and preliminary hearing. The matter of counsel should have been determined prior to the preliminary hearing, so it won't be an issue at the arraignment.

A "direct" indictment is an indictment that originates criminal proceedings against the defendant. The matter of counsel must be addressed during the arraignment. In some cases, counsel will be appointed during the few days between the grand jury meeting and the arraignment date. If the defendant appears at her arraignment without counsel, then the judge will ask her if she wants appointed counsel. If so, she will be given a financial affidavit, and the arraignment will be postponed a few minutes.

2. THE INDICTMENT IS READ

If you have been retained or appointed as counsel *before* the arraignment, you must give the client a copy of the indictment and review it with her before the arraignment. The judge will ask your client whether she has received a copy of the indictment, whether she understands the charge(s) against her, and whether she wants the indictment read to her in open court. You or your client may ask the judge to waive the reading of the indictment, pursuant to *W. Va. R. Crim. P.*, Rule 10.

3. THE CLIENT ENTERS A PLEA

Next, you client is asked to plead. You'll want to advise your client, before the arraignment, to say the words "not guilty, your honor." I usually ask the court to enter a plea of not guilty on behalf of my client.

4. A TRIAL DATE IS SCHEDULED

After your client pleads not guilty, the judge will schedule the trial date. You must discuss with your client, before arraignment, her rights under the One Term Rule, which is the *statutory* right to have her trial in the same term in which the indictment was returned. The One Term Rule is contained in *W. Va. Code* 62-3-1. There are three terms in a year, and the exact dates of each term vary from circuit to circuit. These dates are contained in Rule XVII of the Trial Court Rules (T.C.R.) for Trial Courts of Record. Whether to waive the One Term Rule is a strategy decision to carefully discuss with your client.

5. A DISCOVERY TIMETABLE IS ORDERED

Some circuit judges have strict rules regarding time deadlines to file discovery requests and responses, and they will order specific dates for compliance. Some judges will not even mention discovery during the arraignment.

If your judge does not order a specific dates for the filing of discovery requests and responses, then you should ask the judge to do so at the arraignment.

Many Judges will give defense counsel a couple of weeks to file discovery requests. Don't wait a couple weeks to do this, though. I file my omnibus discovery motion *before* the arraignment, whenever I can. I then remind the Judge that my discovery requests have already been filed, and ask that the timetable for the state's response be moved up -- I want the State's discovery responses as soon as possible! This gives me more time to file, if necessary, motions to compel discovery responses, motions in limine and motions to suppress.

6. BOND IS SET

The last thing that happens at the arraignment is the matter of bond. Be well prepared for this. Many Judges will not have the patience for a lengthy bond hearing during the ten minutes scheduled on the docket for your client's arraignment. Be prepared to communicate your position to the Judge succinctly. File a written motion to set (or reduce)

bond a couple days before the arraignment, clearly setting forth exactly what you want bond to be set at, and why, so the judge can read this before the arraignment. Be aware: the circuit court judge has the authority to raise your client's bond at the arraignment.

H. GUILTY PLEAS & PLEA BARGAINING

1. THE LAW ON GUILTY PLEAS

Let's say, for the sake of illustration, your client has entered into a written plea agreement with the State of West Virginia. She is pleading guilty to count one of the indictment. The State will dismiss count two, under Rule 11(e)(1)(A), and it agrees to *recommend* probation, under Rule 11(e)(1)(B).

Before you go into court, review *W.Va.R.Crim.P.*, Rule 11 ("Pleas"), and Call v. McKenzie, 159 W.Va. 191, 220 S.E.2d 665 (1975) (prerequisites for a valid guilty plea).

2. FACTUAL BASIS, INNOCENT CLIENTS & FRAZIER PLEAS

Since your client is pleading "guilty," the Judge will ask your client this question: "*What is it that you did that makes you think you are guilty*?"

Nearly all circuit judges ask this question, word-for-word. Your client has to answer it, and she has to answer it in her own words in a way that admits guilt. A circuit judge cannot accept a guilty plea without a factual basis. If her answer begins like, "Well, I was drunk . . ," or "I didn't know what was happening . . .," the judge will reject her guilty plea, and you go back to the office to prepare for trial.

If you have a client who tells you she is innocent but insists on pleading guilty, advising her is tricky. Recommend that she not take the deal if she persists in her innocence, even though she wants the deal. Take her back to your office and spend the afternoon picking apart her story and comparing it to the State's evidence. While at your office, tell her that the judge will ask her what she did that makes her think she is guilty, and that the judge will not accept her guilty plea if she can't answer this question. This is where your advice gets tricky. You must advise her to tell the truth. You must also advise her that if she tells the judge the story of innocence she is telling you, then it is not likely the judge will accept her plea.

This is one reason why conducting a good initial client interview is so important. In the initial client interview, you should spend plenty of time, before getting to the facts of the case, asking your client questions about who she is and where she comes from, and generally getting to know her better. Give her a cup of coffee and make her feel comfortable with you. *Then* go into the facts of the case - after you have gained her trust. If she tells you the truth from the beginning, you won't find yourself, down the road, in the position of advising her against taking a guilty plea, even when it seems to be in her best interest.

If your client still professes innocence, give the prosecutor a call and try to work out a better deal. Lets face it, this wasn't a good deal anyway - a *felony* conviction, with no promise of probation. She can let the jury give her the felony conviction, and, since she has no prior convictions and two small children at home, she'll probably get probation after a trial.

Being a convicted felon is a life sentence. Would *you* hire a convicted felon? A convicted felon can forget her dream to become a dental hygienist (*W.Va. Code* 30-4-13), an embalmer (*W.Va. Code* 30-6-7), an LPN (*W.Va. Code* 30-7A-10), an optometrist (*W.Va. Code* 30-8-8), a veterinarian (*W.Va. Code* 30-10-11), an engineer (*W.Va. Code* 30-13-21), a sanitarian (*W.Va. Code* 30-17-2), a physical therapist (*W.Va. Code* 30-20-11), a psychologist (*W.Va. Code* 30-21-10), a radiologic technologist (*W.Va. Code* 30-23-9), a barber or cosmetologist (*W.Va. Code* 30-27-15), an occupational therapist (*W.Va. Code* 30-28-16), a social worker (*W.Va. Code* 30-30-8a), a speech pathologist or audiologist (*W.Va. Code* 30-32-17), or an acupuncturist (*W.Va. Code* 30-36-18). Would *you* hire a convicted felon?

Additionally, there are criminal penalties, especially in federal court, for the possession of a firearm by a convicted felon. Forget those squirrel hunting days.

If you must, guilty plea under Kennedy v. Frazier, 178 W.Va. 10, 357 S.E.2d 43 (1987), is an option. Frazier is based on North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). A Frazier (or Alford) plea is a guilty plea, made under circumstances where the defendant recognizes that she will lose at trial because of the State's strong case, but not where she admits guilt. She will be convicted and sentenced the same as if she pled guilty. If she pleads guilty under Frazier to a felony, then she's still a convicted felon. But your client won't have to answer the question, "what did you do that makes you think you are guilty." Rely on Frazier sparingly. Many judges won't accept a Frazier plea except in unusual situations, and it is simply not good practice to be letting your clients plead guilty when they claim innocence. Further, remorse is critical at sentencing. If your client can't even admit guilt, then there is certainly no remorse.

Don't be afraid of the jury. If your client says she is innocent, suggest that she tell her story of innocence to these twelve reasonable people, and ask them to do what's right.

3. CONDUCTING PLEA NEGOTIATIONS

Since you have to phone the prosecutor to try to work out a better deal, why not take some of the information you obtained from your client during the initial client interview and let the prosecutor know positive things about your client. Often a prosecutor won't mind offering your client a better deal if she can justify it with reasons why your client should be given a break. Send a letter to the prosecutor outlining good things about your client, like her family obligations, her work history, the absence of any prior criminal record, her grades in school, etc. The prosecutor can then put the letter in her file, so if she is ever asked about why she gave your client such a good deal, she can pull out the letter and justify her actions. This is something you should have done in the beginning of your plea negotiations.

Prosecutors have heavy caseloads, just like you. Don't assume they know who your client really is.

4. BINDING OR NON-BINDING PLEA AGREEMENT

Your long afternoon session with the client and further negotiations with the prosecutor were successful. Your client finally admitted that she took a little, but not a lot. The prosecutor has agreed to let her plead guilty to petit larceny, a lesser included offense of count one -- and a misdemeanor! The prosecutor will still dismiss count two, and she has offered your client a binding agreement of probation, under *W.Va.R.Crim.P.*, Rule 11(e)(1)(C).

The difference between a binding agreement and a non-binding agreement is outlined in *W.Va.R.Crim.P.*, Rule 11(e)(1)(B), 11(e)(1)(C), and 11(e)(2). If the prosecutor agrees "that a specific sentence (i.e., probation) is the appropriate disposition," (binding) then the judge must inform the defendant, prior to the moment when she pleads guilty, whether the Court will accept the agreement. If the Court does accept the agreement, then your client is guaranteed probation. On the other hand, if the prosecutor merely *recommends* probation (non-binding), or stands silent, your client first pleads guilty, then she finds out whether or not she will get probation.

5. THE GUILTY PLEA HEARING

At the guilty plea hearing, the judge will engage in a dialogue with your client pursuant to Call v. McKenzie, 159 W.Va. 191, 220 S.E.2d 665 (1975) and *W.Va.R.Crim.P.*, Rule 11. Judges follow Call v. McKenzie nearly word-for-word.

Don't forget to remind your client what the maximum punishment is for the crime to which she is pleading guilty. The Judge will specifically ask her this, and she needs to be able to answer correctly.

I. MOTIONS PRACTICE

Generally, there are four types of motions in any criminal case: (1) motions to dismiss; (2) motions to suppress; (3) motions in-limine; and (4) motions to sever or bifurcate.

1. MOTIONS TO DISMISS

The three most common grounds for a motion to dismiss are:

(1) Defects in the charging process;
(2) Defects in the charging document; and
(3) Delays chargeable against the State.

(a) Defects in the Charging Process

In magistrate court, whether felony or misdemeanor, there must either have been a police investigation or a prosecutor's evaluation before a defendant is charged by criminal complaint. Harman v. Frye, 425 S.E.2d 566 (W.Va. 1992).[1] If the complaint is signed by a police officer, who simply states what an alleged victim told him, without any reference to an investigation, then move to dismiss. Request a hearing on this motion, and subpoena the complainant (i.e., the officer), and, if appropriate, other persons, such as the victim. The defendant has the burden of proof at this evidentiary hearing. Even if you lose the motion, this is great opportunity to collect and generate statements of State witnesses for your trial notebook.

A dismissal under Frye is without prejudice, since jeopardy didn't attach. Your client may need to post a new bond if the State re-files. Further, a Frye motion is waived if you don't obtain a ruling on it before the preliminary hearing (for felonies) or before the trial (for misdemeanors).

If your client is charged by indictment, a motion to dismiss is appropriate if there was no evidence *whatsoever* presented to the grand jury on a material element. *See* State v. Clark, 64 W.Va. 625, 63 S.E. 402 (1908) and Brady v. U.S., 24 F.2d 405 (Kan. 1928), but also *See* State v. Lewis, 188 W.Va. 85, 422 S.E.2d 807 (1992). This is a difficult motion to make, because you can't know whether defects occurred before the grand jury without a transcript of the grand jury proceedings. And you don't have a right to the transcript unless you can first show that "grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." *W.Va.R.Crim.P.*, Rule 6(e)(3)(C)(ii). It's a catch twenty-two. Nonetheless, some Circuit Judges will give you the transcript without such a showing, so ask for it. The Omnibus Discovery Motion in the Appendix requests the grand jury transcript.

(b) Defects in the Charging Document

In magistrate court, look carefully at what the complainant wrote in the criminal complaint. If the "four corners" of the complaint (and any attached affidavits) do not provide a factual basis for each element of the crime charged, then a motion to dismiss is proper. For example, if your client is charged with carrying a concealed, deadly weapon, but the complaint fails to say anything about the weapon actually being "concealed," then a motion to dismiss is proper. *See* In re Monroe, 174 W.Va. 401, 327 S.E.2d 163 (1985); Harman v. Frye, 425 S.E.2d 566, 425 S.E.2d 566 (W.Va. 1992); and Whiteley v. Warden, 401 U.S. 560, 565 (1971).

In circuit court, if the indictment fails to contain every element of the crime, State v. Parks, 161 W.Va. 511 (W.Va. 1978), or is otherwise too vague (*See* State v. Eden, 256 S.E.2d 868 (W.Va. 1979); and State v. Donald, 184 W.Va. 187, 399 S.E.2d 898 (1990)),

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[1] Frye does not apply where there is a specific statutory exception. For example, there is a specific statutory exception for worthless checks. *See* State ex rel. Walls v. Noland, 189 W.Va. 603, 433 S.E.2d 541 (1993); *W.Va. Code* 61-3-39(a).

then a motion to dismiss is proper. For example, if your client is charged with statutory rape (i.e., third degree sexual assault), but the indictment fails to allege that the victim is under the age of sixteen, then a motion to dismiss is proper.

A dismissal for defects in the charging document is a dismissal without prejudice. Your client may need to post a new bond if the State re-files. Failure to raise this issue at the trial level, however, does not waive the issue on appeal. In other words, if your client is convicted on an indictment that doesn't actually charge a crime, she may be able to get her conviction reversed on appeal. State v. Knight, 168 W.Va. 615, 285 S.E.2d 401 (1981), *citing* State v. Loveless, 139 W.Va. 454, 80 S.E.2d 442 (1954).

(c) Delays Chargeable Against the State

For magistrate court misdemeanors, State ex rel. Stiltner v. Harshbarger, 170 W.Va. 739, 296 S.E.2d 861 (1982), is the leading case on when a defendant can move to dismiss due to an unreasonable delay. There are two rules set forth in this case: (1) the defendant must be brought to trial within one year; and (2) if the defendant is in jail or has requested a speedy trial, she *should* be brought to trial within 120 days, unless the trial is continued for good cause. If either of these two rules applies to your case, move for a dismissal with prejudice.

In circuit court, the law is similar. There is a one term rule (about 120 days), and a three term rule (one year). The one term rule is contained in *W.Va. Code* 62-3-1, which states that a defendant must be brought to trial in the same term the indictment was issued, unless continued for good cause. The three term rule is contained in *W.Va. Code* 62-3-1, which is West Virginia's Legislative pronouncement of our speedy trial standard under Article III, Section 14 of the West Virginia Constitution. (*See* State v. Carrico, 189 W.Va. 40, 427 S.E.2d 474 (1993)). Under the three term rule, a defendant is to be discharged from prosecution if three unexcused regular terms pass without a trial, after an indictment is found against him. State v. Fender, 268 S.E.2d 120 (W.Va. 1980). If either the one term rule or the three term rule applies to your case, move for a dismissal with prejudice.

2. MOTIONS TO SUPPRESS

(a) Motion to Suppress v. Motion in Limine

A motion to suppress and a motion in limine are similar because they are both used to keep evidence away from the jury. The difference is that a motion to "suppress" is based on constitutional grounds, such as the Fourth Amendment Search & Seizure Clause, while a motion in limine is based on a rule of evidence, such as Rule 403 (unfair prejudice) or 404(b) (collateral crimes).

(b) Three Motions to Suppress

There are three basic motions to suppress: (1) a motion to suppress the defendant's confession; (2) a motion to suppress information or evidence obtained as a result of a police

search; and (3) a motion to suppress a pre-trial identification, such as a line-up, show-up, or photo-array.

(1) *Confessions*

Generally speaking, there are four grounds to suppress a confession (made during a "custodial interrogation"), namely: (1) Miranda was not complied with (*See* State v. Rissler, 270 S.E.2d 778 (W.Va. 1980)); (2) the Prompt Presentment Rule was violated (*See* State v. Persinger, 286 S.E.2d 261 (W.Va. 1982); (3) the confession was not "voluntary," under a due process totality of the circumstances test (*See* State v. Slaman, 189 W.Va. 297, 431 S.E.2d 91 (1993)); and the right to counsel was violated (*See* Massiah v. U.S., 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

(2) *Searches w/ Seizures*

Generally, any evidence (or fruit of evidence) obtained during a police search conducted without a warrant is per se inadmissible, unless the search falls within a limited number of carefully drawn exceptions. State v. Farley, 280 S.E.2d 234 (W.Va. 1981); State v. Moore, 272 S.E.2d 804 (W.Va. 1980). If the search is conducted pursuant to a warrant, then the warrant must have been properly issued (*See* State v. Moore, 272 S.E.2d 804 (W.Va. 1980)). Your client must have standing (i.e., a reasonable expectation of privacy) (*See* State v. Peacher, 280 S.E.2d 559 (W.Va. 1981)). And there are all kinds of exceptions, like the Independent Source Rule, the Inevitable Discovery Rule, the Attenuated Connection Rule (State v. Hawkins, 280 S.E.2d 222, 228 (W.Va. 1981)), and Leon's Good Faith Exception to a bad warrant (State v. Adkins, 176 W.Va. 613, 346 S.E.2d 762 (1986)).

(3) *Identifications*

The purpose of an in camera hearing on a motion to suppress a pre-trial identification is for the court to determine whether the identification procedure is so suggestive as to give rise to a substantial likelihood of irreparable misidentification. State v. Harless, 168 W.Va. 707, 285 S.E.2d 461 (1981). This is a totality of the circumstances test, and factors to consider are contained in many cases, such as State v. Casdorph, 159 W.Va. 909, 230 S.E.2d 476 (1976); State v. Williams, 162 W.Va. 309, 249 S.E.2d 752 (1978); and State v. Rummer, 189 W.Va. 369, 432 S.E.2d 39 (1993). Don't forget the Independent Source Rule. State v. Boyd, 280 S.E.2d 669, 680 (W.Va. 1981).

(c) When to File a Motion to Suppress

You can only move to suppress evidence that the State intends to use at trial, and you can't really know this until you receive the State's discovery responses. After all, if the State obtained a confession, but doesn't intend to use it at trial, then there's not much point in filing a motion to suppress.

On the other hand, you must file a motion to suppress every time the state intends to admit into evidence a confession, evidence seized by the police, or evidence of a pre-trial

identification, *whether or not you know of any grounds to support this motion*! This may feel awkward, because the Rules of Professional Conduct prohibit you from filing a frivolous motion, but the law on confessions, searches and seizures and pre-trial identifications give your client the right to have a hearing on the admissibility of such evidence before trial.

In fact, under West Virginia law, the trial court must conduct a hearing on the admissibility of a confession, *whether or not defense counsel requests this hearing*. State v. Fortner, 148 S.E.2d 669 (W.Va. (1966); State v. Wimer, 168 W.Va. 417, 284 S.E.2d 890 (1981). Search and seizure law requires an in-camera hearing any time the defendant moves to suppress such evidence, State v. Tomey, 259 S.E.2d 17 (W.Va. 1979). A hearing on the admissibility of a pre-trial identification must be held any time the defendant challenges the identification on the ground that it is tainted by unconstitutionally suggestive identification procedures. State v. McCormick, 277 S.E.2d 629 (W.Va. 1981).

As grounds for your motion to suppress, just state that you object to the admission of the confession, fruits of a search, or any pre-trial identification, and that you request a pre-trial hearing. If you don't have any specific grounds, then don't allege any specific grounds. The State, as the proponent of the evidence, has the initial burden at the suppression hearing to establish the admissibility of the evidence.

At the end of the suppression hearing, move the Court for an order directing the court reporter to prepare a transcript of the hearing. This transcript will be handy in preparing for, and conducting, cross-examination at trial. You may also need the transcript to help research and brief any complicated issues that arose during the hearing. For these reasons, don't let the judge schedule the suppression hearing on the morning of trial.

3. MOTIONS IN LIMINE

File a motion in limine every time you believe the State will use unfairly prejudicial evidence at trial. In your motion, be specific about the exact evidence you want kept away from the jury, and request that the prosecutor advise her witnesses not to mention this evidence. Cite *W.V.R.E.*, Rules 402 (relevant evidence) and 403 (unfair prejudice), as well as any other applicable rule of evidence. Request a pre-trial ruling on your motion.

The most common use of the motion in limine is to exclude evidence of collateral crimes under *W.V.R.E.*, Rule 404(b). The omnibus discovery motion in the Exhibit B requests notice of the State's intent to use evidence of collateral crimes. If the State responds that it does intend to use such evidence (or you otherwise believe that collateral crimes evidence may be brought out at trial), file a motion in limine to exclude this evidence. *See* State v. McGinnis, 455 S.E.2d 516 (W.Va. 1994).

Examples of other uses of a motion in limine include: (1) in a prosecution for false pretenses, the trial court erred in denying the defendant's motion in limine to exclude evidence of the victim's poor health, since "the only purpose which could be served by the introduction of such evidence would be to create sympathy for the victim in the minds of the

jury and to prejudice them against the defendant." State v. Moore, 273 S.E.2d 821 (W.Va. 1980). (2) In a homicide prosecution, the Court held it to be error, under *W.V.R.E.*, Rule 402, for the prosecutor to admit evidence of the defendant's gun collection. State v. Walker, 188 W.Va. 661, 425 S.E.2d 616 (1992).

4. MOTIONS TO SEVER OR BIFURCATE

As a general rule, you want the jury to hear as little of the State's case as possible. File a motion to sever or bifurcate the trial anytime (1) there is more than one charge against the defendant *W.Va.R.Crim.P.*, Rule 8(a); State v. Mitter, 285 S.E.2d 376, 381 (W.Va. 1981); State v. Bell, 189 W.Va. 448, 432 S.E.2d 532 (1993); (2) there is more than one defendant named in the indictment or complaint (*W.Va.R.Crim.P.*, Rule 8(b)); or (3) the charge against the defendant can be logically bifurcated (e.g., carrying a concealed weapon, second offense: one jury could determine whether your client is guilty of carrying a concealed weapon, and a second jury could determine whether this is the defendant's second offense (see e.g., State v. Boyd, 280 S.E.2d 669, 675 (W.Va. 1981) and State v. Daggett, 280 S.E.2d 545, 556 (W.Va. 1981).

J. TRIAL

1. HYPOTHETICAL FACT PATTERN

A bar fight. Your client is charged with malicious wounding. Trial begins Monday.

The fight started inside the bar, and ended in the parking lot. When the police arrived, the "victim" was lying in the parking lot, bleeding from a gash in his leg. Police took statements from three witnesses, who said your client started the fight, and that he fled the scene. The officers arrested him at his home twenty minutes later. He gave a statement, admitting participation in the fight. The police found a pen knife in his pocket.

At the initial client interview, the defendant told you that the (1) "victim" started the fight; (2) the defendant punched back in self-defense; but (3) he, the defendant, didn't stab anybody.

When you viewed the crime scene, you found and spoke to four additional eye-witnesses. You also spoke to emergency room doctor who examined the victim. The witnesses support your client's version of events. The doctor says she found glass fragments in the victim's leg, and the cut could have been caused by falling on a broken beer bottle.

2. THINGS THAT SHOULD BE IN YOUR FILE

At the bond reduction hearing, you challenged the "strength of the state's case." Testimony was taken from the arresting officers, and they admitted that they refreshed their memory with police reports. These police reports, along with the bond reduction hearing transcript, are in your file.

At the preliminary hearing, two of the State's eye-witnesses and one police officer testified. The transcript from this hearing is in your file.

The Court held a suppression hearing on the seizure of the knife and on the taking of your client's statement. The transcript from this hearing is in your file.

At a hearing on the defendant's motion to compel discovery responses, the Court ordered (1) that the State produce Rule 26.2 statements two weeks before trial; and (2) that the State produce the medical records of the victim. Accordingly, the State has given you the victim's statement, statements from the three State witnesses, police reports of officers who will testify at trial, the grand jury testimony of witnesses who will testify at trial, and the victim's medical records. These are in your file.

Your file also contains photographs of the bar parking lot on the morning after the fight. These photos show broken beer bottles in the area where the fight ended. Your intern accompanied you to view the scene, so he can testify that the photos are an accurate depiction of the parking lot on the morning after the fight.

3. SCORING POINTS

Review your entire file. As you do this, keep a running list of every piece of evidence, or "point", that helps your case. Keep another list of each point that hurts your case. Break down each witness's testimony into as many separate points as you can. When you complete the review of your file, you should have a long list of points.

For example, as you review the emergency room doctor's statement, the medical records, and notes from your interview with her, your list might include these points:

1. glass fragments were found in the wound;
2. the victim's knuckles were bloody;
3. the victim had a blood alcohol level ("B.A.C.") of .24;
4. the wound is not consistent with a knife wound;
5. the wound is consistent with the victim having fallen on a broken beer bottle;
6. the victim was belligerent;
7. there was no sign of trauma to the victim's nose, which is inconsistent with witness #1's written statement.

As you review the statement of State's eyewitness No. 1, your list might include:

1. the witness is the "victim's" brother;
2. the witness said in his written statement that the victim only had one beer;
3. the witness said your client punched the victim in the nose, which is inconsistent with the doctor's findings;
4. the witness said the defendant called the victim a "wimp," which is inconsistent with a second witness who said . . .

Each witness will have a different section (or tab) in your trial notebook. In each section, use a separate piece of paper for each point. Write the "point" at the top of the page. The remainder of the page will contain a line of questioning that will get you to your point effectively. When you finish a point, catch a few jurors in the eye and let them watch you flip another page of your notebook, so they know you are about to begin to amputate another limb.

Every time you stand up to speak during the trial, score points. Score as many points as you can, as often as you can. If you don't have any points to make during the examination of a particular witness, then don't stand up. Every time you speak, you should be scoring points. Don't go on fishing expeditions, and don't waste time asking questions about things that don't matter. Just score points. You should make as many points as you can during voir dire, during opening statement, during cross-examination, during direct examination, and during closing.

Scoring a point doesn't mean asking one question, and then sitting down. Take time to elaborate on each point. When examining a witness, use a series of questions leading up to each point you make. Plan out trilogies, pyramids, and words and phrases that you can use to score your point effectively.

4. THE TRIAL NOTEBOOK

Your trial notebook should only include things you will actually need during the trial. Don't clutter it with motions, discovery responses, notes, etc. Put those in another folder and keep them on hand - - but keep them *out* of the trial notebook. Divide your trial notebook like this:

(1) Pre-Trial Issues
- (a) Motion to Sequester Witnesses
- (b) Last Minute Motions in Limine
- (c) Any Other Pre-trial Issues

(2) Jury Selection
- (a) List of Prospective Jurors
- (b) Your Motion for Voir Dire
- (c) State's Motion for Voir Dire

(3) Opening Statement
- (a) Outline of Your Opening Statement
- (b) Complete List of "Points"

(4) Cross Examination

A separate sub-heading for each State witness, with copies of the witnesses' prior statements, and a list of the "points" you want to score with that witness.

(5) Direct Examination

A separate sub-heading for each of your witnesses, with copies of the witnesses' prior statements, and a list of the points you want to score with that witness.

(6) Closing Argument
  (a) Outline of Your Closing Argument
  (b) Complete List of Points
(7) Jury Instructions
  (a) Your Proposed Jury Instructions
  (b) State's Proposed Jury Instructions
  (c) the Court's Approved Instructions

5. JURY SELECTION

(a) Argue Your Case During Jury Selection

Jury selection isn't just a time to select (or "deselect") the perfect jury. You must also use the jury selection process to *win.*

Consider two rules of human nature:

First, primacy. People remember best what they hear first:

DEFENSE COUNSEL:	Has any member of the jury been in a situation where you have needed to use physical force to defend yourself from an attacker?
DEFENSE COUNSEL:	Do you have a family member or close friend who has ever had to use physical force to defend himself or herself from an attacker?
DEFENSE COUNSEL:	Ms. Juror, you raised your hand?
MS. JUROR:	My son was attacked when he was on vacation.
DEFENSE COUNSEL:	Was the attacker intoxicated?

The trial hasn't begun, yet every juror knows that the case is about a defendant who used force to defend against a drunk attacker. They'll remember this when they retire to the jury room.

Second, spectators pick sides. And they pick sides *early.* Whether from the bleachers, the couch or the jury box, they choose who they want to win - or who they want to lose -- early in the contest. My son and I sit down to watch a football game. He wants the *yellow* team to win. Not blue. Not green. And nothing will change his mind. I don't know why he has picked yellow. Yellow cars. Yellow trucks. Yellow jerseys. He picked yellow early in life, and, for no logical reason, that's his color and he's stickin' to it. You could put on a ton of evidence, but if your client isn't wearing yellow, forget it. Adults aren't really much different. If your jury doesn't choose the color "self-defense" early, forget it. Guilty.

Don't take jury selection lightly. This is when jurors size up your client and check *you* out! This is when they decide which team they're going to be pulling for during the trial. This is when you win or lose.

(b) Conducting Voir Dire

I recommend filing two separate motions to voir dire the prospective jury. The first is a "Motion to Supplement the Court's Voir Dire," which asks the Judge, pursuant to *W.Va.R.Crim.P.*, Rule 24(a), and *W.Va. Const. Art III, sec. 14*, to ask the prospective jurors several standard questions. I usually want the judge to ask these questions, because it feels awkward for me to ask prospective jurors whether they have ever been convicted of false swearing, or whether they speak the english language. These questions should be asked in every criminal jury trial. **You will find a sample motion in Exhibit C.**

The second motion is for an order permitting you, the lawyer, to ask questions specifically tailored for your case. Take your time drafting this motion. You want questions that will accomplish three things: (1) pick out prospective jurors who you don't want on your jury; (2) let the jury know why your client should be found not guilty (i.e., win the case); and (3) let the jury know that you are a decent, honest lawyer (i.e., get to know the jury).

You may want to file a motion for individual voir dire (i.e., to ask each juror specific questions out of the hearing of the other prospective jurors). I generally reserve this motion for serious felony cases or sensitive cases, such as child sexual assault cases. In child sexual assault cases, for example, a prospective juror might not be comfortable answering publicly whether she, or anyone she knows, has been accused of sexually assaulting a child. There is no reason, however, not to request individual voir dire in any case.

The types of questions you might want to ask the jury include:

(1) Whether prospective jurors can follow certain general principles of criminal law, such as proof beyond a reasonable doubt and the presumption of innocence.

(2) Whether prospective jurors can follow certain rules of law that specifically pertain to your case, such as the right of self-defense, and how to weigh the expert testimony of the emergency room doctor. Your question might be: "In this case, the defendant intends to call the emergency room doctor, who will be an expert witness . . ." Regardless of the answers you elicit from the jury, this will let the jury know that you have credible evidence (testimony of ER doctor) to support your claim of self-defense.

(3) Whether prospective jurors are involved with any social group, school club, professional association, or other organization that might affect the juror's ability to be impartial. For example, in this case, you might not want anybody who contributes to an organization that advocates peaceful resolution to non-peaceful aggression. Or, you might not want the leader of your local "Kids Against Drugs," club to sit as a juror in a drug case.

These examples are just suggestions. You may or may not want to use any of these examples. Decide what goals you want to accomplish during voir dire, and then think through questions that will help you obtain those goals. The scope of your questioning is in the judge's discretion, State v. Peacher, 280 S.E.2d 559, 569 (W.Va. 1981), so you may or may not be permitted to ask each of the question you propose to ask.

Regardless of the questions you propose to ask, you definitely need to get out of your seat, and speak directly to the jury (or to each juror individually). You need to make eye-contact with members of the jury, and let them begin to trust and like you, and understand why your client is not guilty. Waiting until opening statement to do this is a mistake.

6. OPENING STATEMENT

Never waive opening statement. Never wait until the State rests to make your opening statement. As with voir dire, you want to rally the support of the entire jury right from the very beginning, and keep their support throughout the trial.

Go through your entire list of favorable "points" in opening statement. Don't hold anything back. It's a mistake to plan a surprise revelation during cross examination (i.e., when the jury will hear for the first time the identity of the real killer). When this revelation takes place, three of the jurors might be looking out the window, one of the jurors might be thinking about her child's report card, five of the jurors might still be pondering your last point, and the remaining jurors have already made up their mind that your client is guilty. Lay out all your "points" every time you possibly can.

An outline of a typical opening statement might look like this:

1. The one-liner. In one or two sentences, tell the jury why your client is not guilty: "Nobody was stabbed. The quote victim fell on a piece of a broken beer bottle and cut his leg -- after he and his friends jumped Mr. Defendant. Testimony from the ER doctor will prove this."

2. Introduce you and your client. After your one-liner, introduce yourself and your client. I always put my hands on my client's shoulder and ask her to stand up as I introduce her to the jury.

3. Outline each of the "points" of weakness in the State's case.

4. Outline each of the "points" of innocence. Don't tell the jury *your opinion* of what the evidence will prove. Instead, tell the jury what they will actually see and hear as they sit through the trial. For example, "You will hear John X testify that he saw the quote victim lunge at the Mr. Defendant. Jack Y will testify that he, too, saw the quote victim lunge at the defendant. And Joe Z will testify that he saw the lunge. Each of these witnesses will come in here and tell you they were in the bar at the time the fight started.

They will tell you what they saw. They will tell you that Mr. Defendant was minding his own business, when the quote victim and his buddies jumped Mr. Defendant."

4. Explain proof beyond a reasonable doubt, and the presumption of innocence, as set forth in State v. Goff, 166 W.Va. 47, footnote 9, 272 S.E.2d 457, (W.Va. 1980). Goff explains that "reason" and "common sense" are involved in deciding whether there is a reasonable doubt. Tell the jury to use their common sense when they examine the evidence. Remind them that they have taken an oath to uphold the law.

5. Finally, sum up the main points. Be sure to say the words, "Not Guilty." If you can't say it, don't expect the jury to say it.

7. EXAMINATION OF WITNESSES:

The difference between cross-examination and direct-examination is this: During cross-examination *you* tell the story. During direct-examination *the witness* tells the story.

Suppose the prosecutor calls the arresting officer as her first witness. Direct examination is completed, and it's time for cross-examination. Your trial notebook is open, so you have an outline of the "points" to score with this witness. The trial notebook also contains the officer's 26.2 statements (his police report) and his prior testimony at the suppression hearing and before the grand jury, so you know what his answers will be. Leave your table or podium, and stand in the middle of the courtroom. You take center stage. Your questions should all be statements, not questions, that elicit a yes or no answer.

For example, your cross examination might go like this:

Q: Officer, you arrested my client at his home, right?
A: Right.
Q: In doing this, you went up to his front door?
A: [no response]
Q: Right?
A: Yes.
Q: And you were in uniform?
A: Right.
Q: Police cruiser was parked out front?
A: Yes.
Q: You knocked on the door and my client welcomed you into his home.
A: Yea, he opened the door and asked us to come in.
Q: He didn't try to sneak out the back door?
A: No.
Q: He didn't try to hide in a closet?
A: No, he didn't.
Q: He didn't try to run from you?
A: No.
[turn toward the jury, and speak to them as you ask the next question:]

Q: In fact, he acted as if he was glad to see you.

Direct examination, on the other hand, is completely the opposite. When conducting direct examination, stand in a location that will put you out of the direct view of the jury and the witness in center stage. Stand beside the jury box, so that your witness will look directly at the jury when she looks at you. Questions on direct-examination should all sound like, "what happened next?" "why did you do that?" "where were you standing?" and "what did you see?".

Direct examination of the defendant is absolutely the most important evidence you will present at trial. Before trial, talk to your client about how to act in the courtroom, and how to testify. Here are some pointers to tell your client:

(1) Tell your client to never argue with the prosecutor -- just answer the questions. Prosecutors receive training on how to make defendants argue from the witness stand. Don't let your client fall into that trap. *You,* the lawyer, can do all the arguing.

(2) Tell your client to answer the prosecutor's questions politely.

(3) Remind your client that the jury will be watching her throughout the trial. Her response to adverse testimony (squirming in her seat, turning red in the face, yanking your shoulder to tell you something) will impact the jury. Every time she rolls her eyes, the jury notices.

(4) Don't let your client open the door to collateral crimes or other bad acts, by answering questions like, "I would *never* do a thing like that," or "I would *never* hurt anybody." "Oh, yeah," says the prosecutor. "In 1977 you threw a battle-axe at . . ., didn't you."

(5) Talk to the *jury*. The prosecutor isn't asking questions because *she* cares about the answer. The prosecutor knows the answers. Your client should make eye-contact with jurors throughout the trial, and especially during her testimony.

(6) If your client doesn't *know* the answer to a question, then she should say she doesn't know the answer. Advise her not to make up answers, or give hypothetical answers, or give argumentative answers. Just answer the question, honestly.

I've seen lists of a hundred possible trial objections. I recommend that you cross out ninety-seven of those objections, and scribble out only three objections on a piece of paper to put before you on the defense table in the courtroom: (1) hearsay (always object to anything that sounds even remotely like hearsay); (2) leading question (the prosecutor can kill you with leading questions - so don't even let it start); and (3) lack of personal

knowledge (object every time the witness starts talking about something she doesn't know first hand).

8. CLOSING ARGUMENT

Closing argument is your chance to remind the jury that everything you promised them in the opening statement came true. The outline of your closing argument might be similar to the outline of your opening statement (i.e., a one-liner beginning, go through each of the "points" that weaken the State's case, go through each of the "points" that support your case, remind the jury about using their common sense in applying the reasonable doubt standard, and finish up with the words "not guilty").

This is "argument," so argue the significance of each "point." Don't be afraid to use fictitious or real life analogies. In a recent jury trial, I brought an empty McDonalds coffee cup to the courtroom. In opening statement, I held the empty cup before the jury, and said that I would poke so many holes in the state's case, that it wouldn't hold water. Later, I began closing argument by literally cutting the cup in half, since the prosecutor didn't present as much of a case as he promised in his opening statement. Then, I took a pencil and poked a hole right through the cup each time I pointed out a "hole" in the State's case. By the end of my closing argument, my McDonald's cup was so full of holes, I showed the jury, that the case against my client couldn't hold water. The jury convicted. Oh well.

9. JURY INSTRUCTIONS

Propose a jury instruction on just about every rule of law that applies to the case. There are several standard rules of law that apply to nearly every criminal jury trial. File a proposed jury instruction on each of these rules of law. When drafting proposed instructions, follow the language from the applicable case as closely as possible, and cite the case. There are new Trial Court Rules (T.C.R.) that will soon be effective, I think, that require you to file jury instructions (and voir dire questions) three (3) days before trial. Check this out!

The standard jury instructions are:

(a) Reasonable Doubt

Footnote 9 of State v. Goff, 166 W.Va. 47, 272 S.E.2d 457, (W.Va. 1980), is the reasonable doubt instruction approved by the West Virginia Supreme Court of Appeals. Always propose this instruction, word for word. Several West Virginia cases strongly discourage any re-wording of this instruction (e.g., State v. Duncan, 168 W.Va. 225, 228, 283 S.E.2d 855 (W.Va. 1981); State v. Greenlief, 168 W.Va. 561, 568, 285 S.E.2d 391 (1981); and State v. Boswell, 170 W.Va. 433, footnote 16, 294 S.E.2d 287, (1982)).

(b) Weight of the Evidence

State v. Stevenson, 147 W.Va. 211, 236, 127 S.E.2d 638 (1962), provides the rule of law that the jury must apply in weighing the testimony of each witness. This is a common instruction.

(c) Indictment Not Evidence

Instruct the jury that an indictment is not evidence of guilt, and that no juror should be influenced against the defendant merely because an indictment has been returned against her. State v. Fugate, 103 W.Va. 653, 657, 138 S.E. 318 (1927); State v. Banks, 99 W.Va. 711, 714, 129 S.E. 715 (1925).

(d) Circumstantial Evidence

State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995) , eliminated a long-standing rule on the use of circumstantial evidence at trial. Under Guthrie, an instruction on circumstantial evidence "is no longer required even if the State relies wholly on circumstantial evidence." Sorry about that.

(e) Defendant is a Competent Witness

If the defendant testifies, propose an instruction which tells the jury that the defendant is a competent witness in his own behalf, and that the jury should weigh his testimony under the same standards they use to weigh the testimony of every other witness. State v. Stevenson, 147 W.Va. 211, 236, 127 S.E.2d 638 (1962); State v. Taylor, 105 W.Va. 298, 305, 142 S.E. 254 (1928).

(f) Defendant Did Not Testify

If your client does not testify at trial, propose an instruction which tells the jury that the defendant has no duty to produce any evidence at all, and that he has the right to rely on the State's failure to prove its case beyond a reasonable doubt. You might file this instruction, along with the "Defendant is a Competent Witness" instruction. You can always withdraw whichever of these instructions doesn't apply when the trial is over -- and filing both of them keeps the State off-guard. The fact is, only the defendant can decide whether to testify. And she does not make her decision until after the close of the State's case. You never *know* which way it will go, so file both instructions.

(g) The Crime and its Elements

Propose an instruction which tells the jury (1) exactly what the defendant is charged with; and (2) what the possible verdicts are.

In a typical malicious wounding case, the jury would have to choose between four possible verdicts: (1) guilty of malicious wounding; (2) guilty of unlawful wounding; (3) guilty of battery; or (4) not guilty.

This instruction should specify, or enumerate, each of the elements of malicious wounding (as set forth in the indictment) and, as well, each of the elements of the lesser-included offenses. This instruction should also direct the jury that they cannot convict the defendant of malicious wounding, unless they are convinced beyond a reasonable doubt of each and every element of malicious wounding.

(h) Define the Elements

Propose a separate instruction for the definition of each element of the crime(s) charged. For example, in a malicious wounding case, you want a separate instruction which provides the definition, under West Virginia law, of the term "malice."

(I) Grade of Offense

If lesser-include offenses are possible verdicts, then propose an instruction that if the jury has a reasonable doubt as to the grade of the offense, then they must resolve that doubt in his favor and find him guilty of the lower grade. State v. Wayne, 162 W.Va. 41, 245 S.E.2d 838, 842 (W.Va. 1978).

(j) Separate Offenses

If the defendant is charged with more than one crime, then propose an instruction which tells the jury that they must consider each charge separately, and that proof of one crime is not to be taken as proof of another. United States v. Clayton, 450 F.2d 16, 17 (1st Cir. 1971).

(k) Unanimous Verdict

Always propose an instruction that tells the jury their verdict must be unanimous. State v. Cokley, 226 S.E.2d 40 (W.Va. 1979); State v. McKinney, 88 W.Va. 400, 106 S.E. 894 (19--); State v. Wiseman, 94 W.Va. 224, 118 S.E. 139 (19--); State v. Anderson, 117 W.Va. 265 (W.Va. 1936).

In addition to the standard jury instructions listed above, propose a jury instruction on any rule of law that plays a role in your criminal trial. For example, if the State's case rests solely on the uncorroborated testimony of the victim, then you should propose a cautionary instruction under State v. Maynard, 393 S.E.2d 221, 226-228 (W.Va. 1990); State v. Payne, 280 S.E.2d 72, 76-79 (W.Va. 1981). If you present evidence of the defendant's good character, then propose an instruction that tells the jury how to weigh good character evidence. State v. Currey, 133 W.Va. 676, 688, 57 S.E.2d 718 (1950); State v. Wilson, 207 S.E.2d 174 (W.Va. 1974).

K. POST-TRIAL MOTIONS

If your client is convicted, you might feel the urge to throw the file in the corner of your office and go on vacation for a few days. Don't forget to file your post trial motions within ten (10) days! *See W.Va.R.Crim.P.*, Rules 33, 34.

Filing a motion for new trial is necessary to perfect the record for appeal. Try to think back through the trial, and allege, as grounds for a new trial, every error that occurred during the trial. If you can't think of any errors, just allege, if arguably legitimate, that there was insufficient evidence to support the conviction, and add, as a further ground, "any other error apparent in the record." Schedule your motion for an argument hearing, and make sure the Judge rules on the motion.

L. SENTENCING

The jury has reached a verdict. The bailiff hands the verdict form to the judge, who reads it in open court: "We the jury (your heart skips a beat) find the defendant guilty of battery." The jury is excused.

The next thing that happens (i.e., before your client leaves the courtroom) is that the judge will (a) decide whether to order a presentence report; (b) schedule the sentencing hearing; and (c) decide whether to set bond for your client pending the sentencing hearing.

1. THE PRESENTENCE REPORT

After your client is convicted, the judge is likely to order the probation department to prepare a presentence report pursuant to *W.Va.R.Crim.P.*, Rule 32(c). Your client can waive the presentence report, with the permission of the court (and there are times when you want to do this).

In preparing the presentence report, the probation officer will conduct an investigation into your client's background, which will include an interview with your client. The probation officer will make a sentencing recommendation to the judge based on this investigation. Factors the probation officer will consider in making her recommendation include (1) remorse; (2) acceptance of responsibility; (3) cooperation; (4) prior record; (5) work history; (6) family life; (7) current status; and (8) drug and alcohol use.

If your client is remotely remorseful about the crime, the interview with the probation officer is a good time for her to exhibit this remorse. In practice, your client's remorse seems to be a key factor in swaying the probation officer's recommendation one way or the other. Of course, this can be a bit of a problem if your client proclaimed innocence during the trial. This problem may be one reason to waive the presentence report.

2. BOND PENDING THE SENTENCING HEARING

Under *W.Va.R.Crim.P.*, Rule 46(c) and *W.Va. Code* 62-1C-1(b), the defendant will be entitled to bond pending the sentencing hearing, unless the crime involved violence or the

use of a deadly weapon. You have a heavy burden to convince the judge that your client will not flee, or pose a danger to anyone.

Ask the judge to permit the pre-trial bond continue until sentencing. You might suggest that home incarceration be a condition of bond.

3. THE SENTENCING HEARING

If the judge orders a presentence report, then you'll have about 30 days to prepare for the sentencing hearing. During this time, file a motion setting forth your sentencing proposal (e.g., a motion for probation), and listing the reasons why the judge should accept your proposal. This motion will look a lot like a motion for bond reduction, and you may want to refer to the Ghiz case for factors to put in your motion.

Under *W.Va.R.Crim.P.*, Rule 32(a)(1)(C), the defendant has the right to "present any information in mitigation of punishment." Take advantage of this. Attach to your sentencing motion good character letters and affidavits from friends and family members. Subpoena character witnesses to testify at the sentencing hearing. The sentencing hearing is another good time for your client to express remorse. I guarantee that the hearing won't go well if your client tells the judge, *"They didn't read me my rights or nothing!"*

4. SENTENCING RULES

I mentioned that you file a written motion proposing a particular sentence for your client (i.e., usually probation). Figuring out the various sentencing options can be complicated. There are several things you need to know about sentencing in West Virginia:

(a) Indeterminate Sentences

If your client has been convicted of "malicious wounding," the statutory sentence is "not less than two nor more than ten years." *W.Va. Code* 61-2-9(a). This is an "indeterminate sentence." That means that the judge, if she imposes a term of incarceration, has no discretion in the number of years your client will serve. Your client will be eligible for parole after two years, and can be kept in prison no longer than ten years, minus good time.

(b) Determinate Sentences

If your client is convicted of aggravated robbery, pursuant to *W.Va. Code* 61-2-12, the statutory sentence is "not less than ten years." Here, the judge has great discretion in fixing the number of years your client will serve in prison. If probation is not granted, the judge must sentence your client to a flat (or "determinate") number of years. For example, the judge might sentence your client to, say, sixty years.

(c) Life Sentences

If your client is sentenced to life with*out* mercy, then calculating the time she will serve is easy. She'll never get out. Never.

If your client receives mercy, your client will become eligible for parole after ten years, except that parole eligibility begins after 15 years if your client was convicted of murder, or she has two prior felony convictions. *W.Va. Code* 62-3-15 (murder sentences); *W.Va. Code* 62-12-13 (parole eligibility).

(d) Prison Good Time

If your client is convicted of a felony, and is sentenced to prison, then she is entitled to good time under *W.Va. Code* 28-5-27.

(1) *Indeterminate Sentences*

If the prisoner is serving an indeterminate sentence, then one day is subtracted off the maximum sentence for every day she actually serves in prison. In other words, if your client is sentenced to 1 to 10 years, she must serve the minimum of one year, but the 10 years is cut in half, so she will discharge in five years.

(2) *Determinate Sentences*

One day of good time comes off the end of the sentence for every day of incarceration. A twenty year sentence will discharge after ten years, with good time.

(e) Jail Good Time

(1) *Sentences of Six Months or Less*

Your client must serve the actual sentence if she is sentenced to six months or less. There is no good time. *W.Va. Code* 7-8-11.

(2) *Sentences of More Than Six Months*

If your client is sentenced to more than six months (i.e., six months and one day), then she will receive five days of good time for every month she serves. *W.Va. Code* 7-8-11.

(f) Concurrent v. Consecutive Sentences

When a person is convicted of two or more offenses, the sentences must be served consecutively (i.e., one after the other), unless the court orders that the sentences be served concurrently (together as one sentence). *W.Va. Code* 61-11-21.

(g) Credit for Time Served

W.Va. Code 61-11-24 provides that the judge or magistrate, in imposing a sentence, may give credit for time served. In Martin v. Leverette, 161 W.Va. 547, 244 S.E.2d 39 (W.Va. 1978), however, the Court removed this discretion and made credit for time served mandatory.

(h) Youthful Offender Treatment

The youthful offender act (*W.Va. Code* 25-4-1 et seq.) authorizes the judge to suspend the sentence of any "male" between the ages of 16 and 21 who has been convicted of either an adult crime not punishable by life imprisonment or of juvenile delinquency and to confine him in a youthful male offender center. Upon completion of the treatment program or upon a determination that he is unfit for treatment, the offender is returned to the sentencing court for probation or re-sentencing. The period of confinement at a youth center is from six months to two years. *W.Va. Code* 25-4-1 through 12.

The Department of Corrections currently maintains the Anthony Center in Greenbrier County as its only center for youthful offenders ages 18 to 21 (currently a six-month program). Similarly, the Davis Center in Tucker County accepts 16 to 18 year olds, but these youths are ordinarily juveniles convicted of delinquency, rather than juveniles transferred to adult status.

In Flack v. Sizer, 174 W.Va. 79, 322 S.E.2d 850 (W.Va. 1984), the Court held that youthful male offender programs must also be available for females, but there don't appear to be any female programs in place.

The Youthful Offender Statute is a great option for a 21 year old client who looks like he's headed for prison. If appropriate, make this your sentencing proposal.

(i) Probation

If this is your client's first felony conviction, then she is a good candidate for probation. Probation means that the judge or magistrate imposes a sentence (say, two to ten years), but then the judge "suspends" the imposition of that sentence and places the defendant on probation.

(1) *General Eligibility*

Ordinarily, convicted persons are eligible for probation, unless: (1) the maximum penalty for the offense is life imprisonment, (2) the person committed or attempted to commit a felony with the use, presentment or brandishing of a firearm, or (3) the sentencing statute, such as DUI, prohibits probation.

(2) *Sexual Offenses*

If a person is found guilty or pleads guilty to a sexual offense, such person will only be eligible for probation after undergoing a physical, mental and psychiatric study

and diagnosis which must include an on-going treatment plan requiring active participation in sexual abuse counseling at a mental health facility or through some other approved program. *W.Va. Code* 62-12-2.

It is your responsibility, as defense counsel, to ensure that the requirements of *W.Va. Code* 62-12-2 are met. Call your local mental health center to find out what treatment programs are available for sex offenders. Arrange for your client to be seen by a psychiatrist - preferably one who has an established relationship with whatever sex offender treatment program is available in your area.

(3) *Jail as a Condition of Probation*

Terms of probation may include confinement in the county jail up to one third of a determinate sentence or one third of the minimum of an indeterminate sentence, not to exceed six months. The court may sentence the defendant within such six-months period to intermittent periods of confinement, such as weekends. *W.Va. Code* 62-12-9.

(4) *Length of Probation*

The period of probation, together with any extensions of probation may not exceed five years. *W.Va. Code* 62-12-11.

(5) *Probation in Magistrate Court*

Under *W.Va. Code* 50-2-3a, a Magistrate has "authority to suspend sentences and impose periods of unsupervised probation for a period not to exceed two years," unless otherwise prohibited (e.g., the DUI sentencing statute prohibits probation).

(j) Parole

To be eligible for parole, a prisoner ordinarily must serve the minimum term of an indeterminate sentence, or must serve one fourth a determinate sentence. (If the indictment and conviction specify the use of a firearm, a minimum of three years must be served before eligibility for parole. If the firearm was used in a robbery, the minimum is five years or one third of the definite term, whichever is greater.) *W.Va. Code* 62-12-13.

(k) Firearm Specification

If the indictment and the conviction specify the use of a firearm in the commission of a felony, the defendant is not eligible for probation. *W.Va. Code* 62-12-2(b), (c) and (d).

Also, if the indictment and the conviction specify the use of a firearm, the defendant is ordinarily not eligible for parole until she serves three years. (If the firearm was used for a robbery, the period of ineligibility for parole is five years or one third of the determinate sentence, whichever is greater.)

(l) Home Incarceration

Magistrates and circuit judges may order home incarceration, with or without electronic monitoring. *W.Va. Code* § 62-11B-4.

In 1994, the Legislature modified previous legislation to allow for home incarceration for DUI, including second and third offense DUI. *W.Va. Code* 17C-5-2(o).

Whether your client is likely to receive home incarceration depends on (1) whether she presents a risk of flight; (2) whether she is employed and has dependents to support; (3) whether she is likely to commit another crime (i.e., danger to society); and (4) whether your client has any specialized medical needs.

If home incarceration is a possibility, then make sure your client has a telephone, because the electronic monitoring device is hooked up to a telephone. Also, there are fees for home incarceration. Call your local probation department to find out what fees are being assessed for the home incarceration program in your area.

(m) Alternative Sentences

Any person who has been convicted in circuit or magistrate court of a misdemeanor or felony punishable by confinement in the county jail, as an alternative to the sentence imposed by statute may be sentenced to weekend jail time, a public works program, or a community service program. *W.Va. Code* 62-11A-1a.

(n) Recidivist Sentences

When a person is convicted of a felony, before sentencing the prosecutor may file an information alleging prior felony convictions. If the defendant denies the information, the defendant has the right to a jury trial to determine whether he is the same person who was previously convicted of the felonies. If admitted or found to be the same person by the jury, for one previous felony conviction an additional five years is added to a fixed-term sentence, or five years to the maximum of an indeterminate sentence. For two or more previous felonies, the penalty is life, with parole eligibility after 15 years. *W.Va. Code* 61-11-18 and 19; *W.Va. Code* 62-12-13. Upon a previous conviction for first degree murder, second degree murder, or first degree sexual assault, the penalty for a subsequent conviction for any of these three offenses is life without parole. *W.Va. Code* 61-11-18(b).

The recidivist statutes have been strictly construed and contain a long series of defenses set forth in the annotations to *W.Va. Code* 61-11-18 and 19 (disproportionality, silence regarding counsel in records of previous convictions, overlap between commission of new offense and sentencing for prior offense, etc.)

Even upon a recidivist conviction, if the penalty is less than life, the defendant may still be eligible for probation. *W.Va. Code* 62-12-2(a).

(o) Motion to Reconsider the Sentence

Under *W.Va.R.Crim.P.*, Rule 35, you client has a right (and you should enforce this right) to be brought back before the sentencing judge for a reconsideration of the sentence. This motion must be filed within 120 days "after the sentence is imposed or probation is revoked . . ."

M. APPEAL

There are three parts to the criminal appeal process:

1. Filing the Notice of Intent to Appeal
   (Organizing the record for the Supreme Court)

2. Filing the Petition for Appeal
   (Asking the Supreme Court to Hear Your Appeal)

3. Filing the Appellant's Brief
   (Presenting Your Appeal to the Supreme Court)

1. NOTICE OF INTENT TO APPEAL

You win some and you lose some. You can't just throw the file in the corner and block it out of your mind. There's more work.

Under *W.Va.R.Crim.P.*, Rule 32(a)(2), and Carrico v. Griffith, 272 S.E.2d 235 (W.Va. 1980), the trial Judge must advise the defendant of her right to appeal the conviction. Don't read this to mean that you are relieved of any further responsibility. Make sure your client's appeal rights are preserved. That means that you must see to it that: (1) the Notice of Intent to Appeal is filed, in the Circuit Court, within 30 days from the date the Clerk enters the sentencing order into the record (*See W.Va.R.Crim.P.*, Rule 37); (2) appellate counsel is appointed; and (3) the court reporter begins transcribing the trial and any other proceedings in the case.

W.Va.R.Crim.P., Rule 37(a), lists the things to put in the Notice of Intent to Appeal. One of those things is that the Notice "should concisely state the grounds for appeal." Don't worry about this too much. What's important is that it gets filed on time. Just copy the grounds you put in your post trial Motion for New Trial, and, if appropriate, throw in an allegation about the evidence being insufficient, and file it. *W.Va. Code* 58-5-4 gives the defendant the right to assign additional grounds in the Petition for Appeal.

When the Notice of Intent to Appeal is filed, also file a motion for the appointment of appellate counsel, and a motion for an Order directing the official court reporter to begin transcribing the trial and other proceedings in the case. Get your client to complete a

(2) Never waive oral presentation on the petition. Never presume that the Justices have read your petition, understood your assignments of error, or remembered what you put in the petition. Be there personally to tell the Justices why your case should be reversed; and

(3) When you appear for oral presentation, know your case inside and out. The November 1, 1994, issue of the State Supreme Court Journal (Volume 1, Number 11), warns that "Lawyers appearing before the Court can expect increased questioning on (1) the appropriate standard of review for the issues presented on appeal; (2) the manner in which the alleged error was preserved; [and] (3) the trial court's reasoning for rendering the challenged ruling . . ."

Oral presentation on your petition is pretty straightforward. The Clerk will call your case, you'll come forward to the podium and introduce yourself. Then start talking. Make the issue(s) clear in your first sentence. You may want to begin by saying, "The most important issues in this case are assignments of error numbers 1, 2 and 3, regarding X, Y and Z, respectively. I intend to argue those points, beginning with the first assignment of error." Then go into the first assignment of error. The Justices may sit back and listen, or they may interrupt you during your first sentence and begin asking questions. Be prepared for any questions.

(C) APPELLANT'S BRIEF

Since you put forth the strongest case possible in the petition, the "Appellant's Brief" may be nothing more than a copy of the Petition, with a new cover page. The only new material in your Appellant's Brief should be (1) changes or new arguments to address issues raised by the Justices during their questioning of you during the oral presentation of the Petition; and (2) anything you neglected to put in the Petition.

Finally, as with the Petition, it is very important that you make oral arguments. As when you present a case to a jury, you need to remind the Justices that your case is important - every chance you get.

EXHIBIT A
SAMPLE BOND REDUCTION MOTION

IN THE _____ COURT OF _____ COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v. CASE NO.

_____,
Defendant.

MOTION FOR BOND REDUCTION

The defendant, _____, in person and by counsel, _____, moves this Honorable Court for an Order, pursuant to W.Va.R.Crim.P., Rule 46 and W.Va. Code 62-1C-1, reducing the defendant's bail from its present amount of _____ to specify the dollar amount you want bail reduced to], a just and reasonable amount. In support hereof the defendant alleges as follows:

1. On the _____ day of _____, 19____, the defendant was arrested and charged with the felony/misdemeanor offense of _____, in violation of W.V. Code _____.

2. The penalty for the aforementioned offense is as follows: _____.

3. The defendant has a right to be admitted to bail inasmuch as the crime(s) charged against the defendant is not punishable by life imprisonment.

4. Since the defendant's arrest, on the _____ day of _____, 19____, he/she has remained incarcerated in the South Central Regional Jail - unable to make bail in the amount of $_____.

5. The defendant has been found to be indigent by a circuit court judge, and counsel has been appointed to represent him/her.

6. A preliminary hearing was held on _____, 19____, and this case was bound over to circuit court. The defendant has not yet been indicted.

7. The defendant is _____ years old (DOB), and was born in _____. His/her social security number is _____.

8. The defendant lives with _____, at _____. He/she has lived in Kanawha County Area for _____ [years -or- his entire life].

9. The crimes charged against the defendant are not alleged to have involved firearms or other deadly weapons or the use of violence to any person.

10. The defendant did not resist arrest or attempt to flee.

11. The defendant has the prior convictions, to wit:

_____

12. The defendant has extensive ties to the community, to wit: _____
_____
_____
_____.

WHEREFORE, the defendant respectfully prays this Honorable Court that bond be reduced to _____, as well as any other relief which this Court deems proper.

_____

BY COUNSEL

[your signature line]
[your typed name]_____
[your typed address and phone]_____

COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I, _[yourname]_____, hereby certify that on _____, 19____, service of the foregoing _____ was made upon the State of West Virginia by hand-delivering a true copy to the Office of the _____County Prosecutor, [address], his/her last known address.

COUNSEL FOR DEFENDANT

EXHIBIT B

SAMPLE OMNIBUS DISCOVERY MOTION

IN THE _____ COURT OF _____ COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v. CASE NO.

_____,
Defendant.

OMNIBUS DISCOVERY MOTION

The defendant, by counsel, _____, moves this Honorable Court for an Order directing the State of West Virginia to comply with the following discovery requests:

1. Bill of Particulars:

The defendant requests, pursuant to W.Va.R.Crim.P., Rule 7(f) and W.Va. Code 62-1B-1, that the State answer the following questions:

(a) _____;
(b) _____;
(c) _____.

2. Written or Recorded Statements Made by Defendant:

The defendant requests that the State provide to defense counsel, prior to trial, copies of any relevant written or recorded statements made by the defendant, within the possession, custody or control of the State, the existence of which is known, or by some exercise of due diligence may become known, to the attorney for the State. W.Va.R.Crim.P., Rule 16(a)(1)(A); W.Va. Code 62-1B-2. This request is includes any relevant written or recorded statement made by the defendant to any person, and is not limited to statements made to law enforcement officers. State v. Lambert, 175 W.Va. 141, 331 S.E.2d 873 (1985); State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987).

3. Oral Statements Made by Defendant:

The defendant requests that the State provide to defense counsel, prior to trial and in writing, the substance of any oral statement which the State intends to offer in evidence at the trial made by the defendant whether before or after arrest. W.Va. Code 62-1B-2.

W.Va.R.Crim.P., Rule 16(a)(1)(A). This request is includes any oral statement made by the defendant to any person, and is not limited to statements made to law enforcement officers. State v. Lambert, 175 W.Va. 141, 331 S.E.2d 873 (1985); State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987).

4. Defendant's Grand Jury Testimony:

The defendant requests that the State provide to defense counsel, prior to trial, true and complete copies of all recorded testimony of the defendant before a grand jury which relates to the offense charged. W.Va.R.Crim.P., Rule 16(a)(1)(A).

5. Defendant's Criminal Record:

The defendant requests that the State furnish to defense counsel, prior to trial, such copy of his prior criminal record, if any, as is within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the state. W.Va.R.Crim.P., Rule 16(a)(1)(B).

6. Documents and Tangible Objects:

The defendant requests that the State provide to defense counsel, prior to trial, a written list of all books, papers, documents, photographs, tangible objects, maps or drawings of buildings or places, or copies or portions thereof, which are within the possession, custody and control of the State, and which are material to the preparation of his defense or are intended for use by the State as evidence in chief at the trial, or were obtained from or belong to the defendant. The defendant further requests permission to inspect and copy or photograph the same. Also, the defendant asks that the State provide defense counsel with copies of photographs. W.Va. Code 62-1B-2; W.Va.R.Crim.P., Rule 16(a)(1)(C).

7. Reports of Examinations and Tests:

The defendant requests that the State furnish to defense counsel, prior to trial, copies of all results or reports of physical or mental examinations, and of scientific tests or experiments, which are within the possession, custody or control of the State, the existence of which is known or by the exercise of due diligence may become known, to the attorney for the State, and which are material to the preparation of the defense or are intended for use by the State as evidence in chief at the trial. W.Va.R.Crim.P., Rule 16(a)(1)(D); W.Va. Code 62-1B-2.

8. Specific Information Relating to Hearsay:

The defendant requests that the State furnish to defense counsel, prior to trial, the substance of all hearsay evidence the State intends to introduce pursuant to W.Va.R.Evid., Rules 803(24) and (804)(b)(5). State v. Walker, 188 W.Va. 661, 425 S.E.2d 616 (1992).

9. State Witness List:

The defendant requests that the State furnish to defense counsel, prior to trial, a written list of the names and addresses of all witnesses whom the State intends to call in its case in chief. W.Va.R.Crim.P., Rule 16(a)(1)(F).

10. Rebuttal Witness List:

The defendant requests that the State furnish to defense counsel, prior to trial, a written list of the names and addresses of all rebuttal witnesses whom the State reasonably anticipates will be used during trial. State v. Roy, 194 W.Va. 276, 286, 460 S.E.2d 277 (1995).

11. Criminal Convictions of State Witnesses:

The defendant requests that the State furnish to defense counsel, prior to trial and in writing, any record of prior convictions of all witnesses whom the attorney for the State intends to call in the presentation of the case in chief, which is within the knowledge of the State, or by the exercise of due diligence may become known to the State. W.Va.R.Crim.P., Rule 16(a)(1)(E).

12. Expert Witnesses:

The defendant requests that the state disclose to defense counsel a written summary of testimony the state intends to use under Rules 702, 703, or 705 of the Rules of Evidence during its case in chief at trial. The summary must describe the witnesses' opinions, the bases and reasons therefor, and the witnesses' qualifications. W.Va.R.Crim.P., Rule 16(a)(1)(E).

13. Identity of Witnesses Before the Grand Jury:

The defendant requests that the State provide to defense counsel, prior to trial and in writing, the names of all persons who testified before the grand jury regarding this case. W.Va. Code 52-2-8.

14. Statements of Co-Defendant(s):

The defendant requests that the State provide to defense counsel, prior to trial, copies of any written or recorded statement made by each and every co-defendant, and as well, in writing, the substance of any oral statement made by a co-defendant, which the State intends to introduce at trial. State v. McCormick, 277 S.E.2d 629 (W.Va. 1981) (The admissibility of statements of a co-conspirator should be settled out of the jury's presence).

15. Notice of State's Intention to use Discoverable Evidence:

The defendant requests, pursuant to W.Va.R.Crim.P., Rule 12(d)(2), that the State notify defense counsel, in writing, of its intention to use, in evidence in chief at trial, any evidence which the defendant may be entitled to discover and/or move to suppress, respectively, pursuant to W.Va.R.Crim.P., Rules 16 and 41. This request includes, but is certainly not limited to the following:

(a) Any evidence or information seized or otherwise obtained during a search, or seized or otherwise obtained as a result of a search, executed by government officials or state agents, including the fruit of such search(es); and

(b) Any pre-trial identification procedure including, but not limited to, line-ups, photo spreads, one-on-one show-ups, and displays of one or more photographs to one or more witnesses or potential witnesses.

16. State's Intent to use Collateral Crimes/Other Wrongs Evidence:

The defendant requests that the State provide defense counsel, prior to trial and in writing notice of its intention to use at trial collateral crime evidence and evidence of other crimes, wrongs or acts, whether or not such misconduct constitutes a criminal offense, together with the particulars as to the conduct, times, dates, places and persons present thereat; and, as well, a statement of the State's theory of admissibility with respect to each item of such Rule 404(b) evidence. W.Va.R.Evid., Rule 404(b); State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994); State v. Larock, 196 W.Va. 294, 470 S.E.2d 613 (1996).

17. Notice of State's Intention to use Flight Evidence:

The defendant requests that the State to furnish written notice of its intention to use evidence of flight at trial, and as well, the particulars as to the time, date, place and persons relevant thereto. Accord v. Hedrick, 176 W.Va. 154, 342 S.E.2d 120 (1986).

18. Pre-Trial Production of Statements of State Witness:

The defendant requests, pursuant to W.Va.R.Crim.P., Rule 26.2 and W.Va. Const. art. III, sec. 14, that the State produce, in advance of trial, any statement, as defined by W.Va.R.Crim.P., Rule 26.2(f), made by a witness who will be called to testify in the State's case-in-chief in the trial of this action. State v. Gale, 177 W.Va. 337, 352 S.E.2d 87, 89-91 (W.Va. 1986); State v. Watson, 173 W.Va. 553, 318 S.E.2d 603 (1984) ("We . . . urge the parties to make a voluntary disclosure of Rule 26.2 statements"); State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990) ("[I]n Watson, we encouraged the early disclosure of statements under W.Va.R.Crim.P. 26.2(a)"). This requests includes, but is certainly not limited to:

(a) Statement(s), however taken or recorded or a transcription thereof, made by the witness to a grand jury. W.V.R.Crim.P., Rule 26.2(f)(3); State v. Watson, 173 W.Va. 553, 318 S.E.2d 603 (1984);

(b) Written statement(s) made by a witness that is signed or otherwise adopted or approved by him/her. W.V.R.Crim.P., Rule 26.2(f)(1);

(c) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical or other recording or a transcription thereof. W.V.R.Crim.P., Rule 26.2(f)(2); and

(d) Reports of police officers. State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990).

19. Pre-Trial Production of Grand Jury Transcript:

The defendant requests, pursuant to W.Va.R.Crim.P., Rule 6, and W.Va. Const. art. III, sec. 14, that the State provide to defense counsel, prior to trial, transcripts of the proceedings before the grand jury which returned the indictment in this case, and as well, any other minutes and notes required to be kept, including the number of grand jurors concurring in the finding of the indictment in this case. In support hereof, defense counsel states:

(a) That the disclosure to defense counsel of matters occurring before the grand jury may show that grounds exists for a motion to dismiss;

(b) That the record required to be kept by W.Va.R.Cr.P., Rule 6(c), may reveal the failure of a requisite number of grand jurors to have concurred in the finding of said indictment in this case, which would constitute a valid defense to the indictment herein;

and

(c) That disclosure to the defense counsel of matters occurring before the grand jury will reveal evidence which tends to exculpate the defendant by indicating his innocence and impeaching the credibility of potential State witnesses, which disclosure is compelled under Brady v. Maryland, 373 U.S. 82 (1963), and its progeny.

20. Electronic Surveillance:

The defendant requests that the State provide to defense counsel written notice of any mail cover, wire cover, electronic surveillance, and/or surveillance by any mechanical or physical means used in connection with this case. The defendant further requests that the State provide to defense counsel a copy of the Court order authorizing such surveillance, as well as copies of all other materials provided to the Court issuing said order, in support of the application for said surveillance. W.Va. Code 62-1D-11(k).

21. Exculpatory and Impeachment Material:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State provide to defense counsel, in writing and prior to trial, all exculpatory materials favorable to the accused and which may negate or tend to negate guilt for the offense alleged or which may mitigate punishment, and all evidence which could reasonably weaken or impeach any evidence proposed by the State to be introduced against the defendant. W.Va. Const. art. 3, secs. 10 and 14, U.S. Const. amends 5, 6 and 14.

22. Witness's Failure to Inculpate the Defendant:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, (1) any statement made by a percipient or informed witness which failed to mention the defendant. Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978); and (2) any failure by an eyewitness to identify the defendant as an actor in a transaction in which the State contends he personally participated.

23. Offers of Leniency to State Witnesses:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, the terms of any plea bargain, offer of leniency or immunity, or other inducement or agreement, whether oral or written, offered or actually given to any witness whom the State intends to call at trial. SEE State v. Jones, 161 W.Va. 55, 239 S.E.2d 763 (1977).

24. Juvenile & Criminal Records of State Witnesses:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, the prior juvenile and criminal records or other prior material acts of misconduct of any witness whom the State intends to call at trial. United States v. Strifler, 851 F.2d 1197, 1202 (9th Cir. 1988); United States v. Perdomo, 929 F.2d 967, 970-71 (3rd Cir. 1991). This includes all declarants whose out-of-court statements the State will seek to introduce as an exception to the hearsay rule. SEE See W.Va.R.Evid., Rule 806.

25. Probation Reports of State Witnesses:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, a copy of any federal or state probation or presentence report of any prospective State witness. United States v. Figurski, 545 F.2d 389 (4th Cir. 1976); United States v. Anderson, 724 F.2d 596,

598 (7th Cir. 1984) (presentence report contents that impeach witness' credibility are discoverable; interpreting Figurski); United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988).

26. Complaining Witness' Efforts to Dismiss Charge:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, all oral or written requests by a complaining witness or victim to withdraw a complaint or to otherwise cause the dismissal of the charges alleged herein.

27. Polygraph Tests:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, the oral and/or written results of any polygraph test administered to any prospective State witness. Carter v. Rafferty, 826 F.2d 1299, 1306-09 (3rd Cir. 1987).

28. Investigations of State Witnesses:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence that any prospective government witness is or has been under investigation by federal, state or local authorities for any criminal conduct unrelated to the instant case. United States v. Chitty, 760 F.2d 425, 428 (2nd Cir.), cert. denied, 474 U.S. 945 (1985).

29. Prior False Statements of State Witnesses:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence that any prospective State witness has ever made any false statement to authorities, whether or not under oath or penalty of perjury. United States v. Strifler, 851 F.2d at 1202 (9th Cir. 1988).

30. Bias/Motive of State Witnesses:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence that any prospective State witness is biased, prejudiced or has a motive to be biased or prejudiced against the defendant for any reason. United States v. Strifler, 851 F.2d at 1202 (9th Cir. 1988); United States v. Sperling, 726 F.2d 69 (2nd Cir. 1984).

31. Inconsistent Statement(s) of State Witnesses:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence

that any prospective State witness has made a contradictory or inconsistent statement with regard to this case, and evidence that the testimony of any prospective State witness is inconsistent with any statement of any other preson or prospective witness. Hudson v. Blackburn, 601 F.2d 785, 789 (5th Cir. 1979); United States v. Hibler, 463 F.2d 455, 460 (9th Cir. 1972); Mesarosh v. United States, 353 U.S. 1 (1956); Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975).

32. Medical/Psychiatric Condition of State Witnesses:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective State witness' ability to perceive, remember, communicate, or tell the truth is impaired; and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic. Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980) United States v. Society of Independent Gasoline Marketers of America, 624 F.2d 461, 467-69 (4th Cir. 1980).

33. Informant's CI File:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, if the prosecution intends to call an informant in this case, provide a copy of the informant's personnel ("CI") file. United States v. Garrett, 542 F.2d 23 (6th Cir. 1973); United States v. Austin, 492 F.Supp. 502 (N.D. Ill. 1980).

34. Evidence of Other Suspects in this Case:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, any evidence that someone other than the defendant committed, or was ever suspected of committing, the crimes charged or of performing the role in the offense which the State intends to prove was performed by the defendant. McDowell v. Dixon; Miller v. Angliker, 848 F.2d 1312, 1321-23 (2nd Cir. 1988); Bowen v. Maryland, 799 F.2d 593, 613 (10th Cir. 1986); James v. Jago, 575 F.2d 1164, 1168 (6th Cir. 1978).

35. Witnesses Not Called by The State:

Pursuant to Brady v. Maryland, 83 S.Ct. 1194 (1963), and it's progeny, the defendant requests that the State disclose to defense counsel, in writing and prior to trial, the names and addresses of witnesses to the offenses allegedly committed by the defendant whom the State does not intend to call at trial. United States v. Cadet, 727 F.2d 1453, 1469 (9th Cir. 1984); State v. Bennett, 176 W.Va. 1, 339 S.E.2d 213 (1985); State v. Mansfield, 175 W.Va. 397, 332 S.E.2d 862 (1985).

36. Additional Discovery Requests:

The defendant requests permission to file such additional discovery requests as defense counsel deems necessary as a result of defense counsel's further investigation of this case and the production of the State's discovery responses.

WHEREFORE, the defendant respectfully prays this Honorable Court for the relief requested in the premises herein, as well as any other relief which this Honorable Court deems proper.

CLIENT'S NAME
BY COUNSEL

LAWYER'S NAME
LAWYER'S ADDRESS AND PHONE
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I, _____, hereby certify that on this ___ day of _____, 19__, service of the foregoing motion was made upon the State of West Virginia by hand-delivering a true copy to the Office of the _____ County Prosecutor, at [HIS/HER ADDRESS].

_____
COUNSEL FOR DEFENDANT

EXHIBIT C

SAMPLE STANDARD MOTION FOR

COURT'S VOIR DIRE

IN THE _____ COURT OF _____ COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v. CASE NO.

_____,

Defendant.

DEFENDANT'S MOTION TO SUPPLEMENT COURT'S VOIR DIRE

The defendant, _____, by counsel, _____, hereby moves this Honorable Court, pursuant to W.V.R.Cr.P., Rule 24(a), and W.V. Const. Art III, sec. 14, to supplement its voir dire examination of prospective jurors with the following questions:

1. Are any of you between the ages of eighteen (18) and sixty-five (65)? W.Va. Code 52-1-8(c).

2. Are any of you not a citizen of the United States, and a resident of Kanawha County, West Virginia? W.Va. Code 52-1-8(b)(1).

3. Do any of you have difficulty reading, speaking or understanding the English Language? W.Va. Code 52-1-8(b)(2).

4. Have any of you ever been convicted of perjury or false swearing? W.Va. Code 52-1-8(b)6).

5. Have any of you ever been convicted of a felony? W.Va. Code 52-1-8(b)(6); State v. Maynard, 170 W.Va. 40, 289 S.E.2d 714, 718 (W.Va. 1982).

6. Have any of you ever lost the right to vote because of a criminal conviction? W.Va. Code 52-1-8(b)(5).

7. Within the last two (2) years, have any of you been summoned to serve as a grand juror, petit juror or a magistrate court juror? W.Va. Code 52-1-8(b)(4).

8. Do any of you have any matters presently pending before the Circuit or Magistrate Courts of Kanawha County, West Virginia? W.V. Code 56-6-14.

9. Are any of you related to, acquainted with, or present or former clients of any of the following attorneys employed by the Kanawha County Prosecuting Attorney's Office (State v. Beckett, 172 W.Va. 817, 310 S.E.2d 883 (W.Va. 1983):
[LIST THE ATTORNEYS HERE]

10. Are any of you related to, or acquainted with any of the following employees in the Kanawha County Prosecuting Attorney's Office (State v. Beckett, 172 W.Va. 817, 310 S.E.2d 883 (W.Va. 1983): [LIST EMPLOYEES HERE]

11. Are any of you related to, acquainted with, or present or former clients of any of the following attorneys employed by the Kanawha County Public Defender's Office (State v. Beckett, 172 W.Va. 817, 310 S.E.2d 883 (W.Va. 1983): [LIST ATTORNEYS HERE]

12. Are any of you related to, or acquainted with any of the following employees of the Kanawha County Public Defender's Office (State v. Beckett, 172 W.Va. 817, 310 S.E.2d 883 (W.Va. 1983): [LIST EMPLOYEES HERE]

13. Are any of you related to, or acquainted, associated or in any way familiar with the defendant in this case, _____.

14. Are any of you related to, or acquainted or familiar with the following individuals who I am advised may be called to testify as witnesses in this case (State v. Kilpatrick, 158 W.Va. 289, 210 S.E.2d 480 (1974):

(A) STATE'S WITNESS LIST:

(B) DEFENDANT'S WITNESS LIST:

15. Are any of you a current or former employee of any municipal, state or federal law enforcement agency? State v. West, 157 W.Va. 209, 200 S.E.2d 859 (W.Va. 1973).

16. Are any of you related to, or acquainted with any present or former employee of any municipal, state or federal law enforcement agency? State v. Beckett, 172

W.Va. 817, 310 S.E.2d 883, 888-889 (W.Va. 1983). State v. Pratt, 161 W.Va. 530, 244 S.E.2d 227 (W.Va. 1978).

17. Are any of you a current or former employee of any other agency of any municipal, state or federal government?

18. Are any of you related to, or acquainted with any present or former employee of any other agency of any municipal, state or federal government?

19. Have any of you asked to be excused from serving as a juror in this case? W.Va. Code 52-1-11(a)&(b).

20. Do any of you suffer from a physical, mental or emotional disability which, in your opinion, may make you incapable of rendering satisfactory service as a juror? W.Va. Code 52-1-8(b)(3).

21. Do any of you feel that it would work an undue hardship or extreme inconvenience upon you to serve as a juror in this case? W.Va. Code 52-1-11(b).

22. Do any of you have any personal knowledge about the facts of this case?

23. Have any of you read or heard anything about the facts of this case other than what which has previously been mentioned in Court this morning?

24. Have any of you previously formed or expressed an opinion about the guilt or innocence of the accused? State v. McMillion, 104 W.Va. 1, 8, 138 S.E. 732 (1927). Code 61-6-12.

25. Have any of you heard any other person express an opinion about the guilt or innocence of the accused?

26. Do any of you have any knowledge why it may be improper for you to serve as a juror in this case?

27. Do any of you know of any other reason whatsoever which may not have been mentioned in any of these questions which may prevent or preclude you from rendering a fair and impartial verdict in this case based solely and exclusively upon the evidence and the law?

WHEREFORE, the defendant respectfully prays that this Honorable Court supplement its voir dire questioning of prospective jurors with the above questions, as well as other relief which this Court deems appropriate.

_____

BY COUNSEL

LAWYER'S NAME
LAWYER'S ADDRESS AND PHONE
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I, _____, hereby certify that on this ___ day of _____, 19__, service of the foregoing motion was made upon the State of West Virginia by hand-delivering a true copy to the Office of the _____ County Prosecutor, at [HIS/HER ADDRESS] .

_____

COUNSEL FOR DEFENDANT