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on cross-examination will usually not be allowed."[101]

EE. Meaning of Materiality

In *State v. Kerns,*[102] Justice McHugh ruled that "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[103]

III. CRIMINAL PROCEDURE

A. Defendant's Presence at All Critical Stages

Justice McHugh ruled in *State ex rel. Redman v. Hedrick*[104] that "[i]n a criminal proceeding, the defendant's absence at a critical stage of such proceeding is not reversible error where no possibility of prejudice to the defendant occurs."[105]

B. Continuance

The case of *State ex rel. Shorter v. Hey*[106] called upon the West Virginia Supreme Court of Appeals to revisit its precedent concerning continuances in criminal cases. Justice McHugh noted that the court's precedent was inconsistent with fairness, and in doing so, he held that "[syllabus points] 1 and 2 in State ex rel. *Holstein v. Casey*, 164 W. Va. 460, 265 S.E.2d 530 (1980) are hereby overruled to the extent the same are in conflict with this opinion."[107]

The court in *Hey* then went on to establish new law in the area of continuances in criminal cases. Justice McHugh held as an initial matter that

> [t]he determination of what is good cause, pursuant to *W.Va. Code*, 62-3-1, for a continuance of a trial beyond the term of indictment is in the sound discretion of the trial court, and when good cause is determined a trial court may, pursuant to *W.Va. Code*, 62-3-1, grant a continuance of a trial beyond the term of indictment at the request of either the prosecutor or defense, or

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101 *Id.* at Syl. Pt. 4.

102 420 S.E.2d 891 (W. Va. 1992).

103 *Id.* at Syl. Pt. 6.

104 408 S.E.2d 659 (W. Va. 1991).

105 *Id.* at Syl. Pt. 3.

106 294 S.E.2d 51 (W. Va. 1981).

107 *Id.* at Syl. Pt. 5.

upon the court's own motion.[108]

The *Hey* opinion next set fourth a bright line specifically for multi-judge circuit courts to sua sponte continue a criminal case. Justice McHugh wrote that "[a] trial judge in a multi-judge circuit may, upon his own motion and for good cause, order a continuance of a trial beyond the term of indictment because of the judge's congested trial docket, and such judge need not ascertain whether any other judge in the circuit can try the case within the term of indictment."[109]

Justice McHugh concluded the opinion in *Hey* by establishing a rule of law to assist trial courts when confronted with efforts by prosecutors to unjustifiably delay criminal trials. The court held as follows:

> Where the trial court is of the opinion that the state has deliberately or oppressively sought to delay a trial beyond the term of indictment and such delay has resulted in substantial prejudice to the accused, the trial court may, pursuant to *W. Va. Code*, 62-3-1, finding that no good cause was shown to continue the trial, dismiss the indictment with prejudice, and in so doing the trial court should exercise extreme caution and should dismiss an indictment pursuant to *W. Va. Code*, 62-3-1, only in furtherance of the prompt administration of justice.[110]

C. Arrest

The court held in *State v. Boggess*:[111]

> Where a conservation officer, employed by the West Virginia Department of Natural Resources, arrested an individual for the offense of possession of marihuana with the intent to deliver, which offense was committed in the presence of the officer, that arrest was authorized under the provisions of *W. Va. Code*, 20-7-4 [1971], which statute describes the authority, powers and duties of conservation officers.[112]

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108 *Id.* at Syl. Pt. 2.

109 *Id.* at Syl. Pt. 3.

110 *Id.* at Syl. Pt. 4.

111 309 S.E.2d 118 (1983).

112 *Id.* at Syl. Pt. 1.

D. Indictment and Information

State v. Wade[113] clearly articulated that "[a]s a general rule, under W. Va. R. Crim. P. 7(c)(1), the body, charge or accusation contained in an information is to be judged by the same standards that determine the sufficiency of the body, charge or accusation of an indictment."[114]

In *State ex rel. Starr v. Halbritter,*[115] Justice McHugh stated:

> The failure of the grand jury as a body to vote upon the text of the indictment is a fundamental error so compromising the integrity of the grand jury proceedings as to constitute prejudice per se, and the indictment must be dismissed as void, without prejudice to the right of the state subsequently to seek a valid indictment.[116]

In *State ex rel. Redman v. Hedrick,*[117] Justice McHugh held that "[w]here a prosecutor in a criminal case becomes the presiding judge over the grand jury that ultimately indicts the defendant in such case, the record of the grand jury proceeding must be made a part of the record before this Court will determine whether prejudice has resulted therefrom."[118]

Justice McHugh addressed the issue of variance between proof and the charge contained in an indictment in the case of *State v. Johnson.*[119] The court held that

> [i]f the proof adduced at trial differs from the allegations in an indictment, it must be determined whether the difference is a variance or an actual or a constructive amendment to the indictment. If the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced, then the difference between the proof adduced at trial and the indictment is a variance which does not usurp the traditional safeguards of the grand jury. However, if the defendant is misled, is subjected to an added burden of proof, or is otherwise prejudiced, the difference between the proof at trial and the indictment is an actual or a constructive amendment of the

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113 327 S.E.2d 142 (W. Va. 1985).

114 *Id.* at Syl. Pt. 2.

115 395 S.E.2d 773 (W. Va. 1990).

116 *Id.* at Syl. Pt. 2.

117 408 S.E.2d 659 (W. Va. 1991).

118 *Id.* at Syl. Pt. 5.

119 476 S.E.2d 522 (W. Va. 1996).

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indictment which is reversible error.[120]

E. Joinder of Offenses

Justice McHugh held in *State v. McFarland*[121] that "[i]f it appears that a defendant or the state is prejudiced by a joinder of offenses in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of the counts or provide whatever other relief justice requires."[122]

F. Preliminary Hearing

Justice McHugh relied upon the decision in *Spaulding v. Warden, West Virginia State Penitentiary*[123] to address the issue of right to counsel at a preliminary hearing in the case of *State v. Stout.*[124] The court held:

> A preliminary hearing, when accorded an accused by a [magistrate] pursuant to [*W. Va.*] *Code* 1931, 62-1-8, as amended, is a critical stage in a criminal proceeding to which the right to counsel, guaranteed by the Sixth Amendment to the Constitution of the United States, attaches, and a denial of counsel in those circumstances constitutes error for which a defendant is entitled to relief, unless it is clear beyond a reasonable doubt that the denial of counsel was harmless error.[125]

Several crucial issues involving a preliminary hearing were addressed by Justice McHugh in *Desper v. State.*[126] The court held initially that

> A preliminary examination conducted pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure serves to determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it; the purpose of such an examination is not to provide the defendant with discovery of the nature of the State's case against the defendant, although discovery may be a by-product of the preliminary

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120 *Id.* at Syl. Pt. 3.

121 332 S.E.2d 217 (W. Va. 1985).

122 *Id.* at Syl. Pt. 7.

123 212 S.E.2d 619 (W. Va. 1975).

124 310 S.E.2d 695 (W. Va. 1983).

125 *Id.* at Syl.

126 318 S.E.2d 437 (W. Va. 1984).

examination.[127]

Justice McHugh next stated:

> In challenging probable cause at a preliminary examination conducted pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure, a defendant has a right to cross-examine witnesses for the State and to introduce evidence; the defendant is not entitled during the preliminary examination to explore testimony solely for discovery purposes. The magistrate at the preliminary examination has discretion to limit such testimony to the probable cause issue, and the magistrate may properly require the defendant to explain the relevance to probable cause of the testimony the defendant seeks to elicit.[128]

Disclosure of the identity of an informant during a preliminary hearing was addressed by Justice McHugh in *State v. Haught.*[129] The court held that

> [d]uring a preliminary hearing held for the purpose of determining the question of probable cause for an arrest or search, a trial court is not required to disclose the identity of a confidential informant, provided that there is a substantial basis for believing that the informant is credible, that there is a factual basis for the information furnished and that it would impose an unreasonable burden on one of the parties or on a witness to require that the identity of the informant be disclosed at the hearing.[130]

Justice McHugh said in *Peyatt v. Kopp*[131] that

> [t]he magistrate has the discretion to allow hearsay evidence at a preliminary hearing under W. Va. R. Crim. P. 5.1 if three conditions are met: (1) the source of the hearsay is credible; (2) there is a factual basis for the information furnished; and (3) an unreasonable burden would be imposed on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing.[132]

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127 *Id.* at Syl. Pt. 1.

128 *Id.* at Syl. Pt. 2.

129 371 S.E.2d 54 (W. Va. 1988).

130 *Id.* at Syl. Pt. 2.

131 428 S.E.2d 535 (W. Va. 1993).

132 *Id.* at Syl. Pt. 1.

G. *Motion to Suppress*

Justice McHugh ruled in *State v. Preece*[133] that "[w]hen ruling upon a motion to suppress a statement made by a suspect pursuant to a traffic investigation due to the investigating officer's failure to provide Miranda warnings, the trial court must determine whether the statement was the result of custodial interrogation."[134] The opinion noted that "Miranda warnings are required whenever a suspect has been formally arrested or subjected to custodial interrogation, regardless of the nature or severity of the offense."[135] *Preece* concluded:

> The sole issue before a trial court in determining whether a traffic investigation has escalated into an accusatory, custodial environment, requiring Miranda warnings, is whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest.[136]

H. *Trial Security*

In *State v. Peacher,*[137] Justice McHugh examined the use of security measures by trial courts. The court held:

> Although the use of security precautions at a criminal trial is a matter which lies within the sound discretion of the trial judge, an evidentiary hearing should be held to determine whether the circumstances of a case justify greater than normal security precautions at trial. The absence of a record of such evidentiary hearing is not, per se, reversible error.[138]

I. *Witness Immunity*

The issue presented to Justice McHugh in *State v. Pennington*[139] concerned who may invoke immunity granted to a prosecution witness. The court held:

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133 383 S.E.2d 815 (W. Va. 1989).

134 *Id.* at Syl. Pt. 2.

135 *Id.* at Syl. Pt. 1.

136 *Id.* at Syl. Pt. 3.

137 280 S.E.2d 559 (W. Va. 1981).

138 *Id.* at Syl. Pt. 6.

139 365 S.E.2d 803 (W. Va. 1987).

> A prosecution witness who has purportedly been afforded immunity from prosecution pursuant to *W.Va. Code*, 57-5-2 [1931], and who testifies against a defendant in a criminal proceeding is the only person who may assert the protection of that statute in regard to that grant of immunity. The defendant, however, in that criminal proceeding may not assert irregularities in regard to the granting of that immunity from prosecution.[140]

J. Jury Instructions

In *State v. Payne,*[141] the court stated:

> Where the State's case is based upon the uncorroborated and uncontradicted identification testimony of a prosecuting witness, it is error not to instruct the jury upon request that, if they believe from the evidence in the case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, then the jury should scrutinize such testimony with care and caution.[142]

Justice McHugh quoted in part from the decision in *Wiseman v. Ryan*[143] to hold in *State v. Harshbarger*[144] that

> W. Va. R. Crim. P. 30 (1981) provides that "[u]nless otherwise ordered by the court with the consent of all parties affected thereby, instructions shall not be shown to the jury or taken to the jury room." However, prior to the effective date of such rule on October 1, 1981 "[i]t [was] in the trial court's sound discretion whether instructions which have been read to the jury may be taken by them to their room when they retire to consider . . . their verdict."[145]

Justice McHugh held in *State v. Hall*[146] that "[a]n instruction to the jury is proper if it is a correct statement of the law and if sufficient evidence has been

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140 *Id.* at Syl. Pt. 3.

141 280 S.E.2d 72 (W. Va. 1981).

142 *Id.* at Syl. Pt. 5.

143 182 S.E. 670 (W. Va. 1935).

144 294 S.E.2d 254 (W. Va. 1982).

145 *Id.* at Syl. Pt. 4 (alteration in original).

146 298 S.E.2d 246 (W. Va. 1982).

offered at trial to support it."[147]

In *State v. Kopa,*[148] Justice McHugh altered state precedent regarding the giving of an instruction on the alibi defense. The court stated:

> Because of the holding in Adkins v. Bordenkircher, 674 F.2d 279 (4th Cir.), cert. denied, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982), State v. Alexander, 161 W.Va. 776, 245 S.E.2d 633 (1978), is overruled to the extent that it permits the giving of an instruction that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt.[149]

Justice McHugh found it necessary to limit the scope of *Kopa*. The court stated:

> The invalidation of the instruction approved in State v. Alexander, 161 W.Va. 776, 245 S.E.2d 633 (1978), that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt[,] is only applicable to those cases currently in litigation or on appeal where the error has been properly preserved at trial.[150]

The case of *State v. Jones*[151] required Justice McHugh to develop a judicial test for determining whether an instruction on a lesser included offense is warranted. Justice McHugh held:

> The question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense.[152]

Justice McHugh stated in *State v. Harper*[153] that "[a] trial court must give

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147 *Id.* at Syl. Pt. 8.

148 311 S.E.2d 412 (W. Va. 1983).

149 *Id.* at Syl. Pt. 1.

150 *Id.* at Syl. Pt. 2.

151 329 S.E.2d 65 (W. Va. 1985).

152 *Id.* at Syl. Pt. 1.

153 365 S.E.2d 69 (W. Va. 1987).

an instruction for a lesser included offense when evidence has been produced to support such a verdict."[154]

Additionally, Justice McHugh stated in *State v. Miller*[155] that "[t]he trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error."[156]

K. Jury Selection

Justice McHugh wrote in *State v. Peacher*[157] that

> [t]he right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14, of the West Virginia Constitution. A meaningful and effective voir dire of the jury panel is necessary to effectuate that fundamental right.[158]

The court in *Peacher* concluded:

> It is an abuse of discretion and reversible error for a trial judge, in the exercise of his discretionary control over the scope of inquiry during voir dire, to so limit the questioning of potential jurors as to infringe upon a litigant's ability to determine whether the jurors are free from interest, bias or prejudice, or to effectively hinder the exercise of peremptory challenges.[159]

Justice McHugh held in *State v. Audia*[160] that

> [w]here a prospective juror is one of a class of persons represented by the prosecuting attorney at the time of trial, but there has been no actual contact between that juror and the prosecutor, the existence of the attorney-client relationship alone is not prima

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154 *Id.* at Syl. Pt. 3.

155 400 S.E.2d 611 (W. Va. 1990).

156 *Id.* at Syl.

157 280 S.E.2d 559 (W. Va. 1981).

158 *Id.* at Syl. Pt. 4.

159 *Id.* at Syl. Pt. 5.

160 301 S.E.2d 199 (W. Va. 1983).

facie grounds for disqualification of that juror.[161]

Justice McHugh held in *State v. Meadows*[162] that "[w]here a prospective juror, upon individual questioning, indicated that he was a former penitentiary guard but had retired ten years before trial, it was not reversible error to permit him to be a juror where no prejudice was shown."[163]

In *State v. McFarland,*[164] Justice McHugh wrote that "[i]t is within the sound discretion of the trial court to reject the proposed voir dire questions of a criminal defendant when the questions are substantially covered by others which are used."[165] The opinion also went on to hold:

> A criminal defendant is not entitled as a matter of right, under syl. pt. 7, State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983), to question potential jurors on voir dire to determine their views on the various theories underlying incarceration, namely, rehabilitation, punishment and deterrence. It is within the discretion of the trial court whether such a question may be asked on voir dire to enable the defendant to exercise more informed judgment in utilizing his peremptory challenges.[166]

Justice McHugh made clear in *State v. Finley*[167] that

> [w]hen a trial court determines that prospective jurors have been exposed to information which may be prejudicial, the trial court, upon its own motion or motion of counsel, shall question or permit the questioning of the prospective jurors individually, out of the presence of the other prospective jurors, to ascertain whether the prospective jurors remain free of bias or prejudice.[168]

Justice McHugh ruled in *State v. Dietz*[169] that

> [i]n a criminal case the trial court's conduct of the voir dire is not reversible error if it is conducted in a manner which safeguards the

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161 *Id.* at Syl. Pt. 3.

162 304 S.E.2d 831 (W. Va. 1983).

163 *Id.* at Syl. Pt. 8.

164 332 S.E.2d 217 (W. Va. 1985).

165 *Id.* at Syl. Pt. 4.

166 *Id.* at Syl. Pt. 6.

167 355 S.E.2d 47 (W. Va. 1987).

168 *Id.* at Syl. Pt. 1.

169 390 S.E.2d 15 (W. Va. 1990).

> right of a defendant to be tried by a jury free of bias and prejudice. Accordingly, it is not reversible error in a criminal case for a trial court to refuse to ask questions submitted for voir dire by the defendant if such questions are substantially covered by other questions asked by the trial court.[170]

L. *Plea Bargaining*

In *State ex rel. Forbes v. Kaufman,*[171] Justice McHugh addressed several issues involving a trial court's sentencing discretion when a plea agreement is entered. Justice McHugh stated:

> Where the state agrees to make a sentencing recommendation and enters into a plea agreement with the defendant pursuant to Rule 11(e)(1)(B) of the West Virginia Rules of Criminal Procedure, the trial court is not bound to impose the sentence recommended by the state if it accepts the plea agreement.[172]

Justice McHugh indicated that

> [w]here the state agrees that a specific sentence is a suitable disposition of a criminal case and enters into a plea agreement with the defendant pursuant to Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure, the trial court may either accept or reject the entire agreement, but it may not accept the guilty plea and impose a different sentence.[173]

Justice McHugh concluded in *Forbes* that

> [i]f a plea is taken pursuant to a plea agreement and the state has agreed to a specific sentence in that agreement, yet if it is not clear whether the plea was taken under Rule 11(e)(1)(B) or 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure, the trial judge may sentence the defendant without being bound by the sentencing provision in the plea agreement.[174]

Justice McHugh ruled in *State ex rel. Phillips v. Boggess*[175] that

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170 *Id.* at Syl. Pt. 10

171 404 S.E.2d 763 (W. Va. 1991).

172 *Id.* at Syl. Pt. 1.

173 *Id.* at Syl. Pt. 2.

174 *Id.* at Syl. Pt. 3.

175 416 S.E.2d 270 (W. Va. 1992).

> [a] request for a transcript by a criminal defendant is not tantamount to an appeal. Therefore, an indigent defendant is entitled to a transcript of his trial without endangering a prior plea agreement wherein he agrees not to seek an appeal in exchange for the agreement of the State to forego initiation of a recidivist proceeding. If the defendant subsequently files a timely appeal, the State should not be held to the plea agreement.[176]

M. Three Term Rule

The decision in *State v. Young*[177] restated a principle of law set out in *State ex rel. Smith v. DeBerry*.[178] In *Young*, Justice McHugh held:

> The three regular terms of a court essential to the right of a defendant to be discharged from further prosecution pursuant to provisions of [*W. Va.*] *Code*, 62-3-21, as amended, are regular terms occurring subsequent to the ending of the term at which the indictment against him is found. The term at which the indictment is returned is not to be counted in favor of the discharge of a defendant.[179]

The three term rule was again addressed by Justice McHugh in *State ex rel. Webb v. Wilson*.[180] He held that

> W.Va. Code, 62-3-21 [1959] limits the state to three unexcused regular terms of court, calculated in accordance with State ex rel. Spadafore v. Fox, 155 W.Va. 674, 186 S.E.2d 833 (1972), in which to bring an accused to trial on the charges contained in an indictment. Once three unexcused regular terms of court have lapsed, and the state has failed to bring the accused to trial on the charges contained in the indictment, the state may not further proceed on the charges contained in the indictment, for, under the plain meaning of the statute, the accused must be "forever discharged" and the indictment dismissed.[181]

Webb concluded that "[o]nce an accused is indicted, an entire panoply of constitutional rights attaches, including the right to trial without unreasonable

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176 *Id.* at Syl. Pt. 3.

177 280 S.E.2d 104 (W. Va. 1981).

178 120 S.E.2d 504 (W. Va. 1961).

179 280 S.E.2d at Syl. Pt. 2.

180 390 S.E.2d 9 (W. Va. 1990).

181 *Id.* at Syl. Pt. 1.

delay, as implemented by *W.Va. Code*, 62-3-21 [1959], regardless of whether the indictment is dismissed as void after three unexcused regular terms of court."[182]

N. 180 Day Rule

The requirement of prosecution within 180 days under the Agreement on Detainers Act was addressed in *State ex rel. Modie v. Hill*.[183] Justice McHugh wrote that

> [t]he failure of the State to bring the accused to trial within 180 days following the State's receipt of the petitioner's notice of imprisonment and request for final disposition of the case, pursuant to the Agreement on Detainers, *W.Va. Code*, 62-14-1, article III(a) and article V(c) [1971]; mandates the dismissal of the indictments pending against the petitioner, where there was no motion for continuance made by the State and the delay was not reasonable or necessary.[184]

O. Venue

The case of *State v. Peacher*[185] addressed the issue of a defendant's ability to change venue due to hostile sentiment. Justice McHugh wrote that "[a] change of venue will be granted in West Virginia when it is shown that there is a present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial."[186] *Peacher* also held that "[i]n a criminal case the defendant who is trying to show the existence of a present hostile sentiment in the community that would affect his right to a fair and impartial jury panel should have a wide latitude of inquiry on voir dire."[187]

In *State v. McFarland*,[188] Justice McHugh stated:

> Even though a majority of individuals surveyed in a county where a prosecution is pending, by way of a questionnaire, indicate that, based upon what they have heard or read, there is existing hostile sentiment in that county but that the defendant would receive a fair trial in that county, before a change of venue shall be granted the circuit court must be satisfied that there exists in the county

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182 *Id.* at Syl. Pt. 2.

183 443 S.E.2d 257 (W. Va. 1994).

184 *Id.* at Syl.

185 280 S.E.2d 559 (W. Va. 1981).

186 *Id.* at Syl. Pt. 1.

187 *Id.* at Syl. Pt. 2.

188 332 S.E.2d 217 (W. Va. 1985).

> where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial.[189]

P. *Prosecutorial Misconduct*

In *State v. Pennington,*[190] Justice McHugh had to determine whether pretrial statements by a prosecutor required the prosecutor be disqualified from the case. He stated that

> [w]here a prosecutor, while involved in his election campaign, made pretrial statements regarding the status of a criminal case and also by newspaper advertisements responded to his opponent's newspaper advertisements which questioned acts of the prosecutor in the conduct of that case, absent evidence that the defendant was prejudiced by the prosecutor's conduct, that conduct alone may not necessarily disqualify the prosecutor in that case.[191]

Justice McHugh held in *State v. Haught*[192] that

> [e]ven though the prosecuting attorney participated in the investigation surrounding the defendant's arrest and was present at the defendant's arrest, where the record failed to disclose any evidence which would indicate that the prosecutor's interest in prosecuting the case went beyond his or her ordinary dedication to his or her duty to see that justice is done, the trial court did not err in denying a defendant's motion for a special prosecutor.[193]

Q. *Appointment of Special Prosecutor*

Justice McHugh ruled in *State v. Kerns*:[194]

> Where a special prosecutor is appointed to try a criminal case due to a conflict, and the case is dismissed without prejudice, but the defendant is reindicted on the same charges, it is not error for a trial court to deny a motion to remove the special prosecutor if it is shown that the conflict which led to the original removal of the

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189 *Id.* at Syl. Pt. 1.

190 365 S.E.2d 803 (W. Va. 1987).

191 *Id.* at Syl. Pt. 5.

192 371 S.E.2d 54 (W. Va. 1988).

193 *Id.* at Syl. Pt. 3.

194 420 S.E.2d 891 (W. Va. 1992).

regular prosecutor still exists.[195]

In *Harman v. Frye,*[196] Justice McHugh held:

> Criminal cases involving the issuance of cross-warrants must be prosecuted by the prosecuting attorney, who is charged with the duty under *W.Va. Code*, 7-4-1 [1971] of instituting and prosecuting all necessary and proper criminal proceedings against offenders, and, in cases where it would be improper for the prosecuting attorney or his assistants to act, by a competent attorney who is appointed to act under *W.Va. Code*, 7-7-8 [1987].[197]

R. Right to Counsel for Indigents

Justice McHugh took the opportunity in *State ex rel. Barber v. Cline*[198] to examine the procedures for appointing counsel to indigent defendants. The *Barber* opinion stated:

> Circuit courts ordinarily must follow the attorney-appointment sequence set forth in W.Va. Code, 29-21-9(c) [1989]. Cunningham v. Sommerville, 182 W.Va. 427, 429, 388 S.E.2d 301, 303 (1989). The attorney-appointment sequence in circuits where no public defender office is in operation is ordinarily as follows: (1) a voluntary member of the local panel of attorneys; (2) a voluntary member of the regional panel of attorneys; (3) any public defender office in an adjoining circuit which agrees to the appointment; (4) qualified private attorneys from in-circuit or out-of-circuit.[199]

Barber next held that

> [a] "local panel" under *W.Va. Code*, 29-21-9 [1989] is a panel of private attorneys whose principal offices are located within the circuit of the court establishing and maintaining such panel. A "regional panel" under *W.Va. Code*, 29-21-9 [1989] is a panel of private attorneys whose principal offices are located in circuits adjoining the circuit of the court establishing and maintaining

195 *Id.* at Syl. Pt. 8.

196 425 S.E.2d 566 (W. Va. 1992).

197 *Id.* at Syl. Pt. 3.

198 391 S.E.2d 359 (W. Va. 1990).

199 *Id.* at Syl. Pt. 1.

such panel.[200]

Justice McHugh also stated:

> Reading *W.Va. Code*, 29-21-5(a) [1989] and *W.Va. Code*, 29-21-9(a)-(b) [1989] in pari materia, we hold that the executive director of public defender services has the obligation to assist each circuit court in establishing and maintaining local and regional panels of private attorneys desirous of appointments. In addition, such director has the obligation of assisting circuit courts by developing and revising periodically a statewide list of other "qualified private attorneys" from in-circuit or out-of-circuit who may be appointed to represent indigents in eligible proceedings when no local or regional panel attorney or public defender or assistant public defender is available for appointment.[201]

The opinion in *Barber* concluded that "[an] out-of-circuit lawyer in private practice who has never practiced law in a certain circuit and whose partners and associates, if any, have never practiced law in that circuit ordinarily should not be appointed to represent indigents in eligible proceedings in such circuit."[202]

Justice McHugh clarified the procedure for paying attorney fees to counsel appointed to represent indigents in the case of *Judy v. White*.[203] It was said initially that

> *W.Va. Code*, 29-21-13a [1990] mandates that a trial court review vouchers submitted by court-appointed attorneys for indigent criminal defendants to determine if the time and expense claims made therein are reasonable, necessary and valid; and said trial court shall then forward the voucher to the agency with an order approving payment of the claimed amount or such lesser sum as the trial court considers appropriate. The decision of the trial court in that regard will not be altered by the West Virginia Supreme Court of Appeals absent an abuse of discretion.[204]

The court in *Judy* held:

> Trial courts must give a brief explanation for any order reducing the amount of fees claimed by a court-appointed attorney by virtue of *W.Va. Code*, 29-21-13a [1990]. Said explanation must provide

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200 *Id.* at Syl. Pt. 2.

201 *Id.* at Syl. Pt. 3.

202 *Id.* at Syl. Pt. 4.

203 425 S.E.2d 588 (W. Va. 1992).

204 *Id.* at Syl. Pt. 2.

> enough guidance for the court-appointed attorney to respond meaningfully by petitioning the trial court for reconsideration of the reduction order and allowing the attorney to submit additional supporting written documentation and explanation without appearance. The trial court shall then set the final amount of compensation without further explanation. Absent an abuse of discretion, the trial court's decision is final.[205]

Justice McHugh addressed the issue of right to counsel in municipal criminal court in the case of *State ex rel. Kees v. Sanders*.[206] The court held:

> In a municipal court proceeding on a minor traffic offense, where a judge states, in advance of the proceeding, that notwithstanding the applicable provision which permits a jail sentence, the judge will under no condition impose one nor impose a fine so onerous that the defendant cannot pay it thereby subjecting him to a contempt charge which may result in a jail sentence, then appointment of counsel pursuant to *W.Va. Code*, 29-21-2(2) [1990] is not required.[207]

S. Discovery

In *State v. Audia*,[208] Justice McHugh ruled that "[s]ubject to certain exceptions, pretrial discovery in a criminal case is within the sound discretion of the trial court."[209]

The opinion in *State v. Tamez*[210] addressed the issue of a defendant's ability to discover the identity of an informant from the prosecutor. Justice McHugh wrote:

> When the State in a criminal action refuses to disclose to the defendant the identity of an informant, the trial court upon motion shall conduct an in camera inspection of written statements submitted by the State as to why discovery by the defendant of the identity of the informant should be restricted or not permitted. A record shall be made of both the in court proceedings and the statements inspected in camera upon the disclosure issue. Upon the entry of an order granting to the State nondisclosure to the

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205 *Id.* at Syl. Pt. 3.

206 453 S.E.2d 436 (W. Va. 1994).

207 *Id.* at Syl. Pt. 1.

208 301 S.E.2d 199 (W. Va. 1983).

209 *Id.* at Syl. Pt. 8.

210 290 S.E.2d 14 (W. Va. 1982).

> defendant of the identity of the informant, the entire record of the in camera inspection shall be sealed, preserved in the records of the court, and made available to this Court in the event of an appeal. In ruling upon the issue of disclosure of the identity of an informant, the trial court shall balance the need of the State for nondisclosure in the promotion of law enforcement with the consequences of nondisclosure upon the defendant's ability to receive a fair trial. The resolution of the disclosure issue shall rest within the sound discretion of the trial court, and only an abuse of discretion will result in reversal.[211]

Justice McHugh addressed the issue of production of statements by a testifying witness in *State v. McFarland*.[212] The court held:

> After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and his attorney, as the case may be, to produce for the examination and use of the moving party any statement of the witness that is in their possession that relates to the subject matter concerning which the witness had testified.[213]

He further held in *McFarland* that "[a] witness' notes which are abstracts from reports in the possession of a defendant in a criminal case do not constitute a 'statement' as defined in W. Va. R. Crim. P. 26.2(f)."[214]

In *State v. Bennett*,[215] Justice McHugh addressed late disclosure of discoverable matters by the state in a murder prosecution. The court held:

> Where a defendant charged with murder of the first degree filed discovery motions seeking information concerning the manner in which the homicide was committed and a list of persons possessing knowledge of the facts and circumstances of the homicide, and the motions were granted by the trial court, the defendant was entitled to a new trial where (1) the State, two days before trial, informed defense counsel of the existence of a weapon used in the commission of the homicide, which weapon the State had knowledge of in excess of two months before trial, (2) the State, during the trial, revealed to defense counsel the names of four witnesses who could connect the weapon to both

211 *Id.* at Syl. Pt. 3.

212 332 S.E.2d 217 (W. Va. 1985).

213 *Id.* at Syl. Pt. 13.

214 *Id.* at Syl. Pt. 14.

215 339 S.E.2d 213 (W. Va. 1985).

> the homicide and the defendant and (3) in camera hearings conducted during the trial with regard to such previously undisclosed evidence failed to overcome the undue prejudice suffered by the defendant at trial because of the non-disclosure.[216]

T. *Extradition*

Justice McHugh addressed the issue of a defendant's ability to challenge being extradited to West Virginia for prosecution in the case of *State v. Flint*.[217] The court held that "[o]nce a fugitive has been brought within the jurisdiction of West Virginia as the demanding state, the propriety of the extradition proceedings which occurred in the asylum state may not be challenged. The extradition proceedings may be challenged only in the asylum state."[218]

Justice McHugh addressed several issues involving a rendition warrant in *Cronauer v. State*.[219] The court held that

> [a] rendition warrant issued by the Governor of this State under *W.Va. Code*, 5-1-8(a) [1937], in response to a request for extradition from the executive authority of a demanding state pursuant to the Uniform Criminal Extradition Act, as amended, *W.Va. Code*, 5-1-7 to 5-1-13, "substantially recite[s] the facts necessary to the validity of its issuance" with respect to the crime charged therein, as required by *W.Va. Code*, 5-1-8(a) [1937], if the rendition warrant contains a statement that gives the person sought to be extradited reasonable notice of the nature of the crime charged in the demanding state; and a circuit court, when determining the sufficiency of a rendition warrant in a habeas corpus proceeding challenging the validity of custody in connection with extradition proceedings, may examine underlying documents filed by the demanding state in support of its request for extradition.[220]

Justice McHugh held in *Feathers v. Detrick*[221] that

> [u]nder the Uniform Criminal Extradition Act (*W.Va. Code*, 5-1-7 through *W.Va. Code*, 5-1-13), a demand for the extradition of one who has been convicted of a crime and sentenced and who,

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216 *Id.* at Syl. Pt. 6.

217 301 S.E.2d 765 (W. Va. 1983).

218 *Id.* at Syl. Pt. 4.

219 322 S.E.2d 862 (W. Va. 1984).

220 *Id.* at Syl. Pt. 2 (alteration in original).

221 336 S.E.2d 922 (W. Va. 1985).

> thereafter, is alleged to have broken the terms of his or her parole, must be supported by documents authenticated by the executive authority of the demanding state, including a copy of a judgment of conviction or a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person demanded has broken the terms of his or her parole.[222]

The court in *Feathers* also ruled:

> The Uniform Criminal Extradition Act (*W.Va. Code*, 5-1-7 through *W.Va. Code*, 5-1-13), does not require, as a prerequisite to the extradition of an alleged parole violator, a judicial determination by the demanding state of probable cause to believe that the person demanded has broken the terms of his or her parole.[223]

U. Investigative Services for Indigents

In *State v. Less,*[224] Justice McHugh wrote that "[i]t is a matter within the sound discretion of the trial judge whether investigative services are necessary under *W.Va. Code*, 51-11-18, and the exercise of such discretion will not constitute reversible error unless the trial judge abuses such discretion."[225]

V. Same Judge Presiding Over Different Cases Against Defendant

Justice McHugh made it clear in *State v. Flint*[226] that "[i]t is not error for a trial judge to preside over more than one criminal case involving the same defendant even though some of the facts are the same in each of the cases."[227]

W. Stay and Postponement

Justice McHugh outlined the difference between staying a proceeding and postponing execution of a sentence in the case of *State ex rel. Dye v. Bordenkircher*.[228] The court held:

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222 *Id.* at Syl. Pt. 2.

223 *Id.* at Syl. Pt. 3.

224 294 S.E.2d 62 (W. Va. 1981).

225 *Id.* at Syl. Pt. 6.

226 301 S.E.2d 765 (W. Va. 1983).

227 *Id.* at Syl. Pt. 6.

228 284 S.E.2d 863 (W. Va. 1981).

> The term "postponing the execution of the sentence" in *W.Va. Code*, 62-7-1 [1931], is not synonymous with the term "stay of proceedings" in *W.Va. Code*, 62-7-2 [1931]. A postponement of the execution of the sentence in a criminal case under W.Va. Code, 62-7-1 [1931], delays that one specific event in the case. A stay of proceedings under *W.Va. Code*, 62-7-2 [1931], however, stops all action in the circuit court which otherwise might occur in a case after the stay takes effect.[229]

X. Competency of Defendant

Justice McHugh addressed issues concerning the holding of a competency hearing for a defendant in *State v. Church*.[230] The court held initially that

> [a] trial judge's failure to make a finding on the issue of a criminal defendant's competency to stand trial within five days after the filing of a report by one or more psychiatrists or a psychiatrist and a psychologist in compliance with *W.Va. Code*, 27-6A-1(d) [1977], will not be considered to be reversible error requiring a new trial absent prejudice to the defendant resulting from such failure.[231]

The court in *Church* concluded:

> Even though a trial judge does not make a finding on the issue of a criminal defendant's competency to stand trial within five days after the filing of a report by one or more psychiatrists or a psychiatrist and a psychologist, the defendant may request a hearing on that issue under *W.Va. Code*, 27-6A-1(d) [1977], at any reasonable time prior to trial.[232]

Justice McHugh relied on *State v. Daggett*[233] in *State v. Wimer*[234] to hold:

> There exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant

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229 *Id.* at Syl. Pt. 1.

230 284 S.E.2d 897 (W. Va. 1981).

231 *Id.* at Syl. Pt. 1.

232 *Id.* at Syl. Pt. 2.

233 280 S.E.2d 545 (W. Va. 1981).

234 284 S.E.2d 890 (W. Va. 1981).

was sane at the time of the offense.[235]

Justice McHugh found in *State v. Swiger*[236] that

> [a] circuit court committed reversible error in finding a criminal defendant mentally competent to stand trial, where the sole witnesses who testified at the hearing to determine the defendant's competency were a psychologist and a psychiatrist, and the record clearly revealed that, (1) the testimony of the psychologist that the defendant was competent to stand trial was equivocal and subject to a previous indication by that psychologist that a psychiatric evaluation should be conducted to "support or deny" the psychologist's opinion concerning the defendant's competency, and (2) the psychiatrist, who examined the defendant upon two occasions, consistently maintained that the defendant was incompetent to stand trial.[237]

The court in *Swiger* also held:

> Where a defendant in a felony case, found by a court of record to be incompetent to stand trial, is civilly committed to a mental health facility pursuant to *W.Va. Code*, 27-6A-2(d) [1979], and *W.Va. Code*, 27-5-1 et seq. [1979], "the defendant's competency to stand trial shall, pursuant to *W.Va. Code*, 27-6A-2(d) [1979], thereafter be periodically reviewed."[238]

In *State v. Bias,*[239] Justice McHugh was asked to determine the status of criminal charges against a defendant found incompetent to stand trial. The court held:

> Being a bar to trial, an accused's incompetency to stand trial, regardless of the duration thereof, will not, as a matter of due process, ordinarily require dismissal of an indictment for a felony. The State must, however, show that the accused suffered no substantial prejudice beyond that which ensued from the ordinary and inevitable delay attendant to the attainment of competency to

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235 *Id.* at Syl. Pt. 3.

236 336 S.E.2d 541 (W. Va. 1985).

237 *Id.* at Syl. Pt. 4.

238 *Id.* at Syl. Pt. 5.

239 352 S.E.2d 52 (W. Va. 1986).

stand trial.[240]

Bias also held that "[a]ny term during which the defendant is unable to be tried because his or her competency to stand trial is being tested or evaluated does not count in favor of discharge from prosecution under the three-term rule, *W.Va. Code*, 62-3-21 [1959]."[241]

Justice McHugh addressed the competency of a defendant once again in the case of *State v. Hatfield*.[242] The court observed initially that "[i]t is a fundamental guaranty of due process that a defendant cannot be tried or convicted for a crime while he or she is mentally incompetent."[243] Justice McHugh then ruled that

> [w]here a circuit court has found that a defendant in a criminal case where the possible punishment is life imprisonment without mercy is competent to stand trial, but subsequent to the competency hearing, the defendant attempts to commit suicide, then against advice of counsel indicates his desire to plead guilty to the charges in the indictment, before taking the plea of guilty, the trial judge should make certain inquiries of the defendant and counsel for the defendant in addition to those mandated in Call v. McKenzie, 159 W.Va. 191, 220 S.E.2d 665 (1975). The court should require counsel to state on the record the reason why counsel opposes the guilty plea. The court should then ask the defendant to acknowledge on the record that he understands his counsel's statements and if in view of them he still desires to plead guilty. If the defendant then states he still desires to plead guilty, the court may accept the plea.[244]

Y. Revocation of Bail

Justice McHugh outlined procedures for holding a hearing to determine reinstatement of revoked bail in the case of *Marshall v. Casey*.[245] The court held:

> An accused admitted to bail pursuant to *W.Va. Code*, 62-1C-1 [1983], et seq., whose bail is subsequently revoked, upon credible evidence reflected in a sworn affidavit by the prosecuting attorney, a law enforcement officer, surety or other appropriate

240 *Id.* at Syl. Pt. 2.

241 *Id.* at Syl. Pt. 3.

242 413 S.E.2d 162 (W. Va. 1991).

243 *Id.* at Syl. Pt. 5.

244 *Id.* at Syl. Pt. 6.

245 324 S.E.2d 346 (W. Va. 1984).

> person, for alleged violations of law or conditions of the bail, may, by motion, challenge the revocation of bail and seek readmission to bail and upon that motion, the accused shall be entitled to a hearing. The hearing concerning the revocation of bail and requested readmission to bail shall be governed by subdivision (h) of Rule 46 of the West Virginia Rules of Criminal Procedure, which subdivision provides for "Bail Determination Hearings" in certain bail matters.[246]

Z. *Probation Hearing*

In *State v. Turley*,[247] Justice McHugh stated that "[p]robation statutes are remedial in nature and are to be liberally construed in favor of the defendant."[248]

Justice McHugh addressed several probation issues in *State v. Godfrey*.[249] The opinion held initially that

> [a] trial judge should, ordinarily, hear testimony regarding whether a defendant should be placed on probation if that defendant is statutorily eligible for such probation. The extent of such testimony, however, is within the sound discretion of the trial judge.[250]

Godfrey next held that "[v]iolation of the procedural requirement of *W.Va. Code*, 62-12-8 [1939], that an order denying probation state the reasons for such denial, will not be grounds for remand for resentencing where the reasons appear in the sentencing record."[251] Justice McHugh concluded in *Godfrey*:

> *W.Va. Code*, 62-12-2 [1979], which provides, in part, that, "[a]ll persons who have not been previously convicted of a felony within five years from the date of the felony for which they are charged . . . shall be eligible for probation" does not preclude a trial judge from considering a prior conviction when deciding whether to grant probation.[252]

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246 *Id.* at Syl. Pt. 2.

247 350 S.E.2d 696 (W. Va. 1986).

248 *Id.* at Syl. Pt. 2.

249 289 S.E.2d 660 (W. Va. 1981).

250 *Id.* at Syl. Pt. 2.

251 *Id.* at Syl. Pt. 3

252 *Id.* at Syl. Pt. 4 (alteration in original).

Justice McHugh wrote in *State v. Ranski*[253] that

> [p]ursuant to *W.Va. Code*, 62-12-2(c) [1979], a trial judge must specifically find, as a matter of record, that a firearm was used in the commission of the crime before a person convicted of the crime upon a plea of guilty may be found to be ineligible for probation under *W.Va. Code*, 62-12-2(b) [1979].[254]

Justice McHugh noted in *State v. Kerns*[255] that "[a]llowance and recovery of costs was unknown at common law, and therefore only costs specifically allowed by statute may be recovered."[256] The court concluded that "*W.Va. Code*, 62-12-9 [1992] does not authorize a circuit court to impose, as a condition of probation, that a convicted criminal defendant pay the fees of a special prosecutor as costs of the prosecution."[257]

AA. Good Time Credit

Justice McHugh held in *State ex rel. Goff v. Merrifield*[258] that

> [a] person who is ordered to serve a consecutive six-month period in the county jail as a condition of probation for one offense and also sentenced to serve an additional six-month period in the county jail on another offense, with the two six-month periods to be served consecutively, is eligible for good time credit pursuant to *W.Va. Code*, 7-8-11 [1986].[259]

Goff concluded that "[w]hen a person is ordered to confinement in the county jail as a condition of probation and performs work as a trustee within the jail, that person is entitled to a reduction in his sentence for work performed in the county jail according to *W.Va. Code*, 17-15-4 [1987]."[260]

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253 289 S.E.2d 756 (W. Va. 1982).

254 *Id.* at Syl.

255 420 S.E.2d 891 (W. Va. 1992).

256 *Id.* at Syl. Pt. 2.

257 *Id.* at Syl. Pt. 3.

258 446 S.E.2d 695 (W. Va. 1994).

259 *Id.* at Syl. Pt. 6.

260 *Id.* at Syl. Pt. 11.

BB. Search with Warrant

In *State v. Peacher*,[261] the court was concerned with the validity of a search warrant that was issued based upon an affidavit that contained information from an unlawful search. Justice McHugh wrote:

> An affidavit in support of an application for a search warrant which contains information that antedates, and is totally independent of, information learned from an unconstitutional search, as well as information from the unconstitutional search, may still be the basis upon which a valid search warrant may issue, if the information in the affidavit, excluding that information attributable to the unconstitutional search, is sufficient to justify a finding of probable cause.[262]

In *State v. Hall*,[263] Justice McHugh held that "[t]he property to be seized must be described within the warrant itself or within the sworn complaint expressly made a part of the warrant by direct reference thereto. A search warrant should not be made a catchall dragnet."[264]

Justice McHugh addressed the authority of conservation officers to execute a search warrant in *State v. Boggess*.[265] The court held:

> Following a valid arrest by a conservation officer, employed by the West Virginia Department of Natural Resources, for the offense of possession of marihuana with the intent to deliver, the conservation officer was authorized under the provisions of *W.Va. Code*, 20-7-4 [1971], which statute describes the authority, powers and duties of conservation officers, and *W.Va. Code*, 62-1A-3 [1965], which statute concerns search and seizure, to execute a valid search warrant relating to the arrested individual's automobile, which automobile was found at the scene of the offense.[266]

Justice McHugh held in *State v. Haught*[267] that "[t]he description contained in a search warrant is sufficient where a law enforcement officer charged with making a search may, by the description of the premises contained in the

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261 280 S.E.2d 559 (W. Va. 1981).

262 *Id.* at Syl. Pt. 9.

263 298 S.E.2d 246 (W. Va. 1982).

264 *Id.* at Syl. Pt. 2.

265 309 S.E.2d 118 (W. Va. 1983).

266 *Id.* at Syl. Pt. 2.

267 371 S.E.2d 54 (W. Va. 1988).

search warrant, identify and ascertain the place intended to be searched with reasonable certainty."[268]

CC. Search Without Warrant

The decision in *State v. Cecil*[269] addressed search and seizure without a warrant. Justice McHugh held:

> Although a search and seizure by police officers must ordinarily be predicated upon a written search warrant, a warrantless entry by police officers of a mobile home was proper under the "emergency doctrine" exception to the warrant requirement, where the record indicated that, rather than being motivated by an intent to make an arrest or secure evidence, the police officers were attempting to locate an injured or deceased child, which child the officers had reason to believe was in the mobile home, because of information they received immediately prior to the entry.[270]

The issue of a warrantless search and seizure was again addressed by Justice McHugh in the case of *State v. Tadder*.[271] That court held:

> Where police officers apprehended in a building two suspects of a breaking and entering of that building, and minutes thereafter the officers stopped a truck with two occupants attempting to leave the scene of the breaking and entering, a warrantless search of the vehicle by the officers, which resulted in the seizure from the glove compartment of the wallets of the suspects apprehended in the building, did not violate the defendant's constitutional rights against unreasonable searches and seizures, where the record demonstrated that the defendant, as a passenger in the truck, had no property or possessory interest in the truck, its glove compartment, or the items seized and, therefore, suffered no invasion of a legitimate expectation of privacy.[272]

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268 *Id.* at Syl. Pt. 4.

269 311 S.E.2d 144 (W. Va. 1983).

270 *Id.* at Syl. Pt. 2.

271 313 S.E.2d 667 (W. Va. 1984).

272 *Id.* at Syl. Pt. 2.

DD. Issuance of Warrant

Justice McHugh held in *Matter of Monroe*[273] that

> [t]he determination of whether probable cause exists to support the issuance of an arrest warrant under W. Va. R. Crim. P. 4 is solely a judicial function to be performed by the magistrate and is to be based upon the contents of "the complaint, or from an affidavit or affidavits filed with the complaint."[274]

EE. Prompt Presentment

In *State v. Mitter*,[275] Justice McHugh relied upon the decision in *State v. Persinger*[276] to examine the delay by police officers in taking a defendant before a judicial officer for an initial appearance. *Mitter* held that "[t]he delay in taking the defendant to a magistrate may be a critical factor where it appears that the primary purpose of the delay was to obtain a confession from the defendant."[277]

FF. Recording Proceedings

Relying on *State v. Bolling*,[278] Justice McHugh held in *State v. Neal*[279] that "[u]nder the provisions of *W.Va. Code*, 51-7-1 and -2, all proceedings in the criminal trial are required to be reported; however, the failure to report all of the proceedings may not in all instances constitute reversible error."[280]

GG. Prison Transfer

The case of *Matter of Crews*[281] required Justice McHugh to address the ability of inmates to transfer from prison to a state hospital for mental health and drug treatment. The court held as follows:

> Inasmuch as the 1980 amendment to *W.Va. Code*, 28-5-31, modified the procedure for transfer of a "convicted person" in

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273 327 S.E.2d 163 (W. Va. 1985).

274 *Id.* at Syl. Pt. 3.

275 289 S.E.2d 457 (W. Va. 1982).

276 286 S.E.2d 261 (W. Va. 1982).

277 *Id.* at Syl. Pt. 2.

278 246 S.E.2d 631 (W. Va. 1978).

279 304 S.E.2d 342 (W. Va. 1983).

280 *Id.* at Syl.

281 283 S.E.2d 925 (W. Va. 1981).

> prison under that statute, and further added provisions concerning security at the facility to which transfer is sought, but did not substantially change the criteria for transfer under the statute or the due process rights of a convicted person in a prison, under the circumstances of this case the "convicted persons" in prisons will not be prejudiced by being required to proceed under *W.Va. Code*, 28-5-31, as amended in 1980, if they wish to further prosecute their claims.[282]

HH. Protective Custody

Justice McHugh examined the rights of inmates held in protective custody in the case of *Bishop v. McCoy*.[283] The court noted as a general matter that

> [p]rotective custody inmates, as well as other prison inmates in the West Virginia correctional system, have rights, as described in Hackl v. Dale, 171 W.Va. 415, 299 S.E.2d 26 (1982), and Cooper v. Gwinn, 171 W.Va. 245, 298 S.E.2d 781 (1981), to (1) reasonable protection from constant threat of violence and sexual assault by fellow inmates and (2) rehabilitation.[284]

Bishop then went on to hold in detail:

> In securing the rights of protective custody inmates to reasonable protection from constant threat of violence and sexual assault and to rehabilitation, the Commissioner of the West Virginia Department of Corrections is hereby directed to (1) establish and maintain, in addition to the safeguarding of protective custody inmates of the West Virginia Penitentiary at Moundsville, protective custody facilities for the safeguarding, for such periods of time as may be required, of protective custody inmates of institutions other than the West Virginia Penitentiary at Moundsville, and such facilities shall be in addition to the Protective Custody Unit at the West Virginia Penitentiary at Moundsville and shall be at a location or locations other than at the penitentiary at Moundsville; (2) ensure that all protective custody inmates, whether of the West Virginia Penitentiary at Moundsville or otherwise, shall, in continuing their rehabilitation, be entitled to the same educational, vocational, recreational and other program opportunities to which other prison inmates in this State are entitled and (3) ensure that no prison inmate under the supervision of the West Virginia Department of Corrections who

282 *Id.* at Syl.

283 323 S.E.2d 140 (W. Va. 1984).

284 *Id.* at Syl. Pt. 3.

> is not a maximum security inmate is transferred, solely for the purpose of placing that inmate in protective custody, to a maximum security institution.[285]

II. Multiple Prosecutions

In *State v. Adkins*,[286] Justice McHugh was called upon to revisit a decision by the West Virginia Supreme Court of Appeals in *State ex rel. Dowdy v. Robinson*.[287] In Dowdy, the court held that West Virginia Code section 61-11-14 was unconstitutional because it provided for multiple prosecutions of the same defendant for the same offense after an acquittal.[288] In Adkins, however, Justice McHugh ruled that "[s]yllabus point 2 of State ex rel. Dowdy v. Robinson, 154 W.Va. 263, 257 S.E.2d 167 (1979), was overbroad and is hereby overruled."[289]

JJ. Mistrial

Several issues concerned with a motion for mistrial made by the defendant were addressed by Justice McHugh in *State v. Pennington*.[290] Justice McHugh held that "[w]hen a mistrial is granted on motion of the defendant, unless the defendant was provoked into moving for the mistrial because of prosecutorial or judicial conduct, a retrial may not be barred on the basis of jeopardy principles."[291] The decision also held:

> Where a defendant moves for a mistrial and fails to withdraw that motion before the motion is granted by the trial court, the trial court's declaration of the mistrial cannot be characterized as sua sponte, when the record does not disclose an objection by the defendant to the trial court's action. Thus, further prosecution of the defendant under the above circumstances does not offend jeopardy principles embodied in the federal and state constitutions.[292]

In *Dietz v. Legursky*,[293] Justice McHugh held that

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285 *Id.* at Syl. Pt. 4.

286 289 S.E.2d 720 (W. Va. 1982).

287 257 S.E.2d 167 (W. Va. 1979).

288 *Id.* at Syl. Pt. 2.

289 Adkins, 289 S.E.2d at Syl. Pt. 2.

290 365 S.E.2d 803 (W. Va. 1987).

291 *Id.* at Syl. Pt. 8.

292 *Id.* at Syl. Pt. 7.

293 425 S.E.2d 202 (W. Va. 1992).

> [b]ecause the right of a defendant in a criminal case to testify on his or her own behalf is fundamental, then, in a case where a trial court represents that a mistrial will be declared if the defendant does not so testify, in the event that the defendant does not in fact testify and can demonstrate that he or she decided to not testify in reliance on the trial court's representation, it is reversible error for the trial court to not declare a mistrial.[294]

KK. Return of Seized Property

Justice McHugh stated in *Ray v. Mangum*[295] that "[a]bsent express statutory authority providing for the humane destruction of gamecocks seized as a result of illegal cockfighting in violation of *W.Va. Code*, 61-8-19 [1931], such gamecocks ordinarily must be returned to the owners thereof."[296]

LL. Preservation of Evidence

Justice McHugh was called upon to give trial courts guidance in resolving issues arising from the loss of evidence by prosecutors in the case of *State v. Osakalumi.*[297] The court held:

> When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.[298]

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294 *Id.* at Syl. Pt. 1.

295 346 S.E.2d 52 (W. Va. 1986).

296 *Id.* at Syl.

297 461 S.E.2d 504 (W. Va. 1995).

298 *Id.* at Syl. Pt. 2.

MM. Use of Exhibits by Jury During Deliberations

In *State v. Armstrong*,[299] Justice McHugh held:

> The jury, during deliberations, may use an exhibit, admitted into evidence, according to its nature and within the bounds of the evidence at trial in order to aid the jury in weighing the evidence, and the jury may make a more critical examination of an exhibit than was made during the trial.[300]

Justice McHugh stated in *State v. Dietz*:[301]

> In a criminal case it is not reversible error for a trial court to allow a document, such as a transcript, a written statement, or a tape recording, any of which contains a confession or incriminating statement, and which has already been admitted into evidence, to be taken into the jury room for the jury's use during deliberations.[302]

NN. Sentencing

In *State v. Turley*,[303] Justice McHugh held that

> [a] person who has attained his or her sixteenth birthday but has not reached his or her twenty-first birthday at the time of the commission of the crime and who is convicted of or pleads guilty to aggravated robbery is eligible for suspension of sentence and commitment to a youthful offender center under *W.Va. Code*, 25-4-6 [1975].[304]

Justice McHugh held in *State v. Finley*[305] that "[a] sentencing judge, in evaluating a defendant's potential for rehabilitation and in determining the defendant's sentence, may consider the defendant's false testimony observed during the trial."[306]

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299 369 S.E.2d 870 (W. Va. 1988).

300 *Id.* at Syl. Pt. 6.

301 390 S.E.2d 15 (W. Va. 1990).

302 *Id.* at Syl. Pt. 11.

303 350 S.E.2d 696 (W. Va. 1986).

304 *Id.* at Syl. Pt. 4.

305 355 S.E.2d 47 (W. Va. 1987).

306 *Id.* at Syl. Pt. 2.

Justice McHugh addressed sentencing a defendant pursuant to the habitual offender statute in *State v. Cain*.[307] That court held:

> A person convicted of a felony may not be sentenced pursuant to *W.Va. Code*, 61-11-18, -19 [1943], unless a recidivist information and any or all material amendments thereto as to the person's prior conviction or convictions are filed by the prosecuting attorney with the court before expiration of the term at which such person was convicted, so that such person is confronted with the facts charged in the entire information, including any or all material amendments thereto.[308]

Justice McHugh indicated in *State v. Haught*[309] that

> [b]efore a trial court conditions its recommendation for a defendant's parole upon the defendant's payment of statutory fines, costs and attorney's fees, the trial court must consider the financial resources of the defendant, the defendant's ability to pay and the nature of the burden that the payment of such costs will impose upon the defendant.[310]

In *State v. Kerns*,[311] Justice McHugh held that "[a] circuit court has the authority under *W.Va. Code*, 62-12-4 [1943] to apply the work release provisions of *W.Va. Code*, 62-11A-1 [1988] in lieu of a sentence of ordinary confinement imposed by a magistrate court in a misdemeanor case."[312] The court also stated that "[a] circuit court has the authority under *W.Va. Code*, 62-12-4 [1943] to order electronically monitored home confinement, in a county having the equipment therefor, in lieu of incarceration imposed by a magistrate court in a misdemeanor case."[313]

Justice McHugh stated in *State v. Craft*[314] that

> [p]ursuant to W. Va. R.Crim.P. 32(c)(3)(D), if the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the

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307 359 S.E.2d 581 (W. Va. 1987).

308 *Id.* at Syl. Pt. 1.

309 371 S.E.2d 54 (W. Va. 1988).

310 *Id.* at Syl. Pt. 1.

311 394 S.E.2d 532 (W. Va. 1990).

312 *Id.* at Syl. Pt. 2.

313 *Id.* at Syl. Pt. 4.

314 490 S.E.2d 315 (W. Va. 1997).

> presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the West Virginia Board of Parole.[315]

OO. Executive Clemency

Some of the practical effects of a reprieve were addressed by Justice McHugh in *County Commission of Mercer County v. Dodrill*.[316] The court held that

> [w]hen the governor grants a reprieve to an individual held in a county jail, who has been convicted of a felony and has been lawfully sentenced to the custody of the State Department of Corrections, but the reprieve is granted merely to delay that individual's transfer to a state penal or correctional institution, the state will be required to pay the reasonable maintenance and medical expenses related to that individual which are incurred by the county due to that delay.[317]

PP. Magistrate Court Criminal Procedure

In *State ex rel. Tate v. Bailey*,[318] Justice McHugh followed the lead of Justice Miller in *State ex rel. Burdette v. Scott*[319] to hold that "*W.Va. Code*, 50-5-7 (1976), requires that if a defendant is charged by warrant in the magistrate court with an offense over which that court has jurisdiction, he is entitled to a trial on the merits in the magistrate court."[320]

Justice McHugh held in *State ex rel. O'Neill v. Gay*[321] that "[p]ursuant to the provisions of *W.Va. Code*, 50-5-13 [1976], a defendant who pleads guilty in magistrate court to a criminal offense may appeal to circuit court, and to obtain such an appeal, the defendant need not allege error committed by the magistrate

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315 *Id.* at Syl. Pt. 1.

316 385 S.E.2d 248 (W. Va. 1989).

317 *Id.* at Syl. Pt. 3.

318 274 S.E.2d 519 (W. Va. 1981).

319 259 S.E.2d 626 (W. Va. 1979).

320 Tate, 274 S.E.2d at Syl.

321 285 S.E.2d 637 (W. Va. 1981).

court."[322]

Justice McHugh addressed several issues affecting prosecution in magistrate court in the case of *Manning v. Inge*.[323] *Manning* held initially that "[j]eopardy attaches in a non-jury trial in a magistrate court which is exercising proper jurisdiction when the accused has been charged in a valid warrant and has entered a plea and the magistrate has begun to hear evidence."[324] The court then looked at the authority of a prosecuting attorney to seek disqualification of a magistrate. Justice McHugh held:

> The State is a party to a criminal proceeding for the purposes of *W.Va. Code*, 50-4-7 [1978], and the prosecuting attorney may file an affidavit alleging that a magistrate before whom the criminal proceeding is pending has a personal bias or prejudice either against the State or in favor of the defendant or that he has counseled with the defendant respecting the merits of the proceeding.[325]

The *Manning* decision went on to state that

> "[t]he discretionary decision to move for the disqualification of a magistrate under *W.Va. Code*, 50-4-7 [1978], ultimately rests with the prosecuting attorney as the State's official representative in a criminal case. The exercise of that discretion must be properly evidenced by the execution of an affidavit by the prosecuting attorney."[326]

Justice McHugh held in *Matter of Mendez*[327] that "[a] magistrate in West Virginia has no power to suspend a sentence imposed in a criminal case."[328]

In *Harman v. Frye*,[329] Justice McHugh abolished the practice of allowing individuals to go directly to magistrates to take out criminal complaints against their neighbors. The court held:

> Except where there is a specific statutory exception, a magistrate may not issue a warrant or summons for a misdemeanor or felony

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322 *Id.* at Syl.

323 288 S.E.2d 178 (W. Va. 1982).

324 *Id.* at Syl. Pt. 4.

325 *Id.* at Syl. Pt. 1.

326 *Id.* at Syl. Pt. 2.

327 344 S.E.2d 396 (W. Va. 1985).

328 *Id.* at Syl. Pt. 3.

329 425 S.E.2d 566 (W. Va. 1992).

> solely upon the complaint of a private citizen without a prior evaluation of the citizen's complaint by the prosecuting attorney or an investigation by the appropriate law enforcement agency. Following such evaluation by the prosecuting attorney or investigation by the appropriate law enforcement agency, the prosecuting attorney shall institute all necessary and proper proceedings before the magistrate, and, in suitable cases, law enforcement officers may obtain warrants and assist private citizens in obtaining the warrant or summons from the magistrate. To the extent In re Monroe, 174 W.Va. 401, 327 S.E.2d 163 (1985), is inconsistent with our holding in this case, it is overruled.[330]

IV. CRIMINAL LAW

A. *Penal and Remedial Statutes*

In *State ex rel. Department of Transportation, Division of Highways v. Sommerville,*[331] Justice McHugh was called upon to determine if the state statute regulating the weight of trucks was remedial or criminal. The court held initially that "[w]here a statute contains provisions which are both remedial and penal, such statute should be considered remedial when seeking to enforce the purpose for which it was enacted, and should be considered penal when seeking to enforce the penalty provided therein."[332]

Justice McHugh then said:

> *W.Va. Code*, 17C-17-10(a) [1976] authorizes a police officer or a member of a Division of Highways' official weighing crew to "require the driver of any vehicle or combination of vehicles on any highway to stop and submit such vehicle or combination of vehicles to a weighing[,]" even where the driver refuses to comply pursuant to *W.Va. Code*, 17C-17-10(c) [1976] and is thus subject to a criminal penalty.[333]

Justice McHugh stated in *State ex rel. Palumbo v. Graley's Body Shop, Inc.*[334] that

> [t]he question of whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction, and requires

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330 *Id.* at Syl. Pt. 1.

331 412 S.E.2d 269 (W. Va. 1991).

332 *Id.* at Syl. Pt. 1.

333 *Id.* at Syl. Pt. 2 (alteration in original).

334 425 S.E.2d 177 (W. Va. 1992).