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HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE

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Chapter 1—RIGHT TO COUNSEL

The imposition of sentence is a critical stage of a criminal proceeding. *State v. McDonald*, No. 21-0796, 2023 W. Va. LEXIS 116 (Apr. 14, 2023).

The cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another. Nonetheless, to establish an ineffective assistance of counsel claim, a petitioner must demonstrate: (1) counsel's performance was deficient under an objective standard of reasonableness;

and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. As to the first prong—the deficiency of counsel's performance—the Supreme Court of Appeals of West Virginia has articulated the following analysis: In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. However, the court has cautioned that the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Sowards v. Ames*, No. 21-0536, 2023 W. Va. LEXIS 173 (May 15, 2023).

Chapter 3—ARREST, EXTRADITION AND DETAINER

Regarding the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury. However, impeachment by use of prearrest silence does not violate the Fourteenth Amendment. There is no constitutional violation when the defendant's silence occurred prior to his or her arrest and the giving of warnings. The protections afforded a defendant for post-silence are generally not available for pre-arrest silence. Impeachment by use of prearrest silence does not violate the Fourteenth Amendment. *State v. Hoard*, No. 21-0764, 2023 W. Va. LEXIS 150 (Apr. 28, 2023).

Chapter 5—CONFESSIONS

A necessary predicate for finding a confession to be involuntary is that the confession was produced through "coercive police activity." *State v. Wells*, No. 21-0769, 2022 W. Va. LEXIS 720 (Dec. 6, 2022). The *Wells* court also restated prior holdings: The State may not use statements stemming from custodial interrogation of a defendant unless it proves by a preponderance of the evidence that the confession was voluntary viewing the totality of the circumstances. The "totality of the circumstances" means that a court reviewing the voluntariness of a confession must look at both the conduct of the police in the investigation and the particular characteristics of the accused.

Chapter 8—JURISDICTION AND VENUE

The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction. *W. Va. R. Crim. P. 32(b)*, titled "Presentence investigation and report," states that the probation officer shall make a presentence investigation and submit a presentence report to the sentencing

court before sentencing, unless, as more fully explained below, certain conditions are met. *W. Va. R. Crim. P. 32(b)(1)*. The presentence report must contain defendant-specific information, including the defendant's history and characteristics, criminal history, occupation, family background, education, habits and associations, mental and physical condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence, determining the propriety and conditions of release on probation, or determining correctional treatment. *W. Va. R. Crim. P. 32(b)(4)(A)–(C)*. *State v. McDonald*, No. 21-0796, 2023 W. Va. LEXIS 116 (Apr. 14, 2023).

To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused. A present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial, is good cause for removing the case to another county. *State v. Hoard*, No. 21-0764, 2023 W. Va. LEXIS 150 (Apr. 28, 2023).

Chapter 10—GRAND JURY AND INDICTMENTS

- **USCS Fed Rules Crim Proc, Rule 6.**

The Grand Jury.

(a) Summoning a Grand Jury.

(1) *In General.* When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.

(2) *Alternate Jurors.* When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(b) Objection to the

Grand Jury or to a Grand Juror.

(1) *Challenges.* Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(2) *Motion to Dismiss an Indictment.* A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson—or another juror designated by the foreperson—will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders.

(d) Who May Be Present.

(1) *While the Grand Jury Is in Session.* The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) *During Deliberations and Voting.* No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present

while the grand jury is deliberating or voting.

(e) Recording and Disclosing the Proceedings.

(1) *Recording the Proceedings.* Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) *Secrecy.*

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii);

(3) *Exceptions.*

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney

for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives

information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against:

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to:

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign

court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) *Sealed Indictment.* The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret

until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) *Closed Hearing.* Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) *Sealed Records.* Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) *Contempt.* A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

(f) **Indictment and Return.** A grand jury may indict only if at least 12 jurors concur. The grand jury—or its foreperson or deputy foreperson—must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

(g) **Discharging the Grand Jury.** A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(h) Excusing a Juror. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

(i) "Indian Tribe" Defined. "Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

HISTORY: Amended Feb. 28, 1966, eff. July 1, 1966; April 24, 1972, eff. Oct. 1, 1972; April 26 and July 8, 1976, eff. Aug. 1, 1976; July 30, 1977, P. L. 95-78, § 2(a), 91 Stat. 319; April 30, 1979, eff. Aug. 1, 1979; April 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, P. L. 98-473, Title II, § 215(f), 98 Stat. 2016; April 29, 1985, eff. Aug. 1, 1985; March 9, 1987, eff. Aug. 1, 1987; April 22, 1993, eff. Dec. 1, 1993; April 26, 1999, eff. Dec. 1, 1999; Oct. 26, 2001, P. L. 107-56, Title II, § 203(a), 115 Stat. 278; April 29, 2002, eff. Dec. 1, 2002; Nov. 25, 2002, P. L. 107-296, Title VIII, Subtitle I, § 895, 116 Stat. 2256; Dec. 17, 2004, P. L. 108-458, Title VI, Subtitle F, § 6501(a), 118 Stat. 3760; April 12, 2006, eff. Dec. 1, 2006; April 26, 2011, eff. Dec. 1, 2011; April 25, 2014, eff. Dec. 1, 2014; Jan. 5, 2023, P.L. 117-347, Title III, Subtitle B, § 323(a)(1)(A), 136 Stat. 6206.

Chapter 11—PLEADINGS

The *Blockburger* test provides: Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *State v. Ward*, No. 21-0806, 2023 W. Va. LEXIS 209 (June 9, 2023).

Chapter 15—TRIAL AND RELATED RIGHTS

Under the *Due Process Clause* of the West Virginia Constitution, W. Va. Const. art. III, § 10, and the presumption of innocence embodied therein, and W. Va. Const. art. III, § 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury. However, impeachment by use of prearrest silence does not violate the Fourteenth Amendment. There is no constitutional violation when the defendant's silence occurred prior to his or her arrest and the giving of warnings. The protections afforded a defendant for post-silence are generally not available for pre-arrest silence. Impeachment by use of prearrest silence does not violate the Fourteenth Amendment. *State v. Hoard*, No. 21-0764, 2023 W. Va. LEXIS 150 (Apr. 28, 2023) further holding that failure to observe a constitutional right constitutes reversible error unless it can be shown

that the error was harmless beyond a reasonable doubt. See also: *Sowards v. Ames*, No. 21-0536, 2023 W. Va. LEXIS 173 (May 15, 2023).

The exclusion of the rule 609 evidence was reversible error, and petitioner was entitled to a new trial. *State v. Michael C.*, 887 S.E.2d 60 (W. Va. 2023).

Chapter 17—DEFENSES

In general, the question on review of the sufficiency of jury instructions is whether the instructions as a whole were sufficient to inform the jury correctly of the particular law and the theory of defense. The appellate court asks whether: (1) the instructions adequately stated the law and provided the jury with an ample understanding of the law, (2) the instructions as a whole fairly and adequately treated the evidentiary issues and defenses raised by the parties, (3) the instructions were a correct statement of the law regarding the elements of the offense, and (4) the instructions meaningfully conveyed to the jury the correct burdens of proof. Thus, a jury instruction is erroneous if it has a reasonable potential to mislead the jury as to the correct legal principle or does not adequately inform the jury on the law. An erroneous instruction requires a new trial unless the error is harmless. *State v. Hoard*, No. 21-0764, 2023 W. Va. LEXIS 150 (Apr. 28, 2023).

Chapter 22—APPEALS AND COLLATERAL ATTACKS

Although the Supreme Court of Appeals of West Virginia liberally construes briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal. *Sowards v. Ames*, No. 21-0536, 2023 W. Va. LEXIS 173 (May 15, 2023).

Chapter 27—RIGHTS OF INDIGENTS

West Virginia Code § 62-12-9.

Conditions of release on probation. [Effective May 31, 2023]

(a) Release on probation is conditioned upon the following:

(1) That the probationer may not, during the term of his or her probation, violate any criminal law of this or any other state or of the United States;

(2) That the probationer may not, during the term of his or her probation, leave the state without the consent of the court which placed him or her on probation;

(3) That the probationer complies with the conditions prescribed by the court for his or her supervision by the probation officer;

(4) That in every case in which the probationer has been convicted of an offense set forth in § 61-3C-14b, § 61-8-12, § 61-8A-1 *et seq.*, § 61-8B-1 *et seq.*,

§ 61-8C-1 *et seq.*, and § 61-8D-1 *et seq.* of this code against a child, the probationer may not live in the same residence as any minor child, nor exercise visitation with any minor child, and may have no contact with the victim of the offense: Provided, That the probationer may petition the court of the circuit in which he or she was convicted for a modification of this term and condition of his or her probation and the burden rests upon the probationer to demonstrate that a modification is in the best interest of the child;

(5) That the probationer pay a fee, not to exceed $20 per month, to defray costs of supervision: Provided, That the court conducts a hearing prior to imposition of probation and makes a determination on the record that the offender is able to pay the fee without undue hardship. All moneys collected as fees from probationers pursuant to this subdivision shall be deposited with the circuit clerk who shall, on a monthly basis, remit the moneys collected to the State Treasurer for deposit in the state General Revenue Fund; and

(6) That the probationer is required to pay the fee described in § 62-11C-4 of this code: Provided, That the court conducts a hearing prior to imposition of probation and makes a determination on the record that the offender is able to pay the fee without undue hardship.

(b) In addition, the court may impose, subject to modification at any time, any other conditions which it may determine advisable, including, but not limited to, any of the following:

(1) That the probationer make restitution or reparation, in whole or in part, immediately or within the period of probation, to any party injured by the crime for which he or she has been convicted: Provided, That the court conducts a hearing prior to imposition of probation and makes a determination on the record that the offender is able to pay restitution without undue hardship;

(2) That the probationer pays any fine assessed and the costs of the proceeding in install-

ments directed by the court: Provided, That the court conduct a hearing prior to imposition of probation and makes a determination on the record that the offender is able to pay the costs without undue hardship;

(3) That the probationer makes contributions from his or her earnings, in sums directed by the court, for the support of his or her dependents; and

(4) That the probationer, in the discretion of the court, is required to serve a period of confinement in the jail of the county in which he or she was convicted for a period not to exceed one third of the minimum sentence established by law or one third of the least possible period of confinement in an indeterminate sentence, but in no case may the period of confinement exceed six consecutive months. The court may sentence the defendant within the six-month period to intermittent periods of confinement including, but not limited to, weekends or holidays and may grant to the defendant intermittent periods of release in order that he or she may work at his or her employment or for other reasons or purposes as the court may determine appropriate: Provided, That the provisions of § 62-11A-1 *et seq.* of this code do not apply to intermittent periods of confinement and release except to the extent directed by the court. If a period of confinement is required as a condition of probation, the court shall make special findings that other conditions of probation are inadequate and that a period of confinement is necessary.

(c) Circuit courts may impose, as a condition of probation, participation in a day report center.

(1) To be eligible, the probationer shall be identified as moderate to high risk of reoffending and moderate to high criminogenic need, as determined by the standardized risk and needs assessment adopted by the Supreme Court of Appeals of West Virginia under § 62-12-6(d) of this code, and applied by a probation officer or day report staff. In eligible cases, circuit courts may impose a term of up to one year:

Provided, That notwithstanding the results of the standardized risk and needs assessment, a judge may impose, as a term of probation, participation in a day report center program upon making specific written findings of fact as to the reason for departing from the requirements of this subdivision.

(2) The day report center staff shall determine which services a person receives based on the results of the standardized risk and needs assessment and taking into consideration the other conditions of probation set by the court.

(d) **HISTORY:** 1939, c. 27, § 9; 1953, c. 62; 1983, c. 59; 1991, c. 34; 1992, c. 52; 1993, c. 56; 1994, 1st Ex. Sess., c. 23; 2001, c. 69; 2013, c. 161, effective July 12, 2013; 2023, c. 106, effective May 31, 2023.

For the purposes of this article, "day report center" means a court-operated or court-approved facility where persons ordered to serve a sentence in this type of facility are required to report under the terms and conditions set by the court for purposes which include, but are not limited to, counseling, employment training, alcohol or drug testing, or other medical testing.

* * * * * *

West Virginia Code § 29-21-13a.

Compensation and expenses for panel attorneys.

(a) All panel attorneys shall maintain detailed and accurate records of the time expended and expenses incurred on behalf of eligible clients, and which records are to be maintained in a form that will enable the attorney to determine for any day the periods of time expended in tenths of an hour on behalf of any eligible client and the total time expended in tenths of an hour on that day on behalf of all eligible clients: Provided, That in no event may panel attorneys be required to maintain or submit the actual start and finish times of work performed.

(b) Upon completion of each case, exclusive of appeal, panel attorneys shall submit to Public Defender Services a voucher for services. Public Defender Services shall electronically acknowledge the submission of a voucher. Claims for fees and expense reimbursements shall be submitted to Public Defender Services on forms approved by the executive director. The executive director shall establish guidelines for the submission of vouchers and claims for fees and expense reimbursements under this section.

Claims submitted more than 90 business days after the last date of service shall be rejected unless, for good cause, the appointing court authorizes in writing an extension.

(c) Public Defender Services shall review the voucher to determine if the time and expense claims are reasonable, necessary, and valid. A voucher found to be correct shall be processed and payment promptly directed within 45 business days of submission of the voucher.

(d)(1) If Public Defender Services rejects a voucher, the attorney submitting the voucher shall be notified electronically of the rejection and provided detailed reasons for the rejection within 30 business days of submission of the voucher. The attorney may resubmit the voucher accompanied by copies of his or her records supporting the voucher and certification from the appointing court that the services or expenses were performed or incurred, and were reasonable and necessary, within 15 business days of receipt of notification. The executive director shall make a final agency decision regarding the rejection of the voucher within 15 business days of receipt of the submitted records and certification. Under no circumstances may the executive director have the authority or require any panel attorney to submit privileged client information.

(2) If the final agency decision is to reject the voucher, Public Defender Services shall request review of the final agency decision by motion to the appointing court filed within 15 business days of notice of the final agency decision. After a hearing providing the attorney and Public Defender Services an opportunity to be heard, the appointing court shall have final authority to resolve the issue of payment and to order all remedies available under the West Virginia Rules of Civil Procedure.

(e) If Public Defender Services reduces the amount of compensation claimed or reimbursement requested, the attorney submitting the voucher shall be notified electronically of the reduction and detailed reasons for the reduction within 30 business days of the submis-

sion of the voucher. The attorney may:

(1) Agree with the reduction and certify his or her agreement electronically to Public Defender Services which shall then proceed to process payment; or

(2) Disagree with the reduction and request payment of the reduced amount while preserving the ability to contest the reduction;

(3) An attorney proceeding pursuant to this subsection shall inform Public Defender Services of his or her decision by electronic means within 15 business days of receipt of the notice of reduction. If there is no communication from the attorney within 15 business days of receipt of the notice of reduction, then the reduction is deemed to be accepted by the attorney;

(4) The attorney may submit records and certification from the appointing court that the services or expenses reflected in the amount reduced were performed or incurred and were reasonable and necessary. The executive director shall then make a final agency decision regarding the reduction within 15 business days of receipt of the submitted records and certification. Under no circumstances may the executive director have the authority to require any panel attorney to submit privileged client information;

(5) If the attorney disagrees with the final agency decision, and the attorney and the executive director cannot reach an agreement regarding the reduction within 15 business days of the receipt of the notice of the final agency decision, Public Defender Services shall request review of the final agency decision by motion to the appointing court filed within 15 business days of notice of the final agency decision. After a hearing providing the attorney and Public Defender Services an opportunity to be heard, the appointing court shall have final authority to resolve the issue of payment, and to order all remedies available under the West Virginia Rules of Civil Procedure;

(6) If there is no communication from Public Defender Services within 30 business days of the submission of the voucher, the voucher is deemed to have been approved for payment without reduction.

(f) Notwithstanding any provisions of this code to the contrary, the executive director may employ in-house counsel to represent Public Defender Services in hearings held pursuant to this article.

(g) Except for the emergency rule-making provision set forth in § 29-21-6(h) of this code, the provisions of the amendments to this article enacted during the 2019 regular session of the Legislature shall be effective July 1, 2019.

(h) Notwithstanding any other provision of this section to the contrary, Public Defender Services may pay by direct bill, prior to the completion of the case, litigation expenses incurred by attorneys appointed under this article.

(i) Notwithstanding any other provision of this section to the contrary, a panel attorney may be compensated for services rendered and reimbursed for expenses incurred prior to the completion of the case where: (1) More than six months have expired since the commencement of the panel attorney's representation in the case; and (2) no prior payment of attorney fees has been made to the panel attorney by Public Defender Services during the case. The executive director, in his or her discretion, may authorize periodic payments where ongoing representation extends beyond six months in duration. The amounts of any fees or expenses paid to the panel attorney on an interim basis, when combined with any amounts paid to the panel attorney at the conclusion of the case, shall not exceed the limitations on fees and expenses imposed by this section.

(j) In each case in which a panel attorney provides legal representation under this article, and in each appeal after conviction in circuit court, the panel attorney shall be compensated at the following rates for actual and necessary time expended for services performed and expenses incurred subsequent to the effective date of this article:

(1) For attorney's work performed out of court, compensation shall be at the rate of $60 per hour.

Out-of-court work includes, but is not limited to, travel, interviews of clients or witnesses, preparation of pleadings, and prehearing or pretrial research;

(2) For attorney's work performed in court, compensation shall be at the rate of $80 per hour. In-court work hour includes, but is not limited to, all time spent awaiting hearing or trial before a judge, magistrate, special master, or other judicial officer;

(3) Compensation for legal services performed for a panel attorney by a paralegal out-of-court is to be calculated using a rate of $20 per hour and no such compensation is to be paid for in-court services performed for a panel attorney by a paralegal absent prior approval of the circuit court before whom the panel attorney is appearing and subject to maximum reimbursement amounts set by agency rule;

(4) The maximum amount of compensation for out-of-court and in-court work under this subsection is as follows: For proceedings of any kind involving felonies for which a penalty of life imprisonment may be imposed, the amount as the court may approve; for all other eligible proceedings, $4,500 unless the court, for good cause shown, approves payment of a larger sum.

(k) Actual and necessary expenses incurred in providing legal representation for proceedings of any kind involving felonies for which a penalty of life imprisonment may be imposed, including, but not limited to, expenses for travel, transcripts, salaried or contracted investigative services, and expert witnesses, shall be reimbursed in an amount as the court may approve. For all other eligible proceedings, actual and necessary expenses incurred in providing legal representation, including, but not limited to, expenses for travel, transcripts, salaried or contracted investigative services and expert witnesses, shall be reimbursed to a maximum of $2,500 unless the court, for good cause shown, approves reimbursement of a larger sum.

(l) Expense vouchers shall specifically set forth the nature, amount, and purpose of expenses incurred and shall provide receipts, invoices, or other documentation required by the executive director and the State Auditor as follows:

(1) Reimbursement of expenses for production of transcripts of proceedings reported by a court reporter is limited to the cost per original page and per

copy page as set forth in § 51-7-4 of this code;

(2) There may be no reimbursement of expenses for or production of a transcript of a preliminary hearing before a magistrate or juvenile referee, or of a magistrate court trial, where the hearing or trial has also been recorded electronically in accordance with the provisions of § 50-5-8 of this code or court rule;

(3) Reimbursement of the expense of an appearance fee for a court reporter who reports a proceeding other than one described in subdivision (2) of this subsection is limited to $25. Where a transcript of a proceeding is produced, there may be no reimbursement for the expense of any appearance fee;

(4) Except for the appearance fees provided in this subsection, there may be no reimbursement for hourly court reporters' fees or fees for other time expended by the court reporter, either at the proceeding or traveling to or from the proceeding;

(5) Reimbursement of the cost of transcription of tapes electronically recorded during preliminary hearings or magistrate court trials is limited to $1 per page;

(6) Reimbursement for any travel expense incurred in an eligible proceeding is limited to the rates for the reimbursement of travel expenses established by rules promulgated by the Governor pursuant to the provisions of § 12-8-11 of this code and administered by the Secretary of the Department of Administration pursuant to the provisions of § 5A-3-48 of this code;

(7) Reimbursement for investigative services is limited to a rate of $30 per hour for work performed by an investigator.

(m) For purposes of compensation under this section, an appeal from magistrate court to circuit court, an appeal from a final order of the circuit court, or a proceeding seeking an extraordinary remedy made to the Supreme Court of Appeals shall be considered a separate case.

(n) Vouchers submitted under this section shall specifically set forth the nature of the service rendered, the stage of proceeding or type of

hearing involved, the date and place the service was rendered, and the amount of time expended in each instance. All time claimed on the vouchers shall be itemized to the nearest tenth of an hour. If the charge against the eligible client for which services were rendered is one of several charges involving multiple warrants or indictments, the voucher shall indicate the fact and sufficiently identify the several charges so as to enable Public Defender Services to avoid a duplication of compensation for services rendered. The executive director shall refuse to requisition payment for any voucher which is not in conformity with the record-keeping, compensation, or other provisions of this article or the voucher guidelines established issued pursuant to this article and in such circumstance shall return the voucher to the court or to the service provider for further review or correction.

(o) Vouchers submitted under this section shall be reimbursed within 90 days of receipt. Reimbursements after 90 days shall bear interest from the 91st day at the legal rate in effect for the calendar year in which payment is due.

(p) Vouchers submitted for fees and expenses involving child abuse and neglect cases shall be processed for payment before processing vouchers submitted for all other cases.

(q) Upon a dismissal of or a finding of not guilty concerning a criminal charge, should the charge or charges for which the indigent defendant was afforded counsel qualify for an expungement of charges under § 61-11-25 of this code, the defendant shall be afforded continued representation upon the terms specified in this section. The Panel Attorney shall include the services performed by panel attorneys in regard to an expungement on the same voucher or a subsequent voucher submitted concerning the same case number as the one submitted to Public Defender Services for the underlying criminal charge or charges. The maximum amount of compensation for out-of-court and in-court work under this section shall be limited to $1,000 for expungement services in addition to the limits imposed on the underlying criminal charge or charges, unless the court, for good cause shown, approves payment of a larger sum. The actual and necessary expenses incurred in providing legal representation for expungement proceedings under this section shall be reimbursed to a maximum of $500 unless the court, for good cause shown, approves reimbursement of a larger sum.

HISTORY: 1990, c. 154; 1996, c. 209; 1997, c. 65; 2008, c. 117; 2019, c. 113, effective July 1, 2019; 2023, c. 110, effective June 9, 2023.

RIGHTS AND PROCEDURE

No major changes in statutes or case law.

Chapter 28—JUVENILE

FILING INSTRUCTIONS

Handbook on West Virginia Criminal Procedure

Publication 60852 Release 14 November 2023

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☐ 1. Check the Title page in the front of your present Volume 1. It should indicate that your set is filed through Release Number 13. If the set is current, proceed with the filing of this release. If your set is not filed through Release Number 13, DO NOT file this release. Please call Customer Services at 1-800-833-9844 for assistance in bringing your set up to date.

☐ 2. Separate this Release Number 14 into the following groups of material:

- Package 1 contains White Revision pages for Volumes 1 and Volume 2 (Chapters 10 thru 15)
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☐ Arrange these groups of material next to each other so that you can take material from each group as required and proceed with the filing of this release.

☐ 3. Circulate the "Publication Update" among those individuals interested in the contents of this release.

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VOLUME 1

Revision

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