MAGISTRATE COURT PRACTICE

RULES OF CRIMINAL PROCEDURE FOR MAGISTRATE COURTS

Pursuant to the authority granted it by WV Code 50-1-16, the Supreme Court of Appeals has adopted Rules of Criminal Procedure for Magistrate Courts. The rules apply to all criminal cases in magistrate court and supplement, and in designated instances, supersede the statutory procedures set forth in Chapter 50 and 62 of the WV Code. (Rule I RCRPMC).

JURISDICTION AND VENUE

Article VIII, Section 10 of the West Virginia Constitution provides that "the jurisdiction of magistrate court shall extend throughout the county for which it is established. "This language necessarily limits a magistrate's jurisdiction to the county of election. At times, however, an individual magistrate may be ordered to temporarily serve outside his/her home county. A circuit judge may order a magistrate to serve "in any other county within the judicial circuit", WV Code 50-l-13, and the Chief Justice may order the magistrate to serve in any county, whether within or without; the Judicial circuit. When ordered to serve outside of the home county, a magistrate's authority is "equal to the jurisdiction and authority of a magistrate elected in the county to which the magistrate is ordered to serve". WV Code 50-1-13.

Under the provisions of WV Code 50-l-6a, the West Virginia Supreme Court of Appeals is authorized and empowered to create a panel of senior magistrates to consist of, and to utilize the talent and experience of retired magistrates. At the time of this writing, rules to implement this statute have not been promulgated.

West Virginia Code 50-2-3 provides that in addition to jurisdiction granted elsewhere to magistrate courts, magistrate court jurisdiction in criminal actions extend as follows:

a. All misdemeanor offenses committed in the county

b. Conduct preliminary examinations on warrants charging felonies committed within the county, and, upon order of referral from the circuit courts

c. Conduct preliminary examinations on probation violations, which examinations shall be conducted without delay and in all events, not later than

thirty days from the date any probation violation petition or motion has been filed in circuit court

d. Authority to issue arrest warrants in all criminal matters

e. Authority to issue warrants for search and seizure and, except in cases involving capital offenses

f. To set and admit bail, provided that in cases only punishable by the fine, such bail or recognizance shall not exceed the maximum amount of the fine and applicable court costs permitted or authorized by statute to be imposed in the event of conviction.

g. Authority to suspend sentences and impose periods of unsupervised probation for a period not to exceed two years

h. Authority to impose periods of supervision or participation in a community corrections program created pursuant to article eleven-c, chapter six-two. Periods of supervision or participation in a community corrections program are not to exceed imposed are not to exceed two years.

i. On motion by the prosecuting attorney, and upon a hearing and finding that reasonable cause exists to believe that a violation of any condition of probation has occurred, the magistrate, may revoke the probation and order execution of the sentence originally imposed.

Magistrate court jurisdiction is expressly prohibited in the following instances:

a. Charges against a defendant set for indictment

b. Set and admit bail in cases involving capital offenses

c. Suspend sentences and impose periods of unsupervised probation for offenses for which the penalty includes mandatory incarceration

Article VIII, section 10 of the West Virginia Constitution provides that venue for magistrate court shall be "as prescribed by law." Pursuant to that authority, the legislature specifically granted magistrate court the same venue as applies to circuit courts. WV Code 56-1-1, et seq.

COSTS IN CRIMINAL PROCEEDINGS

According to WV Code 50-3-2, in each criminal case before a magistrate court in which the defendant is convicted, whether by plea or at trial, there is imposed, in addition to other costs, fines, forfeitures or penalties as may be allowed by law. Notwithstanding any other provision of this code, a person liable for fines and court costs in a criminal proceeding in which the defendant is confined in a jail or prison and not participating in a work release program shall not be held liable for the fines and court costs until one hundred eighty days after completion of the term in jail or prison.

TIME

In computing any period of time, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or when the act to be done is the filing of some paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When a period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, legal holiday includes New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day and any other day appointed as a holiday by the governor or the legislature of West Virginia and all holidays as set forth in Chapter 2, Article 2, Section 1, of the West Virginia Code of 1931, as amended.

When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order; or upon motion made after the expiration of the specified period, permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

COMMENCEMENT OF ACTIONS

A commencement of a criminal prosecution shall commence by the issuance of a citation or filing of a complaint in accordance with the requirements of rules of the supreme court of appeals.

The complaint is a written statement of the essential facts constituting the offense charged. The complaint shall be presented to and sworn or affirmed before a magistrate in the county where the offense is alleged to have occurred. Unless otherwise provided by statute, the presentation and oath or affirmation shall be made by a prosecuting attorney or a law enforcement officer showing reason to have reliable information and belief. If from the facts stated in the complaint the magistrate finds probable cause, the complaint becomes the charging instrument initiating a criminal proceeding.

If a law enforcement officer makes a warrantless arrest and brings the arrested person before a magistrate for an initial appearance, unless a criminal complaint was filed previously, one must be filed at that time. (Rule 3 RCRPMC).

A complaint must be filed prior to trial on a citation. (Rule 7(c) RCRPMC). A complaint in this case must also establish that there is probable cause to believe that an offense has been committed and that the defendant committed it. (See Rule 4 RCRPMC).

The complainant is responsible for filling out the complaint. The complaint form may be filled out with the assistance of a prosecuting attorney, police officers, advocate of anyone associated with the complainant. The complainant must state, as best as possible the following: what happened, when, where, who did it, how it was done, how the complainant knows this information,

The magistrate must read the complaint to determine that each part of the complaint has been properly completed, including the statutory language defining the offense(s) charged. The complainant is responsible for supplying this information. The magistrate must then require the complainant to swear to the truth of the complaint.

PROBABLE CAUSE

Upon reviewing a criminal complaint, the magistrate must decide whether, on the face of the complaint, there is probable cause to believe that the offense has been committed and that there is probable cause to believe that the person names as the defendant committed it. *In State ex. Rel Walls vs. Noland, supra,* the Court noted that a complaint is sufficient if it answers the following five questions: (1) who is charged?; (2) what is the person charged with?; (3) when

and where did the alleged offense take place?; (4) why is the particular person being charged?; and, (5) who says so? Or how reliable is the informant? The finding of probable cause may be based upon hearsay evidence in whole or in part. If the magistrate finds no probable cause the magistrate must check the appropriate box in the lower right hand corner of the complaint and close the file. The file must then be sent to the magistrate clerk who is responsible for maintaining it in a separate but retrievable file.(Rule 4 RCRPMC).

WARRANT FOR ARREST OR SUMMONS TO APPEAR

If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. The magistrate may restrict the execution of the warrant to times during which a magistrate is available to conduct the initial appearance. Within the discretion of the magistrate a summons instead of a warrant may issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate of the county in which the warrant is executed.

Pursuant to WV Code 62-1A-2, a search warrant may be issued to search for and seize any:

(1) Property that constitutes evidence of the commission of a criminal offense; or

(2) Contraband, the fruits of crime, or things otherwise criminally possessed; or

(3) Property designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(4) Person for whose arrest there is probable cause, or who is unlawfully restrained. (Rule 4 RCRPMC)

Under *Katz v. United States*, 389,U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1987), the Court held that a search occurs when the governmental activities violate a defendant’s reasonable

expectation of privacy. The Court, however, has declared that there is no reasonable expectation of privacy in the following, and thus, no warrant is required to:

(1) Search a moving vehicle: it is often said that there is a lesser expectation of privacy in an automobile. See *New York v. Class*, 475 U.S. 106, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986).

(2) Search around area where an arrest is made. See *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

(3) Stop and frisk an individual for weapons incident to a lawful stop that is based on reasonable suspicion that the individual may be armed. See *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 44 O.O.2d 383, 20 L.Ed.2d 889 (1968).

(4) Search someone following a hot pursuit. See *State v. McNeal*, 162 W.Va. 550, 251 S.E.2d 484 (1978).

(5) Seize evidence obvious to the senses. For example, contraband or incriminating evidence obtained in plain view, incident to a lawful intrusion. See *State v. Stone*, 165 W.Va. 266, 268 S.E.2d 50 (1980).

(6) Consent searches.

(7) Inventory searches, when a vehicle is impounded lawfully.

(8) Open fields, streets, sidewalks and parks.

(9) Prison searches.

(10)Abandoned property.

The warrant shall be executed by any officer authorized by law to arrest persons charged with offenses against the state. The summons may be served by any person authorized to serve a summons in a civil action. The warrant may be executed or the summons may be served at any place within the state. It shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest, but upon request, the officer shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued.

The summons shall be in the same form as the warrant except that it shall summons the defendant to appear before a magistrate at a stated time and place. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

The officer executing a warrant shall make return thereof to the magistrate or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the state, any unexecuted warrant shall be returned to and canceled by the magistrate by whom it was issued. On or before the return day, the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable. At the request of the attorney for the state, made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to an authorized person for execution or service.

SEARCH AND SEIZURE

Upon the request of a law enforcement officer or an attorney for the state, a search warrant authorized by this rule may be issued by a magistrate or a judge of a circuit court within the county wherein the property or person sought is located. A warrant may be issued under this rule to search for and seize any:

(1) Property that constitutes evidence of the commission of a criminal offense; or

(2) Contraband, the fruits of crime, or things otherwise criminally possessed; or

(3) Property designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(4) Person for whose arrest there is probable cause, or who is unlawfully restrained.

A warrant shall issue only on an affidavit or affidavits sworn to before the magistrate or a judge of the circuit court and establishing the grounds for issuing the warrant. If the magistrate or circuit judge is satisfied that grounds for the application exist, or that there is probable cause to believe that they exist, that magistrate or circuit judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the magistrate or circuit judge may require the affiant to appear

personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to the sheriff or any deputy sheriff of the county, to any member of the department of public safety, or to any police officer of the municipality wherein the property is located, or to any other officer authorized by law to execute such search warrants. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant may be executed either in the day or night. It shall designate a magistrate to whom it shall be returned.

The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

A person aggrieved by an unlawful search and seizure may move the circuit court for the county in which the property was seized for the return of the property on the ground that he or she is entitled to lawful possession of the property. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the circuit court of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

A motion to suppress evidence may be made in the court of the county of trial as provided in Rule 12.

The magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory, and all other papers in connection therewith and shall file them with the clerk of the magistrate court for the county in which the property was seized.

INITIAL APPEARANCE BEFORE THE MAGISTRATE AND BAIL

The initial appearance is the proceeding conducted by a magistrate when a person who has been arrested or appears for the first time in response to a summons, is first brought before the magistrate. The purpose of an initial appearance is to advise the defendant of his basic rights and to set bail. Rule 5 of the *Rules of Criminal Procedure for Magistrate Courts* provides that an officer making an arrest under a warrant issued upon a complaint or any person making an

arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made. If a person arrested without a warrant is brought before a magistrate, a complaint must be filed immediately which must comply with Rule 4(a) of the *Rules of Criminal Procedure for Magistrate Courts*. Rule 4(a) provides that if it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant committed it, a warrant for the arrest of the defendant must be issued. More than one warrant or summons may be issued on the same complaint. Rule 4(a), *Rules of Criminal Procedure for Magistrate Courts*.

CRIMINAL COMPLAINT AND FINDING OF PROBABLE CAUSE

When an arrested person is first brought before the magistrate for an initial appearance, the arresting officer must fill out a criminal complaint, if one has not already been filed (see Section 2 of this Guide). Rule 3 of the *Rules of Criminal Procedure for Magistrate Courts* provides that the complaint is the written statement of the essential facts constituting the offense charged. The complaint must be presented to and sworn or affirmed before a magistrate in the county where the offense is alleged to have occurred. If a criminal complaint has not previously been filed, the magistrate needs to review the complaint to determine whether, on the face of the complaint, there is probable cause to believe that an offense has been committed and that the accused committed the offense. Pursuant to Rule 4(b) of the *Rules of Criminal Procedure for Magistrate Courts*, the finding of probable cause may be based entirely upon hearsay evidence. In *State ex rel. Walls v. Noland*, 189 W.Va. 603, 433 S.E.2d 541 (1993), the Court noted that a complaint is sufficient if it answers the following five questions: (1) Who is charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take place?; (4) Why is the particular person being charged?; and (5) Who says so? or How reliable is the informant?

If the magistrate concludes from the face of the complaint that there isn't probable cause to believe either that an offense has been committed or that the accused committed it (and a new or amended complaint is not prepared setting forth probable cause), the magistrate should mark the box "no probable cause found" at the bottom of the complaint. Accordingly, magistrates are obligated to ensure that the appropriate findings are indicated on the form.

After a finding of no probable cause, the magistrate must release the defendant from custody, and forward the complaint to the clerk for filing.

If the magistrate concludes from the face of the complaint that there is probable cause to believe that an offense has been committed and that the accused committed it, the magistrate must ask the defendant to approach the bench and proceed with the initial appearance.

At this stage, the magistrate must read the criminal complaint including the statutory language of the offense(s). The magistrate should also read or summarize for the defendant the facts set forth in the body of the complaint.

Two or more offenses may be charged in the same complaint, and tried together, but only if (1) the offenses are of the same or similar character, or (2) the offenses are based on the same act or transaction, or on acts or transactions connected together or constituting parts of a common scheme or plan. A magistrate may also, in his or her discretion, order two or more complaints to be tried together if the offenses could have been joined in one complaint. If it appears that a defendant or the state is prejudiced by joinder of offenses, the court may on motion order separate trials for the offenses. No more than one defendant may be charged in one complaint or tried in one proceeding.

The magistrate should then read to the defendant the statement of rights from the Initial Appearance: Rights Statement form. Rule 5(b) of the *Rules of Criminal Procedure for Magistrate Courts* provides that if the offense is an offense triable in magistrate court, the magistrate must inform the defendant of the complaint and any affidavit filed therewith, of the right to retain counsel, of the right to request the assignment of counsel if the defendant is unable to obtain counsel, of the right to demand a jury trial, of the general circumstances under which the defendant may secure pretrial release. Also, the magistrate must inform the defendant that he or she is not required to make a statement and that any statement made by the defendant may be used against him or her. The magistrate must also allow the defendant reasonable time and opportunity to consult with counsel or with at least one relative or other person for the purpose of obtaining counsel or arranging bail. The magistrate should require the defendant to sign and date each page of the form. If the defendant refuses or is unable to sign the form, the magistrate should note on the form that the defendant refused or was unable to sign.

If the offense charged is a felony, the magistrate should advise the defendant of the right to a preliminary hearing, but should not require the defendant to make a decision regarding waiving the hearing without first having the opportunity to consult with a lawyer and schedule a preliminary hearing. The hearing must be held within a reasonable time, but in any event, if the defendant waives the preliminary hearing, the magistrate court clerk must transmit forthwith to the circuit court clerk all papers in the proceeding. Rule 5(b), *Rules of Criminal Procedure for Magistrate Courts*. If the defendant does not waive the preliminary hearing, the magistrate must schedule a preliminary hearing not later than 10 days following the initial appearance if the defendant is in custody, and no later than 20 days if the defendant is not in custody. *See* Rule 5(d), *Rules of Criminal Procedure for Magistrate Courts*. Since the time period prescribed by Rule 5(d) is greater than seven (7) days, pursuant to Rule 26 of the *Rules of Criminal Procedure for Magistrate Courts*, in arriving at the requisite 10 or 20 days, the magistrate must calculate the

number of days starting with the day after the initial appearance and include both weekends and holidays. If the tenth or twentieth day falls on a Saturday or Sunday, then the magistrate should schedule the preliminary hearing on the preceding Friday

APPLICATION FOR COURT APPOINTED LAWYER

Under West Virginia law, the circuit judge (or in some circuits, the circuit clerk or the public defender's office) has the authority to appoint lawyers for those persons charged with offenses who are otherwise unable to afford a lawyer. *See*, West Virginia Code 29-21-16(d). In many circuits, however, much or all of the responsibility for processing the application for a court-appointed lawyer has been delegated by the supervising circuit judge to the magistrates. In such instances, for persons in need of court-appointed counsel at the initial appearance, the magistrate should process the necessary paperwork required by the supervising circuit judge, including the West Virginia Public Defender Services Affidavit: Eligibility for Appointed or Public Defender Counsel form.

BAIL, GENERALLY

Bail in a criminal case is a bond set by the judge or magistrate in an amount deemed necessary to ensure that the defendant, if released, will appear in court when required for further proceedings and will comply with other conditions of release. *See*, West Virginia Code 62-1C-2.

Bail must be set by the magistrate in all cases where an arrested person is brought before the magistrate, except:

1. offenses punishable by life imprisonment (murder and some forms of kidnapping);

2. arrest warrants (bench warrants or a capias) issued by a circuit judge made returnable to the circuit judge, unless the circuit judge has authorized the magistrate to set bail.

Additionally, under West Virginia Code 62-1C-3, when two or more charges are filed or are pending against the same person at or about the same time, the bail given may be made to include all offenses charged against the defendant. Contrary to popular belief, there is no legal support for the proposition that a defendant may not use his or her real estate to secure bail.

Pursuant to West Virginia Code 62-1C-1, bail may be allowed pending appeal from a conviction. However, bail must not be granted where the offense is punishable by life imprisonment or where the court has determined from the evidence at trial or upon a plea of guilty or *nolo contendere* that the offense was committed with the use, presentment or brandishing of a firearm or other deadly weapon, or by the use of violence to a person. The denial of bail under West Virginia Code 62-1C-1 may be reviewed by a summary petition to the circuit court.

West Virginia Code 50-2-3 provides that where an offense is punishable only by a fine, bail may not be set at an amount higher than the maximum fine and court costs for the offense.

West Virginia Code 62-1C-3 does not limit the amount of bail a magistrate may set. In other words, a magistrate may set bail for an amount that exceeds the magistrate court civil jurisdictional limit. If the magistrate declares the bond forfeited, then the magistrate must certify and transfer the forfeiture to the circuit court. West Virginia Code 62-1C-10.

Under West Virginia Code 62-1C-6, bail, as initially given, may continue in effect pending indictment, arraignment, continuance, trial and appeal after conviction. However, there is no legal authority for a magistrate to continue bond until the successful completion of a sentence.

TYPES OF BOND

Cash bond: A cash bond is for a certain sum set by the magistrate and collected in cash from the defendant or another depositor. *See*, West Virginia Code 62-1C-2. A cash bond may be held until the defendant makes all required court appearances up to final disposition of the case. For example, it may be held until the defendant is convicted or the case is dismissed. There is no legal authority for a magistrate to continue a bond until successful completion of a sentence. Rule 20.1 of the *Rules of Criminal Procedure for Magistrate Courts* allows a magistrate to continue a cash bond pending an appeal to the circuit court. However, West Virginia Code 62-1C-12 provides that when the condition of a bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court or magistrate shall exonerate the surety and release any bail and, if the bail be in a form other than a recognizance, the deposit must be returned to the person who made the same. *See*, Bond Form.

Personal recognizance bond: A personal recognizance (PR) bond is usually set when the magistrate is reasonably certain that the defendant will appear for all court proceedings. If the defendant fails to appear or violates a condition of bond, the defendant may be held liable for

the amount of the bond although no cash or other security was posted at the time bail is granted. *See*, West Virginia Code 62-1C-1a and 4.

Surety (recognizance) bond: A surety company (or bail bondsman), if authorized to do business in the State and in the county, may post bond on a defendant's behalf. *See*, West Virginia Code 51-10-1, *et seq.*; West Virginia Code 62-1C-4.

Property recognizance bond: A property (real estate) bond may be posted by the defendant or by some property owner other than the defendant as security for the bail amount. The magistrate may require a justification of surety. *See*, West Virginia Code 62-1C-4.

10% Cash bond. A magistrate may order a defendant be released on bail on the posting of 10% of the amount of bail with the court. *See*, Rule 31.01 of the *Trial Court Rules*. The magistrate may require property and surety in addition to the 10% cash bond. If the magistrate does not require property or surety, then this bond is actually a combination of a 10% cash bond and a 90% personal recognizance bond. If the magistrate requires surety, then this bond would be a combination of a 10% cash and a 90% property or surety recognizance bond.

West Virginia Code 62-1C-3 provides that the amount of bail must be fixed by the court with consideration given to the following:

> seriousness of the offense charged;
> the previous criminal record of the defendant;
> the defendant's financial ability; and
> the probability of the defendant's appearance.

A magistrate may place an individual on bond with a condition of that bond being home incarceration. West Virginia Code 62-11B-4. West Virginia Code 62-11B-4 provides that as an alternative sentence to incarceration in jail for any criminal violation of the Code over which a magistrate court has jurisdiction to set bail, a magistrate may order an offender confined to the offender's home for a period of electronically monitored home incarceration.

If the defendant or someone acting on the defendant's behalf is able to post the bail bond, the magistrate or magistrate assistant then fills out the criminal bail form that applies to the type of bail set by the magistrate. The magistrate should review the form to make sure that it has been prepared properly, then sign and date the form. The amount and kind of bond needs to be entered on the rights statement and on the case history sheet. The first page of the bail form should be completed and signed by the magistrate and the defendant regardless of whether bond is posted at that time.

If the defendant is unable to post bond at that time, the amount and kind of bond needs to be entered on the rights statement, jail commitment order, and case history sheet.

The magistrate then executes the Jail Commitment Order Form and places the defendant in the jail.

The magistrate who originally sets bail retains jurisdiction with respect to bail only until the case is assigned. The assigned magistrate will then have jurisdiction over the bond until the matter is disposed. *See*, Rule 5(e), *Rules of Criminal Procedure for Magistrate Courts*. Furthermore, no magistrate may conduct hearings or enter orders in a case assigned to another magistrate, except upon consent of the magistrate to whom such case is assigned or upon order of the circuit court or the Supreme Court. However, a magistrate must entertain a motion for a change of bail or bond and must accept an appeal if the assigned magistrate is off duty or otherwise unavailable to do so. *See*, Rule 2(a), *Administrative Rules for Magistrate Courts*.

PRELIMARY EXAMINATION

If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the magistrate shall forthwith hold the defendant to answer in circuit court. The state shall be represented by the prosecuting attorney at the preliminary examination. Witnesses shall be examined and evidence introduced for the state under the rules of evidence prevailing in criminal trials generally except that hearsay evidence may be received, if there is a substantial basis for believing:

(1) That the source of the hearsay is credible;

(2) That there is a factual basis for the information furnished; and

(3) That it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing

The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12 of the Rules of Criminal Procedure applicable to circuit courts. On motion of either the state or the defendant, witnesses shall be separated and not permitted in the hearing room except when called to testify.

If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the state from instituting a subsequent prosecution for the same offense.

RECORDS

A magistrate shall record electronically every preliminary examination conducted. If by reason of unavoidable cause it is impossible to record all or part of a preliminary examination electronically, a magistrate may proceed with the hearing but shall make a written record of the failure to do so and of the cause thereof.

For evidentiary purposes, a duplicate of such electronic recording prepared by the clerk of the magistrate or of the circuit court shall be a "writing" or "recording" as those terms are defined in Rule 1001 of the West Virginia Rules of Evidence, and unless the duplicate is shown not to reflect the contents accurately, it shall be treated as an original in the same manner that data stored in a computer or similar data is regarded as an "original" under such rule.

When requested by the state, the defendant, or any interested person, the clerk of the magistrate or of the circuit court shall provide a duplicate copy of the tape or other electronic recording medium of any preliminary examination held. Any defendant requesting the copy who has not been permitted to proceed with appointed counsel, any prosecutor who does not supply a blank tape, and any other person shall pay to the magistrate court an amount equal to the actual cost of the tape or other medium or the sum of five dollars, whichever is greater.

Preparation of a transcript of the record or any designated portions thereof shall be the responsibility of the party desiring such transcript.

If probable cause is found at the conclusion of a preliminary examination in magistrate court: (i) the magistrate clerk shall transmit to the prosecuting attorney a copy of the criminal case history sheet; (ii) when the proceeding is recorded electronically, the magistrate clerk shall transmit to the clerk of the circuit court all papers and electronic records of the proceeding; if for unavoidable cause the proceeding or part thereof has not been recorded electronically, the magistrate shall promptly make or cause to be made a summary written record of the proceeding, and the magistrate clerk shall transmit to the clerk of the circuit court such record and all other papers of the proceeding. Once the records of the proceeding are transmitted to the clerk of the circuit court, the felony charge shall remain within the sole jurisdiction of the circuit court and shall not be remanded to the magistrate for any purpose.

OFFENSE ARISING IN ANOTHER COUNTY

If a person is arrested and brought before a magistrate on a warrant or capias issued upon a complaint, information or indictment, for an offense alleged to have been committed in a county other than the county of arrest, such magistrate in the county of arrest shall conduct an initial appearance and the defendant given an opportunity to post bond if applicable. If the defendant is unable to provide bail in the county of arrest, he or she shall be temporarily committed to the regional jail serving the county of arrest. Such temporary commitment shall be on behalf of the charging county. The magistrate court of the county of arrest shall immediately transmit, via facsimile and the original via United States mail, all papers to the magistrate court of the charging county wherein the examination or trial is to be held, there to be dealt with as provided by these rules.

If a person is arrested on a warrant or capias issued upon a complaint, information or indictment for an offense alleged to have been committed in a county other than the county of arrest, and if such person is detained in a regional jail before an initial appearance, or if any person is detained in a regional jail and then served with a criminal complaint or other charging document charging such person with additional charges, the initial appearance on all such charges shall be conducted by video conferencing by a magistrate of the county of the charging jurisdiction. *Provided* that, prior to any such initial appearance being conducted by video conferencing by the county of the charging jurisdiction, the magistrate of the county of arrest shall immediately transmit, via facsimile and the original via United States mail, all papers to the magistrate court of the charging jurisdiction. If such initial appearance cannot occur by video conferencing before a magistrate of the county of the charging jurisdiction, such initial appearance shall be conducted by video conferencing by either a magistrate of the county of arrest, if different from the county of the charging jurisdiction, or a magistrate of the county in which the regional jail is located. *Provided*, arraignments may be conducted by video conferencing only if the plea to be entered is a not guilty plea.

If bail was previously fixed in another county where a warrant, information or indictment issued, the magistrate shall take into account the amount of bail previously fixed and the reasons set forth therefor, if any, but will not be bound by the amount of bail previously fixed. If the magistrate fixes bail different from that previously fixed, he or she shall set forth the reasons for such action in writing.

FAILURE TO APPEAR UPON A SUMMONS

The magistrate court clerk shall notify the prosecuting attorney on a regular basis when a defendant fails to answer or appear in response to a summons. The magistrate court clerk shall

notify the Division of Motor Vehicles of such failure to answer or appear in cases involving violations of any provision of Chapter 17, 17A, 17B, 17C or 17D of the West Virginia Code, and for any criminal violation charged on or after July 9, 1993, with the exception of parking violations or other unattended vehicle violations. Notification shall be in the same form as that provided by Rule 22 and Rule 7(e) of these Rules and shall be sent within 15 days from the scheduled date to appear unless the defendant answers or appears within that time.

Upon a motion by the prosecuting attorney, the magistrate may issue a warrant for arrest of a defendant who without providing good cause has failed to answer or appear at any stage of a proceeding in response to a summons.

AMENDMENT OF COMPLAINT, WARRANT, AND SUMMONS; HARMLESS ERROR

Upon motion, the magistrate shall permit the complaint, warrant, summons or any other document to be amended at any time before verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Error in the citation of the statute or rule or regulation which the defendant is alleged to have violated, or the omission of the citation shall not be ground for dismissal or for reversal of a conviction if the error or omission did not mislead the defendant to his or her prejudice.

CITATION FOR TRAFFIC AND NATURAL RESOURCES OFFENSES

In lieu of the procedures set forth in Rules 3 and 4 of these rules, a law enforcement officer may prepare and serve a citation as the instrument charging a misdemeanor violation of Chapter 17, 17A, 17B, or 17C, except as provided by West Virginia Code § 17C-19-3, 17D, or 20 of the West Virginia Code. The citation must state the offense charged and notify the defendant of the requirement to answer or appear in response to the charge, by a date certain, in the magistrate court of the county where the offense occurred.

The citation shall be a sufficient document to which the defendant may plead guilty or no contest. Before accepting a plea of guilty or no contest, the magistrate shall inform the defendant of the charge and the penalties the court may impose. The magistrate shall also advise that the defendant has the right to be represented by an attorney, that the defendant may plead not guilty to the charge and demand a trial by jury in accordance with the time limits set forth in rule 5(c) of these rules, and that by pleading guilty the defendant waives all of these rights.

1. For violations of West Virginia Code § 17B-4-3 (driving while license suspended or revoked), except 17B-4-3(a) first offense or second offense, West Virginia Code § 17-C-5-1 (negligent homicide), West Virginia Code § 17C-5-2 (DUI), West Virginia Code § 17C-5-3 (reckless driving) and West Virginia Code Chapter 20 offenses involving injury to the person, a plea of guilty or no contest shall be made in person before a magistrate in the county where the offense occurred.

2. For all other citations such pleas of guilty or no contest may also be made by telephone to a magistrate in the county where the offense occurred. In such instances the magistrate, upon advising the defendant, accepting the plea, and imposing fine and costs, shall direct the defendant to complete the guilty plea form on the citation and to deliver by mail to the magistrate court the citation and all fines and costs assessed.

A plea of not guilty to a traffic or natural resources citation may be made in person before a magistrate in the county in which the offense was charged, or by mail to the magistrate court of such county. In such instances, a complaint must be filed at or prior to trial which complies with the probable cause requirements of Rule 4 and an initial appearance conducted pursuant to the procedures set forth in Rule 5 of these rules. Upon motion of the defendant, a continuance may be granted if necessary to provide time to meet any new information set forth in the complaint and if the refusal to grant such continuance would substantially prejudice the rights of the defendant.

A defendant may seek dismissal of a traffic or natural resources citation prior to trial by filing, on a form provided by the magistrate court, a motion to dismiss. Such motion shall state with particularity the grounds upon which dismissal is sought. Upon receipt of such motion, the magistrate court shall promptly forward a copy of such motion to the prosecuting attorney. If upon 10 days from the date of delivery of such motion to the prosecuting attorney no objection is made, the magistrate may dismiss the citation. If within 10 days from the date of delivery the prosecuting attorney objects to such motion, the case shall proceed to hearing or trial.

The magistrate court clerk on a regular basis shall notify the prosecuting attorney of citations for which the defendant failed to answer or appear. The magistrate court clerk shall notify the Division of Motor Vehicles of all such instances involving a failure to answer or appear in response to a citation charging a violation of any provision of Chapter 17, 17A, 17B, 17C, or 17D of the West Virginia Code, and for any criminal violation charged on or after July 9, 1993, with the exception of parking violations and other violations for which a citation may be issued to an unattended vehicle. Such notification shall be provided in the same form as that

provided by Rule 5.3 and Rule 22 of these Rules and shall be sent within 15 days from the scheduled date to answer or appear unless the defendant answers or appears within that time.

Upon motion by the prosecuting attorney, the magistrate may issue a warrant for the arrest of a defendant who without showing good cause has failed to answer or appear at any stage of a proceeding in response to a citation.

RELEASE FROM CUSTODY

Eligibility for release prior to trial shall be in accordance with Chapter 62, Article 1C, Section 1 of the West Virginia Code of 1931, as amended.

A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release is necessary to assure such person's presence during the trial or to assure that his or her conduct will not obstruct the orderly and expeditious progress of the trial.

Eligibility for release pending sentence or pending notice of intent to appeal or expiration of the time allowed for filing notice of appeal shall be in accordance with Chapter 62, Article 1C, Section 1(b), of the West Virginia Code of 1931, as amended. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant. The burden of establishing eligibility for bail under this subsection rests with the defendant.

Every surety, except a surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety, and remaining undischarged, and all the other liabilities of the surety. No bond shall be approved unless the surety thereon appears to be qualified. Any surety or bond required by this rule may be approved by any magistrate or circuit judge permitted to accept the same.

If there is a breach of condition of a bond, the circuit court shall declare a forfeiture of the bail.

The court may direct that forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

When forfeiture has not been set aside, the circuit court shall on motion enter a judgment of default, and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction and venue of the circuit court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and notice of the motion, and the hearing thereon, shall comply with Chapter 62, Article 1C, Section 9 of the West Virginia Code of 1931, as amended.

After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail, and if the bail be in a form other than a recognizance, the deposit shall be returned to the person who made the same. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

The court shall exercise supervision over the detention of defendants and witnesses within the county pending trial for the purpose of eliminating all unnecessary detention. The attorney for the state shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of 10 days. As to each witness so listed, the attorney for the state shall make a statement of the reasons why such witness should not be released with or without the taking of a deposition pursuant to Rule 15(a). As to each defendant so listed, the attorney for the state shall make a statement of the reasons why the defendant is still held in custody.

Upon motion of the defendant for release pursuant to subdivisions (a), (b) or (c) of this rule, the court or magistrate exercising jurisdiction over the case shall immediately order a hearing to determine the defendant's eligibility for bail or release or to determine the amount of bail.

1. *Time of Hearing.* The hearing shall be held within a reasonable time not later than five days after the filing of the motion, but:

A. With the consent of the defendant and upon a showing of cause, the hearing may be continued one or more times; and

B. In the absence of the defendant, the hearing may be continued only upon a showing that extraordinary circumstances exist and that the delay is indispensable to the interests of justice.

2. *Procedures.* The magistrate or circuit court shall issue process necessary to summon witnesses within the state for either the attorney for the state or the defendant. Both the attorney for the state and the defendant may offer evidence in their behalf. Each witness, including a defendant testifying in his or her own behalf, shall testify under oath or affirmation and may be cross-examined. The magistrate or circuit court may make any order with respect to the conduct of the hearing that such magistrate or judge could make at the trial of a criminal case.

3. *Testimony of Defendant.* A defendant who testifies at the hearing may nonetheless decline to testify at trial, in which case his or her testimony at the hearing is not admissible in evidence. If the defendant testifies at trial, his or her testimony at the hearing is admissible in evidence to the extent permitted by law.

4. *Evidence.* Objections to evidence on the ground that it was acquired by unlawful means are not properly made by any hearing under this subsection. Hearsay evidence may be received, if there is a substantial basis for believing:

(A) That the source of hearsay is credible;

(B) That there is a factual basis for the information furnished; and

(C) That it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing.

5. *Finding and Disposition.* The magistrate or circuit court shall expeditiously upon receipt of all the evidence make a ruling on defendant's motion and shall, in addition, find the facts specially and state separately its conclusions of law thereon. The findings shall be in writing. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

(i) Production of Statements.

(1) *In General.* Rule 26.2(a)-(d) and (f) applies at a detention hearing, unless the court, for good cause shown, rules otherwise in a particular case.

(2) *Sanctions for Failure to Produce Statement.* If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, at the detention hearing the court may not consider the testimony of a witness whose statement is withheld.

.

GUIDE FOR ACCEPTING GUILTY PLEA

The plea proceeding is the first stage in a magistrate court proceeding where a defendant is required to enter a plea of guilty or not guilty. In practice, however, a guilty plea may be accepted, if appropriate, anytime between the filing of a complaint or issuance of a citation and the return of a finding or verdict, so long as the defendant has been fully advised of the rights that are being waived by pleading guilty. *See,* Rules 9 and 10, *Rules of Criminal Procedure for Magistrate Courts*.

Magistrates are not required to accept a guilty plea simply because one is offered. It is the duty of the magistrate to ensure that the plea is being offered knowingly, voluntarily and intelligently, and that the defendant has been advised of any rights that are being waived. *See,* Rule 10, *Rules of Criminal Procedure for Magistrate Courts*.

GUILTY PLEA PROCEDURE

The magistrate court form, Guilty or No Contest Plea, is designed to cover all of the essential rights that should be afforded to a defendant before a guilty plea is accepted. The appropriate procedure for the magistrate to follow when a guilty plea is offered is to advise the defendant of each right set forth on the form, and to determine that the defendant understands each right before signing the form. *See,* Rule 10, *Rules of Criminal Procedure for Magistrate Courts*.

A magistrate may neither entertain nor grant a motion to withdraw a plea of guilty or no contest.

NOTICE OF TRIAL

When a defendant enters a plea of not guilty to a misdemeanor complaint or notifies the court of the intent to plead not guilty or otherwise to contest a misdemeanor citation, the court shall promptly schedule a date and time for trial.

If the defendant is not in custody, all parties shall be notified by the court by first-class mail not less than six weeks before such date of trial. If the defendant is in custody, trial shall be scheduled for the earliest practical date and all parties promptly notified. All such notices shall contain:

(a) The date, place and time of trial;
(b) The name of the magistrate scheduled to hear the case;
(c) A statement of the time periods in which pretrial motions must be filed, in accordance with Rule 12;
(d) A statement of the manner in which pretrial motions may be filed;
(e) A statement of the restrictions upon continuances as set forth in Rule 12; and
(f) A statement of the manner by which motions for disqualification may be filed as set forth in Rule 1B of the Administrative Rules for Magistrate Courts.

Unless good cause is shown as to why such requirements should be excused, the following motions, if made, shall be made in writing and shall be filed with the court and served upon all parties not less than 10 days before the first date scheduled for trial:

(1) Motion and affidavit for transfer to another magistrate;
(2) Motion for continuance; and
(3) Any other motion which, if granted, would require rescheduling of the hearing or trial.

The clerk, deputy clerk, or magistrate assistant shall provide appropriate forms on which such pretrial motions may be made.

All other pretrial motions may be made at any time in writing prior to trial, or may be made orally or in writing at time of trial.

A motion for a continuance may be granted only upon:

(1) Compliance with the requirements set forth in section (a) of this rule;
(2) A showing of good cause; and
(3) A reasonable effort by the magistrate to notify all parties and provide them with an opportunity to respond to the motion.

DEFENDANT'S STATEMENTS; REPORTS OF EXAMINATIONS AND TESTS; DEFENDANT'S BOOKS, PAPERS AND TANGIBLE OBJECTS

Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to examine and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, which are known by the prosecuting attorney to be within the possession, custody or control of the State, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, which are known by the prosecuting attorney to be within the possession, custody or control of the State, and (3) books, papers, or tangible objects belonging to or seized from the defendant which are known by the prosecuting attorney to be within the possession, custody or control of the State.

SUBPOENA

Subpoenas for attendance of witnesses and subpoenas for production of documentary evidence and of objects shall be issued by the magistrate clerk, deputy clerk, magistrate or magistrate assistant in the same manner as is provided by Rule 17 of the Rules of Criminal Procedure for Circuit Courts.

DISMISSAL

The attorney for the state may move to dismiss a complaint, and if the magistrate grants the motion, the prosecution shall thereupon terminate. Such a dismissal shall not be granted during the trial without the consent of the defendant.

The magistrate may dismiss the complaint, with or without a motion, if there is unnecessary delay in bringing a defendant to trial or if the attorney for the state fails to appear at trial. If the magistrate grants a motion to dismiss a complaint based on a defect in the institution of the prosecution or in the complaint, the magistrate may also stay entry of the order for a specified time pending the filing of a new complaint.

GUIDE FOR JURY TRIAL - CRIMINAL

In advance of a trial, magistrates should hold a pretrial conference with the lawyers and determine what issues will be contested and what issues will not be contested. Any agreements or pretrial rulings that can be made at this time should help to shorten and simplify the trial. If the lawyers know of problems regarding evidence that are likely to arise, they should be resolved

before the trial begins, if possible. The lawyers should also be advised that any legal arguments made concerning evidence should not be made within the hearing of the jury.**)**

When a party appears at trial without counsel, the magistrate may inform the party, in the presence of all other parties, of the proper procedures regarding the conduct of trial and examination of witnesses. Such information shall not include counsel or advice regarding choice of tactics or strategy.

There are several pretrial matters that should always be discussed outside the presence of the jury. More importantly, they should always be the subject of a pretrial conference. These matters are, for example:

Whether or not the police conducted a lawful search of an area;

Whether or not the police lawfully seized a piece of evidence;

Whether or not the police had probable cause to perform certain functions;

Whether or not certain evidence should be excluded from introduction at trial;

Whether or not a confession was voluntarily given

Whether or not the police violated the defendant's right to counsel;

Whether or not the defendant's right to speedy trial was violated;

Whether or not a certain witness should be allowed to testify at trial;

Whether or not a warrant is defective;

Whether or not prior bad acts, on the defendant's part, should be introduced into evidence. For example, whether a defendant who is on trial for battery should have a previous allegation of battery introduced into evidence by the prosecution pursuant to Rule 404(b), *West Virginia Rules of Evidence*. Rule 404(b), *West Virginia Rules of Evidence* requires the State to provide advance notice to the defense prior to seeking the introduction of this type of evidence; and

Whether or not certain evidence was made available to the defendant in a timely fashion.

In anticipation of trial, a magistrate should always review the criminal file with these issues in mind.

In a criminal case, the lawyers should be informed that nothing should be said to the jury about the penalties for the offense charged. The mentioning of penalties during trial is unfairly prejudicial, and irrelevant to the issue of guilt or innocence. The issue of penalty is the exclusive province of the court.

BENCH CONFERENCE WITH LAWYERS

When a lawyer requests permission to approach the bench, it is normally because he or she wishes to confer with the magistrate out of the jury's hearing on an evidentiary or procedural matter. Permission should usually be granted, and both lawyers, along with the defendant, should stand at the magistrate's bench and discuss the issue in a low tone of voice. If the discussion is lengthy, the jury should be recessed or the magistrate and the attorneys should move to another location.

MISTRIAL

In most cases, a magistrate will be able to solve the problem of improperly introduced evidence by ruling the evidence inadmissible and instructing the jury to disregard it. Sometimes, however, this will not be sufficient, since some evidence is so powerful that no juror could ignore it even if he or she tried. This is true, for example, of a confession. If a defendant's confession is mentioned to the jury, but later ruled inadmissible by the magistrate, no amount of instructions will remove that confession from the jury's mind. In this type of situation, the only way to solve the problem is to discharge the jury and start the trial over again with a new jury. West Virginia Code 62-3-7.

The test of determining whether or not a mistrial should be declared over a defendant's objection is found in the case of *United States v. Perez*, 22 U.S. 579, 1824 WL 2694, 6 L.Ed. 165 (1824). In *Perez,* the Court declared that courts have the authority to discharge a jury from rendering a decision whenever, in the court's opinion, "taking all circumstances into consideration, there is manifest necessity for the act of declaring a mistrial or the ends of public justice would otherwise be defeated." In other words, there must be a high degree of necessity before a magistrate should decide on discharging a jury. The courts have found manifest necessity for the declaration of a mistrial, therefore allowing retrial of the defendant, in the following cases:

A hung jury;

Question of whether a juror was acquainted with the defendant;

Juror has been a member of grand jury indicting the defendant;

Courtroom conditions and possible outside comments to jurors;

Juror entering courtroom during argument on motion for acquittal; or

Newspaper article read by jury during trial.

See, Franklin Cleckley, *Handbook on West Virginia Criminal Procedure* (2d ed. 1986).

Nevertheless, it is well established that a decision to grant a mistrial is within the sound discretion of the magistrate, and will not be disturbed on appeal unless there is a clear abuse of discretion. *United States v. Alonzo*, 689 F.2d 1202 (4th Cir. 1982). In *Porter v. Ferguson*, 174 W.Va. 253, 324 S.E.2d 397 (1984), the Court made it clear that if a magistrate acts irrationally, irresponsibly or precipitously in granting a prosecutor's request for a mistrial, such action will not be condoned and double jeopardy will bar a retrial of the defendant. Therefore, great consideration must be given to the question of whether or not a mistrial should be granted. Also, in *Keller v. Ferguson, 177 W.Va. 616, 355 S.E.2d 405 (1987), the Court added that where a prosecutor claims that the defense has, by its actions prejudiced the jury, the prosecutor is entitled to obtain a mistrial, without double jeopardy barring retrial, but only if it can be shown that the conduct complained of was improper and prejudicial to the prosecution, and that the court gave consideration to alternative measures that might alleviate the prejudice and avoid the necessity of terminating the trial. In light of Keller*, a magistrate should indicate on the record the alternatives he or she considered and clearly state the reason why he or she has decided to declare a mistrial.

RECORDING

Pursuant to West Virginia Code 50-5-8(d) and Rule 17(d), *Rules of Criminal Procedure for Magistrate Courts* (hereinafter Rule 17(d)) all jury trials are required to be recorded electronically. Therefore, the following three forms must be appropriately completed:

1. Case Participant List
2. Introduction of a Recorded Case
3. Recording Index

Additionally, pursuant to Rule 17(d), if by reason of unavoidable cause, it is impossible to record all or part of a jury trial electronically, the magistrate may proceed with the hearing, but must make a written record of the failure to do so and of the cause thereof.

When trial will be by jury, it is best that all proceedings, including pretrial conferences and hearings be recorded. This will ensure that all matters are preserved for appeal on the record. *See*, West Virginia Code 50-5-13.

OPENING OF COURT BY BAILIFF OR CLERK

Before entrance of the magistrate into the courtroom, the bailiff or clerk (if available) will ascertain that everyone is prepared for the opening of court; for example, all court officers are in the proper places; no one is smoking; all cell phones and pagers are turned off, and that everything is in order. When everyone is ready, the bailiff should advise the magistrate.

If the magistrate has no baliff or clerk to open court, the magistrate should.

.

VOIR DIRE

This is the phase of the proceeding where the Court and thereafter the attorneys examine the prospective jurors to determine their qualifications and suitability to serve as jurors. Challenges for cause may come into existence from such examination. A "challenge for cause" is a request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of a specified cause or reason. For example, the prospective juror is a member of a neo-Nazi organization and the defendant is a member of a minority group. Such a prospective juror should be excused for "cause." Challenges for cause should always be made at the bench, outside the hearing of the jury.

(The magistrate must, at this time, state the nature of the charge against the defendant, the Code section that was allegedly violated, where the incident occurred, date of the offense, and the name of the charging officer. The magistrate must not read the facts of the complaint to the jury since the complaint may contain inadmissible evidence.)

NOTE: If any of the potential jurors indicate a knowledge of the case, each should be asked at the bench, out of the presence of the other jurors, what they have heard, and from what source. Also, the following is a suggested question where there is knowledge of the case.

If the juror answers in the affirmative, then the magistrate should ask the juror to return to his or her seat. The magistrate should then inquire of the parties whether or not there are any motions to remove the juror for cause. The parties may then make their respective motions. If the magistrate believes the juror's response, then the magistrate may deny the motion(s) and continue with the proceeding. Indeed, if the juror answers in the negative, then he or she should be excused from the panel.

PEREMPTORY CHALLENGES

Peremptory challenge is the right given to the parties to challenge a juror without assigning, or being required to assign, a reason for the challenge. *See*, Rule 17(c), *Rules of Criminal Procedure for Magistrate Courts*. Magistrates must be aware that the use of peremptory challenges to remove prospective jurors on the ground of group bias has been held to violate the right to trial by jury. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986), held that a prosecutor must explain peremptory jury challenges that appear to be motivated by racial considerations alone. For example, defendant, a black individual, is on trial for murdering a white person. During jury selection, the prosecutor used his peremptory challenge to strike the only black juror from the panel. The prosecutor, if questioned by the defense, at the bench, regarding the removal of the only black on the panel, must provide a race-neutral explanation to the magistrate regarding the use of the state's peremptory challenge. The prosecutor may not seek to justify the strike by stating an excuse, such as it was "merely a gut instinct." The basis for the strike must be a firmly rooted, race-neutral excuse. For example, the defendant's relatives and the juror's relatives attend the same church, or the juror smiled at the defendant. If the prosecutor fails to rebut the defendant's charge of discrimination, the magistrate may deny the removal. This challenge of the prosecutor's action by the defense is what is commonly referred to as a *Batson* challenge.

NOTE: From a written list of the ten potential jurors, the prosecutor will strike two names, followed by defense counsel striking two names. The magistrate will then read the four names, excusing them from further participation in the trial. The magistrate must ensure that only the names of the individuals who are excused are read and without reference to the party who made the strike.

TESTIMONY

Testimony continues, by examination and cross-examination, until all witnesses have testified. (Examples of objections to evidence, and rulings on those objections, are set forth in Section 8:Guide for Adult Preliminary Hearing.)

The magistrate must, out of the presence of the jury, inform the defendant of his or her right to testify or not testify. Only the defendant, personally (not counsel), may waive the right to testify. *See*, Defendant's Election to Testify or Not.

ORDER OF WITNESSES FOR PROSECUTION

The order of presentation of witnesses and the respective examination that may be made are as follows:

Prosecution witnesses:	Direct Examination by prosecutor; cross-examination by defense; re-direct by prosecutor (if any); re-cross by defense (if any).

At the conclusion of the foregoing presentation of witnesses and examination by the prosecution, the defense must be given the opportunity to make a Motion for a Judgment of Acquittal. *See* Rule 12, *Rules of Criminal Procedure for Magistrate Courts*. These motions are done as a matter of routine, and do not have to be in writing. They, however, must be made out of the presence of the jury. They are based on the evidence adduced during the state's case. In considering this motion, the court must view the evidence presented in the light most favorable to the prosecution. In other words, the magistrate should gather all the evidence together, and in looking at the same, make a determination as to whether or not the jury, looking at all that evidence, could find the defendant guilty. In appraising the sufficiency of evidence on a motion for judgment of acquittal, it is not necessary that the magistrate be convinced beyond a reasonable doubt of the guilt of the defendant. The question is simply whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt. *State v. Jackson*, 215 W.Va. 188, 597 S.E.2d 321 (2004).

ORDER OF WITNESSES FOR DEFENSE

Defense witnesses: Direct Examination by defense, cross-examination by prosecutor, re-direct examination by defense, re-cross examination, etc.

Prosecution rebuttal witnesses (if any)

Defense rebuttal witnesses (if any)

NOTE: The magistrate needs to be sure that all witnesses identify themselves for the record.

JURY INSTRUCTIONS

Instructions given to the jury should contain clear, distinct and unambiguous statements of the law. An instruction calculated to mislead the jury, whether it arises from ambiguity or from any other cause, ought to be avoided. The jury must be clearly and properly advised of the law in order to render a true and lawful verdict. *State v. Romine,* 166 W.Va. 135, 272 S.E.2d 680 (1980). Additionally, instructions must be based on the evidence. Instructions which are not supported by the evidence should not be given. *State v. Bennett, 157 W.Va. 702, 203 S.E.2d 699 (1974).*

At the close of the testimony, the magistrate excuses the jury from the courtroom, and reviews with the prosecutor and defense counsel the jury instructions that they have proposed.

The magistrate should proceed in this manner until all proposed instructions are ruled on. In doing so, the magistrate should give both sides the opportunity to argue for and against each proposed instruction. The magistrate should refuse all instructions that are repetitive or irrelevant or that contain incorrect statements of law.

Once instructions are approved, the jury should return to the courtroom and read the jury instructions that were approved by the court.

CLOSING ARGUMENTS

When the magistrate completes the reading of the last jury instruction, the parties should proceed with closing arguments. Prosecutor, then defense, then prosecutor on rebuttal deliver their closing arguments to the jury and the jury deliberates. The jury then retires to deliberate. The verdict is received by having the Magistrate read the verdict aloud in open court.

POLLING OF THE JURY

Once a verdict of guilty is returned, the defense may ask that the jury be polled. Polling the jury is a legal term of art. It refers to the practice whereby jurors are asked individually whether they assented, and still assent, to the verdict. To poll the jury, the clerk or magistrate, if

a clerk is not available, should call upon each juror to declare what his or her verdict is before the verdict is recorded. Once concurrence in the verdict has been determined, the polling ends.

NOTE: After all jurors have been polled, the jury should be excused with thanks.

FAILURE TO REACH A VERDICT

If the jury reports that they are unable to reach a verdict, the magistrate should ask that the jury be brought into the courtroom. On the jury's return to the courtroom, the magistrate may read the instruction, commonly referred to as the "Allen Charge," to the panel. Practically, each and every instruction packet presented by the parties contains an "Allen Charge." This is a supplemental instruction that simply encourages the panel to try and reach an agreement. *See, State v. Shabazz, 206 W.Va. 555, 526 S.E.2d 521 (1999).* If no agreement is reached, then the court declares a mistrial of the case.

If there is a not guilty verdict, then the defendant is discharged and the bond is released. If there is a guilty verdict, then, o*nce there is a pronouncement of guilt by the jury, the magistrate should thank the jurors and dismiss them from further service in the case. Immediately thereafter, the magistrate should inquire of the parties as to whether or not there are any motions in light of the verdict. The defendant may then make a motion for judgment of acquittal notwithstanding the verdict, pursuant to Rule 29(c), West Virginia Rules of Criminal Procedure*. In considering this motion, the magistrate must view the evidence in the light most favorable to the verdict. If the motion is denied, then the magistrate should either proceed to the sentencing phase or continue the matter to a later date for sentencing. Rule 19, *Rules of Criminal Procedure for Magistrate Courts*, provides that sentence must be imposed in open court within 60 days of the finding of guilt. (*See* Section 7:Guide for Sentencing.) If the magistrate is inclined to continue the matter for sentencing, the magistrate may continue bond or revoke bail, on motion of the prosecutor pending sentencing. West Virginia Code 62-1C-1. Once again, magistrates be aware that bail is not permissible if the magistrate determines from the evidence at trial or upon a plea of guilty or *nolo contendere* that the offense was committed or attempted to be committed with the use, presentment or brandishing of a firearm or other deadly weapon, or by the use of violence to a person. West Virginia Code 62-1C-1. Moreover, magistrates should be cognizant that bail may be revoked at any time pending appeal. West Virginia Code 62-1C-1. If a magistrate revokes bail pending sentencing, such a revocation may be reviewed summarily by the circuit court. West Virginia Code 62-1C-1. Under Rule 21, *Rules of Criminal Procedure for Magistrate Courts*, the timely filing or granting of an appeal automatically stays the sentence of a magistrate. Furthermore, upon defendant's request, the execution of a criminal judgment must be stayed to allow for the filing of a motion for a new trial or a petition for modification of sentence. *See,* Rule 21(b), *Rules of Criminal Procedure for Magistrate Courts*.

GUIDE FOR BENCH TRIAL - CRIMINAL

Before entrance of the magistrate into the courtroom, the bailiff or clerk (if available) will ascertain that everyone is prepared for the opening of court; that all court officers are in the proper places; that the parties are seated and ready to proceed, that all cell phones and pagers are turned off, and that everything is in order.

Once everything is in order, the bailiff or clerk (if available) will advise the magistrate. (The magistrate should stand during the introduction; upon completion of the introduction, the magistrate should take his/her seat. Thereafter, the bailiff or clerk should direct all persons present to do likewise.)

If the magistrate has no bailiff or clerk to open court, then the magistrate should proceed and the case should be called. Pretrial motion should then be considered.

If there is a matter, then the magistrate should hear the matter, allow the opposing side to respond, rule on the matter, or inform the parties that the matter will be taken under advisement if a ruling is not critical to the start of the trial, before proceeding to try the case.

(If the parties wish to make an opening statement, then the magistrate should proceed to hear opening statements. However, at the outset of a bench trial, the parties are not obligated to make an opening statement. Upon conclusion of the opening statements, the magistrate should instruct the state to call their first witness.

Testimony continues, by examination and cross-examination, until all the witnesses have testified. (Examples of objections to evidence, and rulings on those objections, are set forth above in Section 8:Guide for Preliminary Hearing.)

At the conclusion of the testimony of the State's last witness, the State should rest its case. The magistrate should then ask whether there are any motions. Once this has been said, the defendant normally moves for a judgment of acquittal on grounds that the State has failed to meet its burden of proving guilt beyond a reasonable doubt. Rule 29(a), *Rules of Criminal Procedure*. The motion for acquittal tends to challenge the sufficiency of the State's evidence. When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed in the light most favorable to the prosecution, and the magistrate

must accept all reasonable inferences from the evidence. *State v. LaRock, 196 W.Va. 294, 40 S.E.2d 613 (1996).*

If the magistrate, after viewing the evidence in the light most favorable to the State, denies the motion for judgment of acquittal, the magistrate should instruct the defense to call its first witness. On the other hand, if after viewing the evidence in the light most favorable to the State, the magistrate grants the motion for judgment of acquittal, the magistrate should declare the defendant discharged from further prosecution on the charge before the court.

(If the magistrate grants the motion, the matter ends. However, if the magistrate denies the motion, the magistrate should then instruct the Defense to call its first witness.)

Prior to the Defendant's testimony, the magistrate must inform the defendant of his or her right to testify or not testify. Only the defendant, personally (not counsel), may waive the right to testify.

Note: The defendant must sign the Defendant's Election to Testify or Not form. Upon completion, this form must be placed in the case file as an official record. State v. Neuman, 179 W.Va. 580, 371 S.E.2d 77 (1988).

Order of Witnesses

Prosecution witnesses:

direct examination by prosecutor;

cross-examination by defense;

re-direct, by prosecutor (if any);

re-cross by defense (if any)

Defense witnesses:

examined by defense;

cross-examined by prosecutor, etc.;

Prosecution rebuttal witnesses (if any);

Defense rebuttal witnesses (if any).

After the last witness completes his or her testimony, the magistrate should proceed to hear losing arguments and a verdict is determined of guilty or not guilty.

If the verdict is one of guilty, then the Magistrate may proceed to sentencing. Rule 19, *Rules of Criminal Procedure for Magistrate Courts*, provides that sentence shall be imposed in open court within 60 days of the finding of guilt. *See*, Section 7 concerning the imposition of sentence and alternative sentencing).

If the magistrate decides to continue the matter for sentencing, he or she may continue bond or revoke bail, on motion of the prosecutor, pending sentencing. *See*, West Virginia Code 62-1C-1. If the magistrate decides to postpone sentencing and releases the defendant pending sentencing, the magistrate should remind the defendant of the terms and conditions of his or her bond. Bail is not permissible if the magistrate determines from the evidence at trial or upon a plea of guilty or *nolo contendere* that the offense was committed or attempted to be committed with the use, presentment or brandishing of a firearm or other deadly weapon, or by the use of violence to a person. *See*, West Virginia Code 62-1C-1. If the magistrate should revoke bail pending sentencing, such a revocation may be reviewed summarily by the circuit court. Under Rule 21, *Rules of Criminal Procedure for Magistrate Courts*, the timely filing or granting of an appeal automatically stays the sentence of a magistrate. Furthermore, upon a defendant's request, the execution of a criminal judgment must be stayed to allow for the filing of a motion for a new trial, or a petition for modification of sentence. *See*, Rule 21(b), *Rules of Criminal Procedure for Magistrate Courts*.

If the magistrate decides to proceed with sentencing, then pursuant to Rule 19, *Rules of Criminal Procedure for Magistrate Courts*, the magistrate shall:

Afford counsel an opportunity to speak on behalf of the defendant.

Address the defendant personally to ask if the defendant wishes to make a statement in

the defendant's own behalf and to present any information in mitigation of punishment.

The prosecuting attorney must be afforded an equivalent opportunity to speak to the court.

Except for defendants represented by counsel at a guilty plea, any defendant convicted in magistrate court may appeal a conviction to the circuit court as a matter of right. The notice of appeal must be filed within 20 days after sentencing, or within 20 days after the magistrate has denied a motion for a new trial. *See*, Rule 20.1, *Rules of Criminal Procedure for Magistrate Courts*. The magistrate may require that bond be conditioned upon appearance of the defendant as required in circuit court. Any bond imposed, however, may not exceed the maximum amount of any fine which could be imposed for the offense. *See,* Rule 20.1, *Rules of Criminal Procedure for Magistrate Courts*.

If the verdict is not guilty, then bond is released and the court is adjourned.

SENTENCE

Sentence shall be imposed in open court within 60 days of the finding of guilt.

Except as to pleas of guilty or no contest pursuant to Rule 7(b), before imposing sentence the magistrate shall:

1. Afford counsel an opportunity to speak on behalf of the defendant; and

2. Address the defendant personally to ask if the defendant wishes to make a statement in the defendant's own behalf and to present any information in mitigation of punishment. The prosecuting attorney shall have an equivalent opportunity to speak to the court.

NEW TRIAL

Within 20 days after a verdict or a finding of guilty, the defendant may file a motion requesting that the judgment be set aside and a new trial held.

The clerk, deputy clerk or magistrate assistant shall notify all parties of the time, place and date set for hearing on the motion.

If good cause is shown that a new trial is required in the interest of justice, the magistrate who entered the judgment or such magistrate's successor may set aside the judgment and order a new trial.

If trial was by the magistrate without a jury, in lieu of a new trial, the magistrate may vacate the judgment, if entered, take additional testimony, and direct the entry of a new judgment.

APPEAL TO CIRCUIT COURT

Except for persons represented by counsel at the time a guilty plea is entered, any person convicted of a misdemeanor in a magistrate court may appeal such conviction to the circuit court as a matter of right. Notice of appeal shall be filed in magistrate court:

1. Within 20 days after the sentencing for such conviction; or

2. Within 20 days after the magistrate has denied a motion for a new trial.

The magistrate may require that bond be posted with good security conditioned upon the appearance of the defendant as required in circuit court. Such bond may not exceed the maximum amount of any fine which could be imposed for the offense.

If no appeal is perfected within the appropriate 20-day period, the circuit court may, not later than 90 days after the date of sentencing, grant an appeal upon a showing of good cause why such appeal was not filed within the 20-day period.

An appeal of a magistrate court criminal proceeding tried before a jury shall be heard on the record in circuit court. An appeal of a criminal proceeding tried before a magistrate without a jury shall be by trial de novo in circuit court without a jury.

STAY OF EXECUTION

The timely filing or granting of an appeal automatically stays the sentence of the magistrate.

Upon request by the defendant, the execution of a criminal judgment shall be stayed to allow for the filing of a motion for a new trial or a petition for modification of sentence. Upon timely filing of such motion or petition, the execution of a criminal judgment shall be stayed until the same has been decided. In addition to granting the request of the defendant, the

magistrate shall require the defendant to post or continue a sufficient bond to assure any required further appearance.

ENFORCEMENT OF JUDGMENTS

The clerk shall maintain a register of all cases in which a period of confinement, fine, costs, forfeiture, and/or restitution have been ordered but which, upon 3 months from judgment and the expiration of any stay of execution, have not been satisfied, or, in the case of a period of confinement, is not currently being satisfied. Such register shall include the case number; name of the defendant; address of defendant, if known; nature of the offense; date of sentencing; period of confinement; fine, penalty and costs imposed; forfeiture or restitution ordered; and period of time unserved or amount of fine, penalty, costs, forfeiture and restitution remaining unsatisfied.

On a regular basis of at least once every month, the clerk shall:

1. Provide the prosecuting attorney a copy of the register of unsatisfied judgments with abstracts of judgment for entries involving any criminal violation occurring after July 9, 1993 for which court-imposed assessments have not been paid in full;

2. Provide the Division of Motor Vehicles a notice of all entries that have been added to the register since the previous notification regarding court-imposed assessments not paid in full for violations of Chapters 17, 17A, 17B, 17C and 17D of the West Virginia Code or such entries for any criminal violation occurring on or after July 9, 1993, with the exception of parking violations and other violations for which a citation may be issued to an unattended vehicle; and

3. Provide to the Division of Natural Resources a notice of all hunting or fishing violation entries that have been added to the register since the previous notification for which court-imposed assessments have not been paid in full.

FORFEITURE OF BOND

If there is a breach of condition of a bond, the magistrate shall declare a forfeiture of the bail.

The magistrate may direct that a forfeiture be set aside or reduced, upon such conditions as the magistrate may impose, if it appears that justice does not require the enforcement of the forfeiture.

When a forfeiture has not been set aside, the magistrate shall, upon motion and hearing, enter a judgment of default, and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction and venue of the magistrate and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and notice of the motion, and the hearing thereon, shall comply with West Virginia Code § 62-1C-9.

CRIMINAL CONTEMPT

A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

A criminal contempt, except, as provided in subdivision (a) of this rule, shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the prosecuting attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which the laws of this state so provide. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt, the court shall enter an order fixing the punishment.

GUIDE FOR JUVENILE PROCEEDINGS

According to § 49-4-701, notwithstanding any other provision of this article, magistrate courts have concurrent juvenile jurisdiction with the circuit court for a violation of a traffic law of West Virginia, for a violation of section nine, article six, chapter sixty, section three or section four, article nine-a, chapter sixteen, or section nineteen, article sixteen, chapter eleven of this code, or for any violation of chapter twenty of this code. Juveniles are liable for punishment for

violations of these laws in the same manner as adults except that magistrate courts have no jurisdiction to impose a sentence of incarceration for the violation of these laws.

If a juvenile commits an act which would be a crime if committed by an adult, and the juvenile is adjudicated delinquent for that act, the jurisdiction of the court which adjudged the juvenile delinquent continues until the juvenile becomes twenty-one years of age. The court has the same power over that person that it had before he or she became an adult, and has the power to sentence that person to a term of incarceration: *Provided*, That any term of incarceration may not exceed six months. This authority does not preclude the court from exercising criminal jurisdiction over that person if he or she violates the law after becoming an adult or if the proceedings have been transferred to the court's criminal jurisdiction pursuant to section seven hundred four of this article.

If a juvenile is adjudicated as a status offender because he or she is habitually absent from school without good cause, the jurisdiction of the court which adjudged the juvenile a status offender continues until either the juvenile becomes twenty-one years of age, completes high school, completes a high school equivalent or other education plan approved by the court, or the court otherwise voluntarily relinquishes jurisdiction, whichever occurs first. If the jurisdiction of the court is extended pursuant to this subdivision, the court has the same power over that person that it had before he or she became an adult. No person so adjudicated who has attained the age of nineteen may be ordered to attend school in a regular, nonalternative setting.

A juvenile is entitled to be admitted to bail or recognizance in the same manner as an adult and be afforded the protection guaranteed by Article III of the West Virginia Constitution.

A juvenile has the right to be effectively represented by counsel at all stages of proceedings under this article, including participation in multidisciplinary team meetings, until the child is no longer under the jurisdiction of the court. If the juvenile or the juvenile's parent or custodian executes an affidavit showing that the juvenile cannot afford an attorney, the court shall appoint an attorney, who shall be paid in accordance with article twenty-one, chapter twenty-nine of this code.

In all proceedings under this article, the juvenile will be afforded a meaningful opportunity to be heard. This includes the opportunity to testify and to present and cross-examine witnesses. The general public shall be excluded from all proceedings under this article except that persons whose presence is requested by the parties and other persons whom the circuit court determines have a legitimate interest in the proceedings may attend.

In cases in which a juvenile is accused of committing what would be a felony if the juvenile were an adult, an alleged victim or his or her representative may attend any related juvenile proceedings, at the discretion of the presiding judicial officer.

In any case in which the alleged victim is a juvenile, he or she may be accompanied by his or her parents or representative, at the discretion of the presiding judicial officer.

At all adjudicatory hearings held under this article, all procedural rights afforded to adults in criminal proceedings shall be afforded the juvenile unless specifically provided otherwise in this chapter.

(i) At all adjudicatory hearings held under this article, the rules of evidence applicable in criminal cases apply, including the rule against written reports based upon hearsay.

l. Except for res gestae, extrajudicial statements made by a juvenile who has not attained fourteen years of age to law-enforcement officials or while in custody are not admissible unless those statements were made in the presence of the juvenile's counsel. Except for res gestae, extrajudicial statements made by a juvenile who has not attained sixteen years of age but who is at least fourteen years of age to law-enforcement officers or while in custody, are not admissible unless made in the presence of the juvenile's counsel or made in the presence of, and with the consent of, the juvenile's parent or custodian, and the parent or custodian has been fully informed regarding the juvenile's right to a prompt detention hearing, the juvenile's right to counsel, including appointed counsel if the juvenile cannot afford counsel, and the juvenile's privilege against self-I incrimination.

(j) A transcript or recording shall be made of all transfer, adjudicatory and dispositional hearings held in circuit court. At the conclusion of each of these hearings, the circuit court shall make findings of fact and conclusions of law, both of which shall appear on the record. The court reporter shall furnish a transcript of the proceedings at no charge to any indigent juvenile who seeks review of any proceeding under this article if an affidavit is filed stating that neither the juvenile nor the juvenile's parents or custodian have the ability to pay for the transcript.