



FROM THE PRESIDENT

The Death Penalty in Tennessee: A View from the Federal Bench



Paula R. Voss

On Friday, September 26, I was privileged to be in the audience when the Honorable Gilbert Merritt, Sixth Circuit Court of Appeals, addressed the Tennessee Bar Association's Federal/State Judicial Conference in Nashville. I am sure many were expecting the traditional dinner speech—perhaps a few anecdotes about life in Cincinnati or war stories about his years on the bench. What we got instead was a thoughtful, insightful, and frank discussion about the problems with Tennessee's death penalty.

Although Judge Merritt's comments have already been made available through the Nashville Tennessean, I felt it was a much better use of this space to print it once more, especially for those in the state who may not have seen, or heard about it. So, with many thanks to Judge Merritt for granting us permission to do so, I offer his thoughts for your consideration:

Our state-federal conference here is to address common problems that cross the state-federal judicial boundary. One major problem for us all is the administration of our system of capi-

tal punishment. I am hopeful that the Tennessee Bar can help us do better on a key problem: providing good legal representation in capital cases.

Like lessons from the *Book of Job*, we still have lessons to learn from the trials and tribulations of the Scottsboro boys' case of 70 years ago. In 1930, seven black boys got into a fight with seven white boys and threw them off a freight train going from Chattanooga to Birmingham. Two white girls on the train then accused the black boys of rape, which later turned out to be false when one of the women recanted. But the seven were convicted of rape in Scottsboro and sentenced to death. In 1932, the Supreme Court of the United States set the verdict aside, establishing for the first time the constitutional right to competent counsel in capital cases.

In the first case to be retried on

remand from the Supreme Court, a scholarly, courageous, young state judge by the name of Horton of Decatur, Alabama, set the second jury's death sentence aside. For this, he was soundly defeated for re-election the next year. There were many more trials and retrials, and many years in jail, a fascinating story too long to tell tonight. After many years, the boys were finally exonerated.

That parable of incompetent counsel in capital cases and the defeat or near defeat of courageous state judges is as relevant today as it was 70 years ago. Death and the death penalty are not happy, lighthearted after-dinner topics. But the judicial administration of the death penalty is, I think, by far the most difficult, time-consuming, frustrating and critical joint problem that the Tennessee state and federal judiciary have to grapple with on a daily basis.

(Continued on page 9)

FEATURE ARTICLE

Death By Innocence: Wrongful Convictions in Capital Cases

By Karen S. Miller-Potter

Abstract. In the post-*Furman* era, an extraordinarily high number of reversals have occurred in capital cases due to the innocence or probable innocence of the convicted defendant. This research reviews 88 reversals that occurred between 1973 and 2000. It explores the reasons for those reversals including finding the culpable party, prosecutorial and police misconduct; perjury; new evidence; and ineffective assistance of counsel. The implications of this data as they relate to the operations of the criminal justice system and the credibility of that system are examined.

(Continued on page 2)

Contents

Let's Keep TACDL Growing	3
Uniform Field Sobriety Test—Part 2	4
Tennessee Case Updates	5 & 7
Legislative Committee Gearing Up	7

REMAINING 2002 CALENDER

- Nov. 15—*Sentencing*, (4 general hrs.) Memphis
- Nov. 16—*Davidson County General Sessions* (1 dual & 5 general hours)
- Dec. 3—*Ethics*, (3 dual hours) Knoxville
- Dec. 13—*Ethics and MH Evaluations*, (3 dual and 1 general hours) Nashville
- Dec. ?—December Board Meeting (TBA)
TACDL members always welcome!

Wrongful Convictions

(Continued from page 1)



Karen S. Miller-Potter

Introduction.

The always contentious debate over the use of capital punishment in the United States intensified recently due to a series of highly publicized releases of wrongfully

convicted death row inmates. The conviction of the innocent by the criminal justice system is not uncommon. Research suggests that a minimum of one percent of all felony convictions is mistaken or wrongful convictions (Huff *et. al.*, 1996). Wrongful convictions can and do occur in homicide trials and innocent people in this country can and do receive death sentences. Lack of adequate legal representation, coerced or false confessions, testimony from jailhouse snitches, uncorroborated witnesses, prosecutorial and police misconduct; juror misinterpretation and misunderstanding of the law, and judicial error and prejudice can combine to result in wrongful convictions. The population examined herein is the lucky ones in a system of capital punishment that operates with little rationality. Eventually, they were all exonerated.

Methodology. The purpose of this research is to examine the demographic and circumstantial characteristics of the capital cases in which exoneration followed a wrongful conviction in the post-Furman era and to determine if any relationships exist between variables. Specifically, the questions of race and length of time prior to exoneration, state of conviction and execution rate, and the roles of criminal justice system functionaries will be examined. Data was obtained from the Death Penalty Information Center (DPIC) (<http://www.deathpenaltyinfo.org/>), a large clearinghouse of information regarding capital punishment, and vetted using newspaper articles and court decisions. Each case was reviewed to determine the race and gender of the exonerated person, the state of conviction, the length of time spent in prison prior to release, and the reason(s) for reversal by the courts. The reasons for

reversal were coded as prosecutorial misconduct, police misconduct, perjury, DNA, real killer found, lack of evidence, new evidence, ineffective assistance of counsel, death not a homicide, and another suspect.

Two of these variables were further examined. Prosecutorial misconduct was coded as being present and then described by the type of misconduct: withholding exculpatory evidence, subornation of perjury, and use of improper evidence. Police misconduct was coded as being present and then described as: investigative errors, perjury, forced witness to lie, fabricated evidence, and coerced confession. Perjury and real killer found were also examined to determine if the state's key witness was in fact the murderer.

Between January 1, 1972 and December 31, 2000, 92 people were exonerated after being sentenced to death. For the purposes of this research, all individuals convicted prior to the Furman decision were excluded, which resulted in the review of 88 cases. This was done to assure that all the death sentences resulted from statutes that have been deemed constitutional by the United States Supreme Court. The basic data analysis strategy was descriptive, using simple frequency distributions and cross-tabular analyses. The analysis presented herein is not intended to be a generalization of homicide trials and the errors inherent in those trials. It is an examination of the total population of cases of wrongful convictions and death sentences for the specified time period.

Previous Research

Gender and Race. Females commit far fewer homicides than males and are far less likely to receive death sentences (Morgan, 2000:270). According to Streib (1990:874) this gender bias in capital sentencing finds its roots in two areas. First, "the express provisions of the law", which refers to the idea that some statutory considerations may be applied differently on the basis of gender. For example, prior criminal history is a factor in charging decisions and females are less likely to have prior violent offenses, which would decrease the likelihood of a death penalty trial. Second, "the implicit attitudes, either conscious or subconscious, of key actors involved in the criminal justice

process" (p. 874). This relates to the perceptions of prosecutors, judges and juries that impact their decision-making regarding charging and sentencing of female defendants. There is much research that supports the notion that women are treated more benevolently in homicide cases and helps to explain the relative absence of women from this population (see Streib, 1990; Allen, 1987; Gillespie and Lopez, 1986; Mann, 1984; and Steffensmeier, 1980). Historically, executions of female offenders have been rare. As of October 1, 2000 the death row population in this country was about 3,700 and only 53 were female. In the past one hundred

(Continued on page 6)

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FROM THE EXECUTIVE DIRECTOR'S DESK
Let's Keep TACDL Growing



Barbara N. Short

In the past 11 years, TACDL's membership has grown 28%. In the last year alone, the membership grew 10%! If we could grow another 10%, TACDL's membership would be almost 900 members strong by this time next year. What do you think? Can we do it? I think we can!

Later this month, you will be receiving your 2003 TACDL membership renewal. We hope you will put this invoice at the top of your "to be paid" pile and renew your TACDL membership as soon as possible. Remember that TACDL's membership runs a calendar year -- January 1 through December 31st. You don't want to miss any news or seminars by letting your membership slide.

There are seven types of TACDL memberships and you have some choice in your membership type. First, the Life Member is a one-time payment of \$5,000, and covers all your annual membership dues and CLE fees--forever. You may have small costs of materials or lunches along the way, but basically you will receive a beautiful plaque, special recognition at the next annual meeting, and you will join the elite group of 25 people who have made this kind of financial commitment to this association. Those of you who want to give extra financial support by paying an annual membership fee of \$600 may choose the Sustaining Membership. With this membership, you will receive free CLE at the annual meeting in August and will be given special recognition at that annual meeting. The best part is that after being a Sustaining member for 10 years, you will automatically become a Life member in that 11th year. This is a way of making "payments" toward a Life membership. Give this serious consideration, if you are able.

The four basic types of memberships total 73% of all TACDL members. They include Regular Members (\$125 for private attorneys or law professors), Affiliate Members (\$100 for non-attorneys or investigators), Public Defender Members (\$75 individual public defenders and staff), and Special Contract Members (public defenders dues paid in a lump sum with public money). These members pay annual membership dues and then pay seminar fees as they attend.

Then there are two beginning types of membership for people who are still in law school or who have recently passed the bar exam. We encourage all Law Students to join for \$10 and attend seminars for \$25 in hopes they will become more interested in specializing in criminal defense. There are TACDL chapters on the campuses of University of Tennessee in Knoxville and University of Memphis. We hope to get groups off the ground at the Nashville School of Law and Vanderbilt University soon. For attorneys who are beginning their private practice or who are on a tight budget and have not been members before, there is the New Member rate of \$25 per year for three years of TACDL membership.

Some people got tired of writing numerous checks to TACDL, so last year with their suggestion we introduced the Membership Plus+. You pay one time for your annual membership dues and the CLE hours required for a year. By choosing one of these packages, you will pay only the DISCOUNT RATE for seminars and you will save another \$75 by getting 3 FREE hours of CLE. These special packages are available for people who join as a Sustaining Member for \$900, a Regular Member for \$425 or a New Member for \$325.

If paying all this at one time is hard, you can still join with a Membership Plus+ by arranging for 3-month bank drafts or credit card charges. We will also work out a 3-month payment plan for a new Sustaining or Life memberships. Call the office for more information on this.

This year, we are introducing the new Member Sponsorship program. As a paid member, you can "sponsor" up to three people and get FREE CLE with special recognition in the newsletter. Encourage your friends and colleagues to join as a new Life Member, a

new Sustaining Member, or a 3-year New Member. When you report the names to the office, you will receive 3 free hours of CLE for that year for each new member with the limit of 12 free hours. Then listed along with the new member on the back page of the newsletter will be their sponsor. I encourage you to take advantage of this great offer.

In case you hadn't figured it out yet, we are hoping to increase our membership this year to 900 strong for our 30th year. In August we will celebrate the growth and changes of the Tennessee Association of Criminal Defense Lawyers in the past 3 decades. You can help by joining and by bringing in a couple of friends. We look forward to this next year as we celebrate and begin preparing for the next 30 years. ♦

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& Board Meetings**

See schedule
of upcoming
seminars on page 16

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Uniform Field Sobriety Test—Part 2



David T. Stafford, Ph.D.

In the last issue I discussed the origin, purpose, and overall use of uniform field sobriety tests (FSTs). This time I will address their proper administration and evaluation. The purpose here is to provide information that will help you in deciding whether or not they have been conducted properly. As indicated earlier, the NHTSA Guidelines state if the tests are not given as designed their evaluation may be compromised. I will discuss the one-leg stand (OLS), walk and turn (W&T), and horizontal gaze nystagmus (HGN) tests, even though HGN is not recognized in most jurisdictions in Tennessee.

Both the OLS and W&T are divided attention tasks requiring some physical performance. Prior to administering these tests, the person giving the tests should ascertain that the individual being tested does not have any problems with their feet, ankles, legs, hips, or back which would prevent them from balancing on one leg for a short period of time (30 seconds) or walking a straight line. It should also be determined whether the individual is taking any medication, prescription or otherwise, that would effect their memory or balance, e.g., cause or treat vertigo. The tests should be administered in an area which will provide for the individual's safety, and which will have a minimum of distractions such as strobe lights, traffic, etc. Ideally, the location should be where there is a flat level surface free of debris, and for the W&T there should be an easily discernable straight line about fifteen feet long.

The FSTs must be given with a precise protocol, but there is no dictated order in

which in which they are given. NHTSA generally teaches that the HGN is given first followed by the W&T and OLS. This is probably because the effectiveness of the HGN is greater than the other two. From an officer's safety standpoint, it makes more sense for them to be given OLS, W&T, HGN, since the OLS can be given with the officer at a safe distance, about six feet, from the testee, and this allows him some time to assess the individual's tendency to cooperate, or be belligerent or combative. For the OLS and W&T tests the individual's footwear should be noted and documented. If it is felt that the height of the heels might be detrimental to performance of the tests, an opportunity should be given an opportunity to remove the shoes or boots.

For the OLS the individual is instructed to stand with his feet together and his hands at his sides, and to remain in that position while the officer explains and demonstrates what is to be done.

Officer: "I want you to remain in that position while I explain and demonstrate the test. Do not start until I ask you to. Do you understand?" (Yes)

"When I tell you to begin I want you to raise either leg you choose, hold it straight out in front of you with the heel of your foot approximately six inches off the ground. Both the leg you raise and the leg on which you balance should be straight, not bent at the knee. While in this position I want you to watch the raised foot and count out loud so I can hear you. I want you to count like this—one thousand one, one thousand two, one thousand three—until I tell you to stop. If at any time you put your foot down, raise it again and continue counting from where you were. Do not start over again. While your foot is raised, keep your hands to you side."

During these instructions the officer should demonstrate the procedure. For the demonstration he does not have to keep his foot up 30 seconds, but it is preferable if he does. After the instructions: "Do you understand?" If the answer is yes, "begin, balancing on either leg you choose."

The officer should note the time the foot is off the ground, no matter what the count is. The time should be 30 seconds. If the individual is so unbalanced that it might be unsafe for him to continue, or if he puts his foot down three or more times, the test should be terminated, and he is assessed the maximum score of four points, i.e., he can't perform the test.

There are four points of evaluation:

1. He puts his foot down. One point, no matter how many times he puts it down.
2. He raises his arms more than about six inches from his sides for balance. Again one point, no matter how many times the arms are raised.
3. He hops.
4. He can't do the test at all, as indicated above.

If two or more points are assessed, the individual has failed the test.

Many departments have a FST Form that lists the points of evaluation. The officer should record the count on which each event, foot down, raised arms, hopped, occurred. And should also record any other observations, such as swayed during the instruction phase, etc. Although these are not points of evaluation they are important in describing the individual's conduct.

There are also usually places to record other observations, slurred speech, condition of clothes, general attitude, etc. If it is possible to obtain, or accumulate FST reports for a particular officer, it is sometimes possible to detect a pattern in how he handles these tests. Of course a video of the arrest and tests is usually very helpful.

Next time I will address the W&T and HGN tests, and then the pros and cons of them.

If you have questions or a specific subject you would like to have addressed in "Ask the Doctor", please contact: David T. Stafford, Ph.D., 1896 Overton Park, Memphis, TN 38112; phone: 901-726-4876 or you can e-mail him at Stffrdenslt@cs.com. ♦

Tennessee Court of Criminal Appeals Update



Kevin Batts

AGGRAVATING CIRCUMSTANCES State v. James Mellon - E1999-01505-CCA-R3-DD (Knox County) As long as the fact of a prior violent felony conviction has been adjudicated prior to the sentencing hearing in the capital case in which it is offered, such conviction may be used to establish the (i)(2) aggravator.

SEARCH WARRANT State v. Allen Blye - E2001-01227-CCA-R3-CD (Sullivan County) Aggravated burglary and aggravated rape convictions affirmed where State's action in obtaining the search warrant from a judge in the county in which the Defendant was imprisoned, rather than the trial judge before whom the prosecution was proceeding, did not taint the search so as to render the blood tests inadmissible.

LESSER-INCLUDED OFFENSES State v. Terry - W2001-03027-CCA-R3-CD (Shelby County) Aggravated criminal trespass, attempted aggravated criminal trespass, and criminal trespass are not lesser-included offenses of attempted aggravated burglary.

MVHO State v. Henley - W2001-02962-CCA-R3-CD (Shelby County) In the context of MVHO proceedings, a predicate conviction premised upon out-of-court payment of a fine for a traffic offense is indistinguishable from one premised upon an adjudication of guilt by plea or trial.

PRIOR INCONSISTENT STATEMENT State v. Coble - W2001-00039-CCA-R3-CD (Obion County) Where there is no evidence that the prosecution called a witness knowing that he would repudiate his pre-trial statement to police, it was proper to permit the State to impeach its own witness.

LESSER-INCLUDED OFFENSES State v. Majors - M2001-02143-CCA-R3-CD

(Montgomery County) Conviction for attempted aggravated robbery on the theory of criminal responsibility is reversed where the trial court should have instructed the jury as to facilitation.

LESSER-INCLUDED OFFENSES State v. Leonard - M2001-00368-CCA-R3-CD (Montgomery County) Conviction for especially aggravated kidnapping accomplished by the use of a deadly weapon was remanded for a new trial because the trial court failed to instruct on the lesser-included offense of aggravated kidnapping.

PLAIN ERROR State v. Amonette - M2001-02952-CCA-R3-CD (Williamson County) Trial court erred in revoking 11-29 sentence where the time for probation on that sentence had expired before the probation revocation warrant was filed.

SENTENCING State v. Bailey - E2001-02443-CCA-R3-CD (Cocke County) Trial court's finding that the defendant was "a dangerously mentally abnormal person whose behavior indicated little regard for human life" was not supported by findings from a competent psychiatrist per T.C.A. 40-35-115(b)(3).

SENTENCING State v. Collins - E2001-01301-CCA-R3-CD (Knox County) Trial court's order releasing defendant from probation is affirmed. State argued that the trial court did not have jurisdiction to modify the sentence more than 120 days after it became final. However, CCA held that the trial court maintained authority to modify the sentence under T.C.A. Sec. 40-35-212. The defendant did not serve his time in the Department of Correction. The trial court maintained jurisdiction over the defendant during the term of the sentence.

SENTENCING State v. Craig - E2001-01528-CCA-R3-CD (Bradley County) Trial judge erred in ordering consecutive sentencing based upon a finding that the defendant was a "dangerous offender", without finding particular facts showing consecutive sentencing is reasonably related to the severity of the offenses and that it serves to protect society from aggravated criminal conduct.

DIVERSION Alder v. State - E2002-00287-CCA-R3-CD (Knox County) Failure of a defendant to file for discharge from diversion does not allow the court to continue

jurisdiction ad infinitum. The trial court does not continue jurisdiction until an order is entered terminating the diversion, dismissal is mandatory.

CROSS-EXAMINATION State v. Timothy Sexton - E2000-01779-CCA-R3-CD (Hamilton County) Second degree murder conviction reversed. Juvenile court convictions utilized by the State to cross-examine the Defendant's character witnesses were not relevant to the character trait about which those witnesses testified.

SENTENCING State v. Shawn Brooks - M2001-02358-CCA-R3-CD (Wilson County) Trial court's order revoking Appellant's two-year suspended sentence for sale of counterfeit controlled substance is reversed, vacated. The revocation proceeding violated the minimal due process requirements of *Gagnon v. Scarpelli*. Appellant was not placed on notice by the warrant nor does the record reflect that notice was received in any form prior to the hearing that his two-year probation was being revoked.

SENTENCING/ENHANCEMENT State v. Michael Brogan - E2001-00712-CCA-R3-CD (Claiborne County) Trial court misapplied multiple victim enhancement factor where defendant received separate convictions for each victim; misapplied exceptional cruelty factor where the intentional shooting of a pregnant woman would not, alone, support the factor; misapplied particularly great injuries factor because great bodily injury is inherent in the crime of second degree murder.

INSANITY State v. Claude W. Cheeks - E2001-00198-CCA-R3-CD (Hamilton County) Convictions for especially aggravated robbery and aggravated assault reversed. Record does not reveal sufficient lay testimony, nor expert testimony, concerning the defendant's mental state at or near the time of the offenses that would justify rejection of the insanity defense; for more than two years after the offenses, the experts consistently and unanimously concluded that an insanity defense could be supported.

EVIDENCE State v. Randy Long - W2001-01467-CCA-R3-CD (Madison County) Conviction for introduction of contraband into a penal institution affirmed. Defendant

(Continued on page 10)

Wrongful Convictions

(Continued from page 2)

years, only 44 women have been executed, including six in the post-*Furman* era (NAACP, 2000). In the history of the United States, women have accounted for about 2.7 percent of all executions (Streib, 1998).

Race is an inescapable issue inherent in the death penalty debate and one that has received much scholarly attention. The research contends that patterns of death sentences and executions indicate unequivocally that the lives of whites are valued more than the life of blacks (Baldus *et al.*, 1990; Paternoster, 1991; Radelet, 1981). In all jurisdictions examined through scientific research, prosecutors are more likely to seek the death penalty when the victim is white than when the victim is black. When a white victim dies at the hands of a minority perpetrator, the prospects of a capital prosecution are high (Baldus *et al.*, 1990). Post-*Furman* research shows that African-American charged with the murder of a white victim have about a 25 percent probability of receiving the death penalty, however, for whites who kill African-Americans the probability is negligible (Bowers and Pierce, 1980; Baldus, *et al.*, 1990).

For example, Raymond Paternoster (1984) reviewed 300 capital murder trials in South Carolina. He found that prosecutors were two and one-half times more likely to seek death in cases involving white victims than those involving black victims. While the state sought the death penalty in 49.5 percent of cases involving black offenders and white victims, it sought the death penalty in only 11.3 percent of cases involving black offenders and black victims. According to Paternoster (1984), prosecutors sought death penalties against defendants charged with killing white victims in cases involving fewer aggravating factors. Specifically, in cases with white victims death was sought with only one aggravating felony while in cases involving black victims several aggravating felonies were necessary. This indicates that homicides against blacks had to be far more vicious and brutal in order to justify the death penalty. Paternoster concluded, "victim-based racial discrimination is evident in prosecutors' decisions to seek the death penalty" (Paternoster, 1984:471).

Other studies have replicated these findings. In a Georgia study (Baldus, Wentworth, and Pulaski, 1990) that examined 594 homicide cases prosecutors sought the death penalty in 45 percent of cases with white victims, but only 15 percent of the cases involving black victims. The study further determined that death was sought in 58 percent of the cases with black defendants and white victims, but only 15 percent of the cases with black defendants and black victims. The bias also extended to juries, with death verdicts in 57 percent of cases involving white victims but only 42 percent of the cases with black victims. The researchers concluded that race had a "potent influence" on both the likelihood that the state would seek the death penalty and the likelihood that a jury would return a death verdict (Baldus, *et al.* 1990:185).

Misconduct by System Functionaries.

Prosecutorial misconduct or unethical behavior is often guided by a desire to obtain conviction. The fact that it is rarely punished allows it to continue in courtrooms across the country (Gershman, 1986). Stanley Fisher (1989) characterizes prosecutors who are likely to engage in misconduct as working in environments where the highest charges are always sought, criminal law is broadly interpreted, and the focus is on conviction and the highest possible penalty. Prosecutorial misconduct is a common reason for reversal and most frequently involves prosecutors failing to comply with rules of discovery and failing to provide exculpatory evidence (Liebman, *et al.* 2000). Prosecutors who engage in misconduct have absolute immunity from being sued, even if the misconduct is intentional (Albanese, 2001:258). The Supreme Court in *Imbler v. Pachtman* ruled that prosecutors risked "harassment by unfounded litigation" which would make it difficult for them to carry out their duties. While prosecutors may have protection regarding their actions inside the courtroom, the behavior of many during trial is inexcusable.

Historically, the criminal justice system discriminates by a factor of over 4-1 against defendants who must accept the services of public defenders and court-appointed counsel (Blumberg, 1967). In a more recent study of over 28,000 felony

cases in Tennessee, Virginia and Kentucky it was found that public defenders successfully compelled courts to drop charges or acquit defendants in 11.3 percent of cases. Private attorneys did so in 56 percent of their cases (Champion, 1989). Inadequate funds and resources to gather evidence, interview witnesses, and pursue scientific evidence handicap defendants in these cases. Similar problems plague the defendant all the way through the appeals process (Coyle, *et al.* 1990; Smith, 1995).

Findings

General Characteristics of Defendants.

Each case was reviewed to determine the gender, race, state of conviction, and reason(s) for reversal. While gender was not significant to the review of this data, race was very significant, both in terms of overrepresentation of minorities and longer stays on death row. The exonerations examined for this research represent 22 states that have active death penalty systems, each having carried out an execution in the post-*Furman* era. The reasons for reversal were diverse, with perjury, police and prosecutorial misconduct, ineffective assistance of counsel all being represented. Perjury was the most common reason cited by review courts and "death not a homicide" and "another suspect" was the most infrequent.

Gender

As previously discussed, women are far less likely than men to receive death sentences. It is not surprising then that of the population of innocents freed from death row, only one (1.1%) was female. Therefore, other than the overrepresentation of males in the population, gender was not significant to the review of this data.

Table 1: Race of Those Released from Death Row for Reasons of Innocence

Race	Frequency	Percent
African-American	41	44.3%
Caucasian	33	42.0%
Hispanic	10	11.4%
Native American	1	1.1%
Other	1	1.1%
Total	88	100.0%

(Continued on page 8)

Tennessee Supreme Court Update



W. Mark Ward

LESSER INCLUDED OFFENSES; CHILD ABUSE:

State v. James Frank Elkins, Jr.,
No. M2000-01680-SC-R11-CD
(Tenn. Aug. 28, 2002)
T.C.A. ' 39-15-401(d) specifically provides that child abuse is a lesser included offense of any kind of homicide, assault or sexual offense if the victim is a child; trial court erred in not instructing jury on child abuse in prosecution for rape of a child; evidence supported charge; and error was not harmless beyond a reasonable doubt.

INSANITY; STANDARD OF REVIEW:

State v. Christopher M. Flake,
No. W2000-01131-SC-R11-CD
(Tenn. Aug. 29, 2002)
Appellate court should reverse jury verdict rejecting the insanity defense only if, considering the evidence in the light most favorable to the prosecution, no reasonable trier of fact could have failed to find that the defendant's insanity at the time of the offense was established by clear and convincing evidence. Court splits 3 to 2 on application of the standard.

DEATH PENALTY; HEARSAY IN SENTENCING:

State v. Richard Hale Austin,
No. W1999-00281-SC-DDT-DD
(Tenn. Sept. 16, 2002)
Exclusion of mitigating evidence in sentencing phase of a capital case on the basis that it was hearsay was error; but harmless.

Mark Ward is a Supervisor of the Appellate Division in Shelby County Public Defenders Office in Memphis. You can call him at 901-545-5800, or through e-mail at ward-m@co.shelby.tn.us. ♦



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Legislative Committee Gearing Up for New Session



Stephen G. Young

The Tennessee General Assembly will convene in early January 2003 for its next two-year session. Bills will begin flooding the hopper that will affect every criminal defense attorney's practice. The TACDL Legislative Committee will begin meeting in January 2003 to sort through all the proposed legislation to flag legislation of concern as well as favorable legislation to support.

In conjunction with the Tennessee District Public Defenders Conference, the Legislative Committee will work on the passage of legislation requiring the electronic recording of all custodial interrogations of criminal defendants. **Jeff Henry** and **Ken Irvine** are participating as designees on behalf of the Tennessee District Public Defenders Conference and TACDL, respectively, in a study commission appointed by the House and Senate jointly with reporting of findings going to the House and Senate Judiciary Committees.

Jeff and Ken just participated in a TACDL telephone conference regarding the national effort to pass legislation at the state level regarding the electronic reporting of custodial interrogations. There have been a number of high publicity cases in which defendants have confessed to crimes that they did not commit. Recordings would protect the defendants, the victims and police. There is a great deal of opposition from law enforcement based on presumed concerns of costs, storage of tapes, and intrusiveness.

This issue is just one issue that TACDL will be supporting. If any TACDL member has an interest or concern that needs legislative attention, please feel free to contact me, Stephen Young, Legislative Chairperson, at 615-726-0900 or Stephen.g.young@comcast.net ♦

Wrongful Convictions

(Continued from page 6)

Race. In this study race was a very compelling issue (see Table 1). Of the 88 cases, 51 (58%) were minorities, including 39 (44.3%) African-Americans, 37 (42%) Caucasians, 10 Hispanics (11.4%), one Native American (1.1%) and one other (1.1%). The presence of race as a distinguishing characteristic in cases of innocence is not surprising. Research consistently finds that race is a significant determinant in capital sentencing with prosecutors being more likely to seek death against a minority and juries being more likely to oblige (see Sorensen and Wallace, 1995a and b; Baldus *et al.*, 1990; Keil and Vito, 1990; 1995 Paternoster, 1991; Vito and Keil, 1988; Radelet, 1981; Bowers and Pierce, 1980). It appears from this data that the actual guilt of a defendant is not an issue.

The disproportionality of minorities in this population was not the extent of this issue. In examining the number of years between conviction and release, the mean for the entire population was 7.5 years (see Table 2). The mean for Caucasians was 6.24. The mean for minorities was 8.41, including 8.33 for African-Americans and 8.50 for Hispanics. Minorities spent an average of two years longer awaiting releases than non-minorities. Not only is the state more willing to send minorities to death row, it is also more reluctant to release them in the face of egregious error.

State of Conviction. Thirty-eight states have capital punishment statutes. Twenty-two have exonerated and released a person from death row (see Table 3). The states with the highest numbers of releases since 1972 are Florida, Illinois, Oklahoma, Texas, Louisiana, and Georgia. Between 1972 and 2000, Florida has executed 51 men and women. It has exonerated and released 15 from death row, 11 were minorities. Illinois has executed 12 and released 13, 10 were minorities. Oklahoma has executed 38 and released seven three were minorities. Texas has executed 242 and released seven, four were minorities. Louisiana has executed 26 and released six, four were minorities. Georgia has executed 23 and released six, four were minorities. This data indicates that states with the most active capital punishment systems are also the states

Table 2: Years between Conviction and Release, by Race

Years Between Conviction and Release	All Cases (N=88)	Caucasians Only (N=37)	African-Americans Only (N=39)	Hispanics Only (N=10)	Native Americans Only (N=1)	Others Only (N=1)
1	3 (3.4%)	1 (2.7%)	1 (2.6%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
2	8 (9.1%)	6 (16.2%)	1 (2.6%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
3	12 (13.6%)	6 (16.2%)	6 (15.4%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
4	3 (3.4%)	2 (5.4%)	0 (0.0%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
5	8 (9.1%)	3 (8.1%)	5 (12.8%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
6	8 (9.1%)	4 (10.8%)	3 (7.7%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
7	4 (4.5%)	2 (5.4%)	2 (5.1%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
8	8 (9.1%)	4 (10.8%)	3 (7.7%)	0 (0.0%)	0 (0.0%)	1 (100.0%)
9	4 (4.5%)	1 (2.7%)	2 (5.1%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
10	8 (9.1%)	2 (5.4%)	4 (10.3%)	2 (20.0%)	0 (0.0%)	0 (0.0%)
11	4 (4.5%)	1 (2.7%)	1 (5.1%)	0 (0.0%)	1 (100.0%)	0 (0.0%)
12	2 (2.3%)	1 (2.7%)	1 (2.6%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
13	6 (6.8%)	3 (8.1%)	3 (7.7%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
14	4 (4.5%)	0 (0.0%)	2 (5.1%)	2 (20.0%)	0 (0.0%)	0 (0.0%)
15	2 (2.3%)	0 (0.0%)	1 (2.6%)	1 (10.0%)	0 (0.0%)	0 (0.0%)
16	3 (3.4%)	3 (3.4%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
17	1 (1.1%)	0 (0.0%)	1 (2.6%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
Total	88 (100.0%)	37 (100.0%)	39 (100.0%)	10 (100.0%)	1 (100.0%)	1 (100.0%)
Mean Years in Prison	7.50	6.24	8.33	8.50	11.00	8.00

Table 3: Number of Innocent Inmates Released from Death Row by State

State	Frequency	Percent
Florida	16	18.2%
Illinois	13	14.8%
Oklahoma	7	8.0%
Texas	7	8.0%
Georgia	6	6.8%
Louisiana	6	6.8%
Arizona	4	4.5%
New Mexico	4	4.5%
North Carolina	3	3.4%
Pennsylvania	3	3.4%
South Carolina	3	3.4%
Alabama	2	2.3%
California	2	2.3%
Indiana	2	2.3%
Missouri	2	2.3%
Ohio	2	2.3%
Arkansas	1	1.1%
Maryland	1	1.1%
Mississippi	1	1.1%
Nevada	1	1.1%
Virginia	1	1.1%
Washington	1	1.1%
Total	88	100.0%

with the highest numbers of innocents released from death row. These numbers are indicative of the nature of the capital punishment processes in those states.

They appear to be designed to convict defendants and return death verdicts with little regard for due process or guilt.

Reasons for Reversal. Death penalty cases, like other felony prosecutions in the United States, are fraught with errors. The recent study by Liebman, Fagan and West (2000:i) reviewed all 4,578 state capital cases between 1973 and 1995 and found that "The overall rate of prejudicial error in the American capital punishment system was 68 percent." They report that courts found reversible error in "nearly seven of every 10" capital cases (Liebman, Fagan and West, 2000:i). Numerous legal errors can prompt review courts to reverse convictions and sentences, unfortunately, innocence is not one of them. In *Herrera v Collins* (1998) the Supreme Court ruled that a lawfully convicted defendant could not bring his innocence claim to federal habeas court unless the claim was also accompanied by an independent constitutional violation. The cases reviewed herein were reversed on constitutional grounds that had little to do with innocence. The errors cited by review courts were as diverse as the facts of the cases themselves, and over half of the cases

(Continued on page 11)

A View From the Bench

(Continued from page 1)

There are other problems of joint judicial administration, but they pale by comparison. Death penalty cases take up an enormous amount of time and energy. Capital cases usually present 20 or 30 issues—at least five times more than the regular case. They are the most difficult cases we face—long records and complex legal principles that are often in conflict and difficult to apply.

Before any death sentence is final and can be carried out, it is normally reviewed by three levels of state courts two times each and three levels of federal courts at least once, sometimes more than once. So the judgment is usually reviewed at least nine times and often 12 or 13 times. No other type of case even comes close to this type of extraordinary scrutiny. At the present time, according to the best extrapolation I can make from figures provided from several sources, there are presently about 105 Tennessee death penalty cases pending. The U.S. Supreme Court has granted cert. in one. Six are pending in the Sixth Circuit. Twenty-six are pending in the federal district courts. Another 26 are pending on direct appeal in the state appellate courts. Twenty-seven are pending in the state courts on *habeas corpus* for post-conviction relief. The remaining ones are pending in the trial courts for resentencing or for some other purpose. In addition, there are many more on the way. There are about 65 death penalty cases awaiting trial in the Tennessee criminal courts.

In the 6th Circuit, Michigan does not have

the death penalty. It abolished the death penalty more than 100 years ago, and there is no movement to restore it. Kentucky has the death penalty and has about 75 cases pending in the various state and federal courts. Ohio has the death penalty and has about 250 cases pending for review in the state and federal courts.

When you look closely at the cases, it becomes obvious why close scrutiny over a sustained period of time is needed. Two years ago the Tennessee attorney general looked at all of the 156 death sentences imposed over the last 25 years under Tennessee's current death penalty law. Almost half have now been reversed on appeal. Fifty-six have been reversed because of error in the sentencing phase of the case, and 14 have been reversed because of errors in the guilt phase of the case. These figures were corroborated by John Shiffman in a good piece of investigative journalism in *The Tennessean* last year.

Many of the remaining death sentences have not been fully reviewed. Of the 12 cases completely reviewed on habeas in the 6th Circuit in the last 15 years, the writ has issued in eight, reversing the death sentence. Of the five cases I have had occasion to review from Tennessee, there was just one where we upheld the sentence. I have serious doubts in two of them about whether the defendant even committed the underlying murder or was simply the victim of a mistake. In one of these cases subsequent DNA evidence showed that he did not commit the rape that was supposed to be the basis for his murder of the victim. In two of the remaining three cases

there were other serious constitutional problems with the jury instructions.

In most areas of law and ethics, there is, as Aristotle first put it, a "golden mean," a balance between extremes that best serves a community or a nation. In most areas of constitutional civil liberties and the rule of law, the courts over the years have evolved through trial and error a fairly good balance between extremes. The current state of the constitutional law on the liberties of speech, assembly, religion and so on down the list of civil liberties in the Bill of Rights represents an acceptable balance. Even in highly controversial areas—for example, on the question of abortion, or the meaning of the establishment clause or affirmative action—a more or less acceptable compromise or balance has been worked out. But I do not think that is true of the capital punishment problems that arise under the Eighth Amendment. Capital punishment is based on our biological instinct of an eye for an eye and a tooth for a tooth—the emotion that seeks revenge, reciprocity for evil behavior. The legal system is supposed to turn our revenge instincts and emotions into reasoned, deliberative judgments about state-sanctioned homicide. This is hard to do. It is hard to turn our deep-seated instinct for revenge into a non-arbitrary, reasoned set of legal principles that limit the occasions for executions. No golden mean, no balance that is successful, has yet emerged.

The capital punishment system had broken down in 1972 when the Supreme Court

(Continued on page 14)

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CCA Update

(Continued from page 5)

knowingly and with unlawful intent took cocaine into the jail, even though he was being taken into the jail involuntarily.

PROBATION State v. George Lucas - W2001-02600-CCA-R3-CD (Shelby County) Seven year sentence for carjacking reversed. Trial judge erred in holding that individuals convicted of carjacking were statutorily ineligible for probation and erred in determining that the use of a weapon in a carjacking was, standing alone, sufficient reason to deny the defendant probation.

COMMUNITY CORRECTIONS State v. Debra Thomas - W2001-02039-CCA-R3-CD (Henry County) Trial court erred in failing to give defendant credit for time served in confinement and in the community corrections program under her original sentence in its resentencing upon revocation of community corrections sentence.

SEARCH WARRANT State v. Jack Norton - E2001-01903-CCA-R3-CD (Washington County) There was no requirement for police officers to "knock and announce" prior to entering Defendant's tavern where the tavern was open to the public at the time the search warrant was executed, and officers

could have walked lawfully through the door into the open area of the tavern without a search warrant.

CRIMINAL SIMULATION State v. Mark Walker - M2001-00341-CCA-R3-CD (Davidson County) Conviction for criminal simulation reversed and dismissed. False identifications possessed by the defendant did not have the type of value contemplated by the statute.

EVIDENCE State v. Wade Tucker - M2001-02298-CCA-R3-CD (Franklin County) Evidence was insufficient to sustain an aggravated burglary conviction. Victim-wife's property rights in the house had not yet been adjudicated by the divorce court, and the defendant-husband was not under any restraining or protective order commanding him to stay away from the house.

LESSER-INCLUDED OFFENSES State v. Walter Wilson - W2001-01463-CCA-R3-CD (Shelby County) Convictions for second-degree murder and felony murder reversed, remanded. Trial court failed to instruct on lesser-included offenses. Evidence at trial justified instructions for the lesser-included offenses of reckless homicide and criminally negligent homicide.

LESSER-INCLUDED OFFENSES State v. Russell Maze - M2000-02249-CCA-R3-CD (Davidson County) Reverses conviction for felony aggravated child abuse. Trial court erred by not instructing the jury on knowing and reckless aggravated assault, knowing and reckless assault, and child abuse. The defendant testified that his admitted shaking of the victim was not in a manner that would cause the injuries actually sustained by the victim. This is essentially saying that his conduct was not abusive or -in such a manner as to inflict injury.- A jury could have found the defendant-s conduct to be merely reckless.

SEVERANCE State vs. Steven Brooks - E2001-00920-CCA-R3-CD Trial court erred by not severing rape offenses involving separate victims. Judgments reversed with an order to sever the offenses by victim, and remanded for new trials.

Kevin Batts is the Director of Information Systems for the Public Defender's Conference in Nashville. He writes a similar review for the Conference on a monthly basis. We thank him for sharing this update with all TACDL members. You can call Kevin at 615-741-5562 or e-mail him at kbatts1310@aol.com. ♦

NEWS & ANNOUNCEMENTS

2002-03 NACDL Board of Directors

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NACDL Committee Appointments

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Immediate Past-Chair
Judicial Relations - **Lorna S. McClusky** (Memphis), Vice-Chair
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New Member of the Judicial Selection Commission

Jack P. Green, Assistant Public Defender in Shelby County was appointed in August as TACDL's West Tennessee representative on the Judicial Selection Commission to fill the vacancy left by Robert M. Friedman after his death on June 21, 2002.

NBTA Exam Schedule for 2003

The National Board of Trial Advocacy will give the exam to certify attorneys as specialists at the following proctor sites: Memphis, Chattanooga and Knoxville on April 12th and on October 11th 2003. For more information, go to the website: www.nbtanet.org or call Gwen Coutu at 508-384-6565 in Massachusetts.

Wrongful Convictions

(Continued from page 8)

Table 4: Number of Reasons for Reversal

Number of Reasons	Frequency	Percent
1	41	46.6%
2	33	37.5%
3	11	12.5%
4	1	1.1%
5	2	2.3%
Total	88	100.0%

(47, or 53.4%) involved more than one serious and egregious error (see Table 4).

Prosecutorial Misconduct. In this review, 27 (34%) cases involved 30 instances of prosecutorial misconduct (see Table 5). Fourteen (15.9%) cases involved withholding exculpatory evidence, 12 (13.6%) involved the subornation of perjury, and four (4.5%) involved the use of improper evidence (see Table 6). One of the most egregious cases of prosecutorial misconduct was directed at Shareef Cousin, a 16 year old African-American who was charged with murder and armed robbery of Michael Gerardi. Connie Babin, the victim's friend was the only eyewitness and the state's case hinged on her testimony. She testified that she was "absolutely certain" of Cousin's culpability. Cousin maintained that he had been playing basketball on the night of the murder and had several witnesses who could testify to this. Unfortunately, they did not appear in court and Shareef was convicted and given a death sentence.

After the trial, the defense team received videotape from an anonymous source. It contained Connie Babin's initial statement to the police in which she told investigators that she could not identify the assailant because it was dark in the alley and she had not been wearing her corrective lenses. Clearly, the prosecution had withheld exculpatory evidence; however, it was not the only form of misconduct in this case. Shareef's basketball teammates did appear at trial to testify regarding his alibi, but unbeknownst to the defense, were taken to the prosecutor's office to wait. The prosecutor claimed that he wanted the boys to be comfortable and it was too hot where they waited to testify. During subsequent questioning the Assistant District Attorney admitted that the trial took

place in January, a cold time of year in New Orleans (Amnesty International, 1999b).

The presence of so many cases of prosecutors deliberately withholding exculpatory evidence and deliberately acquiescing to or encouraging perjury in capital cases is a stunning indictment of capital prosecutions in American.

Table 5: Reasons for Reversal

Reason for Reversal	Frequency	Percent*
Perjury	32	36.4%
Prosecutorial Misconduct	27	30.7%
Lack of Evidence	20	22.7%
Real Killer Found	16	18.2%
New Evidence	15	17.0%
Police Misconduct	14	15.9%
Ineffective Assistance of Counsel	11	12.5%
DNA	10	11.4%
Death Not a Homicide	3	3.4%
Another suspect	1	1.1%
Total	88	100%

* Totals will not add up to 100% because more than one reason occurred in 47 (53.4%) of the cases.

Whether a prosecutor engages in such malpractice because of his or her zeal for conviction, for political purposes, or simply out of malice, is of no issue. The numbers speak clearly of the lengths to which some prosecutors will go to gain conviction and the highest possible sentence.

Police Misconduct. According to Barker

and Carter (1991) abuse of authority involves any action by a police officer "that tends to injure, insult, trespass upon human dignity...and/or violate an inherent legal right" of a citizen. In 14 cases (15.9%) police misuse of authority was cited by courts as a reason for reversal. Investigative errors were present in five (5.7%) cases, police perjury in two (2.3%), compelling a witness to lie in four (4.5%), fabricating evidence in one (1.1%), and coercing a confession in two (2.3%) (see Table 7). Nine (10.2%) times in the 88 cases, police officers were responsible for the introduction of perjurious or false evidence that resulted in the conviction of an innocent person. Such an assault on state veracity seriously questions the trustworthiness and reliability of the system of criminal justice.

Perjury. In their study of wrongful convictions in felony cases, Huff, Rattner and Sagarin (1996) found perjury by witnesses and criminal justice officials in 13.6 percent of cases. It was the leading type of error contributing to wrongful convictions. Similarly, in this study, perjury was the most common reason for reversal. It occurred 32 times (36.4%) and was known by the prosecutor 12 (13.6%) times. In five cases (5.7%) the state's main witness was in fact the one who had committed the homicide. While it is highly likely that perjury was present in other cases too, it was not one of the reasons for reversal as cited by the courts. Police officers directly committing perjury were present in only two (2.3%) cases. But, it is also likely that this occurred more fre-

Table 6: Dimensions of Prosecutorial Misconduct

Type of Prosecutorial Misconduct	Frequency	Percent of all Cases of Prosecutorial Misconduct	Percent of All Cases
Withholding Exculpatory Evidence	14	51.9%	15.9%
Subornation of Perjury	12	44.4%	13.6%
Use of Improper Evidence	4	14.8%	4.5%

Table 7: Dimensions of Police Misconduct

Type of Police Misconduct	Frequency	Percent of all Cases of Police Misconduct	Percent of all Cases
Police Errors in Investigation	5	35.7%	5.7%
Police Forced Witness to Lie	4	28.6%	4.5%
Police Perjury	2	14.3%	2.3%
Police Coerced Confession	2	14.3%	2.3%
Police Fabricated Evidence	1	7.1%	1.1%

(Continued on page 12)

Wrongful Convictions

(Continued from page 7)

quently. According to Barker and Carter (1994) and Kappeler, Sluder, and Alpert (1998) police lying and perjury are common, accepted behaviors.

DNA Evidence. The use of DNA evidence to free innocent inmates has received much media attention in recent years. While compelling and offering hope to innocent inmates, it is not an option for everyone because it is often absent from homicide scenes. When it is present, mishandling evidence during the collection process often makes testing impossible and in some cases the physical evidence has been lost or destroyed. DNA evidence has played a small role in releasing innocent people from death row. In this population, exoneration by DNA evidence was present in only 10 (11.4%) cases (see Table 5). When DNA evidence is present it is not a magic bullet that instantaneously leads to exoneration, prosecutors often argue against testing and judges commonly comply. One primary reason for the failure to test is the expense involved and defendants rarely have access to the necessary funds. Functionaries of the state are rarely anxious to allow the tests, as evidenced by the fact that of the 10 people exonerated through DNA evidence, nine (90%) were on death row for more than seven years.

The case of Frank Lee Smith of Florida is indicative of the problems faced by death row and other inmates seeking exoneration through DNA evidence. Smith, an African-American, was convicted and sentenced to death for the rape and murder of an eight-year-old Broward County girl in 1985. DNA testing was sought by his defense attorneys and family but the state resisted. Smith avoided a lethal injection for 14 years; however, he did die of cancer on death row before DNA testing exonerated him. The prosecutor who argued against the tests was quoted later as saying, "This doesn't shake my belief in the death penalty. We're in a system where guilty people go free, and sometimes innocent people are incarcerated" (O'Boye, S. 2000).

Real Killer Found/Another Suspect. In 16 (18.2%) cases the actual offender was revealed and in one case (1.1%) another suspect was established (see Table 5).

Confessions or evidence of the real offender eventually worked to free these men. One of the most astonishing was the case of Rolondo Cruz, who spent 10 years on death row in Illinois for the abduction, rape and murder of eight year old Jeanine Nicarico. Cruz and Alejandro Hernandez (who is also included in this population) were framed by investigators who fabricated evidence and falsified a confession. Several years after Cruz and Hernandez were convicted, another man was arrested for a similar crime in a neighboring county. He confessed to the murder of Jeanine Nicarico and DNA evidence tied him to her death. In spite of compelling evidence of Cruz's innocence, prosecutors continued to fight his release. The man who likely murdered Jeanine Nicarico still has not been charged with her murder. Several police officers and a prosecutor were indicted and tried for obstruction of justice, but were acquitted (Webb, 2000).

Lack of Evidence. In 20 (22.7 %) cases lack of evidence was the primary reason for release (see Table 5). In these cases, the state had prosecuted and convicted innocent men on so little evidence that the reviewing courts were compelled to dismiss the charges against the defendants. This issue speaks to the predisposition of jurors to convict, especially in capital cases. Studies consistently find that the jury process is tainted in such a way that seriously disadvantages the defendant and creates a presumptive guilty verdict. In capital cases, studies indicate that death qualifying a jury leads to a presumptive death decision in spite of evidence, instructions and law (Williams and McShane, 1990; Eisenberg and Wells, 1993; Haney, *et al.* 1994; Bowers, 1995; and Bowers, 1996).

New Evidence. New evidence indicating that the wrong person had been charged and convicted was a factor in 15 (17%) cases (see Table 5). It was not possible to determine the nature of the new evidence from the data set. "New" evidence is a misnomer, the courts should refer to it as "rediscovered" evidence as it is often related to ineffective assistance of counsel and prosecutorial misconduct. New evidence is sometimes found in the file of a prosecutor who failed to comply with discovery. It is sometimes found in a file

belonging to a defense attorney who failed to introduce or investigate it and is often found in the trial transcript. While new evidence is a hope of innocent men and women on death row, time is rarely on their side. In the 15 cases reversed due to new evidence, six (40%) spent more than seven years on death row. As compelling as new evidence may be it is difficult for defense attorneys to convince courts to review the case. The period of time a defendant has to supply new evidence after a conviction varies by jurisdiction, but the time period is short everywhere. Thirty-three states have statutes of limitation of six months or less for introducing new evidence (Gottlieb, 2000).

Ineffective Assistance of Counsel.

Ineffective or inadequate assistance of counsel is endemic in death penalty cases. In this study ineffective assistance of counsel resulted in reversal 11 times (12.5%) (see Table 5). It is unlikely that defense attorney errors are intentional, but more likely the result of socioeconomic bias inherent in the system. Virtually all defendants in capital cases are poor and unable to afford private counsel. They are provided public defenders or court-appointed counsel who are often inexperienced and not well trained in capital litigation. In other words, defendants in the most complex of criminal cases with the highest stakes imaginable are usually represented by counsel least equipped to handle these complexities. While public defenders and court appointed attorneys are not necessarily bad lawyers, they are certainly underpaid and overworked. The very low fees states offer in capital cases and the lack of state-supplied funds for investigation and expert testimony, inhibit the availability of poor defendants to be represented by more qualified attorneys and to gather the evidence necessary to gain acquittal.

In some cases the inadequacy of the attorney is egregious. The case of Ronald Williamson, sentenced to death in Oklahoma for the rape and murder of Deborah Carter was reversed in part due to ineffective assistance of counsel (ACLU, 2000). Mr. Williamson's defense attorney failed to investigate and present to the jury the fact that another man had confessed to the crime. The prosecutors dismissed

(Continued on page 13)

Wrongful Convictions

(Continued from page 12)

charges when DNA cleared Mr. Williamson. In another case, Benjamin Harris was represented in the trial of his life by an attorney who interviewed only three of 32 witnesses and spent a mere two hours consulting with Harris before trial. Harris' co-defendant was acquitted, he was sent to death row (DPIC, 2000; ACLU, 2000).

Death Not a Homicide. Ironically enough, in three (3.4%) cases the murder victim was not murdered (see Table 5.)

This incredible mistake was a result of errors made by forensic investigators and medical examiners. The lone female in this population was a victim of this incredible error. She had been convicted of killing her nine-month-old baby. When Ms. Butler found her child not breathing and unresponsive she performed CPR and then drove him to the hospital. Police interrogated her and she was ultimately prosecuted, convicted and sentenced to death. The Mississippi Supreme Court ordered a retrial and Ms. Butler was acquitted. Further investigation had revealed that her baby died of either sudden infant death syndrome (SIDS) or cystic kidney disease (Amnesty International, 1999). It was not enough that this woman had to endure the loss of her child, but an overzealous prosecutor charged her with murder. A grand jury indicted her, a defense attorney failed to investigate the circumstances of the child's death, a jury convicted her and sentenced her to die and a judge allowed it all to happen. She spent five years on death row.

Discussion and Conclusion. A fair and impartial jury of peers is the heart of the criminal trial in the United States. Jurors are supposed to have an open mind about the defendant's culpability, listen to evidence presented and then determine a verdict based only on the evidence presented. They are supposed to understand that the state has the burden of proof and be able to understand and make their decisions on the basis of judicial instructions. Unfortunately, these things are not characteristic of the average capital jury. There are two primary areas of concern regarding juries in capital homicide cases, juror misunderstanding of law and instruction and the process of death qualifying jurors.

Research indicates that jurors' comprehension of sentencing instructions is limited and that these misunderstandings place the defendant at a disadvantage (Frank and Applegate, 1998). The primary reason the current capital punishment statutes are determined to be constitutional relates to the bifurcated trial process. The presentation of mitigation evidence during a penalty phase is statutory and jurors are required to consider it when determining punishment. Prior to deliberations in a penalty phase, the judge issues a series of instructions that the jurors are expected to understand and use as a guideline. Studies indicate that jurors misunderstand how the capital sentencing decision should be made, including a lack of understanding of mitigating and aggravating evidence and the judge's sentencing instructions (Bowers, 1996; Bowers 1995). For example, Haney and Lynch (1994) reviewed juror understanding of sentencing instructions in California and determined that jurors could not define the concepts of aggravation and mitigation. Jurors are equally unable to understand the sentencing significance of these factors as directed by the judge and by law in reaching their penalty verdicts (Haney and Lynch, 1994; and Bowers, 1996).

Another area of concern is the process of death qualifying juries. According to Goodman, Green, and Hsiao (1998), death qualified jurors consistently dismiss a wide range of mitigating factors or treat them as aggravators in their deliberations. They also report that jurors who favor the death penalty are more likely to infer criminal intent and premeditation into the defendant's actions. The process of death qualifying a jury is detrimental to the defendant. Research indicates that these juries are more conviction prone (Williams and McShane, 1990) and more likely to view a death verdict as mandatory upon finding a defendant guilty (Geimer and Amsterdam, 1987). These juries often begin to determine punishment prior to being exposed to the statutory guidelines (Bowers, 1996; Bowers, 1995).

The problems associated with the death penalty run deep, but those inherent in the jury process are especially deplorable. Unlike the police, prosecutors and judges involved in these cases, the jurors are selected. In capital homicide trials the voir dire process is more thor-

ough and the officials have ample opportunity to recognize bias. A death-qualified jury is viewed as a necessary part of the process, but is to the detriment of the defendant. It is highly likely that many of the individuals whose cases were reviewed for this study were affected by juries prone to conviction and to death verdicts. While the nature of the criminal justice system is one of "innocent until proven guilty," the nature of the jury system is the opposite. Juries in capital cases are inclined to convict anyone charged with murder, the fact that 88 people were wrongly sent to death row in a 28-year period is indicative of this. Attempts to ensure fairness in death penalty statutes will inevitably fail because juries misunderstand, misinterpret, and ignore those statutory requirements. The misunderstanding, misapplication, and circumvention of both statute and judicial instructions by juries are debilitating to a fair or just death penalty.

The data collected for this study paint a chilling portrait of capital prosecutions in the United States. As the last western industrialized nation to use the death penalty, the United States has a special and unique responsibility to go to extraordinary lengths to guarantee the integrity of capital trials. Proponents of capital punishment utilize the release of innocents from death rows to point to the successes of the system. They argue that the release of innocents from death row is proof that the system is working (see Wilson, 2000; Nevada Attorney General's Report, 2000; and Criminal Justice Legal Foundation, 2000). This is fundamentally flawed. The data reviewed for this study reflects the fact that errors are made by criminal justice officials and functionaries. Often, these "errors" take the form of flagrant disregard for the law and legal process, hardly supportive of the idea that the system works to protect defendants.

In 1972 the United States Supreme ruled that existing death penalty statutes were implemented in an arbitrary and capricious manner with great potential for racial discrimination (*Furman v. Georgia* 1972). Since that time, 38 states have revised their death penalty statutes in an attempt to reduce arbitrariness. A review of the research in the post-*Furman* era indicates that the death penalty as it is currently implemented is entirely arbi-

(Continued on page 14)

Wrongful Convictions

(Continued from page 13)

trary. In the post-*Furman* era defendants in capital cases continue to be charged and treated differently under the same penal codes for no logical reason (Berk, *et al.*, 1993; Gross and Mauro, 1989; Paternoster, 1991). "...Being sentenced to death is the result of a process that may be no more rational than being struck by lightning" (Paternoster, 1991:183). The previous research on the death penalty in the post-*Furman* era indicates that the new statutes have not eliminated racial and other biases. This research not only reiterates the sentiment of those studies, but also expands on them with the notion that the post-*Furman* statutes fail to protect innocent defendants from capital convictions and sentences of death.

The data presented herein clearly demonstrates that death penalty trials are designed to convict the defendant. These cases are marked by incompetent investigations and outright perjury on the part of witnesses and criminal justice system functionaries. Prosecutorial manipulation of evidence, jury ignorance and disregard of laws and statutes are a major part of achieving this goal. Capital cases in the American system of justice are designed to guarantee the conviction of the poor through ineffective representation of counsel and lack of investigatory resources. The facts presented by this data suggests compelling incompetence and corruption in the criminal justice system, to such a degree as to call the legitimacy of the entire system of American capital punishment into question.

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Karen S. Miller-Potter is a doctoral student at the University of Kentucky in the department of sociology. After receiving her Masters degree, she was an instructor at Eastern Kentucky University for six years and worked as a mitigation investigator on death penalty cases for the Kentucky Department of Public Advocacy. Ms. Miller-Potter may be contacted at University of Kentucky, Department of Sociology, 1515 Patterson Office Tower, Lexington, KY, Phone: 859-624-9792, ksmill2@uky.edu. ♦

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A View From the Bench

(Continued from page 9)

reversed the whole direction of capital punishment law under the Eighth Amendment in *Furman v. Georgia*. At that time the capital punishment system was being administered in an arbitrary inconsistent way. The system is still broken.

The result in most states that have capital punishment laws is about the same as Tennessee. A majority of the death sentences get reversed at some level of review. What is the problem? Why so many reversals? First, we know that in most cases where there is a really good lawyer who gets paid well, the defendant—guilty or not—is not sentenced to die. The O.J. Simpson case is an example,

but there are many other less well-known examples.

Second, death penalty law is now a specialty like tax law, securities and health cases. But only a few lawyers specialize and know the area well. And no one makes much money defending these cases. The trial records we

(Continued on page 15)

A View From the Bench

(Continued from page 14)

see indicate that ineffective assistance of counsel at the trial level is widespread.

Third, prosecutors and police tend to be extremely zealous in these cases and they fail to turn over exculpatory evidence.

Fourth, as a result, in a large number of cases newly discovered evidence turns up during the course of the habeas post-conviction process after the trial and initial appeals are over. This is because counsel failed to properly investigate the case or because law enforcement did not turn over the exculpatory evidence they had or because of new science like DNA testing.

Fifth, there is a great tendency after the trial is over to find harmless error. This tendency is based on the normal human tendency toward inertia; but, even more, it is based on the political imperative that judges outside the federal system must be elected. And it is a fact that no judge has ever been defeated at the polls for being too much in favor of a harsh application of the death penalty. But, like the Scottsboro boys' case, there are many stories of judges who have been defeated at the polls for setting aside a death verdict. This public opinion factor places our state judges in a very tough situation, calling for great courage without any reward. In the face of this kind of pressure, the fact that state judges have overturned so many death verdicts is remarkable in and of itself.

When a record containing so-called harmless error is presented in the federal court, the case may run into a group of appellate judges or a district judge who does not have to run

for re-election and who is reluctant to uphold death verdicts containing constitutional error.

We have to ask ourselves, "How can we be sure how a jury would have responded in weighting aggravating and mitigating circumstances if the case had been free from constitutional error?" The constitutional test we are supposed to apply on harmless error is a "grave doubt" standard under the so-called Kotteakos test: "If one cannot say with fair assurance—that the judgment was not substantially swayed by error, it is impossible to conclude that substantial rights were not affected." And life is a pretty substantial right.

The Supreme Court has advised us in *Reid v. Covert* to remember that "death is different"—that "[t]he taking of life is irrevocable," so that "[i]t is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights," and in *Andres* that "[i]n death cases, doubts—should be resolved in favor of the accused" and in *California v. Ramos* that "the court—has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determinations." After these admonitions, the basic attitude of many federal judges in these so-called harmless error cases is to say to the state, "If you want to execute the defendant, try the case right in the first place with competent counsel on the other side and without covering up exculpatory evidence and without giving the jury constitutionally impermissible instructions."

There is one area here where the Bar could be a great help to us—to undertake a study of how we can set up a system of effective rep-

resentation in death penalty cases. Tennessee lawyers tell me that the problem of finding competent counsel in these cases is critical. Both at the trial level and at the state post-conviction stage, the number of lawyers and law firms available is diminishing, not rising.

In federal court we pay post-conviction counsel \$125 an hour, and we are able, for the most part, to secure competent counsel at this final stage of review. The result is a lot of newly discovered evidence turns up, and a lot of trial errors are highlighted and thoroughly presented for the first time.

Now is the time for the Bar to intervene because there is now pending in Congress an act that seems likely to pass called the "Innocence Protection Act." That act will make money available to the states to create a better defense system in capital cases. It may be that the best system would be to create and fund a state capital trial agency. Whether or not that act passes, our state needs a much better system of defending capital cases. Where else than the Tennessee Bar Association is the state likely to get good, objective advice on this subject after a thorough study of the situation- I think now is the time. I hope you will give some serious thought to the possibility of setting up a bar group to consider this problem.

Paula Voss is the President of the Board of Directors of TACDL. She is currently a Federal Public Defender after practicing for several years with the state Public Defenders both being in Knoxville. You may reach her by phone at 865/637-7979, fax at 865/637-7999, or by email at paula_voss@fd.org She welcomes your comments and questions. ♦

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TACDL 2002-03 CLE/BOARD MEETING SCHEDULE

SENTENCING SEMINAR, (Friday afternoon), November 15, 2002, Criminal Justice Center Auditorium, Memphis, 4 general hours of CLE

DAVIDSON COUNTY GENERAL SESSIONS TRAINING - FOR NEW ATTORNEYS, (Saturday), November 16, Ramada Inn & Conference Center, Nashville, 1 dual and 5 general hours

KNOXVILLE ETHICS SEMINAR, (Tuesday with lunch), December 3, (*location TBA*) Knoxville, 3 dual hours

➔ **December Board meeting** (*details TBA*)

NASHVILLE ETHICS AND MENTAL HEALTH EVALUATIONS, (Friday), December 13, BellSouth Auditorium, Nashville, 3 dual and 1 general hours

ETHICS AND (*topic TBA*), (Friday), January 24, 2003, Memphis, 3 dual and 1 general hours

SEARCH AND SEIZURE, (Friday), February 7, Nashville, 1 dual and 5 general hours
➔ **Board meeting** 5:00-6:30pm after seminar.

4TH ANNUAL TRIAL COLLEGE, (Thursday and Saturday), March 20 and 22, Knoxville, 3 dual & 12 general hours

TACDL'S DEATH PENALTY SEMINAR, (Friday & Saturday), April 25-26, Nashville, 1 dual & 11 general hours
➔ **Board meeting**, Friday 5:00-6:30pm after seminar.

This calendar is subject to change. Please call the TACDL office (615-726-1225) or check the TACDL website (www.tacdl.org) for confirmation of dates and topics.

Tennessee Association of Criminal Defense Lawyers
207 Third Ave. N., Suite 510
Nashville, TN 37201-1610

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