

# CRIMINAL LAW

The Newsletter for the TBA's Criminal Justice Section

## Letter from the Chair



By Jim Ramsey

The TBA is a voluntary association, and the presumptive professional organization for lawyers in Tennessee. Its membership encompasses the full panoply of interests among attorneys, whether litigators or not. From time to time the TBA through one or more of its 21 sections speaks publicly, sometimes advocating its recommendations in the interest of furthering the administration of justice and advancing the profession. When it does this, its deliberations are best finely ground and blended to form a satisfactory consensus--however footnoted or judiciously constrained, or however "progressive." You know how lawyers are.... In the end, it works only when we have the fullest possible participation, especially from proponents of adverse positions. You get out of it what you put into it. I have noticed that the sections have their own peculiar personalities, sometimes predominantly plaintiff-oriented, sometimes defendant-oriented. This is a function of the inevitable predominance of a certain flavor among the personalities of the participants in any given section; and it is self-perpetuating because members are naturally attracted to like-minded partisans in a cause. Who wants to be "odd man out" under any circumstances? Yet, we as lawyers are professionally immersed in controversy as our "stock in trade," and should not find it surprising or unwelcome that both ends of the "see-saw" are necessary components to rock back and forth and grind out settlements in the process.

Thus, as chair I have sought to recruit balance for the Criminal Justice

Section. I simply cannot understand that the section can pretend to be productively representative of "criminal justice" without both prosecution and defense in at least minimal participation. Certainly each end of the

spectrum has its own several specialized associations focusing on its goals -- to wit: for prosecutors the national District Attorneys Association (NDAA) among many others, and for defense attorneys the Tennessee Association of Criminal Defense Lawyers (TACDL) and its national counterpart, among others. And yet there is much to agree on — for example, getting the issue of resources for both DAs and PDs onto the "radar screen" for the Legislature. And there is much to disagree on, which I've found to be enlightening and oftentimes entertaining. (It might not necessarily be unproductive always to "preach to the choir," but it's no fun and it doesn't make converts.)

Rarely do you hear it expressly acknowledged that prosecution in the name of the state of Tennessee on behalf of the people is a legitimate function; and likewise rarely is it overtly expressed that the defense function in the name of the traditional constitutional rights of the individual is legitimate. As a prosecutor, I am accused in virtually every case by one side or the other

(sometimes one side and the other) of engaging either in "cover-up" or "witch-hunt" — never am I said to have done it "just right." The defense is said with respect to the defendant, always to be "getting him off on a technicality," or challenged to the effect, "How can you defend someone you know to be guilty?"

The Criminal Justice Section can go a long way toward reconciling these seemingly diverse functions, to support the social compact. I hereby acknowledge that all of it is legitimate and invite the broadest participation.

Another article in this issue of our newsletter describes the agenda the section's Executive Council established during our organizational meeting. Our emphasis is on balance and diversity, which are necessary to establish credibility.

Thank you,  
Jim Ramsey, Chair  
TBA Criminal Justice Section, 2003-2004 ■

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## Criminal Justice Section organizes, plans studies

**I**n the Criminal Justice Section Executive Council's organizational meeting on August 8, Chairman Jim Ramsey described eight areas of emphasis on which the section should focus its attention. A study of the death penalty in Tennessee topped the list.

Ramsey said he believes important issues for the section include the death penalty study, due process and victims' rights issues, District Attorney and Public Defender resources from the Legislature, court costs, overlap of the 21 TBA sections, a possible two-year agenda on some of the issues, membership diversity and balance, and the section's newsletter.

Katie Edge was named chair of the death penalty study. (*See exclusive interview with Judge Merritt about death penalty issues in this issue of the newsletter.*) She proposed a comprehensive study of the process of the death penalty in Tennessee. She emphasized that the section should not take a policy position regarding the death penalty; there should be no position on abolition of the penalty or a moratorium on carrying it out. "I see this study as a way to bring together all the points of view," Edge said. Edge

and Ramsey both stressed the need for a balanced study which would include prosecutors, defense attorneys and judges.

Greg Isaacs was named chair on due process and victims' rights. He said the victims' rights issue is putting a stranglehold on the criminal justice and juvenile systems. "This is an important issue and a delicate one," he said in agreeing to head the study group.

According to James (Wally) Kirby, Bill Whitesell, president of the District Attorneys' Conference, will designate a representative to serve as chair on the issue of District Attorney and Public Defender resources from the Legislature. Jeff Henry suggested that Claudia Jack, elected Public Defender from the 22nd District, should serve as co-chair to assure equal representation.

Ramsey accepted chairmanship of the study group on court costs.

Ross Alderman was named CLE program producer to determine what CLE the section will produce during the year.

Joe Culver agreed to be responsible for producing the newsletter. ■

# Jim Ramsey Chairs Criminal Justice Section

(NOTE: This is the first in a series of articles about members of the Executive Council of TBA's Criminal Justice Section. The purpose of the series is to introduce the members, give a glimpse into who they are as attorneys and as people.)

**J**ames Nelson (Jim) Ramsey, new chair of TBA's Criminal Justice Section, was elected District Attorney General for the 7th District in 1978 and he has held that office ever since. The 7th District comprises Anderson County. Ramsey's office is located in Clinton, the county seat.

Ramsey earned his law degree at the University of Tennessee College of Law in June 1972. "By the time I started law school I had two children, so I had to work," Ramsey says. Work was at Oak Ridge National Laboratory, one of the nation's premier scientific research institutions, where Ramsey served as administrative assistant to Dr. David Rose. "I was working part-time at ORNL and going part-time to law school, so it took me four years to graduate at almost age 30," he says.

After earning his J.D., Ramsey started law practice in Oak Ridge. In 1974 he was elected County Attorney, which fulfilled one of his goals: to be lawyer for the School Board. He also served a three-year stint as City Judge for Lake City, 1975 through 1978, concurrently with the County Attorney job.

Ramsey's undergraduate work was done at Dartmouth, class of 1965. He attended Oak Ridge schools from kindergarten through 12th grade, and was the first Oak Ridge High School American Field Service exchange student to go abroad for a school term, which he spent at Stockholm, Sweden (1960-61).

During the fall term of 1964 Ramsey studied at *Universite Caen* through the Dartmouth College Foreign Study Plan and the Experiment In International Living, of Putney, Vt. "That year I witnessed DeGaulle kick NATO HQ out of Paris, and also his ending of the Kennedy Round, for Multi-Lateral Force ideas, etc." Ramsey says. "I also drank a lot of wine."

Professional accomplishments notwithstanding, what is Jim most proud of? "My family," he says without hes-

itation. Family includes his wife, Kathryn Thomas Ramsey, schoolteacher K through 6 at Clinton and Oak Ridge schools; two grown boys, Chris and Geoff, and two granddaughters. He's quite proud of the granddaughters. "Kaitlin is the most precocious grandchild ever," he proclaims, with typical prosecutor's lack of bias. He also is proud of granddaughter Megan, a child born with Down's Syndrome. He also includes two dogs among family: Schaboo ("Kaitlin could not pronounce Scooby Doo") and Grrrrreta, who named herself.

Jim plays the French horn in the Oak Ridge Community Band, but his primary extracurricular interest is in rowing and encouraging young people to get involved in the sport of rowing. Ramsey is the founding promoter of rowing at the University of Tennessee, Oak Ridge, and Clinton, he says, and he still rows and coaches rowing. He's located in an ideal setting for that sport. The Clinch River at the Oak Ridge Marina is regarded as one of the world's finest outdoor rowing areas. College teams come there each spring for their training, and the course hosts several major regattas. One of his protégées, Sarah Hirst, was selected to the Women's National Sculling Team in the U.S. quad and the U.S. double. The teams won silver and bronze respectively at the recent PanAm games. Protégée Eric Barkley became Junior National Sculling Champion in Cincinnati during his senior year at Oak Ridge High School in 1999. Both of them gave Jim credit for being their first coach. "Now I can die," Ramsey says. He's obviously very proud of the achievements of both rowers, and very pleased that they acknowledged his contribution.■

*Professional accomplishments notwithstanding, what is Jim most proud of? "My family," he says without hesitation.*

## Judge Merritt discusses a range of criminal law issues

An interview with Joe Culver of the Criminal Justice Section

**J**udge Gil Merritt of the U.S. Court of Appeals, Sixth Circuit, identified the issues listed on the right as being among the issues of concern in criminal law. He spoke by telephone from his Nashville office on a wide range of criminal law issues during an exclusive interview with the Tennessee Bar Association's Criminal Justice Section newsletter.

Even though these issues are complex and add to the stress on prosecutors, defense attorneys and courts, Judge Merritt believes that the issue most in need of discussion by the Tennessee Bar is effective assistance of counsel to defendants charged with capital crimes. But he acknowledges that the problems are much broader than that one issue. "Most people think of all the problems that exist in the death penalty, the most important - one of the most difficult if not the most difficult - is effective assistance of counsel," Judge Merritt said. He pointed out, however, that effective counsel isn't the only problem in capital cases. Judges also need to become more familiar with that area of the law. Better police investigations and a more consistent set of standards to determine which cases should be brought as death penalty cases also deserve attention.

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- The stress of terrorism on our constitutional values.
- The war on drugs.
- Sentencing guidelines.
- The large number of pending death penalty appeals.

He says that recently published American Bar Association standards for capital cases are the "touchstone" the State and Federal governments are going to have to meet. The Supreme Court said as much in its June decision in *Wiggins v. Smith*. And, Judge Merritt also discussed the role the TBA's Criminal Justice Section can play in studying and helping to address the issues.

#### **EFFECTIVE ASSISTANCE OF COUNSEL**

Judge Merritt traces the growing complexity of death penalty cases to the Supreme Court decision in the 1932 appeal of the Scottsboro Boys case. In 1930, seven African-American young men got into a fight with seven white boys and threw them off a freight train going from Chattanooga to Birmingham. Two white girls who were on the train accused the blacks of rape. One of the women later recanted, and the charges turned out to be false. Despite that, the seven blacks were convicted of rape in Scottsboro, Ala., and sentenced to death.

In 1932, the Supreme Court set that verdict aside, establishing for the first time the constitutional right to competent counsel in capital cases. Then in 1974 in *Furman v. Georgia*, "The Supreme Court basically reinterpreted the 8th amendment and caused a revolution in the way the death penalty is administered," Judge Merritt said. "In Federal constitutional law, the penalty is still in an uncertain state in many areas and still is unstable. All the states are having to administer the death penalty law that is still developing; it has been very subject to change. That's true of effective assistance of counsel as well."

There weren't any standards with respect to effective assistance of counsel when the U.S. Supreme Court decided the Scottsboro Boys Case some 70 years ago. "It was not until 50 years later that the Supreme Court gave definitions and described what is required for effective assistance of counsel," Judge Merritt said. "Then just recently this year the Supreme Court in *Wiggins* said that the ABA standards should apply as a constitutional matter."

The ABA published a new version of its standards in death penalty cases in 2003. The old standards published in 1989 and revised this year, set out in much more detail what is expected of counsel in a death penalty case. "I think now the ABA standards are really the touchstones the State and Federal government are going to have to meet," Judge Merritt said.

He believes several factors are responsible for the issues in death penalty cases, perhaps most prominent of which is the growing complexity of the law. "Nowadays the most salient factor is the difficulty of death penalty cases," Judge Merritt said. "It's gotten to be very complex, as complex as securities law or health care law. It's very complex law that's not stable." "A lawyer who's going to

render effective assistance of counsel has to understand criminal statutes of the state in which he's trying a case, which are often complicated in themselves, and also understand an overlay of constitutional law developed by the state Supreme Court and the Federal courts. To keep up with this developing area requires a considerable amount of work."

That hasn't always been the case. "Fifty years ago people thought if you were a lawyer you could handle death penalty cases because the law wasn't all that complex, and maybe that was true, but today it's very complex. In addition to understanding the complexity, the lawyer has to understand all the rules of evidence that apply, and also understand the technology that applies in death penalty cases." As examples, he mentioned DNA evidence, fingerprinting, blood types and forensic evidence.

#### **HIGHLY COMPLEX, NOT HIGHLY COMPENSATED**

Compensation for attorneys in death penalty cases hasn't increased in correlation to the complexity. "The public and the companies will pay lawyers pretty good fees for handling tax questions and securities questions," Judge Merritt said. "Death penalty lawyers aren't adequately compensated at the state level. It's hard to encourage good lawyers in this area because the fees are so low. Most of the defendants are poor and the money has to come from somewhere else."

The source of compensation has been inadequate in most states, he said, but it is essential that good lawyers be handling these cases. "I think for centuries the public has had a fairly low opinion of lawyers," Judge Merritt said. "Shakespeare said years ago let's kill all the lawyers and society will be relieved of a great plague. But a good legal system requires good

lawyers and a good judicial system."

#### **JUDGES HAVE NEEDS, TOO**

Judge Merritt makes it clear that counsel doesn't bear all the blame for the problems. "Judges have to be more familiar with that area, too," he said. "Judges don't normally get any special training in death penalty proceedings and they have to learn by trial and error as they go. The cases can be very stressful for judges, especially if the judge is an elected judge. There are lots of instances of elected judges being defeated because they're thought to be too soft on the death penalty. We don't know any examples of judges being defeated because they're too harsh."

Going back to the Scottsboro Boys cases, Judge Merritt said that a "scholarly, courageous, young state judge by the name of Horton of Decatur, Ala., set the second jury's death sentence aside." As a result, he was soundly defeated for re-election the next year. The problem of unpopular

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decisions resulting in lost elections continues today, he said, "particularly when judges have an impending election. Ask them, they'll tell you there's a lot of pressure. I think that affects rulings, and other aspects of the trials. It makes the lawyer's job of defending these cases much more difficult."

Trials conducted with an eye toward elections frequently lead to judicial error. "We know that 65 percent of the cases get set aside in the higher state courts or in the Federal courts. The majority that are set aside are from elected judges in the state courts," Judge Merritt explained. "Mainly, the cases are overturned because of counsel's failures, erroneous instructions to the jury, and the erroneous handling of cases at trial. Another thing that can happen is that at the end of the process the governor can intercede and decide he's going to commute."

#### **PRETRIAL INVESTIGATION**

The issue of what a lawyer is required to do in order to properly investigate prior to trial was clarified by the Wiggins case. "The case has to do with investigation at the so-called mitigation phase," Judge Merritt said. "As a result of the revolution in this area starting with *Furman v. Georgia*, you have the guilt phase of the case to determine what the person is guilty of, and then after the person is found guilty you have the second stage which is the sentencing stage. A lawyer has to investigate for both stages. The failure in the past has often been, as in Wiggins, that the lawyer didn't do much to investigate for the mitigation stage, to humanize the defendant so the jury can get a view of the person. Not that a jury will let them go, but a jury has to have all the information. The Wiggins decision said we have to find unanimously beyond a reasonable doubt that the person is guilty of the crime, and that the death penalty decision also must be unanimous. But one juror who finds there are mitigating circumstances can prevent the death penalty from being imposed."

#### **INNOCENCE CASES**

There also are cases handled on appeal as actual innocence cases where counsel has failed to investigate properly and later proof, such as DNA evidence, shows that the person didn't commit the crime. Those cases can be dealt with in one of several ways," Judge Merritt said. The prosecutor at times can decide he got the wrong person. At other times the court throws the case out when the evidence shows the person couldn't have done it.

#### **POLICE PRESSURED DURING INVESTIGATIONS**

Investigation also is an issue for police. "Faulty police investigation is something that often is particularly exacerbated during the death penalty cases," Judge Merritt said, because in a high-profile case "the police are under a lot of pressure to find the culprit. In good faith or not in good faith, but often in good faith, the police have a big incentive to lock onto the first defendant they develop to mold the truth toward a conviction. There's also lots of pressure on the judge and the prosecutor to get them convicted. That sometimes leads to overstepping the bounds, not conducting a good investigation, or jumping to conclusions."

#### **VICTIMS' RIGHTS**

The victims' rights equation also has an effect. "The whole purpose of the death penalty is to try to deter crime

and get the kind of retribution or revenge that society seems to want," Judge Merritt said. "It's in the nature of human beings to want to do something about a brutal murder, so there has to be a balance between the rights of the victims and the rights of the accused. This balance is tough to maintain. Oftentimes the victims' rights people think that their side of the equation is not being addressed properly and certainly the anti-death penalty people feel the same way, so there's a serious conflict between the victims' rights advocates and the anti-death penalty advocates and that's a big problem."

#### **OTHER CRIMINAL LAW ISSUES**

Besides the death penalty concerns, there are many issues in criminal law at the Federal level, he said. "The key problem right now in addition to the death penalty is the terrorism stress on our constitutional values - searches and seizures, holding people incognito, how to deal with these people classified as combatants."

Stress on the system also grows out of the war on drugs and the sentencing guidelines. "The Federal sentencing guidelines are harsh, and the states have adopted guidelines that in many cases are harsh, too, and our prison percentages are now the highest in the world. We are spending a lot of money incarcerating non-violent criminals. A lot of that is a result of the sentencing structure," Judge Merritt said. "The criminal law system is overloaded."

The problems in the system go across the board, but the pressure points come with terror, the war on drugs and the sentencing guidelines which are causing State and Federal governments to have trouble paying for and housing people who will be in prisons for a long period of time, he said. "We have an overproduction of death sentences and long sentences in our criminal justice system."

#### **WHAT IMPACT CAN THE TBA HAVE?**

"The TBA can study carefully these standards that the American Bar Association developed after laborious study and effort and see that they're implemented together with any other standards that Tennessee should adopt," Judge Merritt said. "I think it's really the TBA who are the people who are most knowledgeable and who can encourage government and lawyers outside of government to participate in the process by which we improve administration of capital punishment."

He said one option would be to have a Public Defender system at the state level to handle the death penalty cases, or at least a group of lawyers who are very familiar with the problems and who could advise and assist lawyers at the local level who are trying these cases. "Also, the lawyers need to be compensated adequately," he said. "Compensation is very, very low in Tennessee. I suspect that needs to be raised, and that can only be by the State Legislature."

#### **CAPITAL PUNISHMENT VS. OTHER SOCIAL ISSUES**

If the Tennessee Bar Association's Board, through the Criminal Justice Section's death penalty study group, should reach consensus about what should be done to address Tennessee's capital punishment system, that's not the end of the matter. "I guess there's one question that is

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# SUMMARY of PUBLIC ACTS, 2003

## 103rd General Assembly of Interest to Criminal Law Section

### ADMINISTRATIVE INSPECTION WARRANT

- ▶ Chapter 326 – Amends TCA Title 68, Chapter 120, Part 1 to establish procedures for issuance of administrative inspection warrant authorizing a building inspector to inspect named premises to determine whether violation of state law or local building, fire or safety code occurring. Effective 6/11/2003

### BAIL & BAIL BONDS

- ▶ Chapter 303 – Various revisions concerning forfeiture, bail bond premiums, duration of bond and bondsman's capacity. Effective 6/11/2003

### CRIMINAL RECORDS CHECK

- ▶ Chapter 26 – Requires person applying to work or volunteer with childcare agency to submit to criminal history records check by TBI and submit fingerprints to TBI and FBI. Effective 7/1/2003
- ▶ Chapter 30 – Religious, charitable, scientific, athletic or youth services institution may require person applying to work or volunteer to submit to criminal history records check and fingerprints to TBI under existing law; expands existing law to include FBI as well as TBI and provides for payment of the costs. Effective 7/1/2003

### CONTROLLED SUBSTANCES

- ▶ Chapter 331 – Adds restitution for clean-up costs to sentence for violation (a)(1) of controlled substance listed in TCA 39-17-408(d)(2). Effective 7/1/2003. Transmitted to Governor 6/2/2003.

### DETERMINATION & PRONOUNCEMENT OF DEATH

- ▶ Chapter 85 -- In certain circumstances registered nurse may make the determination and pronouncement of death. Effective 5/5/2003

### DRUG COURTS

- ▶ Chapter 335 – "Drug Court Treatment Act of 2003", establishes guidelines and funding provisions for creation of drug courts. Effective 7/1/2003.

### EDUCATIONAL RECORDS AS EVIDENCE ACT

- ▶ Chapter 36 – Amends Educational Records as Evidence Act (Chapter 621, Public Acts 2002) to include postsecondary institutions and to comply with Family Educational Rights and Privacy Act. Effective 4/23/2003

### EXPUNGEMENT

- ▶ Chapter 50 – Court to send all expungement orders to TBI for entry into expunged offender and pretrial diversion database. Effective 4/23/2003
- ▶ Chapter 175 – Amends TCA 40-32-101 (a)(1) to prevent expungement of the charged offense when the defendant is convicted of a lesser included offense. Effective 5/22/2003

### FRAUD and ECONOMIC CRIME FUNDS

- ▶ Chapter 291 – Amends TCA Title 40, Chapter 3, specifying how District Attorneys General may use fraud and economic crime monies, no civil or criminal immunity for acts relating to the expenditure and accounting of monies collected under act. Effective 7/1/2003

### INDICTMENT

- ▶ Chapter 64 – Indictment to be presented by foreman to clerk of the court as opposed to previous requirement that indictments be presented in grand jury's presence to the court. Effective 5/2/2003

### MINORS

- ▶ Chapter 198 – Not a violation of alcohol, tobacco or lottery tickets prohibitions for a merchant to use a minor to purchase alcohol or tobacco for purpose of aiding in enforcement of laws prohibiting sales of alcohol or tobacco by the merchant at the merchant's place of business. Procedure that law enforcement to obtain approval of minor's parent or legal guardian and juvenile court before using minor to aid in the enforcement of such laws amended to add that merchant must also get such approval. Consent not necessary when using person 18 or older. To use a minor or person under 21 for such purposes the minor or such person shall not disguise appearance to misrepresent actual age; if male, have facial hair; make statements to trick, mislead, encourage or confuse the employee. Such person must be photographed before and after; except for questions about employment or purpose for engaging in the conduct, answer truthfully questions asked of them, including, but not limited to inquiries about his or her age; and if identification is demanded, produce only a valid state-issued card that truthfully indicates actual date of birth. Effective 5/12/2003
- ▶ Chapter 375 – Class A Misdemeanor for person under 21 to consume alcohol. Class A Misdemeanor for person under 21 to possess or transport beer as well as intoxicating liquors. Effective 6/23/2003

## MISCELLANEOUS

- Chapter 160 – Install or reinstall an object in lieu of air bag -- Class A misdemeanor. Effective 5/19/2003
- Chapter 180 – Operation of school bus while using hand held mobile telephone (exception for telephone or radio to dispatch or school transportation department) – Class C misdemeanor punishable only by \$50 fine.
- Chapter 297 – Lottery Implementation Act
- Chapter 298 – Lottery Education Act
- Chapter 355 – Omnibus Bill (18 pages) Changes in State law necessary for the implementation of the Governor's budget
- Chapter 366 – Appropriations Bill (91 pages) Funds State Government for 2003-2004 Fiscal Year
- Chapter 384 – Requires operators to make a lane change, if safe, when approaching stationary emergency vehicle, recovery vehicle or highway maintenance vehicle, failure to do so is a Class C misdemeanor, punishable only by \$50 fine. Effective 7/1/2003. Warning citations to be issued until 7/1/2004
- Chapter 408 – Probation – Amends TCA 40-35-303(i)(1) to increase the maximum the defendant must pay for probation supervision from \$35 to \$45 per month. Effective 5/29/2003

## MUNICIPAL COURTS

- Chapter 113 – Places a moratorium on creation of new municipal courts that have concurrent jurisdiction with general sessions court through the end of the first session of the 103rd General Assembly (Report due from Judicial Council 2/1/2004). Effective 5/12/2003

## NOTARY PUBLIC

- Chapter 106 – Seal of office for a notary now a rubber or other type stamp. Can continue to use impression seal during current term of office. Use of embossed seal after effective date does not render acknowledgement defective. Effective 5/12/2003

## OATH

- Chapter 5 – Clarifies that general sessions judges may administer oath of office for elected or appointed officials. Effective 3/28/2003

## SEX OFFENDERS

- Chapter 95 – Sex offender may not knowingly establish residence or accept employment within 1000 feet of school, licensed day care or child care nor establish residence or other living accommo-

ation within 1000 feet of former victim or victim's immediate family nor come within 100 feet of former victim or make certain gestures at or to a former victim – Class A misdemeanor. Exception for individual establishing residency or accepting employment first. Effective 7/1/2003

- Chapter 188 – Failure of victim to report the crime because physically unable to do so, of sex offense or domestic abuse may constitute good cause for failing to report the crime to the proper authorities within 48 hours under Criminal Injuries Compensation Act. Effective 7/1/2003
- Chapter 304 – Imposes additional \$200 fine on persons convicted of a sexual offense to fund sexual assault program services. Effective 7/1/2003
- Chapter 323 – Adds sexual battery by an authority figure to the sex offenses that are not eligible for pre-trial diversion under Title 40, Chapter 15 or judicial diversion under TCA 40-35-313. Effective 6/11/2003



## TELEPHONE RECORDS

- Chapter 56 – Permits subpoenaed telephone records to be transmitted to law enforcement by telephone or facsimile. Effective 7/1/2003

## WARRANTS

- Chapter 366 – Substantially re-writes TCA Title 40, Part 6 to make probable cause the standard for the issuance of warrant and criminal summons, when law enforcement officer is not the affiant, a criminal summons will be issued, except when imminent threat to victim is shown by probable cause and written finding of fact is made, in that instance the magistrate (not a clerk) may issue an arrest warrant. Effective 1/1/2004. Signed by Governor 6/17/03

## WEAPONS

- Chapter 144 – Authorizes county magistrates to carry weapons. Effective 7/1/2003

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# CRIMINAL LAW

The Newsletter for the TBA's Criminal Justice Section

## Judge Merritt *continued from page 5*

key," Judge Merritt said. "How much luck are we going to have in improving the current situation in light of all the other things that need to be done in our society? It's not only difficult to arrive at recommendations, but it's very difficult to get people to take the time to look at it carefully. There are not a lot of votes to be garnered in this area."

He pointed out that a statute is pending in Congress which would give the states some monetary incentives to make funds available for criminal defense work. "If that should be adopted, I think the Tennessee Bar Association would have a lot easier time talking people into accepting its recommendations," Judge Merritt said. "That legislation has some of the same standards in it as the ABA standards. The implementation problem is a serious problem, and I think that deters bar associations from getting into it. Public opinion, of course, is a key problem and it tends to go back and forth on how serious people are on improving the death penalty system."

### SCOPE OF THE SECTION'S DEATH PENALTY STUDY

"I think if you get too broad it could be a detriment," Judge Merritt said. "If you go into the question of abolishing the death penalty entirely, it would not be good. If the focus is primarily on how Tennessee is going to improve counsel and the effective assistance counsel gives in these cases, the Committee would have its hands

full. It should not undertake too much."

He acknowledges that other problems could be studied, however. "You might also look at problems the police and prosecutors face in these cases. For example, there could be set up in the State Attorney General's office, if the committee thought it was wise, a capital resource center that would bring more consistency as to what cases police and prosecutors bring as death penalty cases. I think there's not any set of standards that governs the discretion the local DA uses to decide what death penalty cases to bring."

Judge Merritt said it might be effective, for example, if the State Attorney General's office or some other responsible agency were able to focus on the front end of the cases, to establish better standards governing which cases will be processed as death penalty cases. This would help bring more consistency to decisions regarding seeking the death penalty. "I think looking at the problems the prosecutors have in that way could be helpful to the state as well," he said. "I don't know if the Bar could come up with recommendations for police and prosecutors about standards. General recommendations like 'be fair' would not be helpful. So perhaps the Bar should just stick to implementing the revised ABA standards for defense counsel in death cases." ■