

CRIMINAL LAW

The Newsletter for the TBA's Criminal Justice Section

Letter from the Vice Chair



By Jeff Henry

If I had made this statement at home, "I looked and I couldn't find it," my wife would tell me that it is probably where I left it. This newsletter is not home and I was looking for the Criminal Justice System on the "Public Issue Radar." Because of other images or issues, it is nowhere to be found.

In 2000 and 2001 the General Assembly engaged the Income Tax issue. In 2002 it engaged TennCare and the Lottery while having to suspend step-raises for Assistant DAs and Assistant PDs. For the first session in several years, there was no salary increase for any state employees.

This adversely affects the Criminal Justice System. No raises for attorneys that are, as District Attorney General Jerry Estes reminded us in the October 2003 Tennessee Bar Journal, the worst paid in the Southeast, not to mention the other professionals such as probation officers, all facing continually increasing caseloads.

At the federal level, money is being spent abroad, while a helpful measure at home to provide student loan forgiveness for full time prosecutors and defenders cannot seem to obtain the same support. At the state level, salary for management of a "game of chance" is at the top of the spectrum, while salary for those professionals in the Criminal Justice System managing "life and liberty" is at the bottom of the spectrum.

Who suffers when Criminal Justice System is not on the radar? Everyone! The accused, the victim, the families of both, and the public suffer. In the February 2001 Tennessee Bar Journal, Tennessee District Public Defenders Conference Executive Director Andy Hardin in his article "What

Price is Justice?" warned of the possibility of the bursting of the "judicial balloon," when judicial agencies have to continue to perform more work with the same or fewer resources.

Will it get worse before it gets better? I wish I knew. I know the backlog of criminal cases gets larger. The

2002-2003 Summary of Charges for the State of Tennessee District Public Defenders Conference indicates that while just over 255,000 charges were closed, more than 276,000 charges were opened. The backlog is almost 21,000 charges. This number can only be greater for the District Attorneys since they have all cases, retained and appointed counsel.

Is this what the public deserves? Someone else needs to answer that question. I do know that defenders and prosecutors are maintaining larger caseloads than optimum numbers prescribed by recognized caseload or workload standards while pundits criticize

the speed of criminal justice system. I don't hear the same criticism of workloads and lack of resources.

In February 2001 Andy Hardin's article stated that a 1998 weighted caseload study recommended an additional 127 prosecutors, 57 defenders and 2 judges statewide. While legislative enactments have authorized a very limited number of positions that are funded by resources other than state appropriations, there has not been an increase in the number of positions funded by state appropriations since 1992. This is not a revelation to most of you. I state these facts to emphasize that I see no image for improvement of the situation.

What will finally project the image on the radar? Will it be when the backlog of criminal cases becomes too great a burden on the civil docket? Will it be litigation? It is too late then.

Lawyers do not need to become radar technicians to get the image projected. Lawyers should become leaders! Who better to project the issues? Contact Congressional Representatives about student loan forgiveness for defenders and prosecutors. Talk to state and local leaders about caseloads, staffing and salaries. Speak out in civic organizations and the like about the lack of proper funding and resources for the system.

Now is the time for the bar to step forward and put these issues on the radar. The problem will not be engaged until detected on the screen. If we don't "...with liberty and justice for all," may become a fading image. ■

Henry is director of Research and Training for the Tennessee District Public Defenders Conference. He earned his Doctor of Jurisprudence at the University of Tennessee, Knoxville.

*I looked
and I couldn't
find it!*

WINTER 2003

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A publication of the
TENNESSEE BAR
ASSOCIATION

Executive Council reports to BOG on plans for death penalty study

Representatives of the Criminal Justice Section's Executive Council reported to the TBA Board of Governors about the section's plans for a study of death penalty issues in Tennessee, particularly the issue of effective assistance of counsel, at the board's meeting in Townsend on October 18.

The council was represented by Jim Ramsey, chair; Katie Edge, co-chair of the Death Penalty Study Committee; and Don Hall and Susan Kay, both of Vanderbilt Law School, who have agreed to serve as reporters.

Ramsey told the board that while the primary focus will be on the issue of effective representation, that will almost certainly lead to some other issues to study, such as issues of adequate resources available to both prosecutors and defense attorneys.

In a letter sent to the four section representatives after the BOG meeting, President John Tarpley noted that the discussion had been "enlivening and enlightening and will go a long way to ensuring the success of our project."

He reaffirmed the board's charge to the committee "to explore whether our system is providing effective assistance of counsel and to make recommendations on ways in which representation can be improved."

(See John Tarpley's letter below.)

In his remarks to the board, Ramsey noted that the TBA has "institutional filters for review of committee work from the committee's balanced co-chair structure to the section's balanced Executive Council, through to the BOG itself."

He said the scope of the study cannot be constrained to the issue of effective representation. That issue, he pointed out, is purely a defense issue, but defense resources are inextricably related to prosecutorial resources. He also said prosecutorial and defense techniques are two sides of the same coin.

"The Criminal Justice Section will remain just a defense-oriented group without an effort to encourage full participation which includes prosecutorial interests," he said.

Ramsey emphasized, "We do in fact trust the whole TBA's capacity for institutional professionalism and substantive relevance."

Hall, noting that the study should be done carefully and fairly, offered three assumptions.

1 Tennessee has a death penalty statute that is constitutional and comprehensive. Many people are of

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Letter from TBA President

(Editor's Note -- John R. Tarpley, president of the Tennessee Bar Association, sent this letter, dated October 21, to Jim Ramsey, Katie Edge, John Gill, Don Hall and Sue Kay.)

Dear Jim, Katie, John, Don, and Sue:

On behalf of the Tennessee Bar Association Board of Governors, I would like to express appreciation for Jim, Katie, Don, and Sue for attending and participating in our Board meeting on Saturday. I believe that the discussion and debate was enlivening and enlightening and will go a long way to ensuring the success of our project.

Your section and committee have taken on an awesome responsibility. The bar takes seriously the obligation to administer a just system and your effort will be critical to that responsibility.

The charge to the committee, reaffirmed by the Board of Governors, is to explore whether our system is providing effective assistance of counsel and to make recommendations on ways in which representation can be improved.

The association is committed to assisting the section. Allan Ramsaur, Lynn Pointer and the capable TBA staff stand ready to assist you with the resources the committee needs. Please don't hesitate to ask.

Again, thank you for taking on this important task for the bar. We look forward to working with you.

Sincerely,

John R. Tarpley, President

Executive Council told of Rule 13 comment status, organizational meeting of Death Penalty Study

The TBA and the Criminal Justice Section plan to ask for an extension of time to comment on the proposed changes to Rule 13, Jeff Henry reported to the section's Executive Council during its meeting on October 31.

Henry is chair of the subcommittee the council established to consider preparing a comment on the proposed change.

In other discussion during the meeting, Katie Edge reported on the first meeting of the Death Penalty Study Committee and the council authorized Jim Ramsey to ask the District Attorneys Conference to nominate three members to serve on the section's Executive Council.

Henry said the Rule 13 issue "is taking on a life of its own outside the subcommittee with broad interest in it, inside and outside the legal profession."

TBA brought interested parties together on October 29 to discuss comments on the proposed changes, Henry said, and there was agreement that additional time is needed. He said the Section's subcommittee has to be impartial and let the several sides advance their own causes.

He said TBA had scheduled another meeting for 2 p.m. Central time on Nov. 11. The deadline for comments at the time of the Executive Council's meeting was Nov. 14.

A proposed request for extension of time of 75 days has been drafted, setting out what TBA is trying to do to put comments together. TBA is willing to facilitate meetings between the various entities that have come forward to express interest in the proposed Rule 13, Henry reported.

Edge reported that the Death Penalty Study Committee met on October 23 at the Bar Center in an organizational meeting.

During that meeting, she said, there was a discussion about the objectivity of the committee's reporters, Don Hall and Susan Kay of Vanderbilt Law School. Professor Hall indicated his personal views were irrelevant to his professional role as reporter. Edge pointed out that the reporters have to

be objective because the TBA Board will have the final say over the product.

One of the primary accomplishments during the organizational meeting, she reported, was to identify sources of information about effective assistance of counsel, where data could be obtained and who would be responsible for gathering it.

Bill Ramsey asked for anyone who knows of additional resources to let the committee know of them. (See article about the meeting elsewhere in this issue of the newsletter for a list of resources that were identified.)

One substantive discussion during the study committee meeting dealt with the scope of the study. John Gill expressed some misgivings about wander-

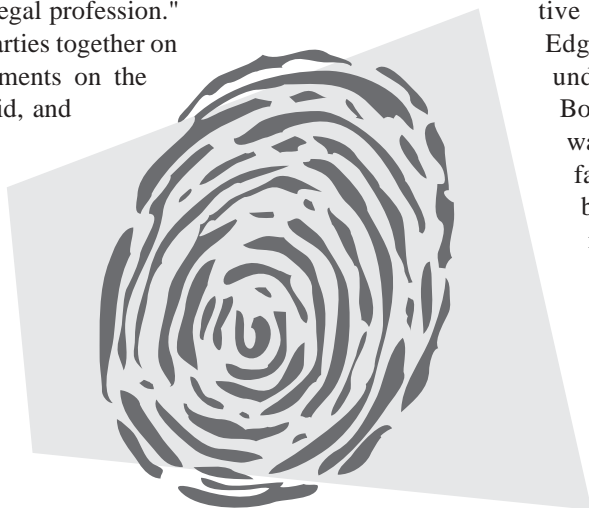
ing outside the scope of effective assistance of counsel.

Edge said the committee understands that the TBA Board of Governors doesn't want the study to stray very far from that topic, but the board did acknowledge that there are some tangential issues that might need to be looked into. For instance, attorneys general and public defenders are interested in the issue of resources.

In another matter, Jim Ramsey said he believes it is important to have additional representation of District Attorneys on the Executive Council, particularly since the council is asking for DA representation on the Death Penalty Study Committee. The council members approved a motion to authorize him to ask the District Attorneys Conference to nominate three members to serve on the council.

Ross Alderman, chair of the CLE Committee, said the TBA Environmental Section is going to contact him about an onsite CLE. Bill Ramsey suggested that an online course with broad appeal would be one on defending a DUI case.

The council's next meeting was scheduled for 3 p.m. Central Time, December 5. ■



Death Penalty Study Committee Meets in Organizational Session

Members of the Criminal Justice Section's Death Penalty Study Committee met in Nashville on October 23 at the Tennessee Bar Center to organize the work of the committee and to make preliminary assignments.

Co-chairs John W. Gill and Katie Edge conducted the meeting that featured a candid discussion of the scope of the committee's mission as requested by the TBA Board of Governors. The committee will explore issues related to the effective assistance of counsel in capital cases and hopes to make its final report to the TBA House of Delegates and Board of Governors in approximately 18 months.

The consensus of the committee members was that its first order of business was to identify existing sources of data relevant to the committee's mission and to assemble that information in a central location for use by committee members in conducting research. Sources of information that were identified during the meeting included:

- Office of the Tennessee Post-Conviction Defender
- Information gathered by the former Indigent Defense Commission
- ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, as reported in the Hofstra Law Review
- Various law review articles and other professional journal articles
- American Bar Association
- District Attorney Generals Conference
- Public Defenders Conference
- Federal Public Defenders Conference
- Office of the Tennessee Attorney General and Reporter
- Tennessee Comptroller's Fiscal Study on the Costs of the Death Penalty in Tennessee (pending)
- Tennessee Administrative Office of the Courts

Existing studies and data will be assembled by committee members and distributed to one another with the assistance of TBA staff, both electronically and manually, where electronic versions of data are not available. The Tennessee Bar Center and TBALink will eventually serve as repositories for relevant data on the effective assistance of counsel in Tennessee and will serve as a resource for other attorneys.

The committee confirmed its commitment to the TBA Board of Governors that the work of the committee would not be played out in the media during the course of the study, it being important that the TBA's governing body be the vehicle for any future distribution of the committee's report. Professor Donald J. Hall and Dean Susan Kay, both of Vanderbilt University School of Law, will serve as reporters for the study.

TBA President-Elect Charles Swanson has attended an ABA conference for bar leaders on assistance of counsel issues in capital cases and will be invited to meet with the committee at one of its upcoming meetings.

The committee membership is diverse by design, the section leadership having endeavored to provide a balance of viewpoints, geography, gender, and race in the committee membership. However, also by design, the committee is relatively small in order to facilitate the coordination of meetings. Various experts in the subject matter will be invited to speak to the committee during the course of the study rather than having a committee with an unmanageable number of members, most of whom would not be able to come to every meeting. At this time, the committee plans to meet monthly, with smaller subcommittees to convene at their discretion to examine discrete issues. The model being used mirrors that employed by the TBA in its highly successful Committee for the Study of Professional Standards whose work resulted in the recent adoption by the Tennessee Supreme Court of the Tennessee Rules of Professional Conduct.

Section members with information to share with the committee should communicate with Lynn Pointer, TBA staff support for the committee, at the Tennessee Bar Center, 221 Fourth Avenue North, Suite 400, Nashville, TN 37219. Her e-mail address is lpointer@tnbar.org. Staff and the committee will appreciate electronic copies of any data section members may wish to provide.

Members of the Death Penalty Study Committee currently include: John W. Gill, Co-chair, Knoxville; Bill Ramsey, Nashville; Katie Edge, Co-chair, Nashville; Diane Thackery, Memphis; Donald J. Hall, Reporter, Nashville; John O. Williams, Cleveland; Susan Kay, Reporter, Nashville; Mike Passimo, Nashville; Don Dawson, Nashville; Sue Palmer, Nashville; Claudia Jack, Columbia.■

(Editor's note – On Nov. 3, John Gill submitted a letter withdrawing from the Death Penalty Study Committee.)

Meet Katie Edge - Death Penalty Study Committee co-chair promises study of value to TBA members

(NOTE: This is the third 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.)

Kathryn Reed (Katie) Edge is co-chair of the section's Death Penalty Study Committee, which will be conducting a study of death penalty issues in Tennessee, primarily those associated with effective assistance of counsel.

She's a partner with Miller & Martin LLP, where she concentrates her practice in the area of financial institutions law. She joined the firm in October, 1995, and practices in the firm's Nashville office. She heads the Financial Institutions Practice Group.

"My favorite professional occupation is starting new banks," Katie says. "There is nothing more professionally satisfying to me than helping a group of people realize a dream, and I have developed a niche practice that includes de novo bank formation. I also do mergers and acquisitions, bank regulatory and securities work, and occasionally am called upon to help a bank client climb out of a regulatory ditch. Practicing with Miller & Martin, a firm with 160 lawyers in three offices, gives me the luxury of focusing my practice and being able to rely on the wonderful expertise of my partners and associates to do the things I cannot do."

Katie has a strong interest in the law and processes surrounding capital cases, but, interestingly, that interest isn't the result of long hours and stressful cases in the field.

"I think I may have the claim to infamy of being the only president of the Tennessee Bar Association who has never been to court as an advocate," Katie says. "I've been a witness on a couple of occasions in my official capacity as a state government official years ago, but because I began my practice as an attorney for the Tennessee Department of Financial Institutions, I was in the position of having the State Attorney General's office represent the agency in any court proceeding, so my practice took a corporate and regulatory turn."

Her personal views about the death penalty are well known to many members of the Tennessee Bar, but she has pledged several times that her views won't influence the study of the death penalty or color the committee's report.

"I know that some members of the Bar may believe that because I have personal views about the death penalty that do not involve legal issues, I might not be able to conduct a balanced legal analysis," she

states candidly. "But this study is not about any one person's views. It is about providing the leadership of the TBA and our members and the public a critical study of the current system in Tennessee. The members of the study committee are diverse in their personal views, good lawyers from many disciplines, and committed to an honest look at where we are in Tennessee with respect to the administration of capital punishment. I do not believe that the TBA should take a political position about the death penalty -- politics are for politicians and our elected representatives. But I do believe that the Bar is uniquely positioned to provide cogent and accurate information to those elected representatives of both the legislative and executive branches so that the decisions they make on behalf of Tennesseans will be informed and not merely based on anecdote or personal bias. The TBA has always been regarded as a trusted advisor to the General Assembly, and I believe the members will value our study."

Katie is a long-divorced mother of one son, Michael Edge, who is 28 and a Realtor in Nashville. "He is engaged to a wonderful young woman, Victoria Baker, who has a six-year old daughter, Alison -- so I am now happy to call myself a grandmother," she says.

Her household includes an aging but loving mixed breed canine named "Cissy" after her friend Judge Cissy Daughtrey (with her permission, of course).

Katie also is an amateur photographer and she loves teaching banking law at the Nashville School of Law -- "satisfying my need to be in the classroom left over from my days as a high school English, theater and journalism teacher."

A couple of years ago, she took a wild notion and redecorated her condo in hues of pink and rose, "including a kitchen whose cabinets look all the world like Pepto Bismol! It is a crazy, feminine mixture of colors and textures that cheers me up after a long day at the office."

Katie started to work for the Tennessee Department of Financial Institutions just days out of the bar exam and was hired in August 1983 when the Commissioner was in the throes of closing banks.

"They needed another lawyer to do some of the grunt work, and even before I had a law license I found myself on a plane to Memphis to attend a bid meeting to sell one of the failed Butcher banks," she remembers. "It was a wonderful and awful trial by fire that presented me with an opportunity to develop an almost unique expertise, but when I left govern-

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Environmental Criminal Enforcement: Debarment, Suspension and Sentencing

(Editor's note - This is the first of a two-part series on environmental crime.)

By W. Thomas Dillard, Esq., Stephen Ross Johnson, Esq., Ritchie, Fels & Dillard, P.C., Knoxville, Tennessee

In the Southeast, many of us find ourselves defending the small company. These organizations have the most to lose from a suspension or a debarment from government contracts, and they will have a tougher fight than larger companies because they do not have the same political and/or economic influence. The worst case scenario is when the investigation into an environmental crime creates a situation where an organization is suspended, and later debarred as a result of a plea or conviction, from government contracts, and this suspension or debarment severely impacts the economic viability of the company, possibly even resulting in bankruptcy. Being charged with and either pleading to or being convicted of an environmental crime can have serious consequences with respect to being suspended and subsequently debarred from participating in future government contracts. Federal agencies are prohibited from entering into contracts with, or even issuing grants to, any entities who are convicted of crimes under certain environmental statutes. This "blacklisting" of an organization, at the Environmental Protection Agency's discretion, can extend to other organizations or entities owned by the entity pleading to or convicted of the environmental violation.

porarily disqualifies a contractor from receiving government contracts or having contracts renewed or extended until the basis for the suspension is resolved." Debarment follows suspension - it is the formal disqualification of a contractor or a participant in government programs for a set period of time, usually one to three years but sometimes longer. Organizations and individuals are treated the same under the debarment and suspension regulations -- they are all considered "entities" for purposes of the applicable regulations.

A. Contractors And Participants - The Immense Breadth Of The Applicability Of Debarment And Suspension

By statute, executive order, and regulations, the government must do business only with responsible contractors and participants in federal assistance, loan, and benefit programs. Each federal agency has a debaring official, and "the debaring official may extend the debarment decision [of a contractor or participant] to include any affiliates of the contractor [or participant]." The debarment regulations apply to individuals who have participated in, or who reasonably may be expected to participate in, covered transac-



I. DEBARMENT AND SUSPENSION FROM CONTRACTING WITH THE FEDERAL GOVERNMENT

Although debarment is generally discretionary, there are certain statutes that mandate debarment. Under the Clean Air Act and the Clean Water Act, no federal agency may contract with any entity if they have been convicted of any offense under the criminal penalty provisions of either Act. Both of these provisions are facility specific, which basically means that if the entity has another facility that was not involved in the violation, then the federal government may contract with the other facility.

"Suspension is an interim refusal to deal with a contractor pending receipt of further information. It tem-

porarily disqualifies a contractor from receiving government contracts or having contracts renewed or extended until the basis for the suspension is resolved." Debarment follows suspension - it is the formal disqualification of a contractor or a participant in government programs for a set period of time, usually one to three years but sometimes longer. Organizations and individuals are treated the same under the debarment and suspension regulations -- they are all considered "entities" for purposes of the applicable regulations.

contract with the government may serve as a basis for suspension or debarment. The same is true for "participants." Those who are in non-procurement positions with the government -- essentially those who participate in government programs in some manner or have the mere potential to participate in government programs of any kind -- may be suspended or debarred by virtue of their status or potential status as a "participant."

B. The Taint Of A Criminal Investigation, Plea, Or Conviction

A debarring official with the applicable federal agency may debar or suspend a contractor for a conviction or civil judgment for "commission of any ... offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor." A contractor or participant may be debarred or suspended for "[a]ny other cause so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor" or of the participant. "Responsibility is a term of art in government contract law that has been

defined to include not only the ability to complete a contract successfully, but also the honesty and integrity of the contractor." Although the test for debarment is the present responsibility of the contractor, present lack of responsibility can be inferred from past acts.

Under the debarment regulations, existence of a criminal conviction for an offense indicative of business risk provides the material fact in support of cause for debarment; a criminal conviction casts doubt on the present responsibility of a person for purposes of debarment or suspension.

II. CONCLUSION

As noted above, the federal debarment and suspension regulations are extremely broad. In representing a business entity or individual who does business with the state or federal government, or who even has the potential to do business with the state or federal government, in any criminal violation, environmental or otherwise, counsel must be aware of the full implications, and advise the client, of any potential conviction.■

Meet Katie Edge *continued from page 5*

ment in 1995 to practice law with Miller & Martin and open the firm's Nashville office, I knew that starting new banks was going to be a lot more fun than closing them."

Katie has been the president of Nashville chapter of the Lawyers Association for Women; the statewide Tennessee Lawyers Association for Women; and the Tennessee Bar Association.

"I am by inclination a bar junkie," she admits. She attends West End United Methodist Church and participates in the Discourse and Discovery Sunday School Class, a diverse bunch of folks not afraid to talk about controversial and thought-provoking issues.

In 1984, she co-authored "State Regulation of Bank Holding Companies and the Future of Interstate Banking: A Tennessee Perspective," with Colman B. Hoffman, for the Tennessee Law Review, Vol. 51, No. 3. She also is a contributing author for Tennessee Practice Legal Forms, Section 39, "Bank Charters" (West, 1992). Ms. Edge served as advisor to the department when it published Selected Laws and Regulations of Tennessee Financial Institutions. Her article "Judicial Independence/Judicial Accountability: A Difficult Balance" was published in

the May/June 1998, issue of the Tennessee Bar Journal. In June, 2000, the ABA Judges Journal published her article "Gender Bias Goes to Ground in Tennessee." She has also been an occasional contributor of book reviews for the Tennessee Bar Journal, and from July, 2000 - June, 2001, Ms. Edge wrote a monthly "President's Perspective" column for the Tennessee Bar Journal.



Katie Edge
*Chair, Death
Penalty Study
Committee*

She is a frequent speaker and lecturer on banking issues, legal ethics, gender and ethnic fairness issues, and lawyer impairment.

"I have problems articulating the word 'no' to any request to do something that whets my appetite as being worthwhile or interesting, so I tend to over-commit," she says. "I think they have a 12-step program for that but I have not yet signed up. Too busy, I guess."■

HOT OFF THE PRESS

Criminal justice from the news media's perspective

DEATH SENTENCE OVERTURNED

Judge didn't fully explain consequences of renegeing on deal, high court says

By JAMIE SATTERFIELD

Knoxville News Sentinel October 31, 2003

The Tennessee Supreme Court on Thursday overturned a Knox County man's death sentence in the 1997 slaying of a 20-year-old man shot to death over a watch and a dollar bill. The state's highest court ruled James A. Mellon was not fully informed of the consequences of his decision to renege on a plea deal that would have netted a life sentence. Mellon and three co-defendants were charged in the Aug. 24, 1997, slaying of Robert Scott Loveday.

Loveday was using a pay phone outside a convenience store in Farragut when he was confronted by four suspects who demanded his valuables. Loveday was shot twice in the chest.

Mellon was not the triggerman in the case. Co-defendant Anthony "T-Bone" Jones has admitted he shot Loveday. Jones was sentenced to life without

parole. Co-defendants Ernest Rodgers and David Jones also pleaded guilty and received 40-year sentences.

Mellon initially pleaded guilty and would have received life with the possibility of parole. But the deal, offered to Mellon by the Knox County District Attorney General's Office in 1998, was conditioned on his agreement to testify against his cohorts.

A few months later, Mellon balked, saying he was afraid of being labeled a "snitch." Mellon asked to withdraw his guilty plea, but Criminal Court Judge Mary Beth Leibowitz refused. Leibowitz ruled Mellon was fully aware he had to testify to get the benefit of the plea deal.

She impaneled a jury to decide Mellon's fate. In March 1999, the jury sentenced Mellon to die. But the state Supreme Court ruled Leibowitz did not clearly state to Mellon that he could face death if he reneged on the deal.

The case now returns to Leibowitz's court, where Mellon likely will receive a new trial.■

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THE ETHICAL OBLIGATIONS OF DEFENSE ATTORNEYS

By NORMAN JULIAN

The Dominion Post Morgantown, West Virginia
(Reprinted with permission of the Dominion Post)
November 2, 2003

Just how far should a criminal defense attorney go to defend someone the lawyer may believe is guilty?

Case in point?

John Allen Muhammed – charged in connection with the Washington, D.C. sniper attacks - decided last week, the second week of his trial, to dismiss his court-appointed attorneys and attempted to handle his defense himself. Muhammed has entered a plea of innocence.

Later in the week he reinstated the lawyers chosen for him. As Muhammed now enters his third week of proceedings, media reports indicate loads of evidence against him.

Most damaging is that, since his arrest and that of Lee Boyd Malvo, the sniper killings have ceased.

In an ethically perfect world, a lawyer would not be asked to defend someone he knows committed the crime, but the law is set up so that even the guilty are guaranteed a defense.

Local attorney Jacques Williams and I kick around legal ideas from time to time, so I asked him how a lawyer should act if he knows the person he is defending is guilty.

"Criminal defense lawyers would generally tell you that what is of paramount importance is the notion that

every person is entitled to have constitutional protection guarantees maximized," Williams said. I took that to mean a charged person should have the strongest, most informed defense possible.

Williams went on: "You have heard the saying that 'it is better for one guilty man to go free than for an innocent man to be condemned.'

In theory, 'the system' will always (or, at least, almost always) work if all the lawyers involved in the proceeding -- the judge, defense lawyer and prosecutor -- do what they are supposed to do.

This type of attitude also entails, I imagine, the detached notion that 'I, the defense lawyer' am not helping a guilty man get away with a crime."

"Rather, I am upholding the system and what our constitution provides," Williams said. "That is an attitude that I understand but am personally not comfortable with, and which is the primary reason I do not practice criminal law."

Williams indicated "that would lead to irresolvable conflicts between what is legal and what is right according to the dictates of my conscience. They will not always coincide."

"Regardless of one's attitude about representing criminal defendants, it is absolutely indefensible and a serious breach of ethics for an attorney to advocate a position or make statements which he knows to be false."

So I asked him if a lawyer claiming his guilty client is not guilty is not a false representation in itself.

Oak Ridge National Laboratory

By Marty Goolsby

(Editor's Note – In an interview with the Criminal Justice Section newsletter, published in the August issue, Judge Gil Merritt mentioned that the complexity of criminal law, especially in death penalty cases, is among the challenges attorneys must face. "One factor that adds to the complexity," he said, "is that in addition to understanding the law, attorneys also must understand the technology that applies in death penalty cases." Some of the new technology that will affect criminal justice in the future is being developed based on research performed in Tennessee at the Department of Energy's Oak Ridge National Laboratory, managed by UT-Battelle, LLC. This forensics research dates back to the mid-1990s when Knoxville police detective Art Bohannon came to the lab with a problem. A child had been abducted and killed. The police department had a suspect and searched his car for the child's fingerprints, but found none. Bohannon's theory was that there must be something that caused a child's fingerprints to vanish. ORNL, under director Al Trivelpiece, began a research project that discovered there is a chemical difference between the fingerprints of children and adults. Children's fingerprints actually do vanish relatively quickly, particularly in a warm environment. Today, ORNL works closely with the University of Tennessee in research aimed at discovering advanced forensics techniques. This article, written for the Criminal Justice Section newsletter, describes some of the research under way at ORNL.)

Oak Ridge National Laboratory, one of the Department of Energy's energy research laboratories, has developed many novel measurement techniques, sensors and instruments and has devised applications that reach far beyond their original basic science intentions.

For example, the Tennessee laboratory's sophisticated analytical and detection methods and equipment are being used to analyze tiny residues of biological fluids and tissues, traces of explosives and chemicals, fiber fragments and fingerprints—all valuable technologies that can be applied to aid in solving a crime.

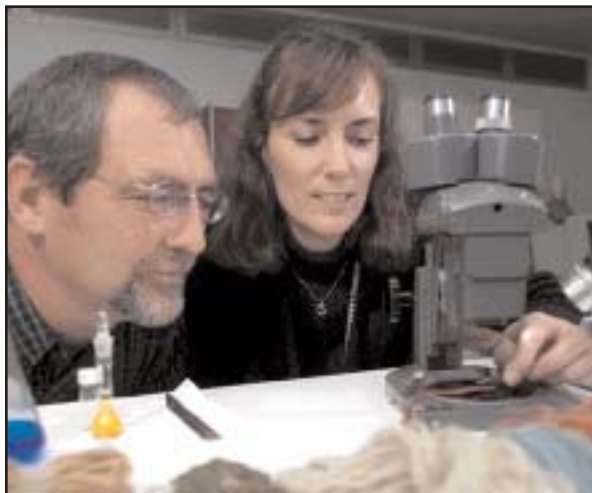
One research project is defining a method to identify fibers left at a crime scene.

Often only minute fiber fragments are found at a crime scene. The question then becomes, how do you positively link a larger fiber, perhaps one clearly linked to a crime suspect, with trace fibers at a crime scene?

For Linda Lewis the answer is simple—chemistry.

Linda, along with Samuel Lewis, another researcher in ORNL's Chemical Sciences Division, and Albert Tuiman of the Chemistry Department at the University of Tennessee set up experiments to distinguish dye constituents.

According to Linda, distinguishing components of a dye is not new. "We were aware of several processes to analyze dye constituents, many of which have been used in forensics work," she says. "But each process had at least one aspect that limited its usefulness. For



Samuel and Linda Lewis, researchers in ORNL's Chemical Sciences Division, set up experiments with yarn windings to distinguish dye constituents. (ORNL Photo by Curtis Boles)

example, one process depended on destructive techniques; another was limited in the number of compounds it was effective on. Some were too expensive, used too much solvent or lacked sensitivity."

The researchers decided on a process never before tried for the forensic investigation of fibers – electrospray ionization mass spectroscopy. Mass spectroscopy is a method of analyzing intensity of a substance's spectra on the molecular level using ions of the substance. Electrospray ionization is a chemical process used for preparing negatively charged ions of a molecule for analysis.

Linda and her colleagues chose nylon, a fiber commonly found at crime scenes, for their proof-of-concept experiments. Carpet manufacturers supplied numerous colored carpet samples and colored nylon windings used in carpet manufacture. A chemical company supplied dyes used to color nylon carpets.

Nine dyes were examined in the initial study. At the beginning of their experiment, the researchers knew the chemical structure of only three from the scientific literature or from the manufacturer.

Designing a protocol for determining the spectra of different dyes and the proportion of dye in each fiber was an important step, since the application to fiber dye was new. The researchers had a goal of using only a minute amount of fiber for a destructive dye analysis, which would leave the remainder of a sample for evidence.

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They determined that they could measure and match dye components in samples as small as one millimeter. More importantly, the researchers also determined that the chemical protocol they used was sufficient to make the comparison and that it was not necessary to apply other measurement techniques such as separating the dye components by chromatography.

Additionally they determined that currently used forensic fiber dye methods are not sensitive enough to distinguish between different colored fabrics manufactured by a given company when computer dyeing techniques are used to mix the same dye components in slightly different ratios to produce similar colors like olive green and brown.

The researchers acknowledge that their experiments were conducted using virgin windings and carpet samples and that normal use of the fibers—such as washing, drycleaning and exposure to sunlight and stains—might alter the dye content. However, in comparing a crime scene's fiber fragment with a larger sample, both would have been subjected to the same normal use and the forensic comparison would still be valid.

The researchers hope to explore other fibers, including cotton, and various dyes. Linda says, "It's rewarding to have an idea and see it work out so well. We're hoping to improve our protocol and have this technique become a valuable addition to forensic investigation."

Funding was provided by the FBI and materials assistance by Shaw Industries Inc., Collins and Aikman, and Ciba Specialty Chemicals. ■

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Is not deception then part and parcel of any such defense?

If the court assigned you to a case, as it has lawyers in the sniper cases, and you knew the client was guilty, would you advise him to enter a guilty plea?

If the defendant wouldn't, what would be your fallback position? Williams said he wouldn't accept the assignment in the first place, but for the sake of discussion, if he knew the client was guilty, he would advise him to plead that way.

If as an attorney he could not be removed from the case, he would not try to get his client acquitted by "lying, cheating, falsely impugning adverse witnesses, fabricating alibis -- in short do anything that smacks of lying or deception."

Helping a guilty person get away with crime, though, is sometimes the case with attorneys who accept the duty.

It is often most pronounced when the defendant is able to pay large sums to obtain highly skilled legal representation, which does not appear to be the case with Malvo and Muhammed.

But when high profile defendants with celebrity status expend big bucks to buy upscale legal help, and get off as a result, society may pay an even larger price.

In the meantime, under our system, neither Malvo or Muhammed should be presumed guilty or innocent until the trial is through. ■

Norman Julian is a columnist at large for the Dominion Post.

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the opinion that the Tennessee Death Penalty statute is more balanced than statutes in other death penalty jurisdictions.

2 The people of Tennessee support the death penalty and the study group should assume that fact. That is, this is not an endeavor to lead to a recommendation that the death penalty be abolished.

3 Tennessee has made a good start at addressing the issue of insuring effective assistance of counsel in death penalty cases. Specifically, rule 13 promulgated by the Tennessee Supreme Court, does establish standards for appointment of counsel representing persons charged with capital offenses and it includes compensation provisions, as well. Amendments are now being considered. If adopted, those amendments offer promise to improve upon these standards significantly.

"Clearly, whether or not the accused is represented by an effective and zealous advocate is an important question to be examined," Hall wrote in his prepared remarks. "In evaluating that matter, however, it is clear that the inquiry may take this committee into arenas that are different from but related to defense counsel's repre-

sentation. Just to choose one example: a nationwide study group ("The Constitution Project") recommends that prosecutors adopt 'open file' policies in death penalty cases. That is, the prosecutor would open his or her file to defense counsel upon that attorney's request. Presumably, the only exceptions would include work product material and privileged information. At least one prosecutor in Tennessee currently has precisely that policy. It would not surprise me to learn that a defense attorney in that county would be more effective in the representation of a person charged with a capital offense (because of his or her ability to more fully prepare for the trial, itself) than a lawyer in another county who must pursue limited criminal discovery avenues."

Al Harvey, former TBA president, noted during the discussion, "It is not the idea of this organization to put restraints on its sections. However, I hope the focus of the study is what we asked the section to do."

Katie Edge, also a former TBA president, told the BOG, "I trust this board to do what it's supposed to do — help lawyers be better lawyers." ■

Weird charges, juvenile records

By Joe Culver, Newsletter Editor

Back in the days when I made my living working at newspapers, I remember being fascinated by some of the charges that showed up on police reports.

Occasionally officers would arrest someone who had a pistol. One of the charges they would write against the miscreant would be something like "Carrying a handgun with the intent of going armed."

I don't know what other reason you might have for carrying a pistol.

No one, as far as I know, ever was charged with "Carrying a handgun intending to go unarmed."

Nor do I recall seeing a charge like "Intended to go armed, but forgot to carry a pistol."

Among my favorites were the "attempt" charges. I thought the police should just brand those would-be felons with a big scarlet "L" for "Loser."

For instance, they would haul in the suspect and charge him with attempted burglary.

How embarrassing it must be to be in a conversation with your jailmates, each of whom is detailing the various crimes they committed to entitle them to long-term lodging in state accommodations.

"I was convicted of armed robbery," Lefty might start the conversation.

"Ha!" Banana Breath Wilson might exclaim. "That ain't nothin'. I'm in here for murder."

"What did you get sent up for?" they would ask our guy.

"Well ..." he would say, head hung down. "They convicted me for failure to complete a burglary."

Talk about being labeled an incompetent.

I have a son who, as a juvenile, was not the law-abiding citizen that I am. He managed to get into trouble a couple of times.

That was about five years ago.

Since then, he's done better. Now, at age 22, he says he wants to go into the military.

When the recruiter asked if he had a juvenile record, my son was honest and admitted that he had. He was turned down on that basis.

That caused me to be curious about the accessibility of juvenile records, so I turned to the Tennessee Code, part 37-1-153.

That code says that except in cases arising under 37-1-146, all files and records in a proceed-

ing under this part are open to inspection only by ...

I was astonished. The "only by" pretty much includes anyone who wants to look, especially after you read down through the first four listings and come to the fifth one which says, "With permission of the court any other person or agency or institution having a legitimate interest in the proceeding or in the work of the court."

That's just about the whole world. I think any resident of the state could claim to have a legitimate interest in the work of the juvenile courts.

If, as I assumed, the purpose of the juvenile law is to make it possible for a young person to become rehabilitated without the stigma of convictions, that purpose is poorly served when the records are open to inspection and decisions impacting the former delinquent's future as a productive member of society are negatively influenced by those records.

But I recognize the dilemma society faces. We believe that juveniles today are more mature than juveniles of past generations, and the nature of some of the crimes they commit is so horrendous that we don't want to give them special protections. We want to try them as adults.

It's intriguing to consider how we let our emotions flavor our ideas.

Is there good justification to hold that someone of a certain age lacks the maturity to consent to sex, while in a different context that same person would be sufficiently mature to be tried as an adult for criminal conduct? Maybe.

These sorts of things have to be difficult decisions for legislators, attorneys and judges.■

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"Carrying a
handgun intending
to go unarmed."*





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CRIMINAL LAW

The Newsletter for the TBA's Criminal Justice Section

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