

# LibertyWatch

## A Publication of the Pennsylvania Association of Criminal Defense Lawyers October 2007

Welcome to *LibertyWatch*. David R. Crowley covered the Pennsylvania Supreme Court, and the Pennsylvania Superior and Commonwealth Courts for the month of September, 2007. We are necessarily selective in our coverage and no newsletter can substitute for diligent research and innovative analysis. The cases can be found in full at: <http://www.aopc.org/>. If you prefer NOT to receive *LibertyWatch* via e-mail, kindly so inform us so that we may delete your e-mail from our records.

### PENNSYLVANIA SUPREME COURT DECISIONS

#### **Search & Seizure — Exception to Warrant Requirement — Apparent Authority**

*Cmwlth. v. Jvanna Strader, No. 43 WAP 2006. Opinion by Eakin, J. 9/26/07.*

The Court held that there is an apparent authority exception to the warrant requirement under the Fourth Amendment. The dissent agreed that apparent authority to permit police access to property is a valid exception to the warrant requirement, but found lacking the officer's opinion that apparent authority was possessed by an individual known not to be the owner of the residence who merely said he was in control while the owner was away. Nice try PACDL member Kirk Henderson.

### PENNSYLVANIA SUPERIOR COURT DECISIONS

#### **Expungement**

*Cmwlth. v. Cyrankowski No. 429 EDA 2006. Opinion by Klein, J. 9/6/07.*

The trial judge did not abuse her discretion in applying the Wexler balancing test and concluding that the Commonwealth met its substantial burden to show that expungement of arrest records of insanity acquittee was inappropriate.

#### **Appellate Practice — Timeliness — Record**

*Cmwlth. v. Dunkle No. 277 WDA 2007. Opinion by Bender, J. 9/7/07.*

Mr. Dunkle was found guilty of driving under suspension and sentenced to fines and costs. Several months later, upon his failure to pay, he was sentenced to incarceration. Following sentencing on the failure to pay, he unsuccessfully sought a common pleas court appeal from the DUS conviction alleging that his appeal was timely because he was not given his appeal rights until he was sentenced to incarceration. He appealed to the Superior Court complaining that he was denied an opportunity to make a record as to his lack of notice of appeal rights. The Court held that the appeal from the underlying conviction was untimely as appellant took no steps toward fulfilling his obligation of providing a record for appellate review other than filing his direct appeal. The Court suggested an appeal *nunc pro tunc* or a statement in absence of transcript under Rule 1923 as means of making a record of the claim. The Court did; however, remand to the lower court to consider the propriety of incarceration for the failure to pay fines and costs as his appeal was timely to this issue.

### **PCRA – Timeliness**

*Cmwlth. v. Taylor No. 369 WDA 200. Opinion by Gantman, J. 9/7/07.*

Finding that the lower court correctly concluded that the PCRA petition was untimely filed it dodged the most pressing issue of our time: "DID THE INSOLVENT COMMONWEALTH COMPEL [APPELLANT] INTO ADMIRALTY/MARITIME JURISDICTION UNDER THE BANNER OF WAR THAT IS NOT RECOGNIZED BY TITLE 4 CHAPTER 1 §[§] 1,2, AND 3, WHEREAS, SAID FLAG IS THE (COLOR) GOLD FRINGED, RENDERING THE COURTROOM A TRIBUNAL UNDER MARTIAL LAW RULE[,] THUS VIOLATING ARTICLE III OF THE UNITED STATES CONSTITUTION[?]"

### **Sentencing – Mandatory Sentences – School Bus Stop**

*Cmwlth. v. Teeter No. 2005 WDA 2005. Opinion by Klein, J.; Concurring Opinion by McEwen, P.J.E. 9/14/07.*

In a case of first impression, the Court held that the school bus stop mandatory does not apply to enhance a defendant's sentence when drug trafficking to minors has occurred within the requisite distance of a bus stop during the evening hours of summer vacation when a school bus wouldn't stop there.

### **Sufficiency — Aggravated Assault — Reckless Conduct**

*Cmwlth. v. Patrick No. 2757 EDA 2005. Opinion by Gantman, J. Dissenting Opinion by Todd, J. 9/24/07.*

*En banc* the court, distinguishing Roche's 1 punch rule, finds that a "sucker punch" to the side of victim's head will *prima facially* support the charge of aggravated assault on the basis of recklessly caused serious bodily injury.

### **Double Jeopardy**

*Cmwlth. v. Walker No. 1249 WDA 2006. Opinion by Popovich, J. 9/25/07.*

Finding that there existed no manifest necessity for the trial court to *sua sponte* declare a mistrial, the Court found the lower court erred in denying defendant's motion to dismiss on double jeopardy grounds.

### **DUI — National Guard**

*Cmwlth. v. Barnhart No. 1858 MDA 2006. Opinion by Stevens, J. 9/26/07.*

51 Pa.C.S. § 4104 does not bar the warrantless DUI arrest of a national guardsman who is off duty out of uniform and on a personal mission.

### **DUI — Constitutionality**

*Cmwlth. v. Morrison No. 352 MDA 2005. Opinion by Todd, J. 9/27/07.*

Third tier offender provision of the DUI statute is not unconstitutionally overbroad or vague.

## **PENNSYLVANIA COMMONWEALTH COURT DECISIONS**

### **Vehicle Registration – Suspensions — Appeals**

*Dinsmore v. Bureau of Driver Licensing, 2219 C.D. 2006. Opinion by Leavitt, J. 9/10/07*

In vehicle registration suspension appeal for failure to maintain insurance on a registered vehicle, the trial court is without jurisdiction to rule on the timeliness of notice to insured of the termination of insurance once the Department has met its *prima facie* burden of establishing that it had received notice of termination of insurance and that the vehicle was of the type required to be registered. Statutorily, this determination must be addressed

in an appeal to the Insurance Commissioner. However, as Penn DOT's notice of right to appeal the suspension to the Common Pleas Court failed to articulate that the validity of the notice of suspension could only be appealed to the Insurance Commissioner; the Court remanded the matter to the trial court with directions to hold the suspension in abeyance pending a *nunc pro tunc* appeal to the Insurance Commissioner.

## PACDL News and Announcements

### Mark Your Calendar

#### ***Libations, Citations and Demonstrations:***

##### ***The Ultimate Motor Vehicle Seminar*** (6 credit hours)

(General Membership and Board of Directors Meeting at 12:15 p.m.)

Friday, October 19, 2007

Ramada Conference Center

1540 S. Atherton Street

State College, PA 16801

##### ***For the Experienced*** (9 credit hours)

General Membership and Board of Directors Meeting on Saturday at 12:15 p.m.)

Friday and Saturday, November 9 & 10, 2007

Pennsylvania Convention Center

Philadelphia, PA

##### ***Capital Cases*** (6 credit hours)

Friday December 7, 2007

##### ***Search & Seizure*** (6 credit hours)

Saturday, December 8, 2007

(General Membership and Board of Directors Meeting on Friday, 12/7/07 at 12:15 p.m.)

Doubletree Hotel

One Bigelow Square

Pittsburgh, PA

### ***Still Time To Register!***

#### **Libations, Citations and Demonstrations:**

##### **The Ultimate Motor Vehicle Seminar**

(6 credit hours)

Friday, October 19, 2007

Ramada Conference Center

1540 S. Atherton Street, State College, PA 16801

8:00 a.m. **Registration and Continental Breakfast**

9:00 a.m. **DUI Update and a Look at the Privileged Life  
(Licensing Issues in Penn Dot Administrative  
Hearings and Appeals)**

*Edward F. Spreha, Jr., Esquire,  
Harrisburg and Beverly J. Points,  
Esquire, Office of Chief Counsel,  
PennDOT, Bureau of Driver  
Licensing*

- 10:00 a.m. **Are Your Eyes Playing Tricks on You?: Human Factors Issues in DUI and Homicide by Vehicle Cases** *Dr. William Vigilante, Jr., Human Factors Expert, Robson Forensics*
- 11:00 a.m. **Break**
- 11:15 a.m. **The Boys and Their Toys: A Demonstration of Speed Timing Devices (radar, Vascar, Acutrack, Enradd, Tracker) and Defenses and Consequences** *Sgt. Cliff Karlsen, Harrisburg Traffic Safety Unit  
John B. Mancke, Esquire, Harrisburg*
- 12:15 p.m. **Lunch (on your own)  
PACDL General Membership and Board of Directors Meeting**
- 1:30 p.m. **OOPS!: Mistakes Lawyers Make at Preliminary Hearings and Trials in Motor Vehicle Cases** *Panel: Honorable Bradley P. Lunsford, Centre County Court of Common Pleas; Honorable Rick Williams, Mifflin County Court of Common Pleas; Dawson R. Muth, Esquire (former District Judge); and David R. Crowley, Esquire, Centre County Chief Public Defender, Moderator*
- 2:30 p.m. **Get the Buzz on the New DUI Drug Recognition Expert (DRE) Program: An Explanation and Demonstration of Its Protocol and Legality** *George Geisler, Jr., Eastern Pennsylvania Law Enforcement Director of Team DUI*
- 3:30 p.m. **Break**
- 3:45 p.m. **Was the District Attorney Caught Speeding on the Way to the Courthouse? Ethical Lessons from the Duke Lacrosse Case** *Professor Christopher Robinette, Widener University School of Law*

# REGISTRATION FORM - Libations, Citations and Demonstrations (10/19/07)\*

Mail the completed Registration Form with payment no later than October 15, 2007. Only prepaid attendees are guaranteed seating. Door registrations are permitted only as space and material are available. The address is: PACDL, 115 State Street, Harrisburg, PA 17101. Telephone 717-234-7403. Fax 717-234-7462.

**CANCELLATION POLICY** - PACDL must guarantee payment for meals and materials in advance. There will be no refunds after 10/15/07. If you cannot attend, a colleague may take your place or your materials will be mailed to you. Cancellations made prior to that date will be subject to a \$50 cancellation fee.

**SCHOLARSHIPS** - There are a limited number of partial scholarships available to assist with the seminar fee for PACDL members whose dues are current. Hotel charges are not included. To apply, mail the completed seminar registration form along with a letter requesting financial assistance to PACDL no later than October 10, 2007. Scholarship applications received after that date will not be considered.

**LOCATION** - The Ramada Inn & Conference Center is located at 1450 S. Atherton Street, State College, PA 16801. For overnight reservations call 814-238-3001. PACDL has a block of rooms available for \$79 King room, plus tax. Please call immediately and reserve your room. You must state you are with the Pa. Assoc. of Criminal Defense Lawyers to receive this rate.

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|--|-------|
| <input type="checkbox"/> PACDL Members                               | \$275 |
| <input type="checkbox"/> PACDL Public Defender Members               | \$225 |
| <input type="checkbox"/> PACDL Members in Practice Less than 5 Years | \$225 |
| <input type="checkbox"/> Public Defenders                            | \$315 |
| <input type="checkbox"/> All Other Criminal Defense Attorneys        | \$375 |

10% Discount for groups of three or more from the same office

Please fill out the following portion as well:

\_\_\_\_\_ Desired Number of Credit Hours Reported to the CLE Board at \$1.50 per hour \$ \_\_\_\_\_  
(no discount on CLE reporting fees)

TOTAL REGISTRATION and CLE REPORTING FEES \$ \_\_\_\_\_

Name \_\_\_\_\_ Attorney ID \_\_\_\_\_

Mailing Address

\_\_\_\_\_

\_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone Number \_\_\_\_\_ FAX \_\_\_\_\_

Please note any dietary needs or needs related to disabilities

This seminar has been approved for 5 credit hours of substantive law and 1 ethics hour by the Continuing Legal Education Board of the Supreme Court of Pennsylvania.

**Ramada Conference Center State College**

1450 S Atherton Street, State College, PA 16801

Phone: 814-238-3001 Fax: 814-237-1345

[www.ramadasc.com](http://www.ramadasc.com)

# FOR THE EXPERIENCED

## The Ultimate Criminal Law CLE

Friday & Saturday, November 9 & 10, 2007

Pennsylvania Convention Center

1101 Arch Street

Philadelphia, PA 19107

### Tentative Schedule

**Friday, November 9, 2007** (6 Rule 801 Capital Case Training Hours)

8:00 – 8:30 a.m.

**Registration and Continental Breakfast**

8:30 – 12:00 p.m.

**Innocence (homicide/arson case): Demonstration of Direct and Cross of an Expert; Ineffective Counsel; Recanting Witness** by *Professor Jules Epstein, Moderator, Widener University School of Law; Gaetan J. Alfano, Miller Alfano & Raspanti P.C.; Thomas A. Bergstrom, Malvern; Stuart Lev, Defender Association of Philadelphia; Brian J. McMonagle, McMonagle, Perri McHugh & Mischak; Sara M. Webster, Mellon, Webster & Shelly; Hon. Pamela Pryor Dembe, Supervising Judge of the Criminal Section, Trial Div., Court of Common Pleas, Philadelphia; and the Hon. Timothy J. Savage, USDC for the E.D. of Pa.*

12:00 – 1:15 p.m.

**Luncheon with Guest Speaker Joshua L. Dratel, Counsel for Guantanamo Detainees, Co-author of *The Torture Papers: The Road to Abu Ghraib*** (included in your registration)

1:15 – 2:15 p.m.

**Ethics and Guantanamo Bay** by *Joshua L. Dratel, Moderator, New York; NY; Major Thomas Fleener, formerly of the Office of Military Commissions, Office of Chief Defense Counsel, Washington, DC.*

2:30 – 3:30 p.m.

**New Developments in the Use of Expert Witnesses** by *Felicia Sarner, Defender Association of Philadelphia and Mark B. Sheppard, Sprague & Sprague*

3:45 – 5:15 p.m.

**Fact Busting For Post Conviction Litigation and Appeals** by *James Klein, Chief, Appellate Division of the Public Defender Service for the District of Columbia*

5:30 – 7:30 p.m.

**Join your comrades at Vintage Wine Bar & Bistro** (13<sup>th</sup> & Sansom Sts.)

**Saturday, November 10, 2007** (3 Substantive Law Hours)

	Federal Track	State Track
8:30 – 9:30 a.m.	<b>Criminal Tax Cases</b> by <i>Robert E. Madden, Philadelphia and Peter Goldberger, Ardmore</i>	<b>Will the Case Go Federal and Then What?</b> by <i>Michael J. Engle, Trigiani &amp; Engle, LLP and Richard R. Harris, Obermayer Rebmann Maxwell &amp; Hippel LLP</i>
9:45 – 11:15 a.m.	<b>Anatomy of a Healthcare Fraud Trial</b> by <i>Ellen C. Brotman, Moderator, Montgomery, McCracken, Walker &amp; Rhoads, LLP; Hon. Michael M. Baylson, U.S. District Court for the E.D. of Pa.; Paul L. Knight, O'Connor &amp; Hannan, L.L.P.; Marc S. Raspanti, Miller Alfano &amp; Raspanti P.C.; Manisha M. Sheth, AUSA; and J. Alvin Stout, III, AUSA</i>	<b>PCRA Traps</b> by <i>Professor Jules Epstein, Widener University School of Law and Helen Marino, Capital Habeas Corpus Unit, Defender Association of Philadelphia</i>
11:30 a.m. – 12:30 p.m.	<b>Bank Secrecy and Money Laundering</b> by <i>Meredith S. Auten, Morgan Lewis; Ian M. Comisky, Blank Rome LLP; Mathew D. Lee, Blank Rome LLP; Richard J. Zack, AUSA</i>	<b>Death by Car in Pennsylvania</b> by <i>F. Michael Medway, Philadelphia</i>

12:40 p.m.

**PACDL General Membership and Board of Directors Meeting – all PACDL Members are welcome to attend**

This seminar has been approved for 8 credit hours of substantive law and 1 ethics hour, including 6 hours of Rule 801 Capital Case Training Hours by the Continuing Legal Education Board of the Supreme Court of Pennsylvania.

Thank You to our Course Planners: *Ellen C. Brotman and Alexandra Gaugler of Montgomery, McCracken, Walker & Rhoads, LLP and Michael J. Engle of Trigiani & Engle, LLP and to our Sponsors: Blank Rome LLP; Dilworth Paxson LLP; Fox Rothschild; The Law Office of Arthur T. Donato, Jr.; Lindy & Associates; Miller, Alfano & Raspanti, PC; Montgomery, McCracken, Walker & Rhoads, LLP; Sprague & Sprague; and Trigiani & Engle, LLP*

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\$450 PACDL Members,  
\$350 PACDL Public Defender Members  
\$350 PACDL Members in Practice Less than 5 Years  
\$450 Public Defender, Non-member  
\$499 All Other Criminal Defense Attorneys  
\$299 Friday Only  
\$199 Saturday Only

10% Discount for groups of three or more from the same office

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\_\_\_\_ Desired Number of Credit Hours Reported to the CLE Board at \$1.50 per hour      \$ \_\_\_\_\_  
(no discount on CLE reporting fees)

TOTAL REGISTRATION and CLE  
REPORTING FEES      \$ \_\_\_\_\_

Name \_\_\_\_\_

Attorney ID \_\_\_\_\_

Mailing Address \_\_\_\_\_

City \_\_\_\_\_ St \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ FAX \_\_\_\_\_

e-mail \_\_\_\_\_

Please note any needs related to disabilities.

