

LibertyWatch

A Publication of the Pennsylvania Association of Criminal Defense Lawyers November 2008

Welcome to *LibertyWatch*. David R. Crowley covered the United State Supreme Court, the Pennsylvania Supreme Court, the Pennsylvania Superior Court and the Pennsylvania Commonwealth Court for the month of October, 2008. We are necessarily selective in our coverage and no newsletter can substitute for diligent research and innovative analysis. The Pennsylvania 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.

UNITED STATES SUPREME COURT DECISIONS

Death Penalty — Cruel and Unusual Punishment
KENNEDY v. LOUISIANA (No. 07-343), Opinion by Kennedy, J., 10/1/08, web-accessible at: <http://www.law.cornell.edu/supct/html/07-343.ZS.html>

The Eighth Amendment bars the imposition of the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death.

PENNSYLVANIA SUPREME COURT DECISIONS

Search & Seizure — Sobriety Checkpoints
Cmwlth., Aplt v. Worthy, No. 1 WAP 2007. Opinion by McCaffery, J., 10/27/08.

Consistent with the *Tarbert-Blouse* guidelines, on-site police officers may exercise their discretion and temporarily suspend the operation of a sobriety checkpoint where traffic back-up has created unreasonable delay or safety concerns. Mr. Justice Saylor penned a well reasoned dissent articulating that prior administrative directives guiding the on-site officer's decisions regarding temporary suspension were constitutionally required.

PENNSYLVANIA SUPERIOR COURT DECISIONS

Effective Assistance of Counsel — Sufficiency of Evidence — Aggravated Assault — Discretionary Aspects of Sentencing
Cmwlth. v. Lawrence, No. 1257 WDA 2007. Opinion by Panella, J., Concurring Opinion by Colville, J., 10/31/08.

Appellate Counsel was not ineffective for failing to raise frivolous sufficiency of evidence claim to aggravated assault conviction. Appellate counsel was not ineffective for failing to preserve claims that imposition of statutory maximum sentence for aggravated assault was excessive and not supported by the record.

PCRA — Remedies — *Liston*
Cmwlth. v. Jones, No. 457 MDA 2008. Opinion by Allen, J., 10/31/08.

PCRA court should not have made Appellant choose between pursuing a *nunc pro tunc* appeal or a PCRA petition based on ineffectiveness of counsel. Per the recent *en banc* opinion in *Liston*, the lower court should have ruled on Appellant's entitlement to the reinstatement of his direct appeal rights and if reinstated restored his right to file post sentence motions and scheduled an evidentiary hearing on the ineffective assistance claims if necessary.

Jury Deliberations — Ineffective Assistance of Counsel
Cmwlth. v. Williams, No. 2964 EDA 2006. Opinion by Donohue, J., 10/29/08.

Judge directing that audio tape of victim's testimony be played to jury did not implicate Rule 641's prohibition against sending transcripts out to the jury. As the playback was not a critical stage of the criminal proceedings counsel was not ineffective in failing to object to his client's absence during the proceeding, and any error therein was harmless.

Appellate Procedure — 1925(b) — *Grant*
Cmwlth. v. Williams, No. 3458 EDA 2006. Opinion by Stevens, J., 10/22/08.

Claims raised in Appellant's direct appeal from his life sentence were either waived for failure to properly develop them in the 1925(b) statement and his brief or unripe for appellate review under *Grant*.

Sentencing — Mandatory Sentences

Cmwlth. v. Foster, No. 3450 EDA 2006. Opinion by Bowes, J., Concurring Statement by Fitzgerald, Dissenting Opinion by Shogan, J., 10/22/08.

Finding support for the argument that the improper application of a mandatory minimum sentence implicates the legality of that sentence, the Court found that defendant's claim that the sentencing court erred in applying the firearm mandatory to an unarmed co-conspirator was not waived for the failure to object to its application at sentencing or in a post sentence motion.

Speedy Trial

Cmwlth. v. Anderson, No. 3422 EDA 2006. Opinion by Klein, J., 10/20/08.

Defendant was timely prosecuted.

Evidence — Other Bad Acts — Hearsay — Crawford

Cmwlth. v. King, No. 3214 EDA 2006. Opinion by Bowes, J., 10/17/08.

Murder victim's prior statements to police about defendant's illegal activities were relevant to establish motive and outweighed its prejudicial effect. The statements were admissible under the forfeiture by wrong doing exception to the hearsay rule. In concluding that one forfeits one's constitutional rights to confront one's accuser when one murders his accuser, the panel seems to be reading only the dissenting opinion in *Giles v. California*.

Sufficiency of Evidence — Escape

Cmwlth. v. Santana, No. 172 MDA 2007. Opinion by Freedberg, J., 10/17/08.

Police in possession of a Parole Board warrant to commit and detain defendant surrounded him, drew down on him, and ordered him to stop running, this constituted the "any other detention for law enforcement purposes" element of the offense of escape.

Venue

Cmwlth. v. Dixon, No. 1502 MDA 2007. Opinion by Shogan, J., 10/15/08.

The Dauphin County Court of Common Pleas abused its discretion in concluding that it did not have venue over the case of the willful failure of a Berks County resident to pay his state income tax.

Inconsistent Verdicts — Sufficiency of Evidence — Unlawful Use of Communication Device

Cmwlth. v. Rose, No. 395 WDA 2007. Opinion by Lally-Green, J., 10/12/08.

Distinguishing *Magliocco*, the Court found that jury interrogatory finding that defendant used a computer to aid in his commission of a misdemeanor sexual offense

rather than a felony did not provide the trial court with a basis to set aside the guilty verdict of unlawful use of a communication device which requires the intent to commit a felony as a predicate.

Sufficiency of Evidence — Solicitation

Cmwlth. v. Hacker, No. 1659 WDA 2007. Opinion by Colville, J., 10/09/08.

While *In re: Bam* (sexual acts between 11 year olds is not delinquent conduct for either as they are both within the protected class of children incapable of consent) would not bar an adult's conviction for soliciting a 13 year old to have sex with a 12 year old; the Commonwealth's failure to produce evidence that defendant knew the one participant was 12 and under the age of consent did make the evidence to support that conviction insufficient. Well done PACDL member Scott White.

Sentencing — Drug Mandatories — Statutory Construction

Cmwlth. v. Rush, No. 71 EDA 2008 (re-argument filed 10/03/08). Opinion by Colville, J., Concurring & Dissenting Opinion by Bender, J., 10/07/08.

A defendant with no prior record who is charged and convicted in one proceeding of multiple drug delivery offenses is subject to the mandatory minimum for each and every conviction. Judge Bender's dissent on the basis that one of the convictions must be considered the predicate offense which triggers the mandatory sentences on the remainder of the sentences fell on deaf ears.

Restitution — Juvenile Law

Cmwlth. v. B.D.G., No. 444 MDA 2006. Opinion by Orié Melvin, J., Dissenting Opinion by Allen, J., 10/07/08.

Over the well reasoned dissent of Judge Allen, the *en banc* Court narrowly finds no abuse of discretion in ordering juvenile to pay victim \$30,000 for medical expenses which were already paid for her by DPW.

Sentencing — Mandatory Sentences — Life Sentence for Second Third Degree Murder Conviction

Cmwlth. v. Morris, No. 1018 EDA 2006. Opinion by Musmanno, J., 10/06/08.

Defendant may be sentenced to a mandatory term of life in prison pursuant to 42 Pa.C.S.A. §9715 where the trial court convicts him of two separate murders at the same trial and subsequently sentenced him on the same date for both counts of third degree murder.

Search & Seizure — Warrantless Search

In the Interest of: O.J., No. 310 EDA 2007. Opinion by Bowes, J., Dissenting Opinion by Musmanno, J., 10/01/08.

Over the well reasoned dissent of Judge Musmanno, the Court found that the furtive movements of the occupants of a stopped motor vehicle justified a protective search of the vehicle for weapons even though the occupants had been removed from car at the time of the search.

PENNSYLVANIA COMMONWEALTH COURT DECISIONS

State Parole — Court of Record — Street Time

Goodwine v. Pa. Board of Probation and Parole, 2032 C.D. 2007. Opinion by Pellegrini, J., 10/31/08.

The State Parole Act only permits the forfeiture of non-delinquent street time for recommitted parole violators convicted in a court of record, providing a significant benefit to those parolees with new charges to dispose of those charges at a criminal preliminary hearing. For those parolees unable to work out a summary or M-3 plea prior to the conclusion of the preliminary hearing there is still hope if the Common Pleas Court Judge agrees to exercise his concurrent jurisdiction as a magisterial district judge and take the plea as such. The Court here specifically rejected the Board's position that the Common Pleas Judge was required to be designated by the president judge of the county in order to sit as a district justice to accept parolee's guilty plea. Well done Scott Rudolf from the Allegheny County PD office. PACDL Board Member Harry Cancelmi is already hard at work trying to raise an equal protection argument that Philadelphia County's lack of a non-court of record within which to dispose of such a case deprives those parolees of that right. Perhaps PACDL members Karl Baker and Sharon Meisler will weigh in on whether Pennsylvania's Unified Judicial system permits a Philadelphia Judge to exercise his concurrent jurisdiction as a Montgomery County MDJ and take a summary plea as such for a state parolee.

State Parole — Timeliness — Date of Verification of Conviction

Eaton v. Pa. Board of Probation and Parole, 47 C.D. 2008. Opinion by Smith-Ribner, J., 10/30/08.

The Board produced substantial evidence to support its position that it received official verification of petitioner's

conviction within 120 days of the revocation hearing where agent testified that the Board received official verification on a date within 120 days and documents supporting that date which the Hearing examiner accepted into the record.

State Parole — Timeliness — Appellate Procedure

Jacobs v. Pa. Board of Probation and Parole, 372 C.D. 2008. Opinion by Cohn Jubelirer, J., 10/22/08.

Parolee who failed to raise timeliness objection to his revocation hearing adequately preserved this issue by raising it in his administrative appeal because the Board has not accepted the Supreme Court's invitation in *Goods* to adopt a regulation requiring issue preservation at the parole revocation hearing level. Well done PACDL Board Member Harry Cancelmi.

State Parole — Technical Violations — Substantial Evidence — Admissions

Sanders v. PA Board of Probation and Parole, 782 C.D. 2008. Opinion by Pellegrini, J., 10/09/08.

Provision in waiver of out of state *Gagnon I* hearing stating that by signing waiver parolee admits to the violations makes such waiver sufficient evidence of the violation at a final hearing in Pennsylvania.

Mark Your Calendar

Sex Offenses

6 credit hours
December 5, 2008
DoubleTree Hotel
One Bigelow Square
Pittsburgh, PA 15219

2009 Joint Annual Meeting

12 credit hours
Thursday, April 23 — Friday, April 24, 2009
Harrisburg Hilton
One North Second Street
Harrisburg, PA



PACDL

Pennsylvania Association of
Criminal Defense Lawyers

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TO: Members of PACDL and Other Criminal Defense Attorneys

Dear Colleagues and Friends,

On December 5, 2008 at the Double Tree Hotel in Pittsburgh, the PACDL is holding a seminar on sex offenses. The people who will be presenting at this six hour CLE seminar are particularly good, and include Stan Levenson, myself, Paul D. Boas, from Pittsburgh, Professor Jules Epstein, Marissa Bluestine and Nicole Pittman from Philadelphia. Nicole is with the Philadelphia Defenders office and is an expert on Megan's Law. There will be excellent written materials and a wide range of matters will be discussed from Internet and computer sex crimes, to defending cases where the victim and defendant knew each other, to rape shield issues, ethical dilemmas, false accusation issues, Megan's Law hearings, etc.

I guarantee you that each person attending will learn things that can absolutely be used in cases that you have pending or will shortly have pending.

Finally, we are honoring recently retired Superior Court Judge Justin Johnson at lunch. In a world of result oriented ex-cop, ex-DA, affirm convictions at any cost appellate judges, Justin Johnson was much more than a breath of fresh air.

Please try to attend. I know that you will be happy that you did.

Very truly yours,



Paul D. Boas



Friday December 5, 2008
6 Credit Hours

The DoubleTree Hotel • One Bigelow Square • Pittsburgh, PA 15219

Course Planner: **Paul Boas**

SCHEDULE

- 8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast
- 9:00 a.m. – 10:00 a.m. **Defending Cases Where the Victim Knows the Defendant: He Thinks She Meant Yes and She Thinks She Meant No**
by Stanton D. Levenson, Esquire, Pittsburgh
- 10:00 a.m. – 12:15 p.m. **Conceptual Overview of a Sex Offense Case** (adult or minor complainant) (including investigation and preparation for the preliminary hearing), Evidentiary Issues (Rape Shield; 404(b), impeachment of the complaining witness, false accusation evidence) *by Professor Jules Epstein, Widener University School of Law and Marissa B. Bluestine, Defender Association of Philadelphia*
- 12:15 p.m. – 1:30 p.m. Luncheon honoring Judge Justin M. Johnson, retired Pennsylvania Superior Court (included in your registration)
- 1:30 p.m. – 2:30 p.m. **Ethical Issues in Sex Offense Cases**
- 2:30 p.m. – 3:30 p.m. **The Nuts and Bolts of Megan's Law Hearings**
by Nicole Pittman, Defender Association of Philadelphia
- 3:45 p.m. – 4:45 p.m. **The Defense of Internet Crimes and Child Pornography**
by Paul D. Boas, Esquire, Pittsburgh
- 4:50 p.m. PACDL General Membership and Board of Directors Meeting
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LOCATION

The **DoubleTree Hotel** is located at One Bigelow Square, in the heart of the Golden Triangle in downtown Pittsburgh. For overnight reservations call **412-281-5800**. PACDL has a block of rooms available for \$119 single or double/night, plus tax. One bedroom suites are available at \$149/night, plus tax. Please call immediately and reserve your room, as this rate expires on **November 11, 2008**. You must state you are with the Pennsylvania Association of Criminal Defense Lawyers to receive this rate.

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.



Friday December 5, 2008
6 Credit Hours

The DoubleTree Hotel • One Bigelow Square • Pittsburgh, PA 15219

**DON'T BE KEPT IN THE DARK.
REGISTER NOW.**

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 **November 28, 2008**. Scholarship applications received after that date will not be considered.

CANCELLATION POLICY

PACDL must guarantee payment for meals and materials in advance. There will be no refunds after **November 28, 2008**. 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.

REGISTRATION

Friday, December 5, 2008

6 credit hours

Mail the completed Registration Form with payment no later than

November 28, 2008. Only prepaid attendees are guaranteed seating.

Door registrations are permitted only as space and material are available.

Address: PACDL, 115 State Street, Harrisburg, PA 17101

Telephone: 717-234-7403 Fax: 717-234-7462

Join PACDL now and save on your fees!

- | | | |
|--|-------|----------|
| <input type="checkbox"/> PACDL Members | \$299 | \$ _____ |
| <input type="checkbox"/> PACDL Public Defender Members or
Members in Practice Less than 5 Years | \$245 | \$ _____ |
| <input type="checkbox"/> Public Defenders | \$349 | \$ _____ |
| <input type="checkbox"/> All Other Criminal Defense Attorneys | \$399 | \$ _____ |

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, CLE REPORTING FEES \$ _____

Name _____ Attorney ID _____

Mailing Address _____

City _____ State _____ ZIP _____

Phone Number _____ Fax _____

e-mail _____

Please note any dietary needs or needs related to disabilities _____



JAMES C. DUFF
Director

ADMINISTRATIVE OFFICE OF THE
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WASHINGTON, D.C. 20544

Office of Defender Services

September 30, 2008

MEMORANDUM

**Fifth National Seminar on Forensic Evidence and The Criminal Law
January 8-11, 2009
The Ritz-Carlton**Philadelphia, PA**

The Habeas Assistance and Training Counsel (capdefnet.org) and the Training Branch of the Administrative Office of the United States Courts (fd.org) are pleased to announce the Fifth National Seminar on Forensic Evidence and The Criminal Law being held in Philadelphia, PA at The Ritz-Carlton. This seminar is designed for, and attendance is limited to: federal defenders, CJA panel attorneys, attorneys interested in representing an inmate in federal collateral review, and state court practitioners who are currently appointed or seeking appointment in a federal habeas corpus proceeding. There will be no tuition, and materials will be provided to participants free of charge. Continuing Legal Education (CLE) accreditation for this program will be sought in all applicable jurisdictions.

Program Description

There have been many developments in the forensics sciences since the Fourth National Forensics Seminar in 2007. This program will bring together the nation's foremost scientific and legal experts to focus on those developments in fields such as arson, DNA, fingerprints, eyewitness identification, false confessions, pathology, firearms identification, and investigating crime labs. An agenda will be emailed to participants approximately one-week prior to the seminar.

Seminar Registration

To register, please go to <http://etrak.fd.org/Login.aspx>. You will need to Login in order to register. If you've attended a program in the past 2 years and haven't created or updated your profile, your Login ID will be your email address you've provided to us and your password will be your last name with the first letter being capitalized. **Example: Login ID:** chastain_smith@ao.uscourts.gov, **Password:** Smith. If you have not attended a program in the past, you will need to create a Login ID. If assistance is needed, please email Shemiah Schuler at Shemiah_Schuler@ao.uscourts.gov. You will receive a confirmation email of your enrollment in the program and you will be provided information on how to make your hotel reservation within 3-5 business days after registering.

Please note: A block of sleeping rooms has been set aside at The Ritz-Carlton at the special rate of \$155.00 per day single occupancy. You must call the Ritz-Carlton at 1-800-241-3333 and state that you are with the “2009 Forensic Seminar.” The hotel cut-off date is Tuesday, December 9th.

On site registration materials pick-up will begin at 3:30 p.m. on Thursday, January 8th, and the program will begin at 5:00 p.m. The seminar is scheduled to conclude around 12:00 p.m. on Sunday, January 11th, 2009.

Thank you for your interest in this very important program. If you have any questions or require additional information, please contact Shemiah Schuler by calling 202-502-1281 or via e-mail: Shemiah_Schuler@ao.uscourts.gov.

Andrea Taylor, Chief
Training Branch
Office of Defender Services