



FBA Memphis/MidSouth Chapter Newsletter

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Chapter Website: www.fedbar.org/Chapters/Memphis-Mid-South-Chapter

UPCOMING FBA EVENTS

2011 Annual Federal Practice Seminar
October 26, 2011

University of Memphis Law School - Memphis, Tennessee

8:00 – 8:30	Registration and Continental Breakfast
8:30 – 8:45	Welcoming Remarks
8:45 – 9:45	Recent Developments in Sixth Circuit Jurisprudence Judge Julia Gibbons and Judge Bernice B. Donald
9:45 – 10:45	Bankruptcy for the Non-Bankruptcy Practitioner Chief Judge David Kennedy, Jeb Bailey and Bettye Bedwell
10:45 – 11:00	Break
11:00 – 12:00	A Morning with Linda Greenhouse
12:00 – 1:00	Lunch
1:00 – 2:00	Trial Technology Phillip Hampton and Bill Ramsey
2:00 – 2:30	Clerk's Corner (Clerk of Court Tom Gould)
2:30 – 3:45	Break-Out Sessions Ethics of Contacting the Opposing Party's Former Employees CJA Panel Business Meeting
3:45 – 4:00	Break
4:00 – 5:15	Judges' Panel – Federal Judges of the Western District of Tennessee Attorney Admissions Ceremony
5:15 – 6:00	Judicial Reception

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The Federal Bar Association's membership application is available online at <http://www.fedbar.org>.

PRESIDENT'S MESSAGE

By Michael E. Gabel

The Memphis-MidSouth Chapter of the Federal Bar Association has been busy over the past few months, and I would like to thank the judges and speakers who have contributed their time and effort to these events.

This past May, the chapter co-hosted the Eighth Annual Immigration Law Seminar with the Immigration Section of the FBA. This year's event was held at the law school at the University of Memphis, and it attracted nearly 400 attendees, the vast majority of whom were from out of town. The seminar included five separate subject matter "tracks," each with renowned speakers from across the nation, as well as the Memphis area.

In addition to the educational curriculum, the Immigration Seminar offered attendees a variety of extracurricular activities, including a trip to the Memphis in May Barbecue Contest, a group outing to a Redbirds game, and a group tour of Graceland.



FBA National President Ashley Belleau presents an award to Judge Ronald Gilman of the United States Court of Appeals for the Sixth Circuit at the Immigration Seminar



Shelby County Mayor Mark Luttrell and FBA Board Member Barry Frager at the Immigration Seminar



Huddled masses of lawyers enjoy the judicial reception at the Immigration Seminar

The seminar received overwhelmingly positive reviews, and a number of the attendees stated that it has become known as the premier national seminar focusing on immigration law. Next year's seminar is already scheduled for May 18-19, 2012, so make plans to attend.

In July, the FBA hosted a federal practice seminar at the federal courthouse in Jackson, Tennessee. Chief Judge Jon McCalla opened the seminar by providing an update on developments within the Western District of Tennessee. The seminar featured Joe Riley speaking on ethics, an update on the new local rules by U.S. Magistrate Judge Edward G. Bryant and FBA Board member Brandon Gibson, and attorney Stacey Winkler discussing discovery in the age of social media. The final hour and half of the seminar featured a discussion of best practices in the Western District by a panel of judges, including U.S. District Judges James D. Todd and S. Thomas Anderson, U.S. Magistrate Judges Tu M. Pham and Edward G. Bryant, and U.S. Bankruptcy Judge G. Harvey Boswell.

Also in July, the FBA hosted a discovery seminar at the federal courthouse in downtown Memphis. This seminar featured U.S. Magistrate Judge Diane K. Vescovo and attorney Richard Carter speaking about recent amendments to the local rules and their impact on discovery, and attorneys Alan Crone and Frank Holbrook speaking about effective discovery and deposition practice from the plaintiff and defense perspective. Finally, the seminar featured a panel of U.S. Magistrate Judges from the Western District of Tennessee, including Judge Vescovo, Judge Tu M. Pham and Judge Charmiane G. Claxton, discussing discovery motions and tips for effective advocacy.



Judges Pham and Anderson at the Jackson Seminar



Magistrate Judges Vescovo, Pham and Claxton at the Discovery Seminar



Judges Todd, Boswell, and Bryant at the Jackson Seminar



Attendees at the Federal Discovery Seminar

The next major event will be the FBA's Annual Federal Practice and Procedure Seminar, which will be held at the law school at the University of Memphis on October 26. The keynote speaker for this year's seminar is Linda Greenhouse, a Pulitzer prize winning journalist who covered the Supreme Court for the New York Times for nearly three decades.

Last year this event sold out, so you will want to register early. The registration form for the seminar can be found on page 15, and a full flyer for the program is available on the chapter website, www.fedbar.org/Chapters/Memphis-Mid-South-Chapter.

Finally, the chapter will be scheduling its annual elections in December. If you are interested in becoming more involved in the FBA through work on the board, a committee or this newsletter, please let me know.



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JUDICIAL PROFILE

JUDGE BERNICE DONALD

By Bryce W. Ashby



Judge Bernice Bouie Donald currently serves as one of five district court judges for the Western District of Tennessee, Western Division (Memphis). Nominated by President William Jefferson Clinton on December 7, 1995 to fill the seat vacated when Judge Odell Horton took senior status, Judge Donald was confirmed by the U.S. Senate by voice vote December 22, 1995, just two weeks later, and assumed the bench on December 26, 1995. On December 1, 2010 she was nominated by President Barack H. Obama to serve on the United States Court of Appeals for the Sixth Circuit. After being re-nominated on January 9, 2011, she was confirmed on September 6, 2011.

Judge Donald was born on September 17, 1951 in Desoto County, Mississippi to Mr. Perry Bowie,* a sharecropper and mechanic, and Ms. Willie Bell (Hall) Bowie, who worked as a domestic servant for many years and later worked as a machine operator for Cleo Wrap Corporation. Despite her family never moving from its home, Judge Donald recalls that her address shifted throughout her childhood from Memphis, Pleasant Hill, Olive Branch, and Southaven as the area developed and mail routes extended or changed. She is the sixth of eight children born to the Bowie family.

* Deceased September 2, 1997

One of her first memories of being exposed to the law dates back to the late 50's when three civil rights attorneys, two from California and one from New York, stayed with her family during the desegregation campaigns of the late 1950's. Judge Donald remembers how smart, kind, and courageous they were and said she was drawn to them, though she was not sure that she could be an attorney as all three were white and she knew of no African-American lawyers. Her exposure to the civil rights' campaign of the 50's and 60's did not end with those lawyers as her father drove a bus for African-Americans to ensure they arrived at the polling stations during the voter rights campaigns. It was not until much later though that Judge Donald learned that her father's actions put him in some danger.

As a child, Judge Donald not only witnessed family and friends take part in the civil rights campaigns of the day, but was part of the first class to integrate Olive Branch High School. As one of only four African-American students in her high school class, Judge Donald remembers vividly the feelings of rejection, as well as the everyday pain and fear that came with being on the front lines of integration. Despite these feelings, Judge Donald proved herself to be a successful student. She became a member of the honor society, and as a senior was the only African-American member. Judge Donald recalls that every year the seniors in the honor society would take a trip. Her senior year, the students were to take a trip to New York. Judge Donald thought somewhat hopefully that she would be unable to go on the trip because her family would be unable to afford it. Her mother, however, had different plans and insisted on her going even when the class decided to fly instead of taking the bus. Her mother said, "I don't know how we are going to afford it, but if they go, you are going too!"

Judge Donald says that despite being afraid of going on the trip because she had only been away from home once before and because she was the only African-American, the trip ended up being a bonding experience as the students from Mississippi realized that others thought that we

were different. She recalls walking down the streets of Manhattan New York with this group of students each saying hello to passersby, as was customary in Desoto County, and being ignored and looked at like aliens by the New Yorkers unaccustomed to such Southern customs.

After graduating high school in 1969, Judge Donald immediately enrolled as a full-time student at Memphis State University. In June 1971, she went to work at the telephone company while continuing her studies. Judge Donald graduated in 1974 with a B.A. in Sociology and a minor in Political Science. Despite working throughout her undergraduate career, Judge Donald found time to volunteer at juvenile court. This volunteer work ultimately led her to enroll in law school. She says she clearly remembers sitting in juvenile court when a young boy was brought before the judge for some truancy-related violation. After being verbally reprimanded by the judge, the child was told that he would be allowed to return home. Judge Donald said the boy's grandfather, a formally dressed but obviously very poor gentleman, rose to address the court. "You could hear the pain and regret in his voice as he explained to the judge that the child was in his care, but that he could no longer afford to take care of him." The judge said that he had no choice but to place the child in a juvenile detention center. Judge Donald recalls knowing at that point that she needed to go to law school so that she could help children.

While in her undergraduate studies in 1971, Judge Donald met her future husband W.L. Donald in a sociology class. They married in 1973. Mr. Donald is retired from his former employment at the United States post office and from owning an African import/export business.

In 1975, while still working at the telephone company, Judge Donald enrolled in law school. She recalls the challenges of working fulltime while attending law school. She said it required some creative thinking and multitasking. Judge Donald remembers one instance where she had to fly in from a work-related meeting in Nashville, leave her bags at the airport, and have her husband

take her straight to the law school for an exam. Another time, when she could not get leave from work, her Professional Responsibility professor, Allen Blair, allowed her to take an exam while at work and return it immediately after completing it. Once again, Judge Donald relied on her husband to execute the delivery. She notes that her career and her success would not have been possible had Mr. Donald not been so unselfishly supportive of her.

During her final year in law school, another famous Memphis attorney, A C Wharton, shaped her future. At the time, Judge Donald was still set on working with children. Mayor Wharton, who at that time served as an adjunct professor at the law school, counseled her on the unfortunate truth that she would never make a living in that area of the law as no money existed for the representation of juveniles. After graduating in 1979 and attempting for a year to make it on her own as a solo practitioner, Mayor Wharton hired Judge Donald into the Employment Law & Economic Development unit of Memphis Area Legal Services where he was director. Judge Donald remembers putting her keen negotiating skills to the test when she strong-armed Mayor Wharton into raising his initial salary offer from \$12,500 to \$13,000 a year. Despite this successful negotiation, Judge Donald notes that she still had to take a 50% pay cut to practice law. Judge Donald recalls MALS being an energetic and collegial atmosphere and describes it as a "great training ground" for a young lawyer.

Judge Donald did not stay at MALS for long as Mayor Wharton once again intervened and asked her to follow him to the public defender's office. Initially, Judge Donald balked at the offer because she did not think at the time that criminal work was "something that good girls should do." She says that she quickly realized that working at the public defender's office was "God's work." She recalls that she came to see the work as real opportunity to give "voice to the voiceless" and to represent those individuals who are in great risk and have been pushed to the margins of society.

After two years at the public defender's office, Judge Donald decided to try to run for the position of General Sessions Criminal Court Judge. At the time the City and County were consolidating a number of courts, which created several vacancies. Three years out of law school, Judge Donald decided to seek election. Although a number of reasons contributed to her decision to run, Judge Donald says that one incident ultimately caused her to make the decision. Judge Donald said that she was in the back of the court one day and witnessed a petite pregnant woman standing before the judge. The judge was engaged in an indigency determination and began by asking the typical questions about the amount of her income and how many children she had. The judge then asked if the defendant was only having more children to get a larger welfare check. The judge then asked the defendant if she knew who the father to each child was and whether she knew who the father of her unborn baby was. Judge Donald said the girl was obviously confused and intimidated, and likely bothered by the growing inappropriate nature of the questioning, and grew quiet. As the young lady stood unanswering, the sheriff approached her, stood over, and demanded in a threatening tone that she answer the judge. Witnessing this young girl being stripped of her dignity while engaged in the one system that is supposed preserve civility and order and foster respect convinced her that she should run for the bench. At that moment she vowed that as a judge, she would always, first and foremost, treat every lawyer, litigant, witness, and every person entering the court with dignity and respect.

Judge Donald and her husband ran her campaign with the assistance of about eight teenagers from a local housing project. She says they saw the campaign as an opportunity to engage these kids in a hands-on civics lesson. Though she is unsure if the involvement with her campaign played a direct role, two or three of these volunteers went on to college. Despite being a long shot, Judge Donald was elected in 1982 to the General Sessions Criminal Court as the first female African-American elected to the bench in Tennessee.

Judge Donald served on the bench until 1988. Prior to her departure, she applied for a position on the U.S. Bankruptcy court in Memphis. Judge Donald says she was not selected, but the next year another position opened up. Judge Donald recalls that she was not going to apply for the position, but she received a letter stating that because she had previously applied for the position, her name would automatically be placed among the applicants. After a number of interviews, Judge Donald was selected and became the first African-American female in the United States to serve on the U.S. Bankruptcy court.

From 1988 until 1995, Judge Donald served on the bankruptcy court. Judge Donald says that she loved her time on the court. She recalls fondly the collegiality of not only her fellow judges, but also of the practitioners. She said the advocates were passionate and that they clearly loved their work. Judge Donald also remembers that bankruptcy court allowed her the opportunity to write, which her time in General Sessions did not permit her much opportunity.

Judge Donald says that the last fifteen years on the district court have been unbelievably rewarding. She notes that she has been fortunate to serve with individuals who truly take their service serious and care deeply for the legal system. Most rewarding has been her interaction with juries. Judge Donald says it is gratifying to see the way that citizens engage in cases and tackle complicated legal principles and issues. Every trial for her has been a reaffirmation of the solemnity of the process and a confirmation of her belief in the fundamental strength of the justice system.

Judge Donald sees a growing concern over the increased number of *pro se* matters that have come before the court. She notes that while she cannot speak to the factual strength of such cases, a recent survey by the American Bar Association finds that the likelihood of success by *pro se* civil litigants is significantly reduced when compared to represented parties. She notes that our system is an adversary system and thus contemplates both

parties having advocates. Given the complexity of the legal system, a *pro se* plaintiff faces extraordinary obstacles to obtaining a favorable verdict, even if his or her claim has merit. She believes that this problem will continue to grow and will require creative solutions in the very near future.

Judge Donald, of course, has been intimately involved with a number of legal and civic organizations. Among a long list, she currently serves on the Board of Editors for *ABA Journal* and recently concluded a three-year term as ABA Secretary. Judge Donald currently serves as Vice President of the American Bar Foundation, and will assume the role of President in August, 2012. She notes that her time at the ABA has been particularly rewarding and helpful in her work on the bench, particularly because she has had the opportunity to meet and collaborate with practitioners from across the country at a level that might not be appropriate if they appeared before her regularly. Those interactions have helped hone her skills as a judge and shaped how she conducts trials and proceedings. For example, her use of telephone conferences for local attorneys comes out of her interactions with ABA members and their concerns about the unnecessary expenditure of resources. Likewise, Judge Donald's decision many years ago to permit attorneys to conduct *voir dire* was born out of her ABA service and exchanges with practitioners.

Despite early fears of travel as a child from rural Mississippi, Judge Donald is now heavily engaged in a number of international teaching assignments through the United States Patent & Trade Office, the United States Department of Justice, and the United States Commerce Department. Many of these assignments revolve around intellectual property, and Judge Donald has found it particularly rewarding to watch the development of judicial systems across the world. She says that countries like Ghana and Botswana are exciting examples of countries that have embraced the development of an independent and strong judicial system. Likewise, she finds Rwanda, a country with a new woman chief justice who is reform-minded and progressive, a particularly hopeful

prospect for an improved judiciary. Of all of the countries to which she has traveled, Judge Donald says that South Africa is her favorite. In addition to the extensive beauty of the country, she finds the eagerness of the rank and file magistrates to learn and adopt improvements to their judicial system to be intoxicating. Judge Donald has also brought foreign judges to Memphis in her work with the U.S. Patent & Trade Office and says that these visits have been a rewarding exchange for everyone involved.

At a local level, Judge Donald has found her work with For-Life—a program she developed with her sister, Virginia Wilson—the most rewarding. For-Life seeks to empower at-risk children with basic life skills. The program grew directly out of the first death penalty case Judge Donald heard, the first to be tried in the Western District. Judge Donald recalls that as the evidence unfolded at trial, it became clear that the defendant's whole life, which included childhood exposure to drugs and alcohol, sexual abuse at an early age, prolonged periods of malnutrition, and a lack of education and parental involvement, led him almost inevitably to the point where he sat facing the death penalty in her courtroom. Judge Donald says the program has had some notable success. For example, one child, who was on the verge of joining a gang, joined the program, graduated from high school, and then went on to junior college and started a business.

Judge Donald also points to her involvement with the Stax Museum and the Stax Music Academy Board as a particularly rewarding endeavor. The Academy provides at-risk students with music education and performance opportunities with the goals of enhancing their leadership skills and inspiring them to become advocates for community change. She says these inner-city kids have performed across the world and have excelled in the process. As the daughter of a sharecropper and domestic servant, Judge Donald's path was unlikely, and she hopes that just as others have shaped her life, her small contributions may change the trajectory of at least one child's life for the better.



SIXTH CIRCUIT CASE UPDATE

General Civil Law

Thomas More Law Center v. Obama, ___ F.3d ___, 2011 WL 2556039 (6th Cir. June 29, 2011) (Judges **Martin**; Sutton (concurring in part and delivering the opinion of the Court in part); Graham (S.D. Ohio) (concurring in part and dissenting in part)).

The plaintiffs, a public interest law firm and four individuals, filed suit challenging the constitutionality of the minimum coverage provision, often called the “individual mandate,” of the federal Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010. The minimum coverage provision requires that individuals maintain certain minimum health insurance coverage or be assessed a monetary penalty. The plaintiffs sought a declaration that Congress lacked authority under the Commerce Clause to enact the minimum coverage provision of the Act, or, alternatively, that the penalty is an unconstitutional tax.

The district court held the minimum coverage provision constitutional under the Commerce Clause, and declined to reach the question of whether the provision was a permissible tax under the General Welfare Clause. The plaintiffs appealed from the district court’s denial of their motion for a preliminary injunction. The Sixth Circuit, in a divided decision, affirmed the district court, with Judge Martin stating “that the minimum coverage provision is a valid exercise of legislative power by Congress under the Commerce Clause....”

The Sixth Circuit first found that the plaintiffs had standing to pursue their claims and that the courts had subject-matter jurisdiction of the dispute. (Judge Martin’s opinion is the opinion of the Court as to those issues.) Judge Martin then

surveyed the Supreme Court’s Commerce Clause jurisprudence, stating that “it has long been established that Congress may regulate economic activity, even if wholly intrastate, if it substantially affects interstate commerce[.]” and that “Congress may also regulate non-economic intrastate activity if doing so is essential to a larger scheme that regulates economic activity.”

Applying those principles, Judge Martin stated that the minimum coverage provision regulates the financing of health care services, and more specifically the practice of self-insuring for health care costs, which constitutes economic activity that Congress may regulate under the Commerce Clause. Further, Congress had a rational basis to conclude that self-insuring for the cost of health care, in the aggregate, substantially affects interstate commerce. Moreover, even if self-insuring for health care costs was not economic activity that substantially affected interstate commerce, Congress nevertheless could constitutionally regulate the practice because such regulation is necessary to regulate a larger interstate market, that of health insurance and the delivery of health care services.

Judge Martin also rejected the plaintiffs’ argument that the minimum coverage provision is unconstitutional under the Commerce Clause because it regulates “inactivity,” that is, the decision not to purchase the minimum required coverage, as opposed to “activity.” Judge Martin stated that the text of the Commerce Clause draws no constitutional distinction between inactivity and activity, and that “far from regulating inactivity, the provision regulates active participation in the health care market.”

As did the district court, Judge Martin declined to reach the issue of whether the minimum care provision is a permissible tax: “In light of the conclusion that the minimum coverage provision

is a valid exercise of Congress's power under the Commerce Clause, it is not necessary to resolve whether the provision could also be sustained as a proper exercise of Congress's power to tax and spend under the General Welfare Clause[.]”

Unlike Judge Martin, Judge Sutton examined the question of whether the minimum coverage provision, including the penalty thereunder, is constitutional under Congress's power to tax pursuant to the General Welfare Clause. Judge Sutton reasoned that the penalty provision is just that - a regulatory penalty - and not a revenue-raising tax. Therefore, the minimum coverage provision is not constitutional as a tax enacted to provide for the General Welfare of the United States. (Senior Judge Graham, who concurred in part and dissented in part, joined the portion of Judge Sutton's opinion finding that the provision could not be sustained as constitutional under the General Welfare Clause. Thus, as to that issue, Judge Sutton's opinion is the opinion of the Court.) With respect to the Commerce Clause issue, Judge Sutton concurred in the judgment only, finding that, at least in the context of the plaintiffs' facial challenge to the law, the minimum coverage provision is constitutional under the Commerce Clause.

Judge Graham, dissenting in part, would have sustained the plaintiffs' challenge and found the minimum coverage provision unconstitutional as exceeding Congress's power under the Commerce Clause: “If the exercise of power is allowed and the mandate upheld, it is difficult to see what the limits on Congress's Commerce Clause authority would be. What aspect of human activity would escape federal power? The ultimate issue in this case is this: Does the notion of federalism still have vitality? To approve [this] exercise of power would arm Congress with the authority to force individuals to do whatever it sees fit (within boundaries like the First Amendment and the Due Process Clause)... Such a power feels very much like the general police power that the Tenth Amendment reserves to the States and the people.”

The Sixth Circuit was the first U.S. Court of Appeals to rule on the constitutionality of any part of the Act. The plaintiffs have filed a petition for certiorari in the U.S. Supreme Court.

In contrast, on August 12, 2011, the Eleventh Circuit decided *State of Florida v. U.S. Department of Health and Human Services*, Nos. 11-11021 and 11-11067. The plaintiffs in those actions consisted of 26 states, two private individuals, and the National Federation of Independent Businesses. The Eleventh Circuit held that the statute's expansion of Medicaid is constitutional, but, by a 2-1 vote, held that “the individual mandate exceeds Congress's enumerated commerce power and is unconstitutional.”

Criminal Law

U.S. v. Paige, No. 09-6067 (Kennedy, **Martin**, Murphy (E.D. Mich.)) (March 15, 2011)

In *United States v. Hill*, 440 F.3d 292 (6th Cir. 2006), the court held that two prior offenses are committed on “occasions different from one another” for Armed Career Criminal Act purposes when: it is possible to discern the point at which the first offense is completed; it would have been possible for the offender to cease his criminal conduct after the first offense; and the offenses were committed in different residences or business locations. In this case from our district, the court held that *Begay v. United States*, 553 U.S. 137 (2008), did not change the rule in *Hill*. The court affirmed an ACCA-enhanced sentence that was based in part on five prior aggravated robberies that had occurred on the same day and close to each other in Memphis.

* * *

U.S. v. Boyd, No. 08-6402 (**Siler**, Gilman, Griffin) (Apr. 7, 2011)

This case involved a double carjacking, rape and murder in the Knoxville area. Boyd was convicted at trial of being an accessory after the fact and misprision of a felony. Boyd gave a

videotaped interview in which he described various things the perpetrator of the crimes (Davidson) had told him about the crimes. The video was admitted during trial over an objection that Davidson's statements were hearsay. The court affirmed the admission of this evidence, since the statements were offered to prove Boyd's knowledge of the carjacking and murders. Second, the indictment was not duplicitous even though it charged accessory to a carjacking resulting in both serious bodily injury AND death, because being an accessory was itself the crime. Third, the court held that the graphic medical examiner testimony was properly admitted because the government had to prove that Davidson had committed the felony alleged.

* * *

U.S. v. Hardy, No. 08-5991 (**Suhrheinrich**, Cole (dissenting), Cook) (May 19, 2011)

In a drug and gun case, the government introduced evidence under Rule 404(b) of prior uncharged crack sales, for the purpose of showing specific intent to possess and distribute drugs. In challenging the admission of this evidence on appeal, defendant relied primarily on two Sixth Circuit decisions, both of which were from our district and were issued after the trial in this case: *United States v. Bell*, 516 F.3d 432 (6th Cir. 2008), and *United States v. Jenkins*, 593 F.3d 480 (6th Cir. 2010). In *Bell*, the court had held that prior acts can only come in to show intent under Rule 404(b) if they were part of the same scheme or showed the same modus operandi of the charged conduct. *Jenkins* can be seen as an application of *Bell*.

Here, the court explicitly held that "*Bell* is inconsistent with prior precedent and is therefore not controlling." And, "because *Jenkins* follows *Bell*, it too cannot trump prior precedent." Instead, the court relied on the pre-*Bell* authority where the court had "repeatedly recognized that prior drug-distribution evidence is admissible [under Rule 404(b)] to show intent to distribute." Moreover, the evidence was more probative than prejudicial under Rule 403, and even if it weren't,

the error would be harmless due to the extent of other evidence.

* * *

U.S. v. Moore, No. 09-5935 (Martin, Stranch, **Thapar** (E.D. Ky.)) (June 1, 2011)

Defendant received the minimum 15-year sentence under the Armed Career Criminal Act. The court rejected his argument that his mental retardation made this sentence unconstitutional under the Eighth Amendment. The court distinguished *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) as dealing specifically with the death penalty for mentally retarded defendants. The court distinguished *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) as dealing specifically with juvenile offenders subject to life without possibility of parole.

* * *

U.S. v. Gabrion, Nos. 02-1386/1461/1570 (Batchelder (dissenting in part), **Merritt**, Moore) (Aug. 3, 2011)

The defendant was convicted and sentenced to death for killing the victim and her infant daughter in a National Forest in Michigan, while awaiting trial for raping the same victim.

The court affirmed the conviction but remanded for resentencing. The court first held that the district court should have instructed the jury at sentencing that the aggravating factors had to outweigh mitigating factors "beyond a reasonable doubt." (The district court had used the "sufficiently outweigh" language from the death penalty statute.) Second, the court held that the district court should have allowed defendant's counsel to argue in mitigation that applying the death penalty was random in this case, because it would not have been available if the body had been found 227 feet away, outside the National Forest. (Michigan does not have the death penalty.)

☺

THE CLERK'S CORNER



*Wendy Oliver
Chief Deputy of Operations
U.S. District Court*

U.S. District Court Participating in National Patent Pilot Program

The Western District of Tennessee is one of fourteen federal district courts selected to participate in a 10-year patent pilot project. The statute authorizing the pilot, signed by President Obama on January 4, 2011 as Public Law 111-349, is designed to enhance expertise in patent cases for U.S. district judges.

Eligibility to participate in the pilot required courts to either: (1) be among the fifteen (15) district courts with the largest number of patent and plant variety protections filings in 2010, or ; (2) to certify to the Director of the Administrative Office of the United States Courts the intention to adopt local rules for patent and plant variety protection cases. The statute required the Director to select at least six courts from three different circuits. Three of the six courts were to have ten or more active judgeships with at least three of the judges agreeing to hear patent cases and the other three courts were to have fewer than 10 active judgeships with at least two of the judges agreeing to hear patent cases.

Chief Judge Jon McCalla and Judge S. Hardy Mays, Jr. have been designated as the patent pilot judges for our district.¹ All cases will initially be

¹ The Administrative Office's Office of General Counsel has determined that the statute provides that only U. S. district judges can be designated as patent pilot judges.

assigned in accordance with the court's random assignment system to ensure parity in the distribution of judges' caseloads. When a patent case is assigned to a non-patent judge that judge will decide, within thirty days of the assignment, whether to accept or decline the case. If the case is declined it will be randomly assigned to one of our two patent judges.

The Local Patent Rules are under review by the court and will be promulgated for public comment before the effective date of the pilot. Our records indicate that eleven of the forty-four (44) patent cases filed since the court's migration to Electronic Case Filing (January 1, 2006) are currently pending. The Local Patent Rules will apply to cases filed after the pilot begins on September 19, 2011.

Questions regarding the court's participation on the pilot should be directed to the Clerk of Court, Tom Gould at tom_gould@tnwd.uscourts.gov.

* * *



*Ron Dowling
Chief Deputy of IT and Finance
U.S. District Court*

U.S. District Court Participating in National Camera in Courts Video Pilot

The U.S. District Court for the Western District of Tennessee is leading participation in the federal Judiciary's recently initiated *Cameras in Courts* digital video pilot. With fourteen courts from around the nation included in this three-year program, Chief Judge Jon Phipps McCalla was the first federal judge in the pilot to digitally record a proceeding using

cameras in the courtroom. On July 21, 2011, in the matter of *Lauren Lee Gauck v. Hooman Karamian, Dirty World, LLC*, Case 2:11cv02346, the district recorded a preliminary injunction hearing.

The pilot program is available for civil case proceedings before U.S. District Judges. For a proceeding to be recorded, the presiding judge must approve and parties must provide consent. Afterwards, the presiding judge decides if the recording may be posted to the judiciary's video library. If approved, the video is uploaded to an Internet site managed by the Administrative Office of the U.S. Courts, and is available to the public at no charge.

Clerk of Court Tom Gould has organized the process of selecting a case for participation into two different "tracks." In instances where the judge selects a proceeding for inclusion in the pilot program (track 1), the electronic notice an attorney receives setting the proceeding will indicate whether or not the judge intends to include the event within the pilot. Should a party prefer the proceeding not be recorded, counsel may request exclusion from the pilot by filing a motion to exclude in CM/ECF. And, in instances where parties in the case or third party interests would like a proceeding to be considered for the pilot (track 2), counsel may file a motion to include the proceeding in the pilot. Motions for inclusion or exclusion must be filed no less than 24 hours prior to the proceeding.

For flow charts and other procedural guidance and to view video recordings, please visit www.tnwd.uscourts.gov. Additional video from participating courts, and more information about the pilot may be found at www.uscourts.gov/multimedia/Cameras.aspx.



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