JD Note:
This is Part V of a serialization of an article published in the Fall of 2003 by the Northern Kentucky Law Review. It is the first extended critique published in this country of the critical role played by judges in causing wrongful conviction at the trial level, and then sustaining them on appeal. The extensive footnotes are omitted from this reprint, but ordering information of the complete article from the NKLR for $10 is at the end of the article.

The Complicity Of Judges In The Generation Of Wrongful Convictions

By Hans Sherrer

Part 5 of a 7 part serialization

VI.
Appellate Courts Cover-up the Errors of Trial Judges

There are two significant and complementary ways the political nature of judges contributes to victimization of the innocent. The first method is the use of the harmless error rule to dismiss the grounds upon which a wrongful conviction or prosecution is challenged. The second method is the use of unpublished opinions to minimize attention given to an appeal and to conceal the details of the appeal's resolution.

A. The Harmless Error Rule

The harmless error rule is a relatively recent development in this country, having been adopted federally in 1919. It is codified in the *Federal Rules of Criminal Procedure* as Rule 52 and it states that a harmless error is, "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The states followed the federal government's lead and adopted a variation of the harmless error rule applicable in their courts.

Prior to adoption of the harmless error rule, structural omissions or errors in an indictment, search warrant or jury instructions, and a trial judge's judgmental errors in such matters as evidentiary rulings, limiting witness testimony, or motions for a judgment of acquittal that were related to essential facts of a case, were presumed to prejudice a defendant, and thus constituted grounds for automatic reversal of a conviction and a retrial or possible dismissal of the charges. That was consistent with the common law rule that review of a conviction did not involve any re-examination of the facts, which was the sole province of the jury, *and* that was the law applied to Americans at the time the Constitution was written and the federal judiciary was created.

Before codification of the harmless error doctrine, it was recognized that structural errors in documents such as an indictment or search warrant could be due to the possible inability of the prosecution to correct them, and defects that could be cured by the prosecution would be. Trial and appellate judges did not interpose their opinion about the relative strength or weakness of the government's pleadings, but merely ascertained if it met the legal standard for sufficiency and summarily rejected those that did not. The harmless error rule turned that common sense standard on its head by allowing a judge to determine if errors or omissions that made a pleading, document, or jury instructions insufficient were irrelevant, if in the judge's opinion it had no effect on the proceedings. In other words, the harmless error rule elevated the expression 'good enough for government work,' which means conduct and work that is third-rate, shoddy, and not worthy of praise, to the sub-standard by which all legal pleadings in a criminal case affecting a person's life and liberty are judged.

Before the harmless error rule, the jury was considered to be the sole arbiter of a case's facts and any failure by jurors to consider essential facts of a case or to consider the impact of facts on essential elements of an offense, was assumed to have impaired their judgment, and thus, constituted the deprivation of a fair trial to a defendant and warranted reversal of the conviction. Prior to 1919, there was effectively a presumption that trial level errors could prejudice a defendant to a judge and jurors exposed to them, since the State's painting of a person as a criminal carries with it a strong de facto presumption of guilt. Thus, the State must be bound to follow the proper procedures to ensure that an innocent person is not erroneously colored by that de facto presumption of guilt. Consequently, trial level errors embody the presumption that they are prejudicial, some in ways that may remain unseen to anyone outside of the jury: so recognition of their prejudicial effect on a defendant's right to a fair trial and their possible contribution to an adverse verdict is essential to preserve not just the integrity of the judicial process, but the appearance of the system's integrity.

The automatic reversal of a conviction acted as an important shield of protection for innocent defendants from the structural and judgmental errors of a judge, prosecutors and police. Its obliteration began in 1919, and nine decades later is virtually complete: only a hollow pretense of judicial concern for determining the soundness of any conviction remains.

The harmless error rule is defended in a criminal context as contributing to judicial economy by allowing a judge to avoid ruling in a defendant's favor when reasonable grounds can be stated that in the judge's opinion, an error by the police, prosecutors or a judge in a case did not alter the outcome of the issue being considered. The Supreme Court has extended that rationale to encompass the most serious violations of a defendant's express protections under the Bill of Rights. The end result of that rationale was expressed in *Arizona v. Fulminate*, 499 U.S. 279 (1991), a case involving a confession obtained in violation of the defendant's Fifth Amendment right against self-incrimination. The Court has not only continued to apply the rationale that a constitutional violation does not mandate a conviction's automatic reversal, but it has extended it in subsequent cases to encompass indictments and jury instructions that fail to include essential elements of a defendant's alleged criminal offense. Thus, the assessment of a case's facts and deficient prosecution documents and pleadings by a judge who owes his position to the same political establishment to which the prosecutor belongs, has effectively replaced the jury that symbolically represents the community, as the final arbiter of the weight to be given to those facts that the judge cannot possibly view from a disinterested perspective.

It was predictable in 1919 that the 'harmless error rule' would result in less attention to critical details at every stage of a criminal investigation, prosecution and review of a conviction, given the overtly political nature of the state and federal judiciaries, and the panoply of political considerations that are the overriding criteria used to fill those positions and that affect the decisions of judges. So even though details are the life blood of a criminal prosecution and the protection of all criminal defendants is shielded by the presumption of innocence, the liberal application of the 'harmless error rule' has enshrined 'close enough for government work' as the motto that most accurately expresses the standard applicable to misdeeds, errors and constitutional violations committed during the course of a case by judges, prosecutors and the police.

The grave danger posed to the innocent by the Supreme Court's extension of the 'harmless error' principle to an every increasing panoply of prosecution related errors was conclusively proven by the aftermath of its ruling in *Arizona v. Youngblood*, 488 U.S. 51 (1988). Convicted of the 1983 kidnapping and sexual

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assault of a 10 year-old boy based solely on the victims testimony, the Arizona Court of Appeals reversed Larry Youngblood's conviction in 1986 on the ground that the failure of the police to preserve semen samples from the victim's body and clothing that there was substantive reason to believe could have exonerated him, violated his Due Process right to a fair trial. In 1988 the Supreme Court reversed, holding that such destruction of material evidence by the prosecution must be done in "bad faith" to constitute a Due Process violation. The Court's majority acknowledged that although the actions of the police in Youngblood's case could be "described as negligent," they didn't act in "bad faith."

However, in 2000 a preserved rectal swab sample taken from the victim containing the attackers semen was discovered. When subjected to state of the art DNA testing unavailable at the time of his trial, Mr. Youngblood was excluded as the assailant. Mr. Youngblood's exoneration, *after* he had served his prison term, vindicated Justice Blackmun's concern that the Court was using his case to erroneously expand when destruction of material evidence by the prosecution was constitutionally permissible:

> The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial. Respondent here, by what may have been nothing more than police ineptitude, was denied the opportunity to present a full defense. That ineptitude, however, deprived respondent of his guaranteed right to due process of law.
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> …
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> The evidence in this case was far from conclusive, and the possibility that the evidence denied to respondent would have exonerated him was not remote. The result is that he was denied a fair trial by the actions of the State, and consequently was denied due process of law.

Yet in spite of Mr. Youngblood's actual innocence being later proven and Justice Blackmun's correct analysis of why the Court should have affirmed the Arizona Court's reversal, the Court's decision continues to be the controlling authority insofar as whether the prosecution's destruction of material evidence violates Due Process or is merely 'harmless.' It is reasonable to surmise that the Court erred as egregiously in other applications of the harmless error principle to possible Constitutional violations as it did in its as yet uncorrected *Youngblood* ruling.

One logical consequence of the ever more liberal use the 'harmless error rule' is the two pronged evil of a nationwide acceptance of wrongful convictions as the norm, and the failure of appellate courts to reverse convictions that it would have unhesitatingly declared as unsafe mere decades ago. Thus, adoption of the 'harmless error rule' is a largely unseen factor that has evolved into being one of the keys necessary to trigger and sustain what has become nothing less than a tsunami of wrongful convictions in the United States.

B. Unpublished Opinions and the Creation of an Unprecedential Body of Law

The replacement of a written opinion explaining the rationale underlying an appellate court decision, with an unpublished opinion or one line or one word orders has become a pervasive phenomenon in the last three decades. As recently as 1950, a written opinion was issued in all federal appeals as a right. Today, however, over 85% of all federal circuit court opinions are unpublished. The increased use of unpublished opinions since the late 1960s and early 1970s somewhat parallels the growth in the number of people imprisoned since then. It is common for both federal and state appellate courts to use an unpublished opinion to dismiss a defendant's challenges to a conviction based on misconduct, errors and omissions by a judge, prosecutor and the police, as constituting 'harmless error.'

The authors of *Elitism, Expediency, and the New Certiorari*, recognize the negative consequences of the trend toward less public disclosure of the reasons underlying a judicial decision:

> The implications of these changes are enormous. Federal appellate courts are treating litigants differently, a difference that generally turns on a litigant's ability to mobilize substantial private legal assistance. As a result, judicial procedures no longer permit judges to fulfill their oath of office and 'administer justice without respect to persons, and do equal right to the poor and to the rich.' In short, those without power receive *less* (*and different*) justice.

Given the political nature of the judiciary, it is to be expected that the expanded use of unpublished opinions is disproportionate in cases involving people that are politically powerless and who do not have substantial financial resources. Their deficient political and financial circumstances have a significant impact on the outcome of their case by putting them on a "different track" than more well-heeled and connected defendants.

Even less well known to all but legal insiders is the minimal amount of first hand knowledge an appellate judge has about the merits of the majority of the cases he or she makes a decision about. That lack of attention to the details of an appeal is disproportionately weighted towards cases involving defendant's from the lower strata of society. Such defendants are not only involved in the majority of criminal appeals, but they are the ones most likely to have been the subject of a shoddy police investigation, coercive questioning, threatening or intimidation of witnesses, prosecutorial misconduct, or judicial inattention to crucial details involving witnesses, procedures and evidence. Those are the cases that require the most intense scrutiny on appeal because they involve the greatest human cost and the greatest likelihood of an injustice, yet in an Alice in Wonderland type twist of reality, they receive the least personal attention by an appellate judge.

It is unsurprising that the politically and financially powerless, rather than the powerful, suffer the harmful effects of judicial shortcuts exemplified by the issuing of an unpublished decision, given that judges owe their position to the latter and not the former. There are at least four significant ways the different judicial tracks of justice are manifested.

First, the issuance of an unpublished decision by a state or federal circuit court panel is the kiss of death to a defendant, because it effectively ends the appeal process in all but name. An unpublished decision sends a powerful signal to any further reviewing court that the issues involved are too insignificant to bother with explaining, and thus they are not important enough to warrant careful review by any other court. A one line or one word order sends the same message even more powerfully.

Second, an unpublished opinion typically goes hand-in-hand with non-citability of the decision. In *Anastasoff v. U.S.*, 223 F.3d 895 (8th Cir. 2000). Circuit Judge Richard S. Arnold clearly explained that since the days of Blackstone over 200 years ago, the doctrine of precedent has been recognized as one of the few checks on the arbitrary exercise of judicial power, and that all judicial opinions are precedential, not just those that are published. Consequently, the ability of a court to ignore a previous court's opinion regarding a factually and legally similar case removes the only bar preventing judges from substituting their personal opinions for what the law has been declared to be in those circumstances. Thus, the non-citability of an opinion breeds and ensconces judicial lawlessness by allowing judges to avoid any accountability to abide by any precedents applicable to a case. It allows imposition of de facto judicial ex post facto pronouncements. That underscores the all too likely possibility that a person

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whose case is resolved by an unpublished opinion did not have it determined according to established precedents, but by the personal preferences of the judges involved. Those preferences are likely to be different than those of a defendant from a different social and economic place in society than the judges.

The Supreme Court recognized in *Hutto v. Davis*, 454 U.S. 370 (1982). that judicial anarchy is the result of lower courts choosing which precedents they want to follow. The Court stated, "Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." (375)

The danger posed to a defendant by an unpublished opinion's non-citability is compounded by the fact that few people other than lawyers have ready access to unpublished opinions. Whatever check on judicial lawlessness that may exist from the public notice of a precedentially contrary opinion is, therefore, effectively eliminated. The injustice embodied in the non-cited opinion is not buried in legal books sitting on dusty shelves – it is as if the opinion never existed in the first place – other than its effect on the hapless appellant victimized by it.

In an uncommon display of judicial courage, an Eighth Circuit three judge panel ruled in *Anastasoff* that the circuit rule on the non-citability of an unpublished opinion is unconstitutional. The panel declared the non-citability rule "expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decision will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional." All of the federal circuits and most, if not all, of the states have rules resembling the one declared unconstitutional in *Anastasoff*.

Third, a case resolved by an unpublished decision typically receives little or no personal attention from the judges involved. The judges only invest the minimal amount of time and energy necessary to process the final order or decision that is prepared, and that may in fact have been determined to be the appropriate resolution by the judge's support staff. In such cases the judge functions as more of an administrative bureaucrat removed from dealing with a case's details. That is in sharp contrast to what is traditionally thought of as a judge's hands-on role in all aspects of deciding a case. This routine hands-off role by judges raises serious Constitutional issues about the administration of justice in this country, because unseen and unknown bureaucratic functionaries are surreptitiously making judicial decisions that affect litigants and the public without any constitutional authority to do so, and without the litigants or the public being informed of their shadow participation as de facto judges.

Fourth, the quality of unpublished decisions is of significantly lower quality than published decisions. As Professors Richman and Reynolds noted, "The primary cause lies in the absence of accountability and responsibility; their absence breeds sloth and indifference." There has been fourteen additional years for the quality of unpublished decisions to deteriorate since Fourth Circuit Chief Judge Markey described them in 1989 as "junk" opinions.

The serious deficiencies inherent in unpublished decisions are indicative of the presumption that exists in every case resolved by an unpublished opinion that consideration of the defendant's issues was given short shrift. Implicit in that presumption is that the decision may have, in fact, been incorrectly decided. In a criminal case it means the possibility that an innocent person was victimized by a wrongful affirmation and forced to suffer an unjust punishment, up to and including execution.

Part 6 will be in the next issue of *Justice:Denied*. **To order** the complete 27,000 word article, mail $10 (check or money order with a request for **- Vol. 30, No. 4, Symposium Issue** to:
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where the two chatted and decided to return to Newton's apartment. As Newton backed out of the drive, she saw the duffel on the back seat and realized she needed to hide it. With Nelms watching, Newton retrieved the bag and walked next door into a burned and abandoned house owned by her parents, and there (as both women later confirmed), she left the bag.

The women arrived at the apartment around 8pm, and didn't immediately realize that anything was wrong. Newton thought Adrian was napping – until she saw the blood. "As Frances walked around the couch and saw his upper torso, she immediately screamed and bolted to the children's bedroom," Nelms said in an affidavit. "Frances began to frantically scream uncontrollably. I could not calm her down enough to elicit the apartment's address."

Newton says she was shocked and dazed, but gave police as much information as possible – including the fact that she'd just removed a gun from the house. She told police about Adrian's drug habit, and that he owed some money to a dealer – which Adrian's brother, Terrence, corroborated, telling police he knew where the dealer lived. Police never pursued the lead. "To your knowledge, was the alleged drug dealer ever interviewed by anyone in connection with this case?" Newton's attorney asked Sheriff's Officer Frank Pratt at trial. "No," Pratt replied.

A bullet remained lodged in Adrian's head, meaning that the blood and brain matter would have blown back onto the gun and shooter – confirmed by a trail of blood found in the hallway. Police found no trace of residual nitrites (gunshot residue) on Newton's hands, nor on the long sleeves of the sweater she was wearing. They collected the clothing she'd worn that day. There was no blood, nor any trace of blood, on any of the items.

Which Gun?

The next day, April 8, according to trial records, police supposedly confirmed that the gun they had retrieved from Newton's duffel bag in the abandoned building – at her direction – matched the murder bullets. Yet Newton was not arrested until more than two weeks later. Newton says that Harris Co. Sheriff's Sgt. J.J. Freeze told her that police had actually recovered two guns; in a sworn affidavit, Newton's father Bee Henry Nelms says Freeze told him the same thing and added that Newton would "eventually be released." Nonetheless, Newton was arrested two weeks later – after she filed a claim on Adrian and Farrah's life insurance policies – and charged with the capital murder of her 21-month-old daughter.

The state's primary evidence against her was elementary: Newton had filed for insurance benefits, and the Department of Public Safety forensic technicians had detected nitrite traces near the hem of Newton's long skirt – although they couldn't say with certainty that the nitrites were not her father's garden fertilizer transferred earlier that day from the hands of her toddler daughter. For physical evidence, the state relied primarily on the supposed ballistics match to the gun Newton had hidden.

Yet in court Freeze was somewhat vague: "I believe we talked about two pistols," he testified. "I know of one for sure, and there was mention of a second one that Ms. Newton had purchased earlier."

There are serious questions about the prosecutors' timeline, which would have required New-

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