Introduction and Table of Contents

Robin Jean Davis  
*West Virginia Supreme Court of Appeals*

Louis J. Palmer Jr.

Follow this and additional works at: [https://researchrepository.wvu.edu/wvlr](https://researchrepository.wvu.edu/wvlr)

Part of the [Judges Commons](https://researchrepository.wvu.edu/wvlr), and the [Legal Biography Commons](https://researchrepository.wvu.edu/wvlr)

**Recommended Citation**


Available at: [https://researchrepository.wvu.edu/wvlr/vol100/iss5/5](https://researchrepository.wvu.edu/wvlr/vol100/iss5/5)

This A Tribute to Franklin D. Cleckley: A Compendium of Essential Legal Principles From His Opinions as a Justice on the West Virginia Supreme Court of Appeals is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
A TRIBUTE TO FRANKLIN D. CLECKLEY:
A COMPENDIUM OF ESSENTIAL
LEGAL PRINCIPLES FROM HIS OPINIONS AS A
JUSTICE ON THE WEST VIRGINIA SUPREME
COURT OF APPEALS

Robin Jean Davis*
Louis J. Palmer, Jr.**

TABLE OF CONTENTS

I. INTRODUCTION ............................................ 6

II. EVIDENCE ................................................ 8
    A. General Admissibility ................................ 8
    B. Admission of Photographs ............................ 9
    C. Admissibility Under Rule 404(b) .................... 10
    D. Expert Testimony .................................... 11
    E. Admissibility of Illegal Recording ................. 12
    F. Rebuttal Evidence ................................... 12
    G. Impeachment ......................................... 13
    H. Extrajudicial Inculpatory Statements .............. 15
    I. Communication Privileges ............................ 15
    J. Demonstrative Evidence .............................. 18
    K. Admissibility Under Rule 804(b)(3) ............... 18
    L. Admissibility Under Rule 803 ....................... 19
    M. Curative Admissibility Rule ......................... 20
    N. Admitting Evidence of Insurance ................... 20
    O. Scientific Evidence ................................ 21
    P. Excluding Witnesses Under Rule 615 ............... 22
    Q. Witness Competency and the Dead Man's Statute ... 24
    R. Evidence of a Witness' Religion .................... 25
    S. Nonresponsive Answer ............................... 25

* Chief Justice, West Virginia Supreme Court of Appeals; B.A. 1978, West Virginia Wesleyan; J.D. 1982, West Virginia University College of Law.

** Law Clerk for Chief Justice Davis; B.A. 1983, City University of New York; J.D. 1992, West Virginia University College of Law.
### III. CRIMINAL PROCEDURE
- Interrogating a Suspect ........................................... 26
- Venue ........................................................................... 28
- Automobile Stop ......................................................... 28
- Jury Questions During Deliberation ................................. 29
- Discovery Violations .................................................... 29
- Indictment ..................................................................... 29
- Plea Agreement ............................................................. 30
- Subpoena ....................................................................... 32
- Closing Arguments ........................................................ 32
- Discovery ........................................................................ 34
- Search Warrant ............................................................. 36
- Jury Instructions ............................................................ 36
- Selecting a Jury .............................................................. 37
- Warrantless Search of Premises ....................................... 38
- Bifurcation of Trial and Sentence .................................... 40
- Retroactivity of Procedural Rule ....................................... 41

### IV. CRIMINAL LAW
- First Degree Murder ...................................................... 41
- Double Jeopardy Defense .............................................. 42
- Automatism Defense ..................................................... 43
- Defense of Collateral Estoppel ........................................ 44

### V. CIVIL PROCEDURE
- Summary Judgment ....................................................... 45
- Venue ............................................................................. 47
- Jury Selection ................................................................. 49
- Jury Instructions ............................................................. 49
- Motion for Reconsideration ............................................. 50
- Attorney Fees ................................................................. 51
- Motion in Limine ............................................................ 54
- Judgment on the Pleadings .............................................. 55
- Motion to Dismiss .......................................................... 55
- Dismissal for Failing to Prosecute ................................. 56
- Sanctions ........................................................................ 58

### VI. DOMESTIC RELATIONS
- Domestic Violence .......................................................... 59
- Divorce ........................................................................... 60
VII. PROPERTY LAW ........................................... 67
A. Government Sale of Property .............................. 67
B. Easement .................................................. 68
C. Landlord-Tenant .......................................... 68
D. Adverse Possession ....................................... 68

VIII. JUVENILE DELINQUENCY LAW ............................ 69
A. Questioning a Juvenile .................................... 69
B. Transferring Juveniles to Prison ......................... 70
C. Taking Juveniles into Custody ............................ 71

IX. LAWYER DISCIPLINARY LAW ............................. 71

X. JUDICIAL DISCIPLINARY LAW ............................ 72
A. Magistrates ............................................... 72
B. Public Remarks by Judicial Officer ....................... 72

XI. NEGOTIABLE INSTRUMENT LAW .......................... 73

XII. CONTRACT LAW ............................................ 74

XIII. CIVIL RIGHTS ............................................. 75
A. Litigating Discrimination Outside Human Rights Act ... 75
B. Prima Facie Case of Discrimination ....................... 75
C. Proving Employment Disparate Treatment ................. 76
D. Sexual Harassment ........................................ 78
E. Employee Defined to Include a Supervisor ............... 80
F. Instructing the Jury ...................................... 80
G. Retaliatory Conduct ..................................... 82
H. Wage Discrimination .................................... 82
I. Handicap Employment Discrimination .................... 83

XIV. LABOR LAW ................................................. 86
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>XV.</td>
<td>Tort Law</td>
<td>86</td>
</tr>
<tr>
<td>A.</td>
<td>Statute of Limitations</td>
<td>86</td>
</tr>
<tr>
<td>B.</td>
<td>Cause of Action by Attorney General</td>
<td>87</td>
</tr>
<tr>
<td>C.</td>
<td>Libel</td>
<td>88</td>
</tr>
<tr>
<td>D.</td>
<td>Verdict Award</td>
<td>89</td>
</tr>
<tr>
<td>E.</td>
<td>Wrongful Death</td>
<td>90</td>
</tr>
<tr>
<td>F.</td>
<td>Joint Tortfeasors</td>
<td>91</td>
</tr>
<tr>
<td>G.</td>
<td>Immunity</td>
<td>91</td>
</tr>
<tr>
<td>H.</td>
<td>Retroactiveness of Statute</td>
<td>92</td>
</tr>
<tr>
<td>XVI.</td>
<td>Administrative Law</td>
<td>92</td>
</tr>
<tr>
<td>A.</td>
<td>Administrative and Judicial Litigation of Same Issue</td>
<td>92</td>
</tr>
<tr>
<td>B.</td>
<td>Department of Motor Vehicles</td>
<td>93</td>
</tr>
<tr>
<td>C.</td>
<td>Tax Commissioner</td>
<td>94</td>
</tr>
<tr>
<td>D.</td>
<td>Unemployment Compensation</td>
<td>94</td>
</tr>
<tr>
<td>E.</td>
<td>Education Grievance Board</td>
<td>95</td>
</tr>
<tr>
<td>F.</td>
<td>Open Governmental Proceedings</td>
<td>96</td>
</tr>
<tr>
<td>G.</td>
<td>Judicial Enforcement of Administrative Subpoena</td>
<td>96</td>
</tr>
<tr>
<td>H.</td>
<td>Building Commission</td>
<td>97</td>
</tr>
<tr>
<td>I.</td>
<td>School Building Authority</td>
<td>97</td>
</tr>
<tr>
<td>XVII.</td>
<td>Insurance Law</td>
<td>99</td>
</tr>
<tr>
<td>A.</td>
<td>Farmers’ Mutual Life Insurance Companies</td>
<td>99</td>
</tr>
<tr>
<td>B.</td>
<td>Subrogation</td>
<td>100</td>
</tr>
<tr>
<td>C.</td>
<td>Stacking</td>
<td>100</td>
</tr>
<tr>
<td>XVIII.</td>
<td>Corporation Law</td>
<td>100</td>
</tr>
<tr>
<td>XIX.</td>
<td>Election Law</td>
<td>101</td>
</tr>
<tr>
<td>A.</td>
<td>Enforcing Election Laws</td>
<td>101</td>
</tr>
<tr>
<td>B.</td>
<td>Limiting Candidate Eligibility</td>
<td>101</td>
</tr>
<tr>
<td>C.</td>
<td>Filing Requirements</td>
<td>102</td>
</tr>
<tr>
<td>D.</td>
<td>Setting Aside an Election</td>
<td>103</td>
</tr>
<tr>
<td>XX.</td>
<td>Appellate Procedure</td>
<td>103</td>
</tr>
<tr>
<td>A.</td>
<td>Appellate Jurisdiction</td>
<td>103</td>
</tr>
<tr>
<td>B.</td>
<td>Standards of Review</td>
<td>105</td>
</tr>
<tr>
<td>1.</td>
<td>Admissibility of a Confession</td>
<td>105</td>
</tr>
<tr>
<td>2.</td>
<td>Criminal Jury Instructions</td>
<td>106</td>
</tr>
<tr>
<td>3.</td>
<td>Civil Jury Instructions</td>
<td>108</td>
</tr>
<tr>
<td>4.</td>
<td>Motion to Suppress</td>
<td>108</td>
</tr>
</tbody>
</table>
5. Injection of Unlawful Factors in a Criminal Case . 109
6. Discovery Violation ............................................. 110
7. Summary Judgment .............................................. 110
8. Partial Final Judgment Order .......................... 110
9. Motion to Dismiss ............................................... 111
10. Case Transfer Ruling .................................... 111
11. Judgment Notwithstanding the Verdict .......... 112
12. Ruling on Property Sold under Specific Statute 112
13. Lawyer Disciplinary Matters .................. 113
14. Decision of Unemployment Compensation Board . 113
15. Awarding Attorney Fee as Sanction ............. 114
16. Circuit Court Adoption of Family Law
   Master Findings .................................. 114
17. Nonconstitutional Harmless Error Review .......... 114
18. Decision of Tax Commissioner .................. 115
19. Interpreting Rules of Evidence .................. 115
20. Decision of Successor Judge ......................... 115
21. Review of an Ineffective Assistance of
   Counsel Claim ........................................ 116
22. General Evidentiary and Procedural Rulings .... 118
23. Trial Management ........................................ 118
24. Sufficiency of Evidence in Criminal Case .......... 119
25. Parole Statute or Double Jeopardy Claim .... 120
26. Alleged Breach of Plea Agreement .................. 120
27. Review of Challenge to Indictment ................. 121
28. Statutory Interpretation Generally .............. 121
29. Review of Administrative Rule or Regulation ...... 122
30. Findings and Conclusions of Circuit Court ....... 124
31. Civil Service Commission ............................... 126

C. Preserving Issue for Appeal .............................. 127
D. Writ of Prohibition ........................................ 127
E. Writ of Mandamus .......................................... 128
F. Plain Error Rule ............................................ 129
G. Cumulative Error Doctrine .............................. 132

XXI. CONSTITUTIONAL LAW ..................................... 132
A. Free Speech Clause ........................................ 132
B. Due Process Clause ....................................... 134
C. Article IV, Section 8 ..................................... 137
D. Article VIII, Section 3 .................................. 138
E. Grand Jury Clause ........................................ 138
I. INTRODUCTION

When Franklin D. Cleckley joined the West Virginia Supreme Court of Appeals on September 1, 1994 as an appointed Justice,¹ he was quoted as saying, “In my opinion, Justice [Thomas] Miller brought West Virginia jurisprudence into the twentieth century and now I intend and hope to carry it to the twenty-first.”² There is little room to doubt that Justice Cleckley did,³ in a short span of time, carve a magnificent corridor into the twenty-first century for the state Supreme Court.

The purpose of this article is twofold. First, to set out the legal principles Justice Cleckley etched into law as syllabus points⁴ while sitting as a Justice on the state Supreme Court. Second, and most importantly, to preserve in one compendium for jurists of the future the genius of the man.

Justice Cleckley wrote 112 majority opinions during his tenure as a Justice on the state Supreme Court.⁵ However, this article extracts all of the syllabus points

¹ Governor Gaston Caperton appointed Justice Cleckley to complete the term vacated by the retirement of Justice Thomas Miller. Justice Cleckley sat on the state Supreme Court from September 1, 1994 to December 31, 1996.

² Lisa A. Stamm, Franklin D. Cleckley Taking One Giant Step For Mankind, 8 THE WEST VIRGINIA LAWYER 14, 15 (Sept. 1994).

³ Justice Cleckley returned to teaching at West Virginia University College of Law as the Arthur B. Hodges Professor of Law.

⁴ The state constitution specifically provides, in article 8, section 4, that “it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case in which an opinion is written and . . . which shall be prefixed to the published report of the case.”

⁵ The cases in which Justice Cleckley concurred are as follows: State v. Rahman, 483 S.E.2d 273 (W. Va. 1996) (Cleckley, J. concurring); State ex rel. Cavender v. McCarty, 479 S.E.2d 887 (W. Va. 1996) (Cleckley, J. concurring); West Virginia Dept. of Health and Human Resources ex rel. Wright v. Brenda C., 475 S.E.2d 560 (W. Va. 1996) (Cleckley, J. concurring); State v. Greene, 473
created in his opinions and organizes them into appropriate legal categories. In some instances a syllabus point touches upon several issues, and therefore could be categorized into several legal categories. This article has identified a syllabus point no more than once. Additionally, where it was necessary to make a syllabus point clear, some case specific facts have been provided.

The categories in which the syllabus points are organized include the following: evidence, criminal procedure, criminal law, civil procedure, domestic relations, property law, juvenile law, lawyer disciplinary law, judicial disciplinary law, negotiable instrument law, contract law, civil rights, labor law, tort law, administrative law, insurance law, corporation law, election law, appellate procedure, and constitutional law. Ultimately, the wide variety of law in which the syllabus points are organized exemplify the breadth of Justice Cleckley’s legal interests and understanding. In the final analysis, Justice Cleckley’s scholarly work will extend well into and past the twenty-first century.
