
Volume 100

Issue 5 Issue 5, 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*

Article 5

June 1998

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>



Part of the [Judges Commons](#), and the [Legal Biography Commons](#)

Recommended Citation

Robin J. Davis & Louis J. Palmer Jr., *Introduction and Table of Contents*, 100 W. Va. L. Rev. (1998).

Available at: <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
	<i>A. General Admissibility</i>	8
	<i>B. Admission of Photographs</i>	9
	<i>C. Admissibility Under Rule 404(b)</i>	10
	<i>D. Expert Testimony</i>	11
	<i>E. Admissibility of Illegal Recording</i>	12
	<i>F. Rebuttal Evidence</i>	12
	<i>G. Impeachment</i>	13
	<i>H. Extrajudicial Inculpatory Statements</i>	15
	<i>I. Communication Privileges</i>	15
	<i>J. Demonstrative Evidence</i>	18
	<i>K. Admissibility Under Rule 804(b)(3)</i>	18
	<i>L. Admissibility Under Rule 803</i>	19
	<i>M. Curative Admissibility Rule</i>	20
	<i>N. Admitting Evidence of Insurance</i>	20
	<i>O. Scientific Evidence</i>	21
	<i>P. Excluding Witnesses Under Rule 615</i>	22
	<i>Q. Witness Competency and the Dead Man's Statute</i>	24
	<i>R. Evidence of a Witness' Religion</i>	25
	<i>S. Nonresponsive Answer</i>	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	26
	A. <i>Interrogating a Suspect</i>	26
	B. <i>Venue</i>	28
	C. <i>Automobile Stop</i>	28
	D. <i>Jury Questions During Deliberation</i>	29
	E. <i>Discovery Violations</i>	29
	F. <i>Indictment</i>	29
	G. <i>Plea Agreement</i>	30
	H. <i>Subpoena</i>	32
	I. <i>Closing Arguments</i>	32
	J. <i>Discovery</i>	34
	K. <i>Search Warrant</i>	36
	L. <i>Jury Instructions</i>	36
	M. <i>Selecting a Jury</i>	37
	N. <i>Warrantless Search of Premises</i>	38
	O. <i>Bifurcation of Trial and Sentence</i>	40
	P. <i>Retroactivity of Procedural Rule</i>	41
IV.	CRIMINAL LAW	41
	A. <i>First Degree Murder</i>	41
	B. <i>Double Jeopardy Defense</i>	42
	C. <i>Automatism Defense</i>	43
	D. <i>Defense of Collateral Estoppel</i>	44
V.	CIVIL PROCEDURE	45
	A. <i>Summary Judgment</i>	45
	B. <i>Venue</i>	47
	C. <i>Jury Selection</i>	49
	D. <i>Jury Instructions</i>	49
	E. <i>Motion for Reconsideration</i>	50
	F. <i>Attorney Fees</i>	51
	G. <i>Motion in Limine</i>	54
	H. <i>Judgment on the Pleadings</i>	55
	I. <i>Motion to Dismiss</i>	55
	J. <i>Dismissal for Failing to Prosecute</i>	56
	K. <i>Sanctions</i>	58
VI.	DOMESTIC RELATIONS	59
	A. <i>Domestic Violence</i>	59
	B. <i>Divorce</i>	60

	<i>C. Child Abuse and Neglect</i>	61
	<i>D. Paternity</i>	62
	<i>E. Child Custody</i>	63
	<i>F. Circuit Court Review of Family Law Master Recommendation</i>	66
VII.	PROPERTY LAW	67
	<i>A. Government Sale of Property</i>	67
	<i>B. Easement</i>	68
	<i>C. Landlord-Tenant</i>	68
	<i>D. Adverse Possession</i>	68
VIII.	JUVENILE DELINQUENCY LAW	69
	<i>A. Questioning a Juvenile</i>	69
	<i>B. Transferring Juveniles to Prison</i>	70
	<i>C. Taking Juveniles into Custody</i>	71
IX.	LAWYER DISCIPLINARY LAW	71
X.	JUDICIAL DISCIPLINARY LAW	72
	<i>A. Magistrates</i>	72
	<i>B. Public Remarks by Judicial Officer</i>	72
XI.	NEGOTIABLE INSTRUMENT LAW	73
XII.	CONTRACT LAW	74
XIII.	CIVIL RIGHTS	75
	<i>A. Litigating Discrimination Outside Human Rights Act</i>	75
	<i>B. Prima Facie Case of Discrimination</i>	75
	<i>C. Proving Employment Disparate Treatment</i>	76
	<i>D. Sexual Harassment</i>	78
	<i>E. Employee Defined to Include a Supervisor</i>	80
	<i>F. Instructing the Jury</i>	80
	<i>G. Retaliatory Conduct</i>	82
	<i>H. Wage Discrimination</i>	82
	<i>I. Handicap Employment Discrimination</i>	83
	<i>J. Cause of Action Under 42 U.S.C. § 1983</i>	85
XIV.	LABOR LAW	86

XV.	TORT LAW	86
A.	<i>Statute of Limitations</i>	86
B.	<i>Cause of Action by Attorney General</i>	87
C.	<i>Libel</i>	88
D.	<i>Verdict Award</i>	89
E.	<i>Wrongful Death</i>	90
F.	<i>Joint Tortfeasors</i>	91
G.	<i>Immunity</i>	91
H.	<i>Retroactiveness of Statute</i>	92
XVI.	ADMINISTRATIVE LAW	92
A.	<i>Administrative and Judicial Litigation of Same Issue</i>	92
B.	<i>Department of Motor Vehicles</i>	93
C.	<i>Tax Commissioner</i>	94
D.	<i>Unemployment Compensation</i>	94
E.	<i>Education Grievance Board</i>	95
F.	<i>Open Governmental Proceedings</i>	96
G.	<i>Judicial Enforcement of Administrative Subpoena</i>	96
H.	<i>Building Commission</i>	97
I.	<i>School Building Authority</i>	97
XVII.	INSURANCE LAW	99
A.	<i>Farmers' Mutual Life Insurance Companies</i>	99
B.	<i>Subrogation</i>	100
C.	<i>Stacking</i>	100
XVIII.	CORPORATION LAW	100
XIX.	ELECTION LAW	101
A.	<i>Enforcing Election Laws</i>	101
B.	<i>Limiting Candidate Eligibility</i>	101
C.	<i>Filing Requirements</i>	102
D.	<i>Setting Aside an Election</i>	103
XX.	APPELLATE PROCEDURE	103
A.	<i>Appellate Jurisdiction</i>	103
B.	<i>Standards of Review</i>	105
1.	<i>Admissibility of a Confession</i>	105
2.	<i>Criminal Jury Instructions</i>	106
3.	<i>Civil Jury Instructions</i>	108
4.	<i>Motion to Suppress</i>	108

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.	<i>Preserving Issue for Appeal</i>	127
D.	<i>Writ of Prohibition</i>	127
E.	<i>Writ of Mandamus</i>	128
F.	<i>Plain Error Rule</i>	129
G.	<i>Cumulative Error Doctrine</i>	132
XXI.	CONSTITUTIONAL LAW	132
A.	<i>Free Speech Clause</i>	132
B.	<i>Due Process Clause</i>	134
C.	<i>Article IV, Section 8</i>	137
D.	<i>Article VIII, Section 3</i>	138
E.	<i>Grand Jury Clause</i>	138

F.	<i>Search and Seizure Clause</i>	139
G.	<i>Confrontation Clause</i>	139
H.	<i>Jury Clause</i>	141
I.	<i>Article XII, Section 1</i>	141
J.	<i>Double Jeopardy Clause</i>	142
K.	<i>Article XIV, Section 2</i>	143
XXII.	CONCLUSION	144

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.

S.E.2d 921 (W. Va. 1996) (Cleckley, J. concurring); *State v. Houston*, 475 S.E.2d 307 (W. Va. 1996) (Cleckley, J. concurring); *Cox v. Amick*, 466 S.E.2d 459 (W. Va. 1995) (Cleckley, J. concurring); *State v. Hardesty*, 461 S.E.2d 478 (W. Va. 1995) (Cleckley, J. concurring); *State v. Lilly*, 461 S.E.2d 101 (W. Va. 1995) (Cleckley, J. concurring); *State v. Hottinger*, 461 S.E.2d 462 (W. Va. 1995) (Cleckley, J. concurring in part); *Cox v. State*, 460 S.E.2d 25 (W. Va. 1995) (Cleckley, J. concurring); *State ex rel. Gainer v. West Virginia Bd. of Investments*, 459 S.E.2d 531 (W. Va. 1995) (Cleckley, J. concurring); *Petition of Snuffer*, 456 S.E.2d 493 (W. Va. 1995) (Cleckley, J. concurring); *Marshall v. Elmo Greer & Sons, Inc.*, 456 S.E.2d 554 (W. Va. 1995) (Cleckley, J. concurring); *Boley v. Cline*, 456 S.E.2d 38 (W. Va. 1995) (Cleckley, J. concurring); *Brown v. Thompson*, 452 S.E.2d 728 (W. Va. 1994) (Cleckley, J. concurring); *In re State Public Bldg. Asbestos Litigation*, 454 S.E.2d 413 (W. Va. 1994) (Cleckley, J. concurring); *Woodall v. Int'l Broth. of Elec. Workers, Local 596*, 453 S.E.2d 656 (W. Va. 1994) (Cleckley, J. concurring); *Pratt v. Pratt*, 454 S.E.2d 400 (W. Va. 1994) (Cleckley, J. concurring); *Hines v. Hills Dept. Stores, Inc.*, 454 S.E.2d 385 (W. Va. 1994) (Cleckley, J. concurring); *State ex rel. Allen v. Bedell*, 454 S.E.2d 77 (W. Va. 1994) (Cleckley, J. concurring); *Dent v. Fruth*, 453 S.E.2d 340 (W. Va. 1994) (Cleckley, J. concurring); *State v. Hopkins*, 453 S.E.2d 317 (W. Va. 1994) (Cleckley, J. concurring in part); *State ex rel. R.L. v. Bedell*, 452 S.E.2d 893 (W. Va. 1994) (Cleckley, J. concurring); *State v. Phalen*, 452 S.E.2d 70 (W. Va. 1994) (Cleckley, J. concurring); *Committee on Legal Ethics of the West Virginia State Bar v. Sheatsley*, 452 S.E.2d 75 (W. Va. 1994) (Cleckley, J. concurring); *Largent v. West Virginia Div. of Health*, 452 S.E.2d 42 (W. Va. 1994) (Cleckley, J. concurring in part).

Justice Cleckley dissented in the following cases: *Barnhart v. Redd*, 469 S.E.2d 1 (W. Va. 1996) (Cleckley, J. dissenting); *State v. Hottinger*, 461 S.E.2d 462 (W. Va. 1995) (Cleckley, J. dissenting in part); *State v. Linkous*, 460 S.E.2d 288 (W. Va. 1995) (Cleckley, J. dissenting); *Matter of Atkinson*, 456 S.E.2d 202 (W. Va. 1995) (Cleckley, J. dissenting); *State v. Mullins*, 456 S.E.2d 42 (W. Va. 1995) (Cleckley, J. dissenting); *State v. Deem*, 456 S.E.2d 22 (W. Va. 1995) (Cleckley, J. dissenting); *In re Elizabeth Jo*, 453 S.E.2d 639 (W. Va. 1994) (Cleckley, J. dissenting); *State v. Hopkins*, 453 S.E.2d 317 (W. Va. 1994) (Cleckley, J. dissenting in part); *Largent v. West Virginia Div. of Health*, 452 S.E.2d 42 (W. Va. 1994) (Cleckley, J. dissenting in part).