

Monday, November 10, 2008

**To hell with annotations.**

Photo from website of U.S. District Court (W.D. Mi.). When I started law school in 1986, my legal research class included researching weighty tomes with such titles as Supreme Court Digest, F.2d Digest, and A.2d Digest, which used key numbers to find various categories and subcategories of the law. It was part of what made law school unpleasant, to say the least. Next the instructor showed us how Lexis online legal research could shorten the time and tomes for obtaining the same legal research answer. However, at the time, Lexis was only available by dialup hookup; Al Gore had not yet discovered the Internet for legal research purposes. Moreover, at the time, Lexis was an expensive drug to use at a private law firm, so the digests still came in handy. I learned from those digests, annotations to statutes, the American Jurisprudence encyclopedia and other legal encyclopedias (including Corpus Juris Secundum) that the summaries of court cases found therein often were incorrect, or else were not always very precise nor applicable to the legal issue at hand. Most current judges probably learned to do legal research in a similar fashion, because flat-fee Internet-based legal research did not come into being until around ten years ago, and most judges probably began law school more than ten years ago. My legal research instructor -- a bit of an overly intense person, but overall a caring and good educator -- for good reason admonished to rely on case descriptions in legal digests and statutory annotations at one's own peril. He said to review the actual court opinion being referenced, and I have always taken that approach. However, in the heat of trial battle, unless the judge has an online legal research terminal in front of him or her at the bench -- which is the case in federal courts and many state courts, but apparently not in the misdemeanor/District Courts in Maryland and Virginia where I often practice -- sometimes statutory annotations are all that is available to the lawyers and judge at trial, unless the judge affords the lawyers a break to get online themselves or to call their colleagues and assistants to do the research at the office. In the above context, ten days ago, I experienced dark comedy as a prosecutor kept referring the trial judge to the state annotated code's explanatory note about the amendment to a statute that was a basis of one of my evidentiary objections. Here, (1) the statutory language was clear on its face to the issue being argued, (2) the explanatory note apparently was written by the publisher of the code and not by any entity legislative body, and (3) even if the explanatory note was written by an entity of a legislative body (e.g., the committee that drafted the update to the statute), plain language in a statute cannot be trumped by the interpretation of some legislative committee engaged in legislative history mental gymnastics. In any event, the judge rejected the prosecutor's arguments and we moved on. Criminal pattern jury instructions where I practice include references to caselaw in explaining the language of the instruction, and in warning when to be cautious about using a particular instruction. In Maryland, appellate and trial judges generally seem to give tremendous respect to the drafters of the criminal and civil pattern jury instructions. On the one hand, the drafters seem to include some very capable minds and dedicated people, but they are only human, and their work cannot cover every single scenario that might arise at trial. In the District of Columbia, as well, it appears that a committee of lawyers puts substantial time into the criminal pattern jury instructions, and includes commentary with case references. However, when Maurice Lee went to trial for an alleged 2002 murder, the trial judge refused to give the jury an instruction on mitigating circumstances as to second degree murder where neither party had requested that the jury be afforded the option to convict Mr. Lee on the lesser offense of voluntary manslaughter. Last week, the D.C. Court of Appeals reversed Mr. Lee's second degree murder conviction, finding that the judge erred by refusing to instruct on mitigating circumstances. *Lee v. U.S.*, \_\_\_ A.2d \_\_ (D.C., Nov. 6, 2008). Lee says that the trial judge was unintentionally hoodwinked by out-of-date commentary to the then-existing pattern jury instruction: "Regrettably, the Bostick decision has never made its way into the lengthy Redbook commentary accompanying the standard instructions on murder and manslaughter. As a result, the trial judge was influenced here by language in the commentary that appears to condition the need to instruct on mitigating circumstances on the presence in the case of a lesser included offense instruction on manslaughter. But Bostick rejected that proposition and is indistinguishable from this case, because here, as there, the refusal to instruct on mitigating circumstances denied the defendant the proper legal framework within which to have the jury evaluate the evidence of heat of passion caused by adequate provocation. See *Bostick*, 605 A.2d at 918 n.8 (reversing because the jury had not been given a full instruction on provocation, including the requisite burden of proof on the government)." *Lee v. U.S.* Moral of the story: Annotations to legal codes and caselaw, and commentaries to jury instructions cannot meet the value of finding, reviewing, and Shepardizing court opinions. To do otherwise will place criminal defendants' liberty in unacceptable jeopardy. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00