Oral History of Honorable Arthur Burnett, Sr.

This interview is being conducted on behalf of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is William Marmon and the interviewee is Honorable Arthur Burnett Sr. The interview took place at the home of William Marmon on Tuesday, October 29, 2019. This is the fourth interview.

MR. MARMON: Good morning, Judge.

JUDGE BURNETT: Good morning. It's my pleasure to be here with you this morning.

MR. MARMON: In this session, we're going to go back and go over some of the more legalistic aspects of your career as federal magistrate and Superior Court judge. We're going to cite some cases and talk about in more detail some of the things we've mentioned in summary in an earlier session. So I'd like to start with your work as a magistrate and in connection with your work on issuance of arrest and search warrants.

JUDGE BURNETT: When the magistrates system was set up by Congress and enacted, it was to replace the old U.S. Commissioner System. Commissioners would issue arrest and search warrants. One of the first assignments I had was to be liaison with the Federal Judicial Center headed by former Justice Tom Clark of the United States Supreme Court who retired, which led to Thurgood Marshall being appointed to his vacancy on the Supreme Court. As a result, I was given the mission as Chair of the Education Committee to educate magistrates on how to issue arrest and search warrants that would withstand appellate scrutiny for adequacy in connection with U.S. Supreme Court decisions that were during that period frequently coming down from the Supreme Court and our Federal Circuit Courts of Appeal. Indeed, the United States Supreme Court Reports and federal Court of

Appeals' decisions were during this period quite numerous. Affidavits were frequently factually insufficient as to how the affiant knew the facts or on the reliability of the informant as to hearsay information.

So I set out to establish the standards for issuance of arrest and search warrants, and indeed we had training sessions for the magistrates in the five pilot districts where I served in the role as the professor of what the standards ought to be and wrote an article that was published in the *Journal of Criminal Law and Criminology* called "Evaluation of Affidavits and Issuance of Search Warrants: a Practical Guide for Magistrates." As a result of that role, I came to the attention of the National Judicial College in Reno, Nevada, affiliated with the American Bar Association that was set up to be one of their two main lecturers on issuance of arrest and search warrants. I was joined by a gentleman who was a trial judge in Oregon by the name of Richard Unis, who later was elevated to become a state Supreme Court Justice. For several years he and I would appear at courses in Reno, Nevada, at the National Judicial College and lecture to audience of 60, 70, or 80, both federal and state warrant issuing judges to correct and improve the quality of arrest and search warrant practices in this country. That led to a copy of this article which I brought with me today as setting the gold standard and led to basically appellate court decisions by our U.S. Courts of Appeal almost disappearing from the official reports because of the quality of the work that Richard Unis and I did with reference to improving the warrant issues

function of the U.S. magistrate system and in the state courts of this nation.

MR. MARMON: We have appended that article to this oral history.

JUDGE BURNETT: As a matter of fact, I became so popular at the National Judicial College that I recall one time going through my notes and realizing that I had spent eight weeks of my calendar year in Reno, Nevada, lecturing to several classes of judges on improving the warrant issuing process for our state and federal court systems. Indeed, there was one instance where the leaders approached me about leaving the bench and becoming Director of the Judicial College, but I didn't want to move to Nevada. Things were much more exciting here in Washington, and I did not pursue it.

MR. MARMON: The next area that we wanted to go into is the issue of the federal magistrates implementing the federal Bail Reform Act.

JUDGE BURNETT: That was the second major area that the Federal Judicial Center and the five federal courts pilot jurisdictions focused on that started up the operation. The five federal districts were the District of Columbia, the Eastern District of Virginia, the District of Kansas, the Northern District of California, and the Southern District of California. We were asked to come up with a system that would comply not only in form but in substance with the philosophy of the federal Bail Reform Act that Congress had passed back in 1966. We had to focus not only on the person's background, but the quality of the government's evidence so that people were not sitting in jail just because they did not have money, were

poor, and did not have employment, did not have family or relatives to pay the premium for surety bonds.

So again, I took a leadership role with the Federal Judicial Center in lecturing to federal magistrates in the five pilot programs and as others joined, on looking at the factors involved in setting bail and came up with the idea that one of the things that we could do to influence people not to commit crimes while on bail release and not to be in violation of bail conditions was to comply, because if guilty, a federal district court judge could take that record of compliance with the bail conditions as to whether that person should be sentenced to be confined inside a prison serving time or if that person is placed on probation.

I was told in comments by a number of my U.S. District Court judges that if people complied with the conditions of bail and showed meticulous compliance and did not commit additional offenses during the months or nine months or a year they were on pretrial release before their case was disposed of, they would take that into consideration in sentencing the person in the situation where the person was deemed not to be a danger or threat to the community.

So we innovated that practice, and I have reflected back over that time period of 1969 to 1975 when I left to go to the Civil Service Commission as legal advisor, I cannot think of a single case in which I placed a person on pretrial release under the federal Bail Reform Act that the person was brought back before me to have pretrial release revoked or

that the person committed any crime while on bail release in the entire six years. When I returned the second time as a federal magistrate judge, I continued those practices. And indeed I recall one instance which was somewhat of a unique case of a young woman who was wanted for forgery of U.S. government checks. The marshal got out the warrant for her. She got word that they were looking for her. She came in and voluntarily surrendered to me rather than to wait for the marshal to arrest her. She said, "Judge Burnett, I'm not the person they are looking for. They are looking for someone in Brooklyn, New York, with my same name, and I am not that person. I put her on pretrial release, checked her story out, and she was right. I then referred her case to Judge Oliver Gasch and told him what her circumstances were, and he terminated her probation based on her diligence and forthrightness.

I recall another instance where my youngest daughter was a student at Yale University. She was coming home, and I went to pick her up at Union Station. She and I were walking down the sidewalk from Union Station to where I had parked my car, and a gentleman on the back of a garbage truck for the District of Columbia. He said "That's your dad? I came before him ten years ago for a drug offense, and he put me on bail, got me in a drug treatment program, and I complied with what he told me to do. And now I'm a supervisor of garbage collectors for the District of Columbia."

MR. MARMON: Great story.

JUDGE BURNETT: So I have had several instances of that type. And then I recall another instance of a young woman who when she came in court before me, she looked like dripping wet she would weigh 90 pounds. She was totally emaciated. I said to her that for her benefit and condition of bail, I'm going to require that she be placed in a drug facility immediately, like a half-way house, for drug treatment for several months. She complied with the bail conditions and completed the program with good flying colors, and then one day I looked up in my courtroom and here is this young lady who looked like a professional lawyer sitting in the back my courtroom. When I finished handling the case before me, she said: "Your Honor, may I approach the bench?" I said "Yes, who are you? " She replied, "I'm such-and-such a person. You saved my life. You required as a condition of bail that I go into this in-patient drug treatment program. I did so, and I got over my addiction. I took a secretarial course, and now I'm a secretary in one of the major law firms here in the District of Columbia."

So by putting trust in people, you can change their lives and their motivation and what they can become. Those are just three instances of how my bail practices changed people's lives.

MR. MARMON: The third area that we wanted to discuss was the evolution of the pretrial stages in criminal cases and the pioneering decision of *Coleman v. Burnett*.

JUDGE BURNETT: In the case of *Coleman v. Burnett*, 477 F.2d 1187 (1973), the issue that came up in a rape case where there had been an issue of whether the

woman had consented but then when the guy didn't pay enough money, she claimed rape. I recall that the prosecutor wanted the guy held without bond and wanted me to, send the case to a grand jury. I said "No, in view of the defense and consent issue here, I'm going to allow the defense counsel to subpoena her to testify at the preliminary hearing.' As a result, the government filed a Writ of Mandamus against me, and the case went to the United States Court of Appeals. Judge Spottswood Robinson ended up writing an extensive appellate decision that went for more than a hundred pages saying that the Bail Reform Act considered by Congress had emphasized looking at the quality of the evidence, and we think Magistrate Burnett is correct in allowing defense counsel to present witnesses to undermine the strength of the government's case.

I was later told that the Judicial Conference of the United States under Chief Justice John Roberts considered the issue and established the policy for all the federal courts that a preliminary hearing is not solely for the purpose of the government presenting its evidence and have a person sitting in jail while a grand jury considers a case. But in cases like a rape case where consent is an issue or in cases where there is a question of discrepancy in the description of the defendant, like narcotics undercover cases or in homicide cases where there is an issue of self-defense, counsel for the defendant can subpoena and have witnesses testify before the federal magistrates in a preliminary hearing as to the quality of the government's cases in those type of situations. That principle thus became

the policy of the entire federal government. So that case by Judge Spottswood Robinson with the law review type of opinion, the printed pages of more than a hundred pages, became the practice for the entire federal court system.

MR. MARMON: The fourth area we wanted to bring up here is your work with the American Bar Association in connection with some medical issues.

JUDGE BURNETT: In addition to my work as a magistrate here in the federal court, I was active in the American Bar Association with the Conference of Special Court Judges, which it was called at the time, and which the federal magistrates and bankruptcy judges could be members. Indeed, became so active in that entity, that in I974 became the first African-American to Chair a Conference of Judges in the history of the American-Bar Association.

In that capacity, there was a group headed by Chief Justice Shirley Abramson of the Wisconsin Supreme Court looking at the medical issues as well as the legal issues of an individual and that person's stability. I was asked to serve on that Commission. We met on several occasions in Wisconsin and elsewhere with that Commission of a group of medical doctors and lawyers and judges dealing with addiction and substance abuse problems. I recommended to that Commission and indeed I even testified before a Commission created by the state of Minnesota to look at the practices dealing with drug dependence and emotional and mental health. I urged the idea of what I called two-stage probation. The idea is

that a judge would put the person with a drug problem on probation for the maximum time that the law allowed but provide that if probation is not violated, probation shall end at a much earlier date. For example, in the District of Columbia a judge can put an offender on probation for, a total of five years. Then tell the person, or give the person an incentive, that if they comply with the conditions and did not violate conditions of probation, probation shall terminate within thirty months or two years. So give the maximum, but also in the initial order, provide that the individual can earn his or her way off of probation much sooner if he or she demonstrates a program of compliance with these conditions and stabilize their lives. In addition, I have suggested that in order to enhance this objective, that the judge could set a review hearing borrowed from the practice used in family court in a neglect and abuse practice review proceedings. Thus a judge upon initial sentencing could put the person on probation for a long period of time, with an early termination of probation if there is good faith compliance and also set a review hearing for 60 days out or 90 days out from the date of initial sentencing just to review with the person on probation how well he or she is doing.

Indeed, that practice and that idea caught on to a point where Judge Oliver Gasch of the United States District Court here in Washington, D.C., sent a young man before me who the government probation officer had moved to revoke probation because he was homeless, did not have a fixed address, and had not reported that to the probation officer as required.

When he came before me, I said "Why hadn't you done such and such?" and he said "I knew because I was homeless, but I haven't committed any crimes, judge. I'm just trying to stay out of the way of everybody, but probation people, they won't give me the services I need." I called in the probation officer and asked, and he said, Well, Judge, I didn't have time." I said just because you didn't have time, we should send this man to prison for ten years. I said at this point, I'm going to recommend to Judge Gasch that the Mayor, Marion Barry at the time, the District of Columbia and government agencies be held in contempt of court for not providing this man with the services he needs. Judge Gasch backed me up with reference to my comments that the Probation Office and government agencies should have provided him with the services he needed. They did so under the threat of contempt. Several years later, I'm giving a talk to a group of youngsters at a Fourth of July gathering at one of the park areas here in the District of Columbia with several thousand youth and adults. As I was leaving after making my comments to the entire audience, this man approaches me and says: "Judge, you don't recognize me, do you?" I said you look vaguely familiar, but the guy I remember was 40 or 50 pounds heavier. He said I'm that guy. You had the federal district judge threaten to issue a contempt order to get the government to give me the services I needed. They did so, and I want you to know that I've been drug-free now for 31 years, and I am now a supervisor for the District of

Columbia government breaking up youth gangs in the District of Columbia. That is a real-life experience.

MR. MARMON: That's a great story.

JUDGE BURNETT: My wife tells me that she does not like to go shopping with me because I walk down the street, I walk into a store, and someone comes over and taps me on the shoulder and says hey, "Judge, you turned my life around." She said she cannot go out shopping incognito without people knowing who she is when she is with me. She likes to go shopping without people watching her and pointing her out as Judge Burnett's wife.

MR. MARMON: I want to turn now to the issue of your handling of civil cases as a magistrate judge in conducting pretrial and settlement conferences.

JUDGE BURNETT: When I was first appointed as a United States Magistrate in 1969, the U.S. District Court in the District of Columbia had a gentleman called Pretrial Examiner, who handled pretrial matters in civil cases. In view of the scope of the Federal Magistrates Act and the pilot program which was being implemented, the Board of Judges of the Federal Court decided to phase out the Pretrial Examiner position and turned the functions of handling civil pretrial issues like compelling production of documents and records, or answers to interrogatories, or holding a pretrial conference, and putting together a Pretrial Order that outlined what the issues in the case are and problems in the areas The federal District Court judges thus decided that these were functions to be turned over to United States Magistrates. They decided to transfer those functions to U.S. Magistrates

to do. Initially the District Court was assigned two United States Magistrates, but with the assignment of civil pretrial matters to the magistrates, a third position was then authorized.

I recall one case where I got a call from a lawyer in London in which his representation was that I had gotten a gotten a civil case settled they thought could not be settled. I developed a reputation that if a case could not be settled, send it to Judge Burnett and he will get it settled. Many of the federal judges had criminal cases, especially where the defendants had to have trial in 90 days, and they turned their civil cases to me. I had several hundred civil cases on my docket as a magistrate, with a reputation if Judge Burnett couldn't get the case to settle it can't be settled.

I developed a reputation of being the moot court judge, and lawyers would present their cases before me with reference to everything except actually presenting the witness live. They'd say witness so-and-so would testify A, B, C, D, and we'd have certain documents to back them up, and we'd hear the cases like they were moot courting the case.

So we developed that practice also in the U.S. District Court as a model for the nation, and that process then began to be emulated all over America in the magistrates system. As a result of that, I don't recall having a total number, but many magistrate judges throughout the federal system became prime candidates and became U.S. District Court judges as a result of the magistrate system being, you might say, an apprentice system for federal judgeships.

And indeed, a couple magistrate judge colleagues became U.S. Court of Appeals judges and several became United States District Court judges. So that's how the system evolved.

MR. MARMON: When you became a judge in the Superior Court for District of Columbia you continued to apply these principles to your judicial work. Tell us how that worked.

JUDGE BURNETT: Again, in the Superior Court, I carried over some of the practices that I developed as a U.S. Magistrate. By that time, Congress had attached the name "judge" to the U.S. Magistrate judge system with reference to pretrial practices, bail practices, and so forth, and with reference to handling criminal cases in Superior Court. When I put a person on probation, I put a person on probation with incentives in the probation. I'm going to put you on probation for five years, but if you do not violate the conditions of probation, if you do not commit new crimes, your probation shall terminate in one year or two years, depending on the risk factors I saw in the individual. And indeed in the meantime, to make sure the probation officer and people will give you the services, I'm going to set a review hearing, and at the time of sentencing, I want to see you in 60 days just for a review, apart from the family law system and the abuse cases, how a family is doing, to how the probationer is doing on probation.

Indeed, I think I mentioned on a previous occasion that I had one case of a woman who had two daughters who, my recollection was, were twins, about 14 or 15 years of age, and she was an alcoholic and a drug

user. I said your daughters are going to end up being prostitutes and drug users like you are. I said that if this does not happen and they get to be 18 years of age, adults without this happening, I'll give them a birthday party here in my courtroom. Lo' and behold, I think I told the story before, when they got to be 18 years of age, one was about to become a Metropolitan Police Department Officer Cadet and the other one was in college. Instead of becoming prostitutes and drug users like their mother, they turned their lives around. In the course of the two- or three-year period, I had periodic review hearings, and they were doing well.

Since I have been doing non-profit work, I got a call one day, four or five years after I left Superior Court, from a lady saying, "Judge, you don't remember me, but I'm such-and-such a person. I want you to know that I recovered from my drug and alcohol problems, and I purchased my first house in my life, and my daughters are doing great."

So that's an example of what we were able to accomplish. As a matter of fact, since we started these sessions, I have on frequent occasions closed my eyes and thought back and say do I or can I recall even one case where I had to revoke someone's probation because they committed a crime while on probation by me, and I can't. I cannot think of a single case where I put a person on release where they committed a new crime and I had to revoke a pretrial release, or I had to revoke probation.

MR. MARMON: The last thing in this area we want to do is we want to talk about the list of cases that we put in the appendix of your opinions as a Superior Court judge. Tell us how that came about.

JUDGE BURNETT: To my surprise, we had a Superior Court magistrate by the name of Ronald Goodbread who was a very scholarly young man, and indeed he should have been elevated to become a full-fledged judge. He decided to put together a compendium, a book, on the history of the Superior Court judges who issued opinions since the Superior Court was created in 1970. Lo' and behold, I get in the mail this notebook which lists all of the judges on Superior Court from its inception in 1970 to 2002, which was even after I left the court to become a senior judge. To my surprise, in going through that book for preparation here, I discovered that I had 107 cases in which I had written opinions. It looks like at this point I may have been the most prolific judge on the court in writing legal opinions of all the judges between 1970 and the year 2000. I counted the number of entries, and there are 107 opinions that I wrote that were published in the *Washington Daily Law Reporter* as published opinions.

That reminded me. When I was in the federal court, I wrote opinions on pretrial issues in civil cases, and they were published in the Federal Rules Decisions. I had 40 opinions actually reported in the Federal Rules Decisions bound volumes as the pretrial discovery judge in the federal court system. But it looks like I may have been the most

prolific opinion writer in the history of the Superior Court in the District of Columbia.

MR. MARMON: We have posted those 107 references as an appendix to this oral history.

JUDGE BURNETT: I got a call in 2014 while on sabbatical doing non-profit work asking if I would like to be the chair of a commission created by the Episcopal Church of America. I said I'm Catholic not Episcopal, and they said with your civil rights history and your academic and intellectual ability, leads us to want to appoint you to be the chair of a commission called Organization for Procedural Justice in America set up by the Episcopal Church of America. I said I think the title should be broadened to be not only procedural justice but substantive justice as well.

In October of 2014, I was invited to Cincinnati, Ohio, to the Southern Diocese of Ohio to a formal ceremony where I was commissioned as an Episcopal Lay Minister with the consent of the Catholic Church, and the Catholic Church also being a co-partner to come up with a much like the Kerner Commission to come up with recommendations for amendments to the United States Constitution to number one, amend the 13th Amendment to eliminate slavery and involuntary servitude, even in prison, to turn our prisons into the equivalent of a community college, trade or technology schools, so when people go to prison and they then thereafter get released, they are trained and educated to be qualified for the jobs and employment that exist in the 21st Century and to do like Germany and a number of countries have done

is to prepare prison inmates to be competitive once they are released from prison, look at the Second Amendment to deal with gun violence in America, and to deal with abuses of stop and frisks and to deal with racial and religious profiling in law enforcement. So I put together a commission, and in addition to the Catholic Church, all the other churches and religions to come together to come up with recommendations for Amendments to the United States Constitution, as to the Thirteenth Amendment, as to the Second Amendment, as to whether Scalia's decision is correct and whether it originally was intended to deal with the National Guard and militia approaches as to who would be allowed to have guns and to deal with Fourth Amendment, stop and frisk and stops based on religious profiling or national origin and to deal with the First Amendment to protect privacy, and deal with issues of obscenity and human trafficking in the United States.

We started putting together a Commission divided into three separate subcommittees. One subcommittee to be constitutional scholars like Larry Tribe and Nathaniel Jones, Charles Ogletree, constitutional scholars, of 25 to 30 individuals. A second group of representatives, one or two representatives of every major religion in the country. And a third group of millennials from age 16 to 40, young professional, college graduates, and so forth, who would talk about what they'd like to see the U.S. Constitution to be. Then all three of these groups, ideas and

recommendations would be merged into a report to the President and to both Houses of Congress.

In view of the current political climate, that project has been put on hold for now. But I have been asked to head that whole Commission operation.

The Southern Diocese recommended that this Commission be ratified by Michael Carey, who heads the entire Episcopal Church. The convention of the Episcopal Church ratified its existence, but right now we're keeping a low profile in view of the political climate that exists right now.

So that's the biggest challenge I have in front of me, and indeed, if we end up with a Democratic president in 2020, it may become very public.

MR. MARMON: That's fascinating. Very interesting.

JUDGE BURNETT: And like I said, this call came out of the clear blue sky saying we want you to chair this Commission.

MR. MARMON: And the other big issue?

JUDGE BURNETT: Is whether or not we should abolish preemptory challenges and eliminate the need to provide that poor people can serve on juries with the provisor that the federal and state government will reimburse them for their day wages to get a real blend of total objectivity as to police brutality issues, credibility of witnesses, so that our jury service will be like the military service, and unless you are physically and mentally incapable, you serve.

I'm going to have legal research assistants to some research on what's happening in England, Canada, New Zealand, Australia, any other countries have abolished preemptory challenges to exclude people living below the poverty line or have a disparate impact who serves on juries.

MR. MARMON: Who's the sponsor of this activity?

JUDGE BURNETT: This will be done through the American Bar Association, and I'll be the lead author on a proposed article dealing with that issue.

People want me to sit down and write my memoirs, but with all this other work, I haven't had time to do that. So I have those three big challenges in front of me at this point.