# CRIMINAL JUSTICE MONOGRAPH


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U.S. DEPARTMENT OF JUSTICE
Law Enforcement Assistance Administration
National Institute of Law Enforcement and Criminal Justice

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## CRIMINAL APPEALS:
## ENGLISH PRACTICES AND AMERICAN REFORMS

## A SUMMARY

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## I. Premises, Purposes, and Problems

In searching for solutions to the problems which increasingly beset appellate courts, Americans have turned attention to England. This study seeks to provide a close, objective look at English criminal appeals, from an American perspective, with an eye toward identifying the procedures employed successfully there which seem arguably worth a try in American appellate courts.

No conclusion can be reached that any particular English practice will surely improve the American appellate process. But by revealing how the English system actually functions, a source of ideas is provided for American experimentation. In advance of actual testing, it is difficult to say what utility there may be in this country in any of the English procedures.

English appellate procedures commend themselves for American experimentation because the premises underlying the systems are essentially the same and similar problems afflict appellate courts in both countries. The premises include the notion that every convicted defendant has a right to have his conviction reviewed by another tribunal. The common problems are chiefly those of heavy caseloads and high percentages of frivolous appeals.

In England criminal appeals are adjudicated under procedures different from those employed in civil appeals. There are functional justifications for specialized procedures in criminal appeals (but not specialized judges); this is one of the distinctive features of the English system which should be tried in the United States.

This study is based on the work of the Court of Appeal, Criminal Division (CACD), which has jurisdiction to review convictions and sentences of the Crown Courts of England and Wales--the trial courts where major offences are tried by jury.

## II. An Overview of English Criminal Appeals: The Court, the Procedure, and the Cases

The Court. The modern type of appellate review in criminal cases dates from 1908. Since 1966 appeals from Assizes, Quarter Sessions and Crown Courts (now all known as Crown Courts) have come to the Court of Appeal, Criminal Division. The Court is composed of 15 appellate judges, who also sit in the Civil Division, and of 74 trial judges. The judges sit in panels of three to hear appeals. Two characteristics of the court are the numerousness of its judges and the substantial involvement of trial judges.

The Court during 1970 entertained 8,500 appeals in criminal cases, a volume of business substantially in excess of the combined civil and criminal caseloads of the busiest American appellate courts. Since these cases were handled by upwards of 89 judges, sitting only part time on criminal appeals, it is difficult to compare the work burden of each judge with that of American judges.

The Procedure. In over 90% of the cases in CACD the defendant is required to obtain leave to appeal. Leave can be granted by any judge eligible to sit in the court; in this capacity he is known as "the single judge." If the single judge denies leave, the defendant may renew his application before two other judges. Leave is granted, at least in theory, if the case presents an arguable issue. If leave is granted the case becomes an "appeal" and is set for hearing on its merits before a panel of three judges.

House of Lords review of CACD decisions is available on a discretionary basis; but it is granted in so few cases that it plays no significant part in English Criminal Appeals.

The Cases. The volume of appeals in CACD has grown greatly in recent years. It rose from 2,901 in 1965 to a peak of 8,660 in 1969. Sentence alone is attacked in some 78% of the applications. This study is confined to the review of convictions, cases constituting some 22% of the applications. This is the aspect of the English practice most nearly analogous to American criminal appeals.

Of all applications for appeal coming to the Court, 63% do not proceed beyond the single judge's denial of leave. The remainder are either denied after a renewal of the application or they become "appeals" and are argued orally before a three-judge panel. Some 900 cases annually are in the latter category--the "appeals" as distinguished from the "applications." The reversal rate, based on all applications coming to the Court, is about 6%.

## III. A Central Professional and Administrative Staff

A principal key to CACD's ability to cope with its extraordinarily large caseload is the Criminal Appeal Office, headed by the Registrar of Criminal Appeals. The Office has a staff of 22 lawyers and 23 administrative clerical personnel.

The Registrar's office exercises total management over every case from the filing of the application for leave to appeal until it is ready for judicial action. The office obtains all documents from the trial court and obtains such portions of the transcript as its staff deems necessary to a consideration of the grounds of appeal. In all cases the trial judge's "summing up" of the evidence is obtained. This is often sufficient. The defendant's lawyer plays no part in assembling what Americans call the "record" on appeal.

The application then goes to the single judge for action. He may request the Registrar to obtain additional information. The defendant may submit additional matter not in the record. CACD, unlike American appellate courts, can consider matters outside the record.

If leave to appeal is granted, a lawyer in the Criminal Appeal Office prepares a summary of the facts and issues to aid the three judges who are to hear the appeal. This staff member is present in court to assist the judges during the hearing.

There is a printed form for every step in the process; copies are freely provided to all convicted defendants by the Registrar.

A central professional staff may be of maximum utility where, as in England, relatively large numbers of appellants proceed on their own without legal representation. But even with counsel for every app ellant, such a staff may give an added guarantee of completeness in the record, reduce unnecessary paper volume, expense and time through tailoring of the transcript, and expedite the process. Apart from all of its English details, the concept of a central staff exercising affirmative management over appeals deserves consideration in the United States. Few American courts have staffs, and, even where they do, the staff does not affirmatively control the appeals in the English fashion.

## IV. Frivolous Appeals: Screening and Deterrence

Screening and the Single Judge Procedure. By coupling the requirement of leave to appeal with the authority of a single judge to grant or deny leave in the name of the Court, the English system has created an effective mechanism to screen out frivolous appeals. Since a denied application may be renewed before two other judges, there is a check on the screening decision. The validity and justice of such an initial screening procedure depend on three conditions: (1) that the screening judge and his appellate colleagues have substantially the same attunement to basic principles in the administration of criminal justice; (2) that the screening judge grasps the defendant's arguments for overturning his conviction; and (3) that the screening judge has before him all relevant information concerning

the defendant's contentions. All three conditions seem to be reasonably satisfied in actual practice in the English Court.

Screening for a similar purpose is not unknown to American appellate courts. For example, a vigorous screening procedure is in effect in the U.S. Court of Appeals for the Fifth Circuit.

Deterrence: Directions for Time Served Not to Count. Where the single judge or the full court determines that an application is "hopeless" or "unarguable", a direction may be entered that all or part of the defendant's time in confinement pending appeal shall not count toward service of his sentence. This is done on a selective basis--in perhaps 20% of all applications denied. The deterrent effect appears strong.

There are problems in a fair administration of this device, especially as to unrepresented defendants on either side of the Atlantic. In the United States constitutional pitfalls might be encountered, but these could probably be avoided by careful structuring.

## V. Hearing and Deciding Appeals

The hearing and decisional processes by which a three-judge panel in CACD deals with an appeal are characterized by orality, flexibility, openness, and finality.

The hearing of a conviction appeal is an amalgam of what Americans know as a new trial motion in the trial court and a traditional appellate argument. All authority over the case lies in the appellate court after conviction and sentence. Flexible procedures place no limits on the length of oral argument, and they allow new evidence to be offered on appeal, including testimony of witnesses. This makes possible a high degree of finality; finality, in turn, requires that procedures be flexible so that all issues can be decided in this one review proceeding.

Counsel for appellant always presents argument. Since there are no written briefs he must inform the court orally of pertinent statutes and decisions. Counsel for the prosecution presents argument only if desired by the court. In some respects the hearing is like an American appellate argument, but it has a different flavor because of its hybrid nature.

The hearing is in effect an open conference of the court, with counsel participating. The judges may confer among themselves on the bench as the argument proceeds, and they hold a whispered discussion at the conclusion. The decision is announced in open court at that time, and a full statement of reasons is given orally.

Among the distinctive features in the CACD hearing there are several possibilities for American experimentation: dispensing with written briefs, at least in some cases or as to some issues; announcement of decisions from the bench with orally stated reasons; and combining the new trial motion and the appeal into a single review proceeding.

## VI. Judicial Attitudes and Decisional Flexibility

The flexibility which is characteristic of the English criminal appeals process carries over into CACD's decisional processes and the decisions themselves. As a result, a conviction is both more vulnerable and less vulnerable than in the United States. In England attention is directed more to the issue of guilt. This can be seen in the operation of two statutory provisions.

The "Unsafe or Unsatisfactory" Verdict. In 1966 a provision was enacted authorizing CACD to quash a conviction if under all the circumstances the judges think the verdict is "unsafe or unsatisfactory." This means that the verdict can be overturned even though there is evidence to support it. The salutary end served is to prevent a miscarriage of justice.

The Proviso. The "proviso" is a statutory provision which says in effect that even though there is error the judges may leave the conviction standing if "they consider that no miscarriage of justice has actually occurred." This is a variety of the harmless error rule. But it directs the court's attention to the ultimate issues of guilt and justice more than is done by typical American harmless error rules. The result is that more convictions are apt to be affirmed in England.

More important than the wording of rules, however, are the attitudes of the English judges toward trial judges' actions and toward their own role as members of an appellate court.

Leeway for the Trial Judge. The judges sitting on CACD accord the trial judge at least as much discretion as in the United States, and perhaps more. But beyond the traditionally discretionary matters, the English judges appear to give a deference to the trial judge's rulings on issues of law. There is a readiness to accept a trial judge's handling of a matter that is not found in American appellate courts. This means that fewer convictions are overturned.

The Court's Conception of its Appellate Review Role. CACD is essentially interested in whether the trial court result was right and whether the trial was conducted in an acceptable manner. The court avoids "making law" as much as possible. By deciding fewer issues and not writing elaborate opinions, CACD is able to adjudicate appeals more expeditiously than American courts.

## VII. The Law, the Judges, and the Lawyers

The Law. The judges and lawyers involved in criminal appeals in England have a relatively small body of law with which to deal. The chief source of decisional authority is the Criminal Appeal Reports, consisting of only 54 volumes. Highly selective reporting results in the publication of no more than 15% of the court's opinions. The appellate process, not being "law ridden," can move more expeditiously than the American appellate process which is heavily burdened with case law. Steps can be taken by the courts themselves in the United States to reduce drastically the volume of reported opinions.

The Judiciary. The English judiciary is competent and is not chosen on political consideration. The non-political nature of the selection process contrasts sharply with the political atmosphere surrounding judicial selection in the United States. The English system gives rise to confidence in the judiciary among the bar and a mutual confidence among the judges themselves. This atmosphere tends to reduce the quantity of issues contested on appeal, the length of argument, and the number of occasions on which error will be found. Education of the American public not to be tolerant of political considerations in judicial selection is probably the ultimate corrective.

The Lawyers. Significant characteristics of counsel (barristers) who practice in CACD are competence, candor, mutual trust, and detachment. These qualities interact and reinforce each other. They make for crisper presentations, absence of tedious insistence on technical rule compliance, and non-emotional conduct of proceedings.

Developing a more competent, professionalized bar in the United States is a long-range educational task. In addition, attitudes need to be changed so that nothing less than genuine competence and ethical practice is tolerated. Detachment and professionalism might be fostered in this country by arranging the lawyers who do trial and appellate work in criminal cases into a rotating system so that, as in England, no individual lawyer is identified as a prosecutor or defender; each would in turn represent both sides. This would prevent ideological commitment to either side.

## VIII. Expedition and Delay in the Appellate Process

How does expedition in English criminal appeals compare with American expedition or delay?

Though comprehensive statistics are lacking, the following average time lapses in the English process have been computed from several sources:

| | |
|---|---|
| From conviction to application | 28 days |
| From application to transcript | 58 days |
| From transcript to single judge action | 10 days |
| Total | 96 days |

A decade and more ago the usual dispositional time for an English criminal appeal was one month.

Compared to American appellate courts, however, the English time still seems short. In Virginia, where, like England, all criminal appeals are heard by leave of court, the comparable time in 1970--from conviction to the court's grant or refusal of leave--was approximately one year. In CACD after leave to appeal is granted from one to two months elapse before the appeal is heard and disposed of by the full court. The comparable dispositional time in Virginia was slightly over one year, beyond the year consumed in obtaining the grant or refusal of leave.

Figures from New Jersey and California intermediate appellate courts where every criminal appeal comes as a matter of right show time lapses at various stages which are substantially longer than in CACD, though shorter than in Virginia. In all three of these American courts, the time consumed at each step of the appeal was substantially in excess of that allowed by the court's rules. There was no staff in any of those courts to control the process.

The only delay producing feature common to appellate courts on both sides of the Atlantic is transcript preparation time. Apart from that, the major American delay producing procedures--new trial motions, written briefs, reserved decisions, and written opinions--consume more time collectively than the delay producing features of the English system.

## IX. An English Case and a Comparative Exercise

In an effort to reveal some of the intangibles of the English process, as well as to assist Americans in understanding the process in operation, one English criminal appeal heard and decided unanimously in July, 1971, was selected for a comparative exercise. All papers in the case, including a transcript of the hearing, are included in the appendices to the full report on this project. These papers (without the English judgment) were furnished to three American judges, each sitting on a different state appellate court. Each of these judges was asked to write an opinion deciding the case for his court as though it had arisen in his state. The three American opinions are included in the appendices, and they are compared in Chapter X of the full report with the English opinion.

The defendant in the case was convicted of two drug offenses. He asserted four grounds of appeal. CACD upheld the conviction. Two of the American judges did likewise, but they treated the issues differently from CACD and from each other. The third American judge reversed the conviction on a ground not asserted by the defendant and not dealt with by CACD.

This comparative exercise serves to buttress a number of impressions previously mentioned: that English review is oriented toward the case, not "the record"; that American review is more rigidly tied to procedural requirements; that the English harmless error concept (embodied in "the proviso") results in upholding convictions more often; that the English court makes as little law as possible; and that the English judges sitting in CACD have a higher degree of confidence in trial judges and trial counsel than their American counterparts.

## X. Appellate Experimentation in the United States: An Agenda and a Design

Appellate procedures should be designed to insure (1) that adequate information about the trial proceedings and the parties' legal contentions is available to the reviewing judge, and (2) that adequate time is provided for assimilation of that information and for the functioning of the rational deliberation essential to wise judgment. Efficient procedures to achieve those ends can be designed consistently with due process.

The English procedures described in this report furnish an array of ideas for appellate experimentation in the United Ststes. Adaptation of a particular idea in this country may require variation from the details of the English practice. Imaginative thought and a willingness to test novel procedures are required.

Based on ideas from the English system and on ideas advanced in recent years by American judges, a model criminal appeal procedure is proposed. The procedure is built around a central professional staff of lawyers who are to monitor appeals and to perform a screening and memorandum writing function. The handling of each appeal is to be tailored to fit the difficulties and importance of the issue involved. While the proposed procedures place important responsibilities in staff hands, ultimate control over both procedural and substantive matters lies with the judges.

The point of the proposal is to bring appeals before the appellate court so that they are ready for initial consideration not later than 30 days after conviction. At that time final action can be taken in frivolous cases; those of more substance would get further attention, and would, in any event be disposed of within two to three months of conviction. The plan is designed for an appellate court in which the first review of a conviction takes place. For the plan to function it is essential for defendant's trial counsel to handle the appeal, at least in its early stages.

Professional Staff. The appellate court must create a central staff of attorneys. Heading this professional group should be a Chief Staff Attorney, a lawyer of substantial experience. He would be responsible for supervising the entire work of the staff; he would be the point of contact between the staff and the court.

Procedure. Given the central professional staff, the procedures for criminal appeals could be as outlined below. Obviously not all of the details set out here are essential; variations can be made while preserving the essence of the scheme.

1. Taking the Appeal. The initial step by the convicted defendant to set an appeal in motion should be required within a short time, say 10 days, after conviction. This step should be accomplished by filing a simple written statement (notice of appeal). Copies should be filed simultaneously in the trial and appellate courts, with a copy sent to the prosecuting attorney. It is crucial to the concept of central appellate staff management that the professional staff in the appellate court know immediately when an appeal has been taken.

2. Readying the Appeal for Staff Action

a. Immediately upon receipt of a notice of appeal the trial court clerk should notify the judge who presided over the trial that an appeal has been taken. The judge, within 10 days of the filing of the notice of appeal, should transmit to the appellate court (with a copy to the clerk of the trial court) a copy of his instructions to the jury, or, in a non-jury case, a copy of his findings of fact and conclusions of law. If the judge's instructions or findings do not include a reasonably full summary of the evidence, the judge should prepare and file such a summary in addition to the instructions or the findings.

b. Immediately upon receipt of a notice of appeal, the trial court clerk should transmit to the appellate court the originals of all papers and exhibits in the trial court files. In addition, the clerk should transmit to the appellate court a photo-copy of the docket entries or other formal records maintained in the trial court concerning the case.

c. Within 7 days after the notice of appeal is filed, the appellant should transmit to the appellate court, with a copy to the prosecuting attorney, an Appellant's Statement of Points. This should be a brief typewritten document. It should list succinctly the points the appellant desires to present on appeal. Each point should be accompanied by a brief indication of the facts essential to its consideration. Argument should not be included, but an indication of the legal theory supporting each point may be given. Citations to statutes and decisions deemed to support directly the appellant's contentions may be included (limited perhaps to 3 decisions per point).

d. Within 7 days after the filing of the Appellant's Statement of Points, the prosecuting attorney should transmit to the appellate court an Appellee's Statement, with a copy to appellant. This statement, in content and length, should be subject to the rules governing the Appellant's Statement.

e. If by the date the Appellee's Statement is filed there is available a transcript of any or all of the trial court proceedings or a statement of facts agreed to by both parties, those items may be filed in the appellate court.

3. Staff Action. The professional staff should monitor the appeal from the point that notice of appeal is filed, so that in instances of non-compliance with the time limitations prompt follow-up can be taken. The staff should deal directly by telephone with the persons involved (trial clerk, lawyers, trial judge). Effective sanctions should be available to the appellate court for delinquencies without compelling justification.

When all of the steps outlined above have been taken, the appeal will be ready for initial consideration by the professional staff.

a. The staff attorney will study the Appellant's Statement of Points and the Appellee's Statement (and the authorities cited) in light of all the information contained in the trial court entries, the trial judge's summary of the evidence, and the papers and exhibits from the trial court file. Based on this study, the staff attorney will then take one of the steps below.

b. If the staff attorney can determine from the papers then available to him that no one of appellant's contentions has sufficient merit to justify argument or to require a transcript, he shall write a memorandum (for the judges' use only) setting forth his conclusions and the reasons for them; he shall also prepare a recommended memorandum opinion affirming the conviction. This opinion, though brief, should indicate the reasons why there is no merit in appellant's points. All the papers in the case, along with the staff memorandum and the draft opinion, shall then be sent to the judges to whom the case has been assigned for decision. If all judges agree with

the staff attorney's conclusions, the conviction will be affirmed and the memorandum opinion will be issued. However, if any one of the judges objects to disposing of the appeal in that posture or by that means, the case will be returned to the staff attorney where further steps will be taken, as described below for cases of more substance.

c. If after his initial study of the case the staff attorney is of the opinion that the appeal cannot appropriately be disposed of in the above manner, he may take any one or all of the steps described hereafter. Such steps will also be taken if the staff attorney had originally recommended memorandum disposition and the case was returned because one or more judges disagreed; in that event the judges may have directed the steps that they desired to be taken. Thus, though the following steps are described in terms of staff attorney decisions, they may also be taken pursuant to judicial direction.

d. If the staff attorney deems all or part of the transcript of trial proceedings to be essential to a sound decision of the issues, he shall order the necessary portions of the transcript. (At any stage in this appellate process laywers for the parties can suggest portions of the transcript that they deem necessary).

e. If the staff attorney deems adversary argument to be essential to a sound disposition of the appeal, he shall determine whether such argument should be presented by written briefs or by oral argument, or both. For experimental purposes some cases might be set for oral argument without briefs, while other cases would be dealt with on briefs without oral argument. In either event, the staff attorney shall notify the lawyers for both sides of the precise issues on which argument is to be presented. Simultaneous filings of briefs by both sides might be tried experimentally.

f. If the staff attorney has called for either a transcript or written briefs, or both, he shall prepare a memorandum for the court's use, after the receipt of these items. This memorandum shall present the substance of the staff attorney's research and conclusions on the issues, and shall make recommendations as to disposition of the case.

The staff attorney's recommendations may be as follows:

(1) If he has not already directed oral argument, he will recommend that such argument be held or not be held.

(2) If he concludes that the appeal can be disposed of without oral argument and without a full-length opinion, he shall prepare a recommended memorandum opinion deciding the case, with reasons stated, and send the case to the judges.

(3) If he concludes that the case requires a full length opinion (with or without oral argument), he shall so recommend, but he shall not undertake to draft the opinion. The case then goes to the judges.

The Court's Role in Relation to the Staff. The concept which must be preserved in any appellate staff arrangement is that judges, not staff, decide cases. The staff's role must be limited to assisting the judges. Consistently with this conception, a professional staff can make many decisions connected with the shaping of the appeal for judicial consideration, and a staff can make recommendations as to how a case should be handled.

The drafting of full length opinions is a task which the staff would not undertake under this plan. That is the one major step in the appellate process left originally to the judges' own creative efforts.

Staff action on a case, generally speaking, will terminate once the case is in the judges' hands. After staff action is completed, the judges normally will proceed either to decide the case and issue the staff's recommended memorandum opinion (or an edited version of it), or they may decide the case with a full-length opinion of their own, or they may hear oral argument and then agree upon the appropriate type of opinion to be issued.

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