THE SENTINEL
GBCDLA's Official Newsletter

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NEWSLETTER OF THE GREATER BIRMINGHAM CRIMINAL DEFENSE LAWYER'S ASSOCIATION
January - April 2007 **(Visit our Website: http://gbcdla.tripod.com)**

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MESSAGE FROM THE President

PRESIDENT'S COLUMN
By Brett M. Bloomston

Dear Members-

Unlike our civil bar contemporaries, we criminal defense lawyers are often faced with clients having, what appears to be, the "no-win" case. We are retained and sometimes appointed in these quagmire cases, most likely facing monumental hurdles just to reach a tolerable, if not favorable, outcome. We cannot turn down these "dog" cases when they are appointed, and more common than not, we do not turn them down when we have the choice.

Why is this so? We are often placed in David vs. Goliath situations with well-funded government jurisdictions, overzealous prosecutors, and law enforcement officers that testify according to scripted dialogue. Yet we still take the cases. Are we masochists? . . . . Do we enjoy the pain? You well know it's not for the money . . . we are likely some of the lowest paid attorneys in the bar.

I think we take on these challenges for different reasons. Look around at your next GBCDLA meeting and look at your criminal defense bar colleagues. We are not like other lawyers. We may be a bit scary to outsiders. To put it bluntly, we are a "freakshow"; a conglomeration of free-thinkers, rebels, and pirates. Deep in our hearts we know we are doing what needs to be done. It takes more guts to do what we

do than we are given credit. We are in the trenches. It makes me feel proud, never alienated, to be a criminal defense lawyer, despite what my Momma says.

Enough rambling. The Supremes have recently released their opinion in Wright v. Childree and it looks like the good guys have won this round. The ultimate fallout appears to be uncertain, as the State may seek to continue to tie this up in court. Stay tuned to your GBCDLA "Sentinel", and our wonderful website for news and updates on the status of payments. I hope our membership recognize that we could not have gotten this far in the fight to be reasonably compensated without the valiant efforts of the ACDLA, our statewide affiliate group. The ACDLA lobbied hard and incurred tremendous expenses to insure that we had a voice and a fighting chance against the powers that be. Please show your gratitude and consider a membership with the ACDLA, along with your membership to our local group.

Our CLE featuring TASC and an insightful description of how sentencing will be affected by the Community Corrections Act was a tremendous success. Thanks to Vaughn Branch and Ralph Hendrix for helping us with the CLE, and more importantly, their steadfast commitment to help our clients and so many more in our community get the counseling and treatment that they need.

More information will be coming soon regarding a new Mentoring Program for young lawyers. If you are interested in participating or if you have any thoughts or issues please feel free to contact me.

Good fortune to all.

Warmest regards,

Brett Bloomston

The History and Founding of the GBCDLA - Contributed by David Scott – Secretary GBCDLA

In 1992, the practice of Criminal Defense was very different that it is today. How was it different you ask? Well, to start with, there was no significant Criminal Defense Organization in place for Jefferson County and there was no "unified voice" for defense lawyers. Accordingly, significant policy decisions involving Criminal Law in Jefferson County were being freely advanced through meetings between the D.A's office and the Jefferson County Judges. At that time, defense attorneys were not invited to these meetings and they (and their clients) learned about these decisions only after the fact.

A few issues to come out of these Judge's meetings were: whether or not to have a Deferred Prosecution Program, policies regarding guilty pleas, and many other changes that periodically occur in the practice of Criminal Law. Also in 1992, there was no organization in place to defend Defense Attorneys who were being threatened, harassed, held in contempt of court, or even jailed by a local judge. What was a Defense Attorney to do? Luckily for us, a group of courageous lawyers answered that question and took a stand to organize!

Guess we need an "It all started when" reference, so here it is: It all started on a drive back from Walker County. Richard Jaffe and Roger Appell had been representing Capital Defendant Jerry Baker. Driving home, they vented back and forth about the lack of any real voice in the Jefferson County Criminal Courts and of the continuing, unchecked policy decisions that were being made at the time. On that very day it was decided that they would try to form a local Criminal Defense Lawyers Association.

Well, to start an organization you have to have a meeting right? Right. This meeting occurred early in 1993 and was held in the conference room at Jaffe, Burton, and Digiorgio. Early on, it was decided that the GBCDLA would be patterned after the NACDLA and the ACDLA. It was also decided that the GBCDLA would remain separate from the Alabama Bar as the focus was to remain on Jefferson County. During the meeting, David Luker moved to seed the organization with everyone contributing $500 each. Richard Jaffe then drafted the bylaws, circulated them to those present, and the GBCDLA was born on March 1, 1993!

Who exactly attended this first meeting? Well, we had to rely on the memories of several lawyers (and Judges), and I was given the ominous task of sorting through the data to compile a list of those attending. The list reads like a "who's who in Criminal Law" and contains several award winning and nationally recognized Lawyers. The consensus seems to indicate that the following lawyers were present: David Luker, Richard Jaffe, Roger Appell, John Lentine, Bill Dawson, Dan Turberville, John Robbins, Erskine Mathis, Tommy Spina, Steve Saulter, Mark Polson, Tommy Nail, Larry Sheffield III, and Don Colee (Please forgive in advance and please blame me if ANYONE was left out, we will update this info in upcoming issues of this publication and on our website if necessary).

In the years that followed, the GBCDLA became a unified and meaningful "voice" in the Jefferson County Criminal Courts. The GBCDLA was invited to attend Judge's meetings, the Press began to take notice of our organization, and our mere existence and presence was enough to give us power in influencing the Criminal Justice system in Jefferson County. One policy the GBCDLA was instrumental in changing was to push for reinstatement of the Deferred Prosecution Program. After much effort, Roger Brown and David Barber finally did this!

In addition to influencing policy decisions, the GBCDLA organized a Task Force of two or three lawyers. Members of this team stood ready to defend, at no cost, fellow GBCDLA members who were being harassed, threatened, intimidated, or jailed by a local Judge. The Task Force was modeled after the NACDLA's "Strike Force", which did the same thing, but only on a national level. Additionally, the GBCDLA has gone on to champion various other Criminal Law causes in Jefferson County throughout the years.

Here, in 2007, the GBCDLA still strives to assess and influence the constant changes occurring here in Jefferson County. We are also striving to live up to the efforts of our predecessors (Those are big shoes to fill of course!). As for the future of the GBCDLA, that is up to us. If we honor the efforts of those before us, and if we maintain and add to their efforts, the GBCDLA will continue to be a meaningful presence in Jefferson County!

LAWYERS WIN OVERHEAD PAY

THE ISSUE: The Alabama Supreme Court ended an unnecessary fight, ruling that defense lawyers who represent poor people can get paid for their overhead costs.
A silly effort to keep indigent defense lawyers from collecting extra pay for their overhead costs has been brought to a good and welcome end.
The Alabama Supreme Court concluded that state law provides for these lawyers to collect overhead pay, notwithstanding an unfortunate and contrary interpretation from Attorney General Troy King on the subject.

King touched off this controversy in early 2005 with an opinion saying that lawyers representing poor clients weren't entitled under state law to get reimbursed for such expenses as office supplies, rent and staff. The result was wholly predictable. Lawyers abandoned appointed cases. Some lawyers also fought back, suing to have the payments for overhead expenses reinstated.

Near the end of December, the court ruled (unanimously, we might add) that King was wrong.

At issue, the court said was a 1999 law in which the Legislature raised the hourly rates for court-appointed lawyers - from $30 to $40 for out-of-court work and from $50 to $60 for in-court work. King argued the new law also eliminated payment for overhead expenses.

The court disagreed.

Justices said the current law specifically allows a lawyer to be reimbursed for "expenses reasonably incurred in the defense of his or her own client." This wording represents only a slight change from the old law, which provided for reimbursements for "expenses reasonably incurred in such defense." The court found "no meaningful differences in the phrases." But King's different interpretation produced very real differences for poor people and the lawyers who represent them.

Average overhead pay for lawyers representing poor criminal defendants was $29 an hour - a significant amount compared to the paltry legal fees authorized by the state.

King's opinion was, in effect, a huge pay cut for lawyers - and for a number of them, it was a deal buster. Lawyers in solo practice or small firms don't have deep pockets to eat the costs of criminal defense work, especially complicated, expensive big cases, like those involving a possible death penalty. It was no wonder they started dropping court-appointed work - not out of greed, but out of recognition they could not do a reasonably good job. How much pre-trial legwork and legal research can a lawyer perform for $40 an hour?

Some thought that was just as well. The old Christian Coalition of Alabama argued the state couldn't afford the overhead pay, which totaled some $14 million a year.

It's true the state can't afford to empty the treasury on poor criminal defendants. But the state does have an obligation to provide lawyers for those who can't afford one. Providing a good lawyer and a good defense is one way to reduce the number of wrongful convictions and costly retrials. Reinstating overhead pay doesn't come close to solving every problem of indigent defense in Alabama. But it solves one problem. For that, we should thank the Supreme Court.

(Published in the Editorial Section of the Birmingham News, Tuesday, January 02, 2007)

Welcome to our Newest Members!!

Steven Goldstein (sgoldj@yahoo.com)

Josh Briskman (jbriskman@bddmc.com)

Recent Developments in Alabama Criminal Law

Contributed by GBCDLA TREASURER Michael Hanle

Ex Parte Boyd
2006 WL 3824744
(Ala. 12/29/06)

Notice to Attorney General when challenging constitutionality of statute

On direct appeal, Boyd challenged the constitutionality of the Community Notification Act, §15-20-26, Alabama Code 1975, based on his prior conviction for Sexual Abuse - 1st in 1995. The State moved to dismiss the appeal alleging that Boyd did not provide the Attorney General's office with notice as required under the Declaratory Judgment Act, §6-6-227, Alabama Code 1975.

The Court of Criminal Appeals denied the State's motion to dismiss based on the earlier decision in Townsend v. City of Mobile, 793 So.2d 828 (Ala.Crim.App. 1998) and rendered an opinion on the merits of the appeal. The State followed with a writ to the Supreme Court on the issue of notice to the Attorney General's office only.

The Supreme Court quashed the writ without opinion. Justices See and Parker concurred specially asserting that the agree with the quashing of the writ, but hinting that they believe Townsend was decided incorrectly. They further state that the Attorney General's office must be given notice of a facial challenge to the constitutionality of a statute under the Declaratory Judgment Act, §6-6-227, Alabama Code 1975. However, they concur in the quashing of the writ because Boyd did not challenge the constitutionality of the statute on its face, but rather the constitutionality of the statutes application only to him.

Cottrell v. State
2006 WL 3734719
(Ala.Crim.App. 12/20/06)

Anonymous Tip as Basis for DUI Traffic Stop

On direct appeal, Cottrell challenges the Circuit Court's denial of his motion to suppress a firearm seized from his vehicle following a traffic stop for DUI. The issue before the Court centers around the anonymous tip which resulted in Cottrell's traffic stop. Cottrell argues that Florida v. J.L., 529 U.S. 266, (2000) requires the suppression of evidence, which resulted from an anonymous tip.

The Court of Appeals affirmed the denial of his suppression motion and held the facts in Cottrell's case to be distinguished from that in J.L. which clearly involved an anonymous tip that lack any indicia of reliability sufficient to support the original traffic stop in that case. In Cottrell's case, the anonymous tip was a driver who flagged down a passing police car and described in detail the driver and vehicle suspected of driving under the influence. The Court held that under these circumstances, the anonymous tip was sufficiently reliable and detailed, when viewed in the totality of circumstances, to establish reasonable suspicion to initiate a traffic stop.

Pilgrim v. State
2006 WL 3734753
(Ala.Crim.App. 12/20/06)

No Attempted Robbery Charge After January 1, 1980

Pilgrim appeals the summary denial of his 4th Rule 32 Petition, alleging that his conviction and the resulting life sentence he received following his 1982 conviction for "attempted robbery" was void and illegal because no such offense existed at the time of his conviction and therefore subject to being vacated. The Court determined that the issue raised was "jurisdictional" and subject to review by the Court even though raised on rehearing.
The Court remanded the case with specific instruction to the Circuit Court to determine the date the offense was committed. The Court determined that if the offense was committed after January 1, 1980 (the date the statute was amended) than the conviction was due to be vacated and dismissed. The Court reasoned that Pilgrim could not be convicted of an offense which did not exist under in Alabama law and therefore his sentence could not be enhanced due to that conviction.

State v. Seawright
2006 WL 3734708
Ala.Crim.App. 12/20/06)

Dismissal following Loss or Destruction of Evidence by State

The State appeals the summary dismissal of the Indictment in Seawright' case due to an alleged violation of Rule 16 following the loss or destruction of evidence. Seawright had been charged with a single count of distribution of cocaine. Following the filing of Rule 16 discovery requests, the State was unable to produce a copy of an audio/video tape of the alleged drug deal. On the date set for trial, Seawright raised the issue of the lost or destroyed evidence and presented minimal argument that it "may contain exculpatory evidence". The Circuit Court dismissed the case over the argument of the State.
The Court reversed and remanded the case asserting that Seawright had failed to meet his burden of proving (1) that the tape contained exculpatory evidence (2) that the State's loss or destruction was the result of intentional or wilful misconduct (3) that he was prejudiced by the loss or destruction of the tapes and (4) how the tapes were crucial to his defense.

Griggs v. State
2006 WL 3734706
(Ala.Crim.App. 12/20/06)

Drug Convictions under Title 20 and Habitual Offender Act

Griggs entered a guilty plea in 1983 to unlawful possession of pentazocine and/or meprobamate under the Controlled Substance Act found at §20-2-70, Alabama Code 1975 at the time of his conviction. He was sentenced to a 20-year term under the Habitual Offender Act. He did not appeal his conviction, but filed the instant Rule 32 proceeding alleging that his sentence under the Habitual Offender Act was illegal and subject to being vacated for re-sentencing purposes.
The Court determined that at the time of Griggs' conviction, the Controlled Substance Act was contained in Title 20 of the Alabama Code and not Title 13A as it is today. Likewise, Title 20 contained an enhancement provision similar to the Habitual Offender Act for use in enhancing conviction under the Title. The Court remanded the case with instructions to determine under what provision of law Griggs was sentenced. If the sentence was enhanced under the provisions of the Habitual Offender Act, then the sentence was due to be vacated as the Habitual Offender Act found in §13A-5-9 only applies to offense contained within Title 13A of the Alabama Code and not to the Controlled Substance Act found in Title 20.