

6/28/01

The Sentinel

PRESIDENT'S COLUMN

Richard Izzi, Esq.

As summer fast approaches and the terms of the present officers wind down, I want to thank all our members for the opportunity to have served as President from 2000 to 2001. The front-burner issue for most of the year has been the proposal to establish a public defender's office. Whatever the eventual outcome, the process has clearly been enhanced by participation of the criminal defense bar. For the proponents have had to clearly rethink the level of funding and other resources that will be needed to create a genuinely professional office with fully competent staffing. And substantive reforms of the appointed system are apparently gaining momentum. In any event, the continued attention of our organization will be critical to the implementation of any meaningful improvement of the status quo.

On the national front, as Criminal Justice Act (CJA) panel rates have failed to keep up with inflation, the Judicial Conference has endorsed the funding of any hourly rate of \$113 for FY 2002, with the support of NACDL, the Federal Bar Association and the ABA. A call or letter of support to your representative or one or both of our senators requesting them to fund the CJA to increase panel attorney compensation would be helpful.

Locally, the vertical prosecution approach of our district attorney's office is reportedly being discontinued in all but child sexual abuse and homicide cases. Child sexual abuse cases, I am advised, will be taken directly to the grand jury, and the effect that will have on discovery and settling those cases remains to be seen. I am sure the officers and members of the board will appreciate hearing from the membership relative to any adverse affects as a result of this change.

Finally, I do not want to forget to remind everyone that we will be back at the Eleventh Avenue Grill for our summer social this year on July 12th, from 5:30 – 7:30 p.m.

THE OFFICIAL
NEWSLETTER
OF THE GREATER
BIRMINGHAM CRIMINAL
DEFENSE LAWYERS'
ASSOCIATION

ALABAMA CRIMINAL DEFENSE LAWYERS ASSOCIATION 2001 SUMMER SEMINAR AND ANNUAL MEETING

**Justice Must Be Won IX:
Reunited! And it feels so Good
ACDLA 20th Anniversary & Reunion of Past
Presidents**

**June 28-30,
2001 Windemere Condos & Conference Center &
Hampton Inn, Orange Beach, Alabama**

**Seminar Schedule
Thursday, June 28**

| | |
|-------------|-----------------------------------|
| Noon-1:00 | Registration |
| 1:00 - 2:00 | Alabama Update |
| | Don Holt, Esq., Florence, Alabama |

- 2:00 - 3:00 **Divorce & Domestic Violence**
John Wood, Esq., Birmingham, Alabama
- 3:00 - 3:15 Break
- 3:15 - 4:15 **DUI & DRAGER**
Phil Price, Esq., Huntsville, Alabama
- 5:30 - 7:00 Past Presidents Reception

Friday, June 29

- 8:00 - 8:30 Registration
- 8:30 - 9:30 **Crouching Tiger, Hidden Dragon: Kung Fu For Trial**
Dan & Grace Wu Monnat, Esq., Wichita, Kansas
- 9:30 - 10:15 **Medical Evidence in Child Abuse Cases**
Dr. Michael Taylor, Tuscaloosa, Alabama
- 10:15 - 11:00 Annual Membership Meeting
- 11:00 - 11:15 Break
- 11:15 - 12:15 **Apprendi Issues**
Carmen Hernandez, Esq., Washington, D.C.
- 1:00 - 2:30 Luncheon
Keynote Speaker: Dennis N. Balske, Portland, Oregon
- 2:45 ACDLA Board of Directors Meeting

Saturday, June 30

- 8:15 - 9:15 **Presenting Evidence through Cross Examination**
Judge John Carroll and Steve Glassroth, Esq., Montgomery, Alabama
- 9:15 - 10:15 **Self Defense for Lawyers**
Irwin Schwartz, Esq., Seattle, Washington
- 10:15 - 10:30 Break
- 10:30 - 11:30 **Persuasiveness for Probation**
Judge C. Tommy Nail, Birmingham, Alabama
- 11:30 - 12:30 **Paroles: The New Rules**
Donald Parker, Executive Director Board of Pardons & Paroles

JEFFERSON COUNTY MENTAL HEALTH COURT**Program Description**

The Jefferson County Commission has received a funding award from the Bureau of Justice Assistance to establish a Mental Health Court. The program will be based on the successful Drug Court model targeting judicial resources and TASC case management services to offenders with a mental illness incarcerated in the County jail. The grant was written in response to problems identified in the County's study of the criminal justice system. The award will provide \$150,000 for the creation of the Court.

The Mental Health Court will serve a two-fold purpose: (1) To establish a specialized community case management team to assist felony offenders who are mentally ill; and, (2) To expedite the court case processing of this target population. The program will be implemented through the collaborative efforts of UAB Treatment Alternative to Street Crime (TASC), the Sheriff's Department, the court system and local service providers.

Through the program, felony offenders who are mentally ill will be identified and treatment plans will be created to outline specific mental health, housing and other supportive service needs. Each offender will be assigned a Mental Health Case Manager who will closely monitor treatment compliance for a period of six months to one year. Noncompliance will be reported to the court for judicial action.

According to the Bureau of Justice Statistics, the offender with a mental illness is more likely to be a recidivist, unemployed, homeless and an abuser of drugs and/or alcohol. Local sources estimate that 156 individuals receiving psychotropic medications are housed at any given time with the County's jail. Of these offenders, over half have committed non-violent offenses. Projections indicate that the Mental Health Court will provide cost benefits to the criminal justice system through expedited case processing, decreased failure to appear and reduced incidence of re-arrest.

The program will be initiated in July 2001.

Program Eligibility

Eligibility criteria will include:

Felony offense - Class C felonies or Class B property offense

No prior violent felony convictions within past five years;

Identified Axis I mental illness

Judge decides final eligibility of case based upon a recommendation from the Mental Health Court team

Willingness to participate in program

Jefferson County resident

Program Phases

The program will be structured into three stages dictating the frequency of case manager contact and judicial review. The most intensive phase will require three face-to-face case manager contacts per week and Saturday/Sunday phone contact. Graduation into a less intensive phase will require completion of specific criteria including compliance with program requirements and progress made on treatment plan goals.

Success Criteria

The following criteria must be met in order for a participant to be discharged successfully. Program participation must be maintained for a minimum of six months.

Medication stabilization

Applied and/or is receiving SSI

Drug tests for illicit substances

No new offenses

Aftercare plan has been established

Successful completion of program requirements may include a dismissal of charges.

Community Linkage

An interagency service delivery team composed of clinicians from the Fellowship House and Jefferson/Blount/St. Clair Mental Health & Retardation Authority will meet weekly to review the files of potential participants and facilitate the appropriate linkage to community-based resources.

Sanctions/Incentives

Intermediate sanctions will be administered for noncompliance. All administrative sanctions will be made in face-to-face case manager contacts. Program violations and the subsequent sanctions will also be documented in a letter to the participant.

Administrative sanctions will include: (1) retention in current program phase for a specific period of time; (2) demotion to previous program phase for a specific period of time; (3) increased frequency of drug testing; (4) case manager admonishment. Chronic violation may result in termination from the program and routing to the traditional court process.

The Mental Health Court Case Manager will determine preliminary eligibility based on diagnosis and presenting charge. The District Attorney's Office will conduct further case review utilizing National Crime Information Center (NCIC) reports to examine the extent and nature of the offender's criminal history. Eligibility will be determined on a case-by-case basis. A recommendation will be presented to the Mental Health Court judge for final determination.

STATE OF ALABAMA V. BONNER

BY: Wilson Myers, Esq.

On the evening of January 4, 2000, two young women, Brittany and Mandi, went to the fashionable Southside area of Birmingham for drinks and fun. After four bars, seven beers and perhaps two mixed drinks, at 12:30 AM the next morning, Brittany was dead and Mandi began a journey through the Jefferson County criminal justice system as the only eyewitness, and only evidence, to the shooting of her new friend. Little did Mandi realize she was about to become embroiled in a legal battle to be played out in the press as few cases in Birmingham have ever been.

Three hours earlier that night, Terry Bonner, a homeless light-skinned right-handed African-American man, was being ejected from one of the bars after bothering patrons for a beer. It was cold outside that night so Terry was wearing at least three layers of clothes, including a non-descript beige plaid shirt. He left the Southside area and went to Cooper Green hospital to sleep in the chapel, unnoticed and undetected.

After Brittany was shot, Mandi ran hysterically back to the bar from which Terry had been ejected. As Mandi sobbed out her story to the off duty police office bouncer at the door, he immediately knew who committed the shooting and told Mandi he knew who did it. After a composite photo was prepared and

distributed, a re-enactment conducted on Crimestoppers, and hundreds of leads, Terry Bonner was arrested over two weeks after the shooting. Although questioned for two and one-half hours, Terry constantly denied any involvement in the shooting or robbery.

Mandi was shown a six-pack line-up and pointed to Terry Bonner's picture and stated that looks like the man that robbed us. For some strange coincidence, all the pictures had a pink background except number 4, Terry, which had a blue background. The next day, Mandi identified Terry in a live line-up. Terry was taller than anyone else in the live line up and again, coincidentally, was number four.

Terry Bonner was charged with Capital Murder and spent over a year in the Jefferson County Jail. At least, according to one of the investigators in the case, Terry had three hots and a cot. There was no physical evidence linking Terry to the shooting—none! No fingerprints, no DNA, no other witnesses except a woman from the eight story of an adjacent building to the parking lot, lit only by street lights. She described the shooter as a dark skinned African-American. No matter, Mandi was sure of her ID. During the preliminary hearing Mandi, when asked by the DA if she saw the man that robbed her anywhere in the court room, looked straight at Terry Bonner in his jail clothes, sitting between his two white lawyers in suits and said in a clear strong voice, "that's him."

The entire case rested on being able to shake the eyewitness ID of Mandi. It was decided to try and use at trial an expert on eyewitness identification. Of course, the trier of fact in a criminal case may hear various types of testimony. This includes testimony by expert witnesses if the testimony will assist the jury on understanding the evidence or to determine an issue of fact. See Ala. R.Evid. 702.

In Alexander v. State, the Alabama Court of Criminal Appeals allowed expert testimony to explain how post-event information can become part of original memory. See Alexander v. State, 601 So. 2d 1130 (Ala. Crim.App. 1992). In 1999, the Court of Criminal Appeals determined that the trial court did not abuse its discretion when it permitted a witness with specialized knowledge, a victimologist, to testify as an expert. See Simmons v. State, 1999 WL 722688 (Ala.Crim. App. 1999). See also Daubert v. Merrill Dow Pharmaceutical Co., 509 U.S. 579 (1993); Khumo Tire v. Carmichael, 526 U.S. 137 (1999); Kampshaff v. Smith, 698 F.2d 581 (2nd Cir. 1982); United States v. Sebetich, 776 F.2d 412 (3rd Cir.

1985); United States v. Smith, 736 F.2d 1103 (6th Cir. 1984); United States v. Downey, 753 F.2d 1224 (3rd Cir. 1985); Arizona v. Youngblood, 488 U.S. 51 n.8 (1988); and Dunnigan v. Keane, 137 F.3d 117 (2nd Cir. 1998).

See also The General Acceptance of Psychological Research on Eyewitness Testimony: A Survey of the Experts, American Psychologist, August 1989; Michael Leippe, The Case for Expert Testimony About Eyewitness Memory, Psychology, Public Policy, and Law, December 1995.

See also Cindy J. O'Hagan, When Seeing is Not Believing: The Case for Eyewitness Expert Testimony, 81 Geo. L.J. 741 (1993).

Initially, we tried to simply suppress Mandi's eyewitness ID.

This did not work, so we put on Dr. Kimberly Ackerson and was able to qualify her as an expert in eyewitness ID. She did not testify as to whether or not Mandi actually identified anyone accurately, but instead educated the jury on the factors that must be considered when evaluating the accuracy of ANY witness identification. She did an outstanding job. The factors she testified to were:

1. Lack of prior familiarity with the person identified;
2. Limited exposure time to see the person identified;
3. Contrasting lighting conditions between the interior of the vehicle and the lighting conditions outside the vehicle;
4. Light conditions in the parking lot where the shooting took place;
5. The view of the person identified versus the viewing opportunity (front, side, etc.);
6. Distance between the eyewitness and the person identified;
7. Cross - racial identification;
8. Gun focus (the tendency to focus on the weapon and its characteristics rather than the assailant);
9. Focus on multiple targets (i.e. the victim in the car, another person in the distance);
10. Stress as general distraction (The actual threat of harm as a distraction resulting in a self-protecting motion by the eye-witness and the impact of emotional arousal);
11. Elapsed time between the event and the identification;
12. Line-up fairness; and
13. Post-incident contact with suggestive information.

Mr. Tom Mesereau, an attorney from California and a member of the defense team Pro Hoc Vice, conducted the expert qualification hearing and direct testimony of Dr. Ackerson, and it was textbook perfect. A copy of the trial transcript dealing with this is now available from Wilson Myers, by calling 930-9800.

Terry Bonner was found Not Guilty on all charges. Wilson Myers, Charles Salvagio and Tom Mesereau were the attorneys for Mr. Bonner.

America Imprisons Over A Million Nonviolent Offenders Nonviolent Prisoners Increasing Faster than Violent Prisoners

Washington, DC: Coming just a week after the Justice Department announced that 1.8 million Americans were behind bars, a new report by the Justice Policy Institute has found that, for the first time, over one million nonviolent offenders were incarcerated in America in 1998.

"Prisons are built and mandatory sentencing laws passed on the specter of Willie Horton," stated Vincent Schiraldi, the Institute's Director; "But increasingly, those prisons are filled with the 'gang that couldn't shoot straight'."

Entitled **America's One Million Nonviolent Prisoners**, the JPI analysis of recent United States Justice Department data showed that over the past 20 years, the nonviolent prisoner population has increased at a rate much faster than the violent prisoner population, and that 77% of the people entering prisons and jails were sentenced for nonviolent offenses. Since 1978, the number of violent prisoners entering America's prisons doubled, the number of nonviolent prisoners tripled, and the number of persons imprisoned for drug offenses increased eight-fold.

The report, co-authored by John Irwin, professor emeritus from San Francisco State University, and Jason Ziedenberg, JPI Policy Analyst, also catalogued the tremendous costs of imprisoning over a million nonviolent offenders. The \$24 billion spent last year by federal, state and local units of

government to incarcerate 1.2 million nonviolent offenders was almost 50% larger than the entire federal welfare budget (\$16.6 billion) which provides income supports for 8.5 million people, and represents six times what the federal government will spend on child care for 1.25 million children. Further, America is spending more building prisons (\$2.6 billion) than universities (\$2.5 billion). Overall, the combined expenditures for America's prisons and jails has increased from \$5 billion in 1978 to \$31 billion in 1997.

"Spending more to lock up nonviolent offenders than to feed or educate our country's children is a cruel, self-fulfilling prophecy," stated JPI Policy Analyst Jason Ziedenberg. "It's not just bad public policy, but its downright mean-spirited."

The study also found that the overwhelming majority of male jail inmates are not incarcerated for a violent offense (82.4%) and have no violent offense history (64%). That is even truer for America's fastest growing inmate population - women. Eighty-five percent of female jail inmates are incarcerated for a nonviolent offense, and 83.1% of female jail inmates have no violent prior offenses. The research corroborated the findings of other studies which have found that African-Americans are imprisoned at 8 times the rate of whites, and Hispanics are imprisoned at 3 1/2 times the rate of whites. In the 1930s, 75% of the people entering prison were white (reflecting the general demographics of the nation). Today, minority communities represent 70% of all new prison admissions.

The study also found:

- America's nonviolent prisoner population exceeds the combined general population of Alaska and Wyoming.
- America's nonviolent prisoner population is three times the violent and nonviolent prisoner populations of the entire European Union. Those nations have a combined general population of 370 million people, compared to America's population of 274 million.
- America's 1.2 million nonviolent prisoners is five times the number of people held in India's entire prison system, even though India is a country with roughly four times our population.

The growth of America's prison system has become so large that it has spawned numerous family support

and advocacy groups which were unthinkable 20 years ago. For example, this study comes a day before scores of people whose family members are incarcerated for nonviolent crimes will convene in Washington for a national gathering of Families Against Mandatory Minimums.

"The scale of this problem has become truly massive, with populations the size of several states now behind bars" said Julie Stewart of Families Against Mandatory Minimums. "But each one of them is an individual human being, who has left behind a family and loved ones. The statistics are merely a backdrop to their continuing loss."

From April 11 - 18, a newly-created organization called Critical Resistance is preparing a series of prison visitations at institutions around the country to highlight the overuse of incarceration. "Between mandatory minimums and increasing construction, we are on a collision course with our children's future," stated Ellen Barry of Critical Resistance. "It is time for us to focus more on improving our system of education than expanding our prison industry."

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