

The Sentinel

President's Column

Tommy Spina, Esq.

These are difficult times for each of us individually and for our nation. I feel sadness in my heart more often than before. Others I speak with communicate that same sense of melancholy. Our sense of security has been shattered by the acts of terrorism in New York City on September 11, 2001. In spite of what has occurred, we must move forward. As criminal defense lawyers, we must continue to be mindful that when there is an event such as the World Trade Center bombings, the initial reaction is a "knee jerk" reaction. As was evident in the wake of the O.J. Simpson acquittals, changing our system of justice is not the solution. It is not a time to panic. It is a time to remain calm. As lawyers, we must continue to defend and ensure that the rights of all individuals continue to be protected. Do not permit fear to control or negatively alter the lifestyles and actions that you undertake on a daily basis. Now is the time to "step up to the plate" and to communicate to the public the principles that we stand for and are prepared to defend daily.

I appreciate the honor and opportunity to serve as your president. I hope that I will prove worthy of your trust and would encourage each and everyone of you to call

at anytime if I, or this organization, can be of any assistance to you.

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

WHAT'S NEW

A master list of attorneys available for appointment has now been compiled. There are approximately 225 lawyers who have agreed to participate in the appointment process. There will be a mandatory seminar conducted on November 2, 2001 at the Harbert Center.

THE BIRMINGHAM BAR ASSOCIATION'S CONTINUING LEGAL EDUCATION AND CRIMINAL JUSTICE & PROCEDURES COMMITTEES CONTINUING LEGAL EDUCATION SEMINAR.

Friday, November 2, 2001

This program will be held on the third floor of the Harbert Center located at 2019 Fourth Avenue North from 8:30 a.m. until

3:45 p.m. Space is limited and preference will be given to those who have registered for the Court Appointed list. Approved by the Alabama MCLE Commission for 5.0 hours MCLE credit.

Early registration prices are \$110.00 for BBA Member, \$125.00 Non-BBA Member/Non Attorney (includes handout materials and refreshments). There will be an additional \$25.00 charge after Friday, October 26, 2001 and at the seminar (if space is available)

EARLY REGISTRATION DEADLINE IS 4:00 P.M., FRIDAY, OCTOBER 26, 2001, unless we have reached capacity. It is the Birmingham Bar's policy that in order to receive a refund, less \$10.00 administrative charge, or a credit on account, your cancellation must be received by 4:00 p.m., October 30th. Payment by cash or check must accompany your registration; therefore, we do not accept registrations by telephone or facsimile.

SERVING AS APPOINTED COUNSEL. Program moderators are Victory Walker and Maxwell Pulliam, Jr.

8:00 a.m. - 8:30 a.m. Registration
 8:30 a.m. - 8:40 a.m. Welcome and Introductions
 8:40 a.m. - 9:10 a.m. Basics of Being Appointed Counsel. Clyde Jones.
 9:10 a.m. - 10:20 a.m. District Court. Honorable Pete Johnson and John Robbins.
 10:20 a.m. - 10:40 a.m. Program break.
 10:40 a.m. - 10:55 a.m. Grand Jury. Kenneth Gomany.
 10:55 a.m. - 11:30 a.m. Circuit Court. Honorable Tommy Nail and John Lentine.
 11:30 a.m. - 12:45 p.m. Lunch (On Your Own)

12:45 p.m. - 2:00 p.m. Circuit Court (continued). Honorable Tommy Nail and John Lentine.

2:00 p.m. - 2:15 p.m. Program break.

2:15 p.m. - 2:45 p.m. Representing Juveniles at Family Court. Jonathan Schlenker.

2:45 p.m. - 3:00 p.m. Post-trial Procedures and Appeals. Donald Colee, Jr.

3:00 p.m. - 3:15 p.m. Program break.

3:15 p.m. - 3:35 p.m. Post-trial Procedures and Appeals (continued). Donald Colee, Jr.

3:35 p.m. - 3:45 p.m. Getting Paid. David B. Simpson.

3:45 p.m. Adjourn.

NEW OVERHEAD RULES

Effective December 1, 2001, all attorneys seeking reimbursement for overhead expenses will be required to submit an affidavit that states the actual amount of their overhead expense. Included in this newsletter is the standing order that will be signed by Judge McCormick as it relates to each attorney and a format for preparing your affidavit. This is not exclusive, you may calculate your own overhead. Once your affidavit is approved and a standing order is issued, it will be your responsibility to attach the standing order to each voucher that you submit for compensation. In the event the compensation requested is considered excessive by the judge handling your case, a new review committee has been established. The initial review will be conducted by the judge handling your case on an informal basis. That judge will discuss with you your voucher and what areas in the voucher seem to be excessive. If the informal approach fails to result in resolution, the voucher will then be

subjected to review by a committee comprised of two members of our organization, Richard Izzi and Bill Dawson, Circuit Court Judges Jim Hard and Jim Garrett and District Court Judge Robert Cahill. Only one of the Circuit Court Judges will sit on the committee at a time.

IN THE CIRCUIT COURT OF JEFFERSON
COUNTY, ALABAMA

STATE OF ALABAMA,

Plaintiff,

vs.

JOHN DOE,

Defendant.

AFFIDAVIT OF JOHN DOE IN SUPPORT
OF MOTION FOR APPROVAL OF
EXTRAORDINARY EXPENSES

Before me the undersigned, a notary public, in and for Jefferson County, State of Alabama, personally appeared the undersigned, _____, who being known by me and duly sworn deposes and states as follows: My name is _____. I practice in the law firm of _____. I have reviewed my overhead office expenses for the year of _____. I calculated my overhead by determining how much money my costs were for practicing law less whatever I have paid myself as salary. Based on the total figure of my annual overhead, I have calculated that my overhead hourly expense is _____. I have done this by multiplying 50, being the weeks of the year that I have worked times a 40 hour work week and then dividing that figure (2000) into my total overhead expenses. I

swear that the above information is true and correct to the best of my knowledge.

Signature

Notary Public

IN THE CIRCUIT COURT OF JEFFERSON
COUNTY, ALABAMA

STATE OF ALABAMA,

Plaintiff,

vs.

JOHN DOE,

Defendant.

ADMINISTRATIVE ORDER

The Court of Criminal Appeals has held that the office overhead expenses of a lawyer appointed to defendant an indigent in a criminal case should be allowed as an extraordinary expense upon filing of an appropriate motion. In light of the many criminal cases pending in the Tenth Judicial Circuit, I find that the filing of individual motions in each as, and signing of orders will involve an excessive administrative burden on the Court, the Court's personnel, as well as increasing the cost of indigent defense. I have examined the affidavit submitted to me by _____ (lawyer's name).

1. I find this affidavit is accurate. Based upon the affidavit, the appropriate hourly rate for him/her is _____. Therefore, effective the _____ day of _____, 2001, without the need for the filing of individual motions on each case, (lawyer's name), is hereby authorized to charge _____ per hour whether in or out of

court as the cost of his/her office overhead expense in each case.

2. The statutory cap on compensation for indigent counsel does not apply to the amount set forth above.

3. Should appointed counsel seek a change in the amount of his/her overhead expense set by this order, counsel shall submit a motion and affidavit to the presiding judge for consideration.

4. A copy of this order shall be spread upon the minutes of this court by the Circuit Clerk.

5. All attorneys shall attach a copy of this administrative order with their attorney fees claim whenever they claim overhead expenses.

Done and ordered this the ____ day of _____, 2001.

Mike McCormick
Presiding Circuit Court Judge
Criminal Division of Jefferson
County, Alabama

JEFFERSON COUNTY MENTAL HEALTH COURT UPDATE

Court Start Date
July 2, 2001

Supervising Judge
James Hard

Program Goals
Expedite case processing, create effective interactions between mental health and criminal justice systems, increase access to mental health services, reduce recidivism, reduce length of confinement.

Stage of Intervention

Identification begins at booking.

Method of Entry

Preliminary eligibility determined by booking deputies based upon mental health questionnaire. Additional screening conducted within 48 hours of referral by court case managers.

Eligible Criminal Offenses

Class C felonies and some Class B property crimes.

Eligible Criminal History

Misdemeanors and felonies with careful screening of violent offense Client must be in jail.

Mental Health Eligibility Requirements

Axis I serious mental illness

Frequency of Court Sessions

Court convenes each Monday at 10:30 a.m.

Courtroom Team

Judge, District Attorney, defense attorney, mental health court case management team

State of Identification

Within 24 hours of arrest

Referral Source

Pretrial staff, county jail, attorneys, probate court, family

Initial Screening Location

Jail

Time from Referral to MH Court Appearance

7-10 days

Competency Evaluation

Kay Dantzler, UAB psychiatrist, will conduct clinical assessment under contract with the County Jail. Representative from Grayson & Associates will determine competency with necessary referrals made to Taylor Hardin for competency training. Evaluations will be coordinated by case manager with assistance from staff from probate court and jail social work staff members.

Final Eligibility Decision

Judge decides eligibility with recommendation of MH Court team.

Treatment Begins

Treatment plan is to be completed prior to resolution of charges.

Length of Supervision

Minimum length of participation is six months. Duration of participation may vary according to client needs.

Disposition of Charges

Charges may be dismissed upon successful completion.

Effect of Request for Trial

Defendant will be transferred to traditional court for trial, but can access treatment and services through court team.

Supervision

Case management team closely monitor the defendant. Emphasis will be given to compliance with medication and consistent contact with providers.

Frequency of Status and Review Hearings

Hearings will be scheduled on an as-needed basis for clients who will benefit from a review.

Sanctions for Noncompliance

Hearings before judge; change in treatment, support and encouragement; use of jail as sanction extremely rare.

Successful Termination

Deferred prosecution may be available on a case-by-case basis.

Unfavorable Termination

Defendant commits serious new crime, repeated willful violations or wants to get out of program; sentencing will occur or link to Taylor Hardin.

CURRENT DEVELOPMENTS IN THE LAW

THERESA WILSON V. STATE OF ALABAMA

No. CR-97-1494

August 31, 2001

FACTS:

Theresa Wilson sold Valium and Fiorinal tablets to an undercover police officer for \$90.00. Subsequently, Theresa Wilson sold 97.8 grams of a liquid mixture containing morphine to the same undercover police officer.

Theresa Wilson admitted to ~~being addicted to~~ selling the drugs to the undercover police officer and to being addicted to drugs since 1991.

Theresa Wilson was indicted for distribution of a controlled substance, tried and convicted, and sentenced to 2 years

with that sentence being suspended. Additionally, she was sentenced to two (2) consecutive five (5) year sentences because the drug distribution occurred within 5 miles of a school campus and a housing project as required by Section 13A-12-250 and 270, Alabama Code, 1975. Theresa Wilson was also indicted with trafficking in morphine (4 grams or more), tried and convicted, and sentenced to life without the possibility of parole as required by Section 13A-12-231(3)(d), Alabama Code, 1975.

Theresa Wilson appealed her sentence of life without the possibility of parole.

ISSUE:

Whether the court could review a sentence that is within statutory limits based on a violation of constitutional principals as set forth in the 8th Amendment to the United States constitution.

DECISION:

The Court performed an extensive analysis of the Defendant's sentence based on the three-part test set forth by the United States Supreme Court in Solem v. Helm, 463 U.S. 277 (1983) and interpreted in Harmelin v. Michigan, 501 U.S. 957 (1991) to determine whether the mandatory sentence of life imprisonment without parole is grossly disproportionate to the Defendant's crime.

The Court reasoned that Section 13A-12-231 entitled "Drug Baron's Enforcement Act" under which the Defendant was sentenced, was unconstitutional, as it is applied to this Defendant for the commission of this crime. The Court reversed the mandatory life sentence and remanded the case for re-sentencing instructing the court to consider the totality

of the circumstances within the framework set forth in Section 13A-5-6(1).

The Court, however, failed to declare Section 13A-12-231 unconstitutional *per se*. The Court appears comfortable in isolating this particular defendant from a mass of similarly situated defendants serving lengthy jail sentences for similar conduct. It would appear that the Court is not prepared to do the right thing with regard to all other similarly situated defendants and declare the statute as written unconstitutional on its' face.

LARRY JAMES POOLE V. STATE OF ALABAMA No. CR-99-1200 August 31, 2001

FACTS:

On March 31, 1995, a confidential informant purchased cocaine from the Defendant, Larry Poole on two separate occasions. On April 1, 1995 and May 10, 1995, the CI made additional purchases from Poole, the later at his house. Police subsequently obtained a search warrant of Poole's home and seized a quantity of crack cocaine which Poole admitted possessing for personal use only.

Larry Poole was indicted on four (4) counts of distribution of a controlled substance and one (1) count of possession of a controlled substance. Poole was tried and convicted on all counts and following a sentencing hearing was sentenced on one distribution count to 20 years imprisonment, plus two (2) additional 5 years consecutive terms under Section 13A-12-250 and 270, Alabama Code, 1975, for a total of 30 years. On each of the other distribution counts, Poole was sentenced to

15 years, plus two (2) additional 5 year consecutive terms under the enhancements, for a total of 25 years. On the possession count, Poole was sentenced to 2 years imprisonment.

Larry Poole appealed the enhancement of his sentence based on the United States Supreme Court decision in Apprendi v. New Jersey, 530 U.S. 466 (2000).

ISSUE:

Whether the enhancement of the Defendant's sentence based on Section 13A-12-250 and 270, Alabama Code, 1975, must be presented to a jury and proved beyond a reasonable doubt.

DECISION:

The Court performed an extensive analysis of the Defendant's sentence based on the U. S. Supreme Court holding in Apprendi v. New Jersey, 530 U.S. 466 (2000).

The Court reasoned that the Apprendi holding applied to this case because the Defendant was subjected to a greater punishment than that prescribed by the Legislature in Section 13A-5-6, Alabama Code, 1975 as a result of the enhancements contained in Section 13A-12-250 and 270, Alabama Code, 1975.

The Court reversed Poole's sentence and remanded for sentencing without regard to the statutory enhancements contained in Section 13A-12-250 and 270, Alabama Code, 1975 holding that the enhancements must be presented to the jury and proven beyond a reasonable doubt.

The Court continued by holding that it is not necessary to charge any applicable sentencing enhancements in the

indictment, but a defendant must be given notice that the State intends to seek an additional penalty under Section 13A-12-250 and 270, Alabama Code, 1975 and that such notice should be given at a reasonable time before the start of trial.

SOLES v. STATE OF ALABAMA 2001 W.L. 1148130

This is an excellent case to be used in any mandatory sentencing application. Soles sought relief from the mandatory sentences required by § 13A-12-250 and § 13A-12-270 ("the school/housing enhancement"). The Court of Criminal Appeals with the concurrence of the defendant and the State of Alabama, held that the newly amended §15-15-8 allows a trial judge to suspend a sentence imposed upon application of the school/housing enhancements. The court ruled that the amendment to §15-15-8(a) (1) supersedes any prohibition against probation and allows a trial court to suspend a sentence imposed pursuant to the school/housing enhancements.

This case should be asserted as support and authority for relief from any mandatory sentencing statute in Alabama.

EVIDENCE FOR THE DEFENSE

By: Belinda A. Weldon

The Facts

Jones is the store clerk at the local Stop-N-Rob. Around 1:30 am on a Sunday morning, a black male customer enters the store. The customer goes to the beer cooler and picks up a six pack. The man brings the beer to the counter to check out. Jones begins to ring up the purchase when he hears the customer say, "Give me all the money or die!" Jones looks at the customer

who is brandishing a handgun. The clerk hands all the register money to the robber. The robber runs out with the money and the beer. The clerk dials 911 and tells the police operator that a black male wearing a red tee-shirt and dark pants just robbed the store. He further describes the robber as being about his height which is 6'1". He says the robber is about 175 pounds with a slim build and a medium complexion. Jones also tells the operator the man had a black handgun and left on foot running toward the back of the store.

Officer Smith is close to the store when the BOLO [Be On the Look Out] is aired to all surrounding units about the robbery. Smith begins to patrol the area looking for anyone who might fit the description of the robbery suspect.

Officer Clark arrives at the store and talks to the store clerk. Clark learns from the clerk that the man looked dirty and had not shaved in several days. The suspect's hair was cut close to the head and he appeared to be in his late 20's. Clark relayed additional information to the dispatcher and the surrounding units.

Officer Smith sees someone walking in the parking lot of an apartment complex. Smith stops a young black male in the lot. The man fits the description of the robber in that he is a black male with a medium to dark complexion. Otherwise the man is in his late teens or early 20's, wearing an orange pull over styled shirt with blue jeans. The man is 5'7", weighing 180 pounds, has no facial hair but has short hair. The man is searched for officer safety but does not have a weapon, identification, money, beer, or contraband. Officer Smith calls in the field interview to the dispatch.

The detained man identifies himself as Tony Braden, an eighteen year old high school drop out who has been arrested several times for theft and burglary. Tony was looking for a car to break into but can't tell the police that so he is evasive as to where he's been and can't give a reasonable explanation as to why he's in the parking lot of this apartment complex. Tony gets nervous and breaks out into a sweat as Officer Smith continues interrogating him.

Officer Smith notifies his supervisor that Tony is acting suspicious because he is nervous and sweaty. A vague description of Tony is given to the supervisor and a decision is made to bring the store clerk to Officer Smith's location where Tony is being detained. Upon arrival the store clerk sees the young man seated in the back of a patrol car and identifies him as the robber. Officer Clark takes Jones back to the store where he now begins to write the incident/offense report on the robbery. In the suspect block where the descriptive information is recorded, Officer Clark records the following: b/m 5'7" 180 lbs. Reddish/orange shirt, blue jeans. In the narrative, Clark writes that a suspect matching the description given by the witness was stopped a short distance from the scene by Officer Smith. The reporting person/victim (Jones) was transported to the location where the suspect was being detained and positively identified the suspect as the person who robbed the store. Supervisor and robbery detective notified.

The Evidence

In the scenario, the true and accurate information will never be included in the police reports. And worse, the defense attorney will not be made aware there was a discrepancy in the color of the shirt (i.e.

red vs. orange); that the robber was originally described as unshaven (and the defendant was clean shaven); that the robber was described as being tall like the victim (i.e. about 6'1"); that the robber was described as slender build, around 175 pounds; that the robber was described as being in his late 20's; or that the robber was described as being "dirty" by the witness. This is important information for the defense... information that will allow the defense to call into question the identification of the client as the robber. Additionally, such valuable information will create reasonable doubt in the eyes of the jury.

The defense has made great strides in combating eyewitness testimony to the point jurors know eyewitness testimony alone is not sufficient to convict. So anytime the defense can present evidence to a jury showing various inconsistencies of eyewitness identification, the more likely the defense is to win an acquittal or at the very least hang a jury.

Where's the Evidence?

If this type of valuable evidence exists, it must be located and preserved by subpoena as quickly as possible. One of the first places to find this type of evidence is in police radio communications and the records of such communications. The defense attorney should always subpoena the radio transmissions as soon as possible. Radio transmissions are only kept for short periods of time. The duration that radio transmissions are maintained depends on individual law enforcement agencies. For example, the Birmingham Police Department maintains radio transmissions exactly one year from the date of occurrence, whereas Bessemer Police

Department only keeps their transmissions 30 days. Anytime a crime occurs, information is broadcast between the dispatcher and the responding units, and sometimes between the units themselves. Radio transmissions are valuable sources of evidence.

In addition, subpoena the dispatch card or printout. Dispatch cards are handwritten call cards where the dispatcher records information received during the call. The notes written on a dispatch card should include descriptive information of suspects and/or suspect vehicles. Some agencies use computers where the dispatcher enters information received during the call. The information entered may include descriptive information of suspects and/or suspect vehicles.

Police forget what was said over the radio and do not have access to the radio transmissions when its time to write the police reports. **REMEMBER:** The police report is the last thing done when answering any police call. Whether it is a robbery, rape, shooting, murder, etc., the police report will be written last. In essence, the police report will not accurately and truly reflect what happened or even what the police knew when responding to the call. Usually the police report will reflect what the police officer writing the report thinks happened after the fact (i.e. after the officer has had time to think what should be included in the report to make the case strong). But radio transmissions and/or dispatch cards/entries may tell a different story from the official police report. As in the scenario, the police reports show a description of Tony Braden and omit the

original description given by the eyewitness immediately after the robbery.

Another source of valuable evidence is the officer's daily log or snitch sheet.

A daily log is the record where each officer writes down his/her vehicle information and records calls for service received during the shift. In addition to this information, officers have a tendency to make notes on the daily, such as BOLO information, descriptions, etc. Don't just limit your subpoena to the officer who generated the report. Subpoena the daily of each officer that responded to the scene or assisted, or all officers who worked that shift and received the BOLO. You may be surprised to learn that the description in the BOLO does not match the description of your client.

Agencies that have NCIC computers will not only air BOLO's to their own officers but will access the NCIC computer and send a teletype BOLO to all surrounding agencies. This evidence can be retrieved by subpoenaing NCIC printouts from the agency entering the tele-type or from the Alabama Criminal Justice Information System (ACJIS) in Montgomery, Alabama. ACJIS maintains a record of every entry and deletion in the system. The ACJIS record keeping system is very strict in that federal guidelines must be followed to maintain integrity of the system. Therefore, any entry can be found and traced back to the agency making the entry by the ORI number.

Still another source of recorded information is the initial call to the police. Whether it is a 911 call or on the regular police line, it might just be recorded. Most police

telephone lines are recorded today. But remember these recordings are maintained for a short time so the initial call to police must be subpoenaed as soon as possible.

The mug shot or booking photo is another source of information. What evidence can be found in a booking photo? In the scenario, the jury can see that the client was clean-shaven and did or did not appear to be dirty at the time of arrest. Also, if the clothing is not available, maybe the client's clothing (i.e. shirt) can be seen in the booking photograph. Do not just settle for a black and white photograph or a xerox copy because it will not help your case. Go look at the color photograph and subpoena the custodian to bring it to court so the jury can see it. Letting the jury see the color of the shirt in the photograph is better than letting the police tell the jury the shirt is red when it's obviously orange.

The scenario depicted here occurs more often than anyone can imagine. But to uncover missing information, the defense attorney must look at the case from the first source of recorded information - the police communications generated from the call. This type of evidence will put holes in the police version of the case, making the case weaker and weaker. But we as criminal defense attorneys must look for true and accurate information when defending clients. Knowing where to find the evidence is the first step.

WRITTEN NOTICE OF APPEARANCE REQUIRED IN ALL CASES

PROCEDURAL CHANGES

As most of you now know, a written notice of appearance is required in each case for

which you are either hired or appointed. You are no longer permitted to phone in your appearance to the clerk's office.

MEMBERSHIP DUES FOR 2001-2002 DUE NOW

Sustaining Member: \$100.00

General Member: \$50.00

General Member in Practice for Less than Three (3) Years: \$25.00

Please make checks payable to the Greater Birmingham Criminal Defense Lawyers Association and mail to:

Andrew J. Coleman, Treasurer
205 20th Street North, Suite 210
Birmingham, Alabama 35203

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MISCELLANEOUS

Anyone wishing to submit an article for publication in The Sentinel should submit it to Tommy Spina at 1330 21st Way South, Suite 200, Birmingham, Alabama 35205.

GENERAL MEETING

Please Attend.

Date: November 15, 2001
Time: 5:30 p.m. - 6:30 p.m.
Place: Redmont Crowne Plaza

MEMBERSHIP APPLICATION

Name: _____

Address: _____

Telephone: _____

Fax: _____

Admitted to Bar: _____

Annual Dues:

☐ Sustaining Member (\$100.00)

☐ General Member (\$50.00)

☐ General Member less than 3 years in practice (\$25.00)

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