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July '96 Volume 3.7

THE SENTINEL

NEWS FROM THE COURTHOUSE

THE OFFICIAL
NEWSLETTER
OF THE
GREATER
BIRMINGHAM
CRIMINAL
DEFENSE
LAWYERS
ASSOCIATION

JULY JUDGES' MEETING

The Criminal Court Judges' meeting was held on July 8, 1996. I, John Lentine, was the only GBCDLA member present to give the following report. A list of the 35 lawyers willing to accept appointments to Olympic-related cases (i.e., crimes involving foreign defendants and or victims) was distributed to the District judges. These types of cases will be put on a fast track for appointments and preliminary hearings which will be held the same day in most cases. If you are interested in accepting Olympic-related appointments, please contact me at 322-7707. Lawyers who plan to accept these appointments will be expected to provide home phone, cellular phone or pager numbers so they can be on call. Lawyers who speak more than one language are especially encouraged to participate.

Five minutes into the meeting Judge Thorn asked me to leave the room so that the judges could discuss something in private. When I was allowed to return to the meeting 25 minutes later,, May motions were being discussed. I was informed that the pre-approved "flat" hourly rate of $35.00 for overhead expenses for lawyers in this judicial circuit, which the GBCDLA thought was approved by the judges back at the February 13, 1996, Judges' meeting, has not been approved. Presently, there is no pre-approved hourly overhead-expenses rate in Jefferson county. From now on, lawyers wishing to be reimbursed for overhead expenses must file individualized motions and affidavits proving overhead expenses. This judicial revelation was somewhat of a shock and will be explored further.

PRESIDENT'S COLUMN

FOB SAYS, "FORGET THE COURT"

BY

JOHN A. LENTINE - PRESIDENT GBCDLA

Several weeks ago, while addressing several hundred state republican leaders in Huntsville, Governor Fob James gave some free advice to the next president, as well as to Congress: Don't pay attention to decisions of the United States Supreme Court.

Apparently the Governor hit on the bright idea that the President and Congress should simply ignore the Supreme Court when it issues decisions that legislative and executive officials feel are wrong or

simply dislike. The Governor stated that the time had come to end judicial review.

This brainstorm went virtually unnoticed by the Birmingham press. Fortunately for the Governor, the Post-Herald gave the speech a cursory note, while the News totally ignored it. Well, I didn't ignore it. While this column may cost me that next judicial appointment (ha, ha, ha), I've got to respond.

Whoever voted for this man, go directly to the corner. Next election you're sitting it out. Now, check me if I'm wrong, but isn't the Governor supposed to have speech writers on retainer. I mean even if its just a glorified proofreader to glance over the crayon-written notes and say, "Gee sir, are you sure you want to say this in public?" I would have thought that some staffer might have counseled the Fob that calling for the virtual abolition of one branch of the three branches of government might be considered a wee bit rash. Hopefully, one of the Fob's legal advisors will sit down with him and explain American Government 101 before the he decides to get up and call for the impeachment of judges who grant probation.

The heck with the handlers not handling him correctly, the Governor himself really believes in this nonsense. Apparently the term "checks and balances" only refers to his bank account rather than the foundation of the American system of government. Quickly someone, a vitamin B-12 shot, a pot of espresso and a couple of Vivarin for the Governor. It's wake-up-to-the-twentieth-century time. Hands off that snooze button!

Governor James, the independence of the judiciary from the other two branches of government is essential to this nation's continued survival. We kinda need judicial review so that the executive and legislative branches of government won't run amok over the very people they're supposed to serve by passing blatantly unconstitutional laws and regulations.

Now, I can appreciate how the Governor may not like the Courts saying that certain legislation or regulations don't pass the constitutional smell test. I'm a criminal defense lawyer. I'm used to the Courts siding against me on most issues. However, hurt feelings are not justification for the elimination of the most important facet of the judicial branch of our government.

So, my advice is let's just leave our government the same way as when it was established. It's done pretty well over the last 200 years. To the Governor, I suggest buying a pocket version of the United States Constitution. I find that It's good bedtime reading and quite educational, too.

INDIGENT DEFENSE UPDATE

INDIGENT LEGISLATION DIES

The legislation designed to raise indigent defense fees in Alabama passed the House Judiciary Committee, but died in the House Rules Committee during this legislative session. The GBCDLA is very interested in seeing this legislation passed in the next session. The Board of Directors urges each member to contact his or her local representatives in both the House and Senate and impress upon them the serious need for the passage of such legislation.

MAY v. STATE v. COMPTROLLER v. COURTS

With legislation to raise indigent defense fees stalled in Montgomery, criminal defense lawyers are actively filing "May motions" in an effort to recoup overhead expenses per the decision in May v. State, 627 So.2d 1307 (Ala.Cr.App. 1993). Unfortunately, lawyers are experiencing difficulties in a variety of areas. The most recent being with our own Circuit that has no shunned any "flat" hourly rate.

The first issue of importance is when and where should a May motion be filed? The May decision was silent as to these matters. However, a recent Attorney General's opinion issued April 19, 1996 in response to questions raised by the State Comptroller and Finance Director, issued the following opinions in light of May:

1. Office overhead expenses claimed under 15-12-21(d) must be approved by the trial court in advance of being incurred.

2. Approved office overhead expenses incurred on or after 9/3/93 may be reimbursed by the Comptroller contingent upon the expenses having been approved in advance by the trial court.

But, leave it to the AG's office to open a new can of worms. In May, the Court did not define the term "trial court" in order to distinguish between the District and Circuit Courts . Thus the question remains as to when and where to file the motion. Local lawyers have begun to file these motions at the District Court level. However, few if any, have been successful. This may be because the term "trial court" so often refers to the Circuit Courts rather than the District Courts. But, if you settle or see a case through the District Court level, why should you be deprived of overhead expenses that you are incurring for the representation? Any distinction between counsel at the District or Circuit level is utterly irrational and may raise Equal Protections problems. The AG's opinion appears to advocate the filing of a May motion in Circuit Court during the pretrial or arraignment. However, the GBCDLA strongly encourages its members to keep filing these motions on each and every case in both Circuit and District Court in order to have this situation ultimately clarified.

Based on the Judges disapproval of a "flat" hourly rate, which appears to be based on the idea they do not have the authority to establish such a local rule, May motions must now be filed with proof and/or verification of a lawyer's hourly overhead expenses. This may be accomplished by submitting an affidavit by the lawyer attesting to his overhead expenses. The formula (used in the May case) that is being used to calculate overhead expenses is the year's overhead (i.e., rent, phones, etc.) divided 2080 (which is the result of multiplying 52 weeks in a year by a 40 hour work week). For example, a yearly overhead of $70,000.00 divided by 2080 would produce an hourly overhead expense of $33.65. A proposed Motion and Order will be distributed at the Summer Social in an effort streamline this process.

The second part of the AG's opinion basically holds that if you didn't get a May motion approved on or before 9/3/93 the Comptroller is off the hook for those overhead expenses. Wait! What about a Nunc Pro Tunc Order? Well, you can try this route but make very sure that the order refers to the fact that the judge did approve the expenses in advance and that the approval was not reflected in the record. Otherwise the Comptroller will probably deny the overhead expenses.

Remember, the key to this issue is persistence! GBCDLA members should file a May motion on every single appointed case as soon as they are appointed. The GBCDLA has sample May motions and orders available to any GBCDLA member who needs one. Please contact any of the Board of Directors or write **THE SENTINEL.**

Thanks to GBCDLA member DON COLEE for sending a copy of the AG's opinion to THE SENTINEL.

GBCDLA SUMMER SOCIAL

THURSDAY, AUGUST 1ST

5:00 - 7:00 P.M.

THE SUMMIT CLUB

APPOINTED APPELLATE LAWYERS NEEDED

GBCDLDA Secretary and Chair of the Birmingham Bar's Criminal Court Procedures Committee, Wendy L. Willliams has been approached by several of the Circuit Court judges regarding the shortage of lawyers willing to accept appointments in capital appeals and criminal appeals, in general. **THE SENTINEL** has reported in its last several issues that more lawyers are needed to accept capital appointments at the District Court level. However, it appears that this shortage is equally prevalent on the appellate level. Many trial counsel prefer not to handle the appeal of a case they've tried for a variety of reasons. Wendy has asked that any GBCDLA member interested in accepting appointed appeals contact her directly at 591-7828 or by fax at 591-6765.

MEMBERSHIP UPDATE

The GBCDLA constantly needs to keep up with its members. If your are a member and have moved from your last address, please send us your new address! A new phone or fax? Tell us! Are you getting you copy of **THE SENTINEL**? Have you received your Membership Certificate? If not, please contact the Secretary of the GBCDLA,

Wendy L. Williams or GBCDLA President John A. Lentine, so that these things can be handled quickly. The GBCDLA exists for the membership and the Board of Directors is committed to serving the Membership. If you have any such problem, it will be taken care of as soon as possible.

Remember dues are now due, please make your checks payable to GBCDLA, P.O. Box 370282, Birmingham, Alabama 35203.

Dues: $25 -- regular, $100 -- sustaining, $250 -- special

RECENT DECISIONS

UNITED STATES SUPREME COURT:

KOON V. UNITED STATES, 64 LW 4512 (June 12, 1996) (Departures from the Guidelines)

As we all will remember, Officers Koon and Powell were acquitted in state court of assault and excessive force charges regarding Rodney King. They were subsequently tired and convicted in federal court for violating King's constitutional rights under color of law. Their guideline range was between 70 and 87 months, however the District Court granted two downward departures. The first was based on the victim's conduct and the second was a combination of 4 factors which included unusual susceptibility to abuse in prison and successive prosecutions. The Ninth Circuit reviewed the departures de novo and rejected them all.

The Supreme Court affirmed in part and reversed in part, holding that an appellate court should not review a decision to depart under the de novo standard, but under an abuse of discretion standard, instead. The Court noted that the guidelines did not eliminate all of a district court's traditional sentencing discretion. Appellate courts should give due deference to a district court's application of the guidelines to the facts of a case. And, while the deference due depends on the nature of the questions presented, a departure decision will in most cases be due substantial deference on appeal.

As to the basis for departure in this case, the Court upheld it as to the victim's misconduct, the susceptibility to abuse in prison, and the successive prosecution factors, but found the other bases to be inappropriate. The case was remanded to the district court because it was unclear if the district court would have imposed the same sentence without the inappropriate factors.

*** NOTE - This case is important for a variety of reasons. First, it reaffirms the power of the district court to depart without a major threat of reversal on appeal based on the due deference standard. Second, the Court declined a government contention to create an ironclad rule that some of the factors relied on could never be considered as factors for downward departure under any circumstances. The Court also noted that to conclude that a factor could never be considered would be usurping the policy-making authority that Congress vested in the Sentencing Commission.

MELENDEZ V. UNITED STATES, 64 LW 4525 (June 25, 1996) (No Departure from statutory minimum without specific government request under 5K1.1)

In this case the government and defendant entered into a plea agreement that in return for cooperation and a guilty plea the government would move for a 5K1.1. downward departure from the guideline range (which was 135-168). The statutory minimum was 10 years (cocaine conspiracy under 21 U.S.C. 846). Neither the agreement nor 5K1.1 motion mentioned departure below the statutory minimum. The district court departed below the range, but not below the statutory minimum because the government did not make such a request in the motion.

On appeal the Supreme Court held that 18 U.S.C 3553(e) requires a government motion requesting or authorizing the district court to impose a sentence below a statutory minimum because a district court does not have the power to do so unilaterally.

LEWIS V. UNITED STATES, 64 LW 4581 (JUNE 24, 1996) (No right to jury trial in single prosecution for multiple petty offenses even if aggregate prison term exceeds 6 months)

In this case the Supreme Court ruled that no right to jury trial exists where a defendant is prosecuted for multiple petty offenses despite a potential aggregate

prison term in excess of six months for each offense charged.

This case is simply atrocious in that a defendant could be convicted of innumerable offenses in one proceeding and sentenced to any number of years of imprisonment, without the benefit of a jury trial, so long as no one of the charges considered alone is punishable by more than six months in prison. Justice Kennedy, who concurred only in the judgment, lambasted the Court for disregarding contrary precedent. He also noted that the decision will make it easier for the government to evade the constraints of the Sixth Amendment when it seeks to lock up a defendant for a long time.

*** NOTE - Other then *Ursery*, this ranks as possibly the worst decision of the Court this year. Now a defendant can be charged with multiple violations in a single proceeding and receive a sentence from 1 to 20 years as long as none of the charges, individually, is punishable by more than 6 months, all without the right to a trial by jury. To grant the government the unlimited authority to choose to prosecute a defendant for multiple petty offenses rather than one serious crime in order to deprive him of a trial by jury is an affront to the Sixth Amendment.

UNITED STATES V. URSERY / UNITED STATES V. $405,089.23, 64 LW 4565 (June 24,1996) (In rem Civil Forfeitures are neither "punishment" nor criminal for purposes of the Double Jeopardy Clause)

This case put to rest any hopes that the Court's prior decisions in *Austin*, *Halper*, and *Kurth Ranch* meant that in rem civil forfeitures could be considered punishment under the Double Jeopardy Clause. In an 8 to 1 decision (Justice Stevens' dissented in part) the Court ruled that historically Congress had authorized parallel criminal action and in rem forfeitures based on the same conduct and the Court had concluded it did not run afoul of the Double Jeopardy Clause because forfeitures were not punishment.

The Court, applying a two-part test concluded: First, Congress intended the particular forfeitures (pursuant to 21 U.S.C. 881 and 18 U.S.C. 981) to be remedial civil sanctions because both statutes' procedural enforcement were distinctly civil in nature. Second, the Court found no "clear proof" that the proceedings under the statutes are so punitive in form and effect to render them criminal despite Congress' intent to the contrary. The Court also relied on considerations that historically such forfeitures have not been regarded as punishment; there is no requirement in the statutes that the government prove scienter in order to establish that property is subject to forfeiture; that the deterrent purpose of these statutes serves both civil and criminal goals, and the fact that both statutes are tied to criminal activity is insufficient to render them punitive.

*** NOTE - Only Justice Stevens dissented in this case so its fairly obvious that this issue is dead in the water on the federal level. However, the Alabama Courts have held our forfeiture statute to be being "penal" in nature. Lawyers in this State should not give up the Double Jeopardy argument regarding its applicability to the Alabama Constitution. This issue has not been authoritatively addressed by the Alabama Supreme Court and although it may be a long shot, the issue may still have merit on the State level. In future issues **THE SENTINEL** will highlight any other State court decisions in this area which may prove helpful in arguing this issue in Alabama.

CLE UPDATE - CORRECTION

The Alabama Criminal Defense Lawyers Association is having its Annual Seminar on the beach in Gulf Shores, Alabama on August 15-17th. It was erroneously reported in last month's **SENTINEL** that the seminar carried 12 hours of CLE credit. **The seminar actually carries 9. CLE credit hours.** Those interested in more information on the seminar should contact Tommy Goggins, Executive Director of the Alabama Criminal Defense Lawyers Association at (334) 834-2511 for a brochure.

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THE SENTINEL

Bohakel Hard } bailiffs going in jury room & influencing jury

AUGUST JUDGES' MEETING

The monthly Jefferson County Criminal Division Judges' meeting took place on August 13, 1996. In attendance for the GBCDLA were Ken Gomany, John Lentine and Tommy Nail. The only item on the judges agenda was the May decision. Judge Garrett informed those at the meeting that May was the subject of considerable discussion at the State Circuit Court Judges meeting. The judges were informed that the GBCDLA has provided its members with form May motions, affidavits, and orders in order to help the filing and granting of these motions. Many of the judges seemed very receptive to the summary approval of May motions that request an hourly rate of $35.00 or less for overhead expenses. May motions requesting an hourly rate over $35.00 may require an ex parte hearing in order to justify such requests. This hearing procedure may vary with the individual judges.

The GBCDLA also informed the judges of the recent decision of Ex parte Tony Barksdale, CR-95-1607 (Ala.Cr.App. 7/30/96), wherein the Court of Appeals in a decision interpreting the proper procedures for filing May motions noted that when submitting such motions for preapproval, a rough estimate of the hours the lawyer expects to spend on the case as well as the lawyer's hourly rate should be included in the motion. (This decision will be discussed in greater detail on page 3.)

The other item on the agenda was raised by the GBCDLA in response to complaints by several members of the Association. It came to the GBCDLA's attention that at least one District Court judge was handling probation revocation hearings on Circuit Court cases where the Circuit Court judge

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had simply transferred the probation revocation case to the District Court for resolution while the defendant had a preliminary hearing on a new charge. Apparently, a probation revocation on the circuit court case would occur after a finding of "probable cause" in the new district court case. The GBCDLA strenuously objected to this procedure for a variety of reasons. Judge Garrett agreed that unless this procedure was agreed to by all the parties it should not be occurring and he would look into the matter. The two District Court judges in attendance stated they were not taking part in any such actions and would not do so unless it was specifically agreed to by all parties. The GBCDLA is confident that there will not be a repeat of these types of "revocation hearings" in the future. However, if this does occur to you, please bring the matter to the immediate attention of any of the Officers or Board of Directors of the GBCDLA.

Remember, the GBCDLA is your Association and is ready, willing and able to take on any issue or matter you want brought to the attention of the Judges, please contact the Officers or Board

Members or **THE SENTINEL**, P.O. Box 370282, Birmingham, AL 35203.

PRESIDENT'S COLUMN

BY

JOHN A. LENTINE- GBCDLA PRESIDENT

"THE SHACKLING OF ADVOCATES

OR

"ROPED & TIED IN FEDERAL COURT"

I was recently asked by a reporter of the Birmingham News to comment on the "rules of conduct" a federal judge who had just taken senior status imposes on trial lawyers in his court. In my best attempt to be tactful, I told her that I was concerned about limiting lawyers abilities to be advocates through the use of blanket rules. I had just finished a lengthy trial with this particular judge and had been called on the carpet several times for "violating" those rules. However, despite his rules the judge was fairly liberal in allowing me and the other lawyers to be advocates for our clients. Unfortunately, this judges "rules of conduct" have found an even a greater zealot with another federal judge in the Northern District.

I recently received a fax from a GBCDLA member involved in a multi-defendant case in federal court here in the Northern District. The fax was entitled "**NOTICE TO ATTORNEYS**" and was in fact an Order of the Court to be read and followed by the lawyers. It consisted of 2 1/2 pages of "procedural rules" and "accepted standards of decorum". These rules included instructions such as "Do not repeatedly describe the evidence in the case. Ask your questions and sit down", "Do not make reference to the jury by saying "tell the jury"... Don't court the jury", "Do not raise your voice, act indignant or make faces" and my personal favorite "Do not, when questioning a witness, talk directly to the jury....Do not, when making an objection, talk directly to the jury...Any form of improper communication with the jury, whether by body language or otherwise will not be tolerated....If you want to establish a *relationship* do it after the trial." The Court also noted the punishment for violation of these rules. "Attorneys who willfully or continually violate these instructions will invite reprimands, perhaps in open court and in front of the jury."

So let me get this straight, in order to follow these "instructions" and please the Court, I'm not to look at the jury, basically at anytime during trial, except perhaps voir dire, opening and maybe, if I'm good, at closing. I must act like a robot and pretend the jury isn't in the courtroom. I must sit there starring off into space or at the floor (god forbid a causal glance at the jury box because it might be construed as an improper form of communication such as "is everybody still breathing over there?" or "how many of you are sleeping") like I'm totally disinterested in the proceeding or the defense of my client. I should be stiff, straight, and proper (as the Court alone will define that term) and act as disinterested railway conductor on my client's painless trip to the crossbar hotel. Yeah right.

We are advocates for clients in an adversarial, not inquisitorial, system. In In re Dellinger, 461 F.2d 389 (7th Cir. 1972) the Seventh Circuit Court of Appeals wrote, "Attorneys have a right to be persistent, vociferous, contentious, and imposing, even to the point of appearing obnoxious, when acting in their client's best interest. Any attorney may with impunity take full advantage of the range of conduct that our adversary system allows." (Emphasis added). The Court went on to state that "great latitude" and "extreme liberality" in the area of vigorous advocacy must be given to criminal defense lawyers acting on behalf of those accused of crimes. supra., at 400. So why rope and tie us like cattle from doing the jobs we took an oath to zealously do?

Noted Law Professor and Author, James McElhaney, addresses this type of situation in his book, *McElhaney's Trial Notebook, Third Edition* (1994). In the Chapter "Getting Along With Judges" he notes there are several schools of thought regarding judges' use of "blanket rules". The one I find most on point is the school of thought that such rules "reflect a mistrust of the adversary system". McElhaney writes, "Some judges forget that all of the law is a framework for advocacy, and that it is their job to make it work. Some of the judiciary do not believe in advocacy, but rather an inquisitorial system. They seek to emasculate the system we have by interfering with the work of lawyers". supra. at 697.

Now I have no doubt that some lawyers go too far. Laziness, disrespect and poor advocacy are probably in part the catalyst for some of these rules. However, problems with individual lawyers should be handled individually, rather than blanket rules to punish everyone regardless of their conduct. These types of restrictive rules go far beyond any purpose of an orderly trial. They can become shackles which chill the fire advocates must display in representing the accused. As McElhaney so aptly puts it, " [i]t is a sign of real weakness- an inability to sort out very difficult situations-that lead judges to make a blanket rule for a problem that occurs in one out case of a hundred". McElhaney's Trial Notebook, supra., at 696.

I speak for myself and the GBCDLA when I say a criminal defense lawyer has a duty to represent a client zealously. While professional civility and respect for the Court must and should be maintained, injustice must be confronted and fought even if it means going "toe to toe" in order to be an effective advocate.

WILL MAY NEVER END??

This is the next installment for GBCDLA members in the never ending May saga. On July 30, 1996, the Court of Criminal Appeals issued an opinion in the case of Ex parte Barksdale, CR-95-1607, _____ So.2d _____ (Ala.Cr.App. 1996). This case involved a lawyer's (Tommy Goggins - Executive Director of the ACDLA) efforts to satisfy the May requirements for preapproval of hourly overhead. Goggins filed the motion pretrial but was told by the Court that the motion would not be considered until after the trial in conjunction with the fee voucher. At no time would the Court specifically approve the hourly rate in the motion. Another motion was filed and granted, however, the Court's Order indicated it would approve an hourly overhead at the conclusion of trial. Goggins filed a Writ of Mandamus seeking the Court of Appeals to order the trial court to approve a specific hourly rate for overhead. The Court of Criminal Appeals made reference back to the May decision as well as an Attorney General's opinion regarding "preapproval" of specific hourly rates for overhead.

The Court went on to say the following regarding specificity of May motions: "The best practice would be for counsel, when submitting a motion for preapproval of extraordinary expenses that relate to office overhead, to include a rough estimate of the hours counsel expects to spend on the case and an hourly rate that represents counsel's estimate of office overhead expenses incurred in the operation of counsel's law practice." The Court of Appeals noted the trial court should have approved the specific hourly amount and ordered it to do so.

The bottom line of this decision's effect on May motion practice is that now lawyers must include in their May motion an estimate of how many hours they expect to spend on the case in addition to the specific hourly rate they are seeking for overhead compensation. So, the next logical question is how in the heck do we estimate the hours in any given case. Obviously a capital murder case will generate more hours than a theft third degree, however, we all know cases can drag on the docket for well over a year and the hours a lawyer spends on any given case can stack up.

The GBCDLA recommends to its members that when assessing a rough estimate of hours to be spent on a case for May motion purposes a variety of factors should be considered, including, but not limited to the type of case, the trial court in which the case is set, and whether the case will be settled or tried. The GBCDLA further recommends that the a liberal hourly estimate for time to be spent on a case be given. This will provide some modicum of insurance that payment for all time spent will be received. If a lawyer is too conservative with an hourly estimate and actually expends more time than was estimated, he or she may not receive payment for time over and above the estimate in the motion.

Because the May decision is undergoing constant changes and interpretations on a variety of fronts the GBCDLA will continue to appraise its members of changes as they relate to the May decision and their subsequent impact on your practice.

*** NOTE - The GBCDLA has form May motions, affidavits and orders available to it members. If you need these forms please contact any of the Officers or Board Members of the GBCDLA or write **THE SENTINEL** at P.O. Box 370282, Birmingham, AL., 35203. Also if you have any news regarding the May decision and its aftermath, please contact **THE SENTINEL** so all the GBCDLA membership can be informed.

SUMMER SOCIAL A SUCCESS

The annual Summer Social of the GBCDLA was a huge success. Over Seventy-five (75) GBCDLA members, old and new, gathered at the Summit Club on August 1st in a spirit of friendship and camaraderie. Four candidates for the Alabama Court of Criminal Appeals appeared at the social in an effort to garner support for their respective candidacies. Included among them was GBCDLA member Bill North who is running for Place No. 1. Awards were given to the four past presidents of the GBCDLA in honor and appreciation of their work for the Association. GBCDLA members also received copies of past **SENTINELS**, May materials and other handouts relating to the practice of criminal defense work here in the greater Birmingham area. Special thanks to Massey Relfe, Wendy Williams and Virginia Vinson for their efforts in making this year's Social such a success.

MINUTES OF GBCDLA MEETINGS TO BE PUBLISHED IN "THE SENTINEL"

Based on unanimous vote of the Executive Board, the minutes of Executive Board and General Membership meetings will now be reproduced and published in future editions of "**THE SENTINEL**". It is hoped that publication of the minutes of these meetings will keep the membership better informed about the workings and plans of the Association.

GBCDLA MEMBERS SPEAK AT ACDLA SUMMER CLE SEMINAR

The Alabama Criminal Defense Lawyers Association recently held its annual summer CLE at Gulf Shores. Among the speakers in the three day program were GBCDLA members Bill Dawson, David Luker, and Virginia Vinson. The GBCDLA congratulates all three members for the enlightening presentations which made the seminar a success.

RECENT DECISIONS:

ALABAMA SUPREME COURT:

Ex parte Joseph Ward Gentry, 1996 WL 390618 (Ala. 1996) (Capital Murder conviction reversed)

In Gentry, the Defendant had been convicted of capital murder during the course of a burglary. The evidence was the Defendant had a license and/or privilege to be on the premises of the deceased. The State contended he had "remained unlawfully" in that his privilege to be on the property was revoked by virtue of the owner's death. This rationale was upheld by the Court of Criminal Appeals in affirming his conviction as to this issue. The case was reversed for a new trial on another ground and the Supreme Court of Alabama did not grant certiorari. The Defendant was subsequently convicted of capital murder again and this issue was once again affirmed by the Court of Appeals.

The Supreme Court of Alabama granted certiorari and reversed the conviction holding there was no evidence of a burglary. The Court reviewed, in a historic context, the capital/burglary statute and past precedent. The Court noted, "to establish an unlawful remaining" when the defendant has a license or privilege to be on the premises, the State must present evidence other than evidence that the defendant committed a crime in the dwelling or a building owned or controlled by the victim. To hold otherwise would vitiate the statutory elements of first-and second-degree burglary.". The Court held to adopt the State's position would be to expand the scope of the death penalty to apply to intentional murders distinguishable from other intentional murders "only because they occur indoors.". The Court then overruled numerous cases that were inconsistent with their ruling and remanded the case back to the trial court.

*** NOTE - Congratulations to GBCDLA member Bill Del Grosso for his tireless work over four years on this case. The State of Alabama has filed for rehearing, however, the vote was 6-3, so it appears the case will stand. The ramification of the ruling in this case makes questionable further prosecutions under the capital/burglary section of the capital statute wherein the defendant has a license or

privilege to be on the deceased's property at the time of the homicide.

Clay v. State, CR95-0212 (Ala.Cr.App. 1996) (When is a drug "sale" not a drug "sale" for enhancement purposes?)

The facts in Clay were not in any real dispute. The Defendant was approached by undercover officers who wanted to buy cocaine. The Defendant took $10 in bait money and went alone to a pool hall where he inserted the money into a pocket in a pool table while he went to wash his hands in the restroom. When he returned he removed a dime bag of crack from the same pocket and returned it to the officers. (He testified at trial this was a procedure he knew to get cocaine.) The defendant was arrested and the bait money was not recovered. After a trial the Defendant was convicted and sentenced to additional ten years in prison based on the Housing Project and School enhancement statutes.

On appeal the Court of Criminal Appeals reversed and remanded the case for resentencing. The Court noted that under the Ex parte Mutrie, 658 So.2d 347, 350 (Ala. 1993) and Hill v. State, 348 So.2d 848, 855 (Ala.Cr.App.), *cert. denied*, 348 So.2d 857 (Ala. 1977) the Defendant's conduct did not constitute a "sale". The Court reasoned from the facts the Defendant was acting as an agent for the buyers (i.e. the police) in an effort to procure the drugs for them at their behest. Also because there was no evidence the Defendant profited from the transaction there was insufficient evidence to prove the Defendant either sold or acted in concert with the seller. The case was remanded for resentencing without the application of the enhancement statutes.

*** NOTE - Congratulations to GBCDLA member Joe Morgan, Sr. on his fine job in this case. All members should take note of these cases when it comes to any pending distribution cases. If a client is acting at the behest of a police officer or agent as a "procuring agent" and makes no profit from the sale by a third person, there is an extremely sound legal argument that the defendant has not made a "sale" and the enhancement statutes are not applicable. If certiorari is petitioned by the State and granted the GBCDLA will inform the membership of any new developments regarding the status of this decision.

Meinger v. State, CR95-0390 (Ala.Cr.App. 1996) (In a DUI prosecution for .10 no corroborating evidence of intoxication is admissible by the State in its case-in-chief)

Meinger was convicted pursuant to 32-5A-191(a)(1) for driving with a blood alcohol level of 0.10% or greater. At trial the State introduced evidence of the results of field sobriety tests and the officer's opinion of the Defendant's sobriety. The Court of Criminal Appeals reversed the conviction noting that 32-5A-191(a)(1) is an "illegal per se law" and the evidence of sobriety went to a charge of driving under the influence which was not the charged offense. The Court noted, "[e]vidence of any offense other than that specifically charged is prima facie inadmissible.". Judges Long and Cobb dissented.

*** NOTE - This case will probably go up on certiorari by the State's petition. Its too early to call whether the decision will stand. If it does it appears if the door is opened on cross by the defense, the State would be allowed to introduce such evidence in rebuttal.

Hampton v. State, CR95-57 (Ala.Cr.App. 1996) (Improper restriction of cross examination of informant)

In this case Hampton's lawyer was not allowed to question a State's informant in a distribution case about several pending cases against the informant as well as some checks the informant had written for which he had insufficient funds. The Court, over objection, disallowed these questions.

The Court of Appeals unanimously reversed. In an interesting and informative review of the an accused's constitutional right to thorough and sifting cross examination, the Court held the trial court was in error for disallowing questions that were relevant and material regarding the issue of bias of the informant. More importantly the Court found this error not to be harmless because of the denial of the basic constitutional right of confrontation.

*** NOTE - This an excellent decision for the defense in the right to fully and fairly cross examine witnesses as to their respective biases. All GBCDLA members should keep this case on file for potential use at a later time.