24

September '98 Volume 5.9

The Sentinel

NEWS FROM THE COURTHOUSE

THE OFFICIAL

NEWSLETTER

OF THE GREATER

BIRMINGHAM CRIMINAL

DEFENSE LAWYERS'

ASSOCIATION

ALERT TO ALL MEMBERS:

Due to the crises stemming from the overcrowded jail situation, as well as the backup of criminal cases currently docketed, there is to be scheduled a "Rocket Docket" for the entire week of October 12, 1998. Jailhouse cases only will be tried during that week with the oldest jail cases getting the priority. Eleven civil judges will handle the "Rocket Docket".

Initially, Judge McCormick, Judge Bahakel, Judge Hard, and Judge Garrett will each divide up the six hundred jailhouse defendants to be docketed for October 12th. Each judge will conduct a pre-trial one week before the October 12th docket. Many of the pre-trials will be done by telephone, if possible. The Attorney General will also lend prosecutors for the trial docket.

GBCDLA held an emergency meeting on Thursday, September 17, 1998 regarding this move. GBCDLA has voiced loud concerns over not being asked to participate in the planning process. Richard S. Jaffe, president of the GBCDLA, sent the following letter to Judge McCormick:

LETTER TO PRESIDING JUDGE REGARDING "ROCKET DOCKET"

September 15, 1998

Honorable Judge Mike McCormick
Presiding Judge - Jefferson County Criminal Judges
Criminal Justice Center
801 North 21st Street
Birmingham, AL 35263

RE: "Rocket Docket"

Dear Judge McCormick:

Pursuant to our recent conversation at which time you informed me of the October 12, 1998, "Rocket Docket", I have discussed the matter with various

members of the Greater Birmingham Criminal Defense Lawyers Association Executive Board of Directors. I have also received feedback from several members who have otherwise heard rumors about the docket. As a result of some of the very vocal and powerful concerns expressed to me as President of our organization, I have scheduled an emergency meeting with the Board of Directors for Thursday, September 17, 1998. Both the particulars of the upcoming docket and the consensus of the Board will be published prominently in our newsletter that will go out on the following day, Friday, September 18, 1998. I will also be more than happy to share those concerns with you, if you desire, at any time.

Preliminarily, the chief concerns being expressed to me are as follows:

1. Requisite notice commensurate with due process and the right to confront and compel witnesses/the ability to be adequately prepared.

2. Lack of any input from our organization as to the process.

3. The adequacy of the response to "jail overcrowding", etc.

Finally, I was told today by one of our Board members that there was supposedly a meeting to discuss this issue among the judges and that I, as President of our organization, was invited but failed to attend. For the record, I have never been invited to any meeting to discuss any issue since I have been President of the organization and were I invited, I most certainly would have attended.

In any event, thank you very much for your consideration of these matters, and I very much hope that we will be able to address these issues in a forum in which our voice can be heard and considered.

Very truly yours,

/s/

Richard S. Jaffe
As President of the GBCDLA

RSJ/mg

cc: Judge Richmond Pearson
Judge Alfred Bahakel
Judge James Garrett
Judge James Hard
Judge Wayne Thorn
Chief Deputy District Attorney Roger Brown
District Attorney David Barber
All GBCDLA Board Members

GBCDLA MEMBERSHIP DUES FOR 1998-1999 ARE DUE. PLEASE FORWARD DUES TO GBCDLA, P.O. BOX 370282, BIRMINGHAM, AL 35203.

DUES:

$25.00

PRESIDENT'S COLUMN

In my last column I wrote about the difficult times that challenge us as criminal defense lawyers. There is no better example of how tarnished an image we inhabit than the blow recently dealt us by the Alabama Supreme Court. For several years I have served on the Advisory Committee for Criminal Procedures promulgated by the Alabama Supreme Court. In the year of 1997, we adopted fifteen rules to be added to or amended to the current Alabama Rules of Criminal Procedure. The Alabama Supreme Court adopted fourteen out of the fifteen proposals submitted to them by our Committee. The Alabama Supreme Court unanimously rejected only one - the proposed Jencks Amendment regarding discovery. The proposed Jencks revision appears next to this article in the newsletter. Last week at our September meeting of 1998, I learned that the prosecutors led by our Chief Deputy District Attorney Roger Brown found out when the Alabama Supreme Court was meeting to decide to adopt the submitted proposed rules. For reasons probably not relevant to this article, neither the Rules Committee itself nor

our organization was given any notice that the prosecutors intended to make a presentation to the Supreme Court at this meeting. The District Attorney's Association sent its executive officer, Tom Sorrell, who without anyone to debate with, spoke forcefully against the Supreme Court adopting the Jencks proposal. It was then unanimously rejected by the Supreme Court of Alabama.

The Jencks Proposal, which the Committee adopted, would have led to both fair trials and less reversals. The sad fact is that the prosecutors are considerably more powerful as a political force and a moral force than we.

Neither the public nor our elected officials realized just how vital our role is and has always proven to be, as a protector and guarantor of individual freedoms. The axiom that absolute power absolutely corrupts is true in every context. Without constitutional guarantees, there would be no freedom and Government would become dangerously too powerful.

Within the last several weeks, I have received phone calls from various judges and other significant individuals within the criminal justice system. I have received these phone calls, not personally, but as President of this organization. In order to continue our presence and increase our influence, we must contribute our time and resources, and increase our membership.

The strength of our organization is just beginning.

Richard S. Jaffe

PROPOSED JENCKS REVISION

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II - CRIMINAL PROCEDURE
CHAPTER 223-WITNESSES AND EVIDENCE

Current through P.L. 105-22, approved 6-27-97

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a @strial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim
recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

GENERAL MEMBERSHIP MEETING

There will be a general membership meeting of the GBCDLA on Thursday, October 1, 1998 from 5:30-6:30 at the Redmont Hotel, 2101 5th Ave. N. All members are urged to attend to discuss concerns about the "rocket docket" and other issues.

MEMBERS SUCCESSES

Congratulations to Tommy Spina for his acquittal in a capital case this week.

Congratulations to Michael Shores for his reversal in the Alabama Court of Criminal Appeals in the Anderson case.

Please let us know about your recent successes or those of fellow GBCDLA members.

CLE SEMINAR
NOVEMBER 20, 1998

There will be a CLE seminar on November 20, 1998 from 1:30 p.m. until 4:30 p.m. at the Redmont Hotel, 2101 5th Ave. N. Specific topics to be announced.

NOTICE TO ATTORNEYS WHO REPRESENT CHILDREN

If you have a client who has been adjuded a Youthful Sex Offender or who has been declared a delinquent at Family Court, the status of that client may have changed by a recent change in the law.

Any Youthful Offender or Delinquent who has been charged with a sexual offense may be subject to new penalties to include Community Notification and other harsh and strict punishment with no hearing of any kind.

This law is being challenged. If you want to protect your client, there is an information kit that will be mailed to you at no cost. This kit will contain a copy of the Act, and forms that have been filed to obtain a stay of the punitive provisions of the Act.

If you would like such a kit, please contact:

Joe W. Morgan, Jr.
600 Robert Jemison Road
Suite B
Birmingham, AL 35209
(205) 945-8550
(205) 945-9005 (fax)
jowmorgan.com (e-mail)

NEWSFLASH

Our organization has maintained an ongoing dialogue informally with various members of the United States Attorney's Office as to our request that some system be implemented where discovery can occur at arraignment. The United States Attorney's Office for the Northern District of Alabama has been instrumental in getting the judges to adopt a local rule in Federal Court providing that certain discovery be handed to the Defendant's attorney at arraignment. If the attorney elects to accept the discovery, then the Rule 16 requirements of reciprocal discovery are automatically implemented by virtue of the acceptance. This procedure is now in place and adopted as a local rule. The arraigning judge explains the procedure prior to the calling of the docket. This should be a significant enhancement to the administration of justice in this area.

A RECENT RULING ON CHARACTER EVIDENCE

By Barry Alvis

I have been asked by our organization to warn our organizational members of a recent ruling which could affect those of us who do trial work. Bill Delgrosso and I recently had the pleasure of trying a consolidated capital case with Virginia Vin~~cent~~son and Bill Cole. This case involved a robbery/homicide in one of the alleys in the Elyton Village Housing Project. This case was tried before Mike McCormick. One of the very important issues in this case was exactly who was located in the alley where the shooting took place. ~~Certain~~ Some of the state's witnesses placed both Defendants in the alley, but the defense witnesses did not place either of the Defendants in the alley. Ms. Vin~~cent~~son's and Mr. Coles' client elected to take the witness stand and testify that he was not present in the alley and was in fact elsewhere with his mother who had testified previously. Don Cochran was trying the case for the District Attorney's office and in his rebuttal portion of his case elected to call the Probation Officer, who had done a standard background investigation on Ms. Vin~~cent~~son's and Mr. Coles' client, for the sole purpose of testifying that he would not believe their client under oath. At no point was there any testimony regarding the good character of their client, but Judge McCormick allowed the Probation Officer to testify that he would not believe this Defendant under oath. The sole basis for the allowance of this testimony was the fact that this Probation Officer had seen this young man on two occasions for thirty minutes each during a routine interview for application of a youthful offender. I guess, based upon this, a word of caution should now go out to those who are applying for youthful offender in cases where we know the case is going to proceed to trial that we may in fact be providing the State with an impeachment witness by applying for status as a youthful offender. This is just a word of caution to be aware of this potential ruling.

GRAND JURY REFORM MAY BE JUST A BREATH AWAY

By Casey Duncan

It seems that Ken Starr's prurient interests have inspired the first serious discussion of grand jury abuses on Capitol Hill in over a decade. And though the press has not paid much attention, Senator Dale Bumpers (D-AR) has made a personal crusade of such reform after seeing how the Whitewater inquiry treated a legion of his Arkansas constituents. In May, Bumpers introduced legislation which would allow grand jury witnesses to have their lawyers present during questioning, calls for stricter enforcement of grand jury secrecy, and requires prosecutors to disclose to the grand jury any exculpatory evidence. Bumpers' amendment to the Commerce/State/Justice appropriations bill, entitled the Grand Jury Due Process Act, would also entitle defendants to transcripts of the grand jury testimony of all witnesses who are called against him or her at trial. The amendment, co-sponsored by Sen. Orin Hatch (R-UT), failed by a vote of 41-59 on the floor in late July. Still, the strength of support for the amendment has led to its referral to the Federal Judicial Conference, composed of Supreme Court, Circuit Court, and District Court judges, who formulate policy with regard to the administration of federal courts. However, the Conference will limit its consideration of reforms to the issue of witnesses' right to counsel when testifying.

Hatch declared on the Senate floor on July 21 that "the current grand jury process is one-sided...unscrupulous prosecutors [who] can bring an indictment against almost anybody...because there is nobody in there to represent the rights of the accused." He also indicated that the Senate Judiciary Committee, which he chairs, would hold future hearings on the issue of reforms. As you may have seen in recent NACDL publications, there is a call to all members of the defense bar to help provide both the Senate Judiciary Committee and the House Appropriations Committee accounts of "horror stories" of those who have been called before the grand jury. Congressional proponents of the reforms need concrete examples of abuses when the hearings are held later this fall. Our membership should seize upon this opportunity to aid in the process of bringing about these meaningful and long overdue changes.

FALLOUT FROM SINGLETON: AN UPDATE

By Casey Duncan

Many thought U.S. v Singleton, 144 F.3d 1343 (10th Cir. 1998), the historic decision which outlawed federal prosecutors' practice of making deals with witnesses in exchange for testimony, would go nowhere. However, a federal judge in Miami has proven otherwise, despite the fact that Singleton was vacated and set for rehearing before the full 10th Circuit in November. On August 4, 1998, U.S. District Judge William J Zloch, a Reagan appointee, became the first federal judge to follow Singleton, applying its reasoning in barring three men from testifying and declaring the government can no longer promise sentencing leniency. U.S. v. Lowery, 63 Cr.L.Rep. 547 (BNA) (S.D.Fla., No. 97-368-CR). (Full text available at http://cl.bna.com/#0819). According to Judge Zloch, suppression of the testimony was the proper remedy. That same day, Zloch tossed out testimony in another case. U.S. v. Ward, (S.D.Fla., No. 98-6004).

For the moment, Judge Zloch seems to be alone in his decision to follow Singleton. Singleton's reasoning has been rejected by several other district courts. See, e.g., U.S. v. Arana, 63 Cr.L.Rep. 527 (BNA) (E.D.Mich. 1998); U.S. v. Eisehhardt, 63 Cr.L.Rep. 540 (BNA) (D.Md. 1998); and U.S. v. Mauney, 63 Cr.L.Rep. (BNA) (M.D.N.C. 1998). In Washington, at least three senators are clamoring to get the statute at issue in Singleton changed. Senators Patrick Leahy (D-VT), the ranking Democrat on the Senate Judiciary Committee, Herb Kohl (D-WI), and our own Jeff Sessions (R-AL) have all proposed exemptions for prosecutors from 18 U.S.C. § 201, the federal bribery statute. The DoJ is apparently remaining low-key about Singleton, reports the National Law Journal, "because they are working with Congress to pass the legislation."