

# **DEAD DOCKETING CRIMINAL CASES** **IN GEORGIA**

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“Dead-docketing has been characterized as a procedural device by which ‘the prosecution is postponed indefinitely but may be reinstated at any time at the pleasure of the court.’”<sup>1</sup> “Placing a case upon the dead docket certainly constitutes neither a dismissal nor a termination of the prosecution in the accused’s favor. A case is still pending which can be called for trial at the judge’s pleasure, or upon which the accused can make a demand for trial.”<sup>2</sup>

The dead docketing<sup>3</sup> of criminal cases in Georgia was first statutorily authorized by an 1883 statute which amended § 267(5) of the Georgia Code of 1882 to require superior court clerks to keep, in addition to the usual civil, criminal, and other dockets, “a docket of criminal cases, to be known as the dead docket, to which cases shall be transferred, at the discretion of the presiding judge, and which shall only be called at his pleasure ...”<sup>4</sup> The dead docketing provisions of this 1883 statute were subsequently codified in the 1895 and 1910 Georgia Penal Codes<sup>5</sup> and in the Georgia Code of 1933.<sup>6</sup> With certain changes, these provisions are now codified at OCGA § 15-6-61(a)(4)(B), which provides: “It is the duty of the clerk of superior court ... [t]o keep in the clerk’s office the following docket or books: [a] criminal docket ... The criminal docket shall contain ... entries of cases which are ordered dead docketed at the discretion of the presiding judge and which shall be called only at the judge’s pleasure. When a case is thus dead docketed, all witnesses who have been subpoenaed shall be released from further attendance until resubpoenaed.”<sup>7</sup> The current dead docketing statute thus differs from previous codified dead docketing statutory provisions in that (1) the clerk is no longer required to maintain a separate dead docket and

may enter dead docketed cases on the criminal docket; and (2) a case is now dead docketed not by being “transferred” to the dead docket by the judge, but by being “ordered dead docketed” by the judge.

Apart from OCGA § 15-6-61(a)(4)(B), the only other Georgia statutory provisions making reference to dead docketing are OCGA §§ 17-6-31(c) and 17-6-31(d)(1)(F), relating to the surrender of the principal and the release from liability of a surety on a bail bond.<sup>9</sup> OCGA § 17-6-31(c) provides that “[t]he principal shall ... be considered surrendered by plea of guilty or nolo contendere ... or if the principal is present in person when the jury or judge ... finds the principal guilty or if the judge dead docketed the case prior to entry of judgment and, upon such plea or finding of guilty or dead docketing, the surety shall be released from liability.” Similarly, OCGA § 17-6-31(d)(1)(F) provides that “the surety shall be released from liability if, prior to entry of judgment, there is ...[a] dead docket ...”

Although there are scores of Georgia appellate cases which make reference to the practice of dead docketing, in only handful of these cases (most of them in the Court of Appeals) is there any discussion of the rules and procedures applicable to dead docketing.

Judging from the reported cases, it appears that usually the dead docketing of a case does not occur until after there has been an indictment or accusation.<sup>9</sup> There are, however, some reported cases where, before indictment or accusation, an arrest warrant was dead docketed.<sup>10</sup> The Georgia Court of Appeals, although refusing to decide the lawfulness of the dead docketing of arrest warrants, has spoken of “the possible inappropriateness of placing a warrant (rather than an actual indictment) on the dead docket ...”<sup>11</sup>

A criminal case may be dead docketed by either a superior court or a state court,<sup>12</sup> at the request of either the prosecutor<sup>13</sup> or the defense attorney.<sup>14</sup> And, although there is no appellate court decision explicitly holding that a prosecutor must give the defendant notice of a motion to

dead docket filed by the state, it would appear that the prosecutor is statutorily required to do so.<sup>15</sup>

Because an order dead docketing a case after indictment or accusation is not a dismissal of the charges, such an order is not appealable under OCGA § 5-7-1(a), which permits prosecutors to appeal orders dismissing indictments or accusations.<sup>16</sup> For similar reasons, the dead docketing of a case apparently tolls the running of the statute of limitations.<sup>17</sup>

Nevertheless, “[t]he dead docket device may not be used to delay the trial over the defendant's objection.”<sup>18</sup> Thus, a defendant whose case has been dead docketed is entitled to demand a speedy trial,<sup>19</sup> and “the fact that a case is placed upon the dead docket does not affect the constitutional right to speedy trial.”<sup>20</sup> Furthermore, it is an abuse of discretion for a court to dead docket a case over the objection of the defendant.<sup>22</sup>

Interestingly, much of the discussion about the dead docketing of criminal cases is found in appellate decisions involving civil suits, typically claims for malicious prosecution. In order “[t]o recover in tort for either malicious prosecution or malicious arrest, the [plaintiff] ha[s] the burden of showing that the prior criminal proceeding, whatever its extent, ha[s] terminated in [plaintiff's] favor.”<sup>22</sup> In this regard, the appellate decisions make it abundantly clear that “[p]lacing a case on the dead docket does not constitute either a dismissal or termination of the prosecution in the accused's favor.”<sup>23</sup> It is therefore well-established that for as long as his criminal case remains dead docketed, the defendant therein is barred from recovering damages in an action for malicious prosecution or malicious arrest arising out of that criminal case.<sup>24</sup>

See the leading book of criminal forms in Georgia for three forms relating to the dead docketing of criminal cases in Georgia: (1) a Motion and Order to Place Case on Dead Docket,<sup>25</sup> (2) an Order of Court

Placing Case on Dead Docket,<sup>26</sup> and (3) a Motion and Order Removing Case From Dead Docket.<sup>27</sup>

### **Footnotes**

1. State v. Creel, 216 Ga. App. 394, 395, 454 S. E. 2d 804 (1995) (citing Newman v. State, 121 Ga. App. 692, 694, 175 S. E. 2d 144 (1970)). Accord: Beam v. State, 265 Ga. 853, 855 n. 3, 463 S. E. 2d 347 (1995).
2. State v. Creel, 216 Ga. App. 394, 395, 454 S. E. 2d 804 (1995) (citing McCord v. Jones, 168 Ga. App. 891, 892, 311 S. E. 2d 209 (1983), and Courtenay v. Randolph, 128 Ga. App. 581, 583, 188 S. E. 2d 396 (1972)). Accord: Beam v. State, 265 Ga. 853, 855 n. 3, 463 S. E. 2d 347 (1995).
3. See generally WILLIAM W. DANIEL, GEORGIA CRIMINAL TRIAL PRACTICE § 17-16 (2000) (examining the dead docketing of criminal cases).
4. Act of Sept. 25, 1883, § 1, 1882-83 Ga. Laws 55, 56. Prior to 1883 there was no statutory authorization for dead docketing criminal cases in Georgia. However, the Georgia Codes of 1863, 1868, 1873, and 1882 did provide that, in addition to other dockets, the superior court clerk was to keep a docket “in which must be entered all criminal cases which have been on the criminal docket for as much as five years without any existing arrest, and which must be inspected by the Court, at least once every year, that, if necessary, any case may be re-transferred to the criminal docket.” Ga. Code § 262(4) (1863); Ga. Code § 256(4) (1868); Ga. Code § 267(5) (1873); Ga. Code § 267(5) (1882). Furthermore, an 1876 statute provided that (1) it was lawful for the presiding superior court judge to strike from the docket any criminal case where there had been no appearance of the defendant and where the judge had good reason to believe there would be no appearance, and (2) when any case was so stricken from the docket, that case was to be immediately transferred to the docket for criminal cases which have remained on the docket for five years, and all subpoenaed witnesses were released from further attendance unless resubpoenaed. Act of Feb. 28, 1876, §§1-3,

1876 Ga. Laws 99, 100. The 1876 statute was codified in 1882. Ga. Code § 4710a (1882). The roots of the 1883 dead docketing statute thus appear to lie in Ga. Code § 262(4) (1863) and the 1876 statute; see also *Courtenay v. Randolph*, 125 Ga. App. 581, 582-83, 188 S. E. 2d 396 (1972) (examining provisions of Georgia law in reference to dead docketing since Ga. Penal Code §797 (1895)).

5. Ga. Penal Code § 797 (1895); Ga. Penal Code § 797 (1910).

6. Ga. Code § 24-2714(5)(7) (1933).

7. OCGA § 15-6-61(a)(4)(B). See *State v. Creel*, 216 Ga. App. 394, 395, 454 S. E. 2d 804 (1995) (OCGA § 15-6-61(a)(4)(B) is statutory authority for criminal dead dockets in superior courts). The provision in OCGA § 15-6-61(a)(4)(B) relating to the release of subpoenaed witnesses when a case is dead docketed was previously codified in Ga. Penal Code § 797 (1895); Ga. Penal Code § 797 (1910); and Ga. Code § 24-2714(5)(7). It appears to have originated in the Act of Feb. 28, 1876, § 3, 1876 Ga. Laws 99, 100.

8. OCGA § 17-6-31(c) originated in a 1992 statute, Act of May 4, 1992, § 1, 1992 Ga. Laws 2933, 2934, and OCGA § 17-6-31(d)(1)(F) originated in a 1987 statute, Act of Apr. 17, 1987, § 1, 1987 Ga. Laws 1342, 1343. See also Act of Apr. 21, 1997, § 2, 1997 Ga. Laws 973, 976.

9. See, e.g., *State v. Redding*, 274 Ga. 831, 561 S. E. 2d 79 (2002) (indictment); *State v. Creel*, 216 Ga. App. 394, 454 S. E. 2d 804 (1995) (accusation); *Webster v. City of East Point*, 164 Ga. App. 605, 294 S. E. 2d 588 (1982) (indictment); *State v. Colquitt*, 147 Ga. App. 627, 249 S. E. 2d 680 (1978) (accusation); *Underhill v. State*, 129 Ga. App. 65, 198 S. E. 2d 703 (1973) (indictment).

10. See, e.g., *Holsey v. Hind*, 189 Ga. App. 656, 377 S. E. 2d 200 (1988); *Watkins v. Laser-Print/Atlanta, Inc.*, 183 Ga. App. 172, 358 S. E. 2d 477 (1987); *McCord v. Jones*, 168 Ga. App. 891, 311 S. E. 2d 209 (1983).

11. *McCord v. Jones*, 168 Ga. App. 891, 892, 311 S. E. 2d 209 (1983).

12. See, e.g., *State v. Redding*, 274 Ga. 831, 561 S. E. 2d 79 (2002) (superior court); *State v. Creel*, 216 Ga. App. 394, 454 S. E. 2d 804 (1995) (state court). The authority of state court judges to dead docket

cases derives from OCGA § 15-7-41 (the minutes, records, and other books and files that are required by law to be kept for superior courts shall be kept for state courts). See *State v. Creel*, 216 Ga. App. 394, 395, 454 S. E. 2d 804 (1995) (OCGA § 15-7-41 is statutory authority for criminal dead dockets in state courts).

13. See, e.g., *Holsey v. Hind*, 189 Ga. App. 656, 377 S. E. 2d 200 (1988); *McCord v. Jones*, 168 Ga. App. 891, 311 S. E. 2d 209 (1983).

14. See, e.g., *State v. Colquitt*, 147 Ga. App. 627, 249 S. E. 2d 680 (1978).

15. In *Holsey v. Hind*, 189 Ga. App. 656, 377 S. E. 2d 200 (1988), the majority opinion declined to decide whether the prosecutor was under a statutory duty to serve the defendant with a copy of the prosecutor's motion and order dead docketing the case, but the three dissenting judges held that the prosecutor did have such a duty.

16. *State v. Creel*, 216 Ga. App. 394, 454 S. E. 2d 804 (1995). See also *State v. Serio*, 257 Ga. App. 369, 571 S. E. 2d 369 (2002); *State v. Colquitt*, 147 Ga. App. 627, 249 S. E. 2d 680 (1978). See Donald E. Wilkes, Jr., "Government Appeals in Criminal Cases in Georgia," *The Georgia Defender*, p. 1 (May 2002).

17. See *Underhill v. State*, 129 Ga. App. 65, 198 S. E. 2d 703 (1973).

18. *Underhill v. State*, 129 Ga. App. 65, 66, 198 S. E. 2d 703 (1973).

19. See, e.g., *Beam v. State*, 265 Ga. 853, 463 S. E. 2d 347 (1995); *State v. Creel*, 216 Ga. App. 394, 454 S. E. 2d 804 (1995); *McCord v. Jones*, 168 Ga. App. 891, 892, 311 S. E. 2d 209 (1983); *Courtenay v. Randolph*, 128 Ga. App. 581, 188 S. E. 2d 396 (1972).

20. *State v. Redding*, 274 Ga. 831, 833, 561 S. E. 2d 79 (2002).

21. *Newman v. State*, 121 Ga. App. 692, 175 S. E. 2d 144 (1970).

22. *McCord v. Jones*, 168 Ga. App. 891, 892, 311 S. E. 2d 209 (1983) (citations omitted). Accord: *Webster v. City of East Point*, 164 Ga. App. 605, 294 S. E. 2d 588 (1982); *Courtenay v. Randolph*, 125 Ga. App. 581, 188 S.E. 2d 396 (1972).

23. *Wilson v. State*, 240 Ga. App. 681, 682, 523 S. E. 2d 613 (1999) (footnote omitted). Accord: *Beam v. State*, 265 Ga. 853, 463 S. E. 2d 347 (1995); *State v. Creel*, 216 Ga. App. 394, 454 S. E. 2d 804 (1995); *McCord v. Jones*, 168 Ga. App. 891, 311 S. E. 2d 209 (1983); *Webster*

- v. City of East Point, 164 Ga. App. 605, 294 S. E. 2d 588 (1982); Courtenay v. Randolph, 125 Ga. App. 581, 188 S. E. 2d 396 (1972).
24. See, e.g., Watkins v. Laser-Print/Atlanta, Inc., 183 Ga. App. 172, 358 S.E. 2d 477 (1987); McCord v. Jones, 168 Ga. App. 891, 311 S. E. 2d 209 (1983); Webster v. City of East Point, 164 Ga. App. 605, 294 S. E. 2d 588 (1982); Courtenay v. Randolph, 125 Ga. App. 581, 188 S. E. 2d 396 (1972).
25. JOHN J. GOGER, DANIEL'S GEORGIA CRIMINAL TRIAL PRACTICE FORMS § 17-70 (5th ed. 2002).
26. Id. at § 17-71.
27. Id. at § 17-72.

## **CASELAW UPDATE**

**Through April 1, 2008**

Phillips v. State, 279 Ga. 704, 620 S.E.2d 367 (2005) (finding the defendant received sufficient notice, for due process purposes, that his case was being removed from trial court's administrative dead docket for retrial; because the issue was not raised below, it was not preserved for appellate review)

Fischer v. State, 286 Ga. App. 180, 651 S.E.2d 432 (2007) (finding the state negligent because of an unexplained delay where the case against a defendant was placed on the "dead docket" because the investigator in the case was on active duty in Iraq and not returning the case to the active docket for four years even though the investigator was only away for two years)

Serrate v. State, 268 Ga. App. 276, 601 S.E.2d 766 (2004) (assuming, without deciding, that the dead docketing of charges against a witness stemmed from a "deal" with the State, the prosecutor was not required to reveal this information about someone who did not end up testifying at defendant's trial)

Sapp v. State, 263 Ga. App. 122, 587 S.E.2d 267 (2003) (holding the trial court did not abuse its discretion in prohibiting defendant from cross-examining a witness regarding dead-docketed drug charges against the witness that bore no relation to witness's motivation for testifying against defendant)