

# The Guardian

The Newsletter of the Alabama Criminal Defense Lawyers Association

December 2005

## Part I - The Iraqi Criminal Justice System: One Attorney's Perspective

By Wilson Myers, Foley, AL



"An Iraqi courtroom conducting a criminal trial." Photo courtesy of Wilson Myers.

**Y**ou have the right to remain silent; you have the right to an attorney; if you cannot afford an attorney, one will be appointed to you;"

These rights, taken for granted in the western world, were non-existent in Iraq. In fact, for the 35 years of Saddam Hussein, most lawyers and judges never were exposed to modern legal thought. They lived inside of a "bubble" that did not allow free thought, speech, literature, the internet, satellite TV or books. It was this environment that the lawyers of the US led Coalitional Provisional Authority (CPA) found when they arrived into the world of post-Saddam Iraq.

Background (as reported in the *Report of the Iraq Judicial Assessment Team*) - The legal foundation of Iraq was built upon the civil law system as originally practiced in

France. The civil law roots of the Iraqi legal system come from a variety of sources including the Egyptian legal system. During the period of the British mandate in Iraq, changes were made to the substantive law but the procedural legislation remained based on civil law. After independence from the United Kingdom, Iraq retained and now uses a civil law system of jurisprudence. Family law matters are governed by Sharia for Muslims and by canon law for Christians.

The Iraqi justice system had long suffered under the totalitarian regime of Saddam Hussein and was in a state of chaos following the conclusion of major hostilities. The Ba'ath Party manipulated and controlled the legal system to serve its own ends. There were, however, some judges

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## NACDL President to Address Death Penalty Seminar

Barbara Bergman, President of the National Association of Criminal Defense Lawyers, will be the featured keynote at "Loosening the Death Belt X," ACDLA's Annual Death Penalty Seminar. Ms. Bergman will speak on "Reflections on the Future," at the event set for Friday, January 27 and Saturday, January 28, 2006 at Birmingham Embassy Suites Hotel.



Ms. Bergman is a professor of law at the University of New Mexico School of Law where she teaches courses on evidence, trial practice, criminal law, and criminal procedure. She is visiting this academic year at Catholic University's Columbus School of Law. Before turning to teaching fulltime in 1987, Barbara was a staff attorney at the Public Defender's Service in Washington, DC. She is also co-author of the *Every Trial Criminal Defense Resource Book*, as well as the fifteenth edition of *Wharton's Criminal Evidence* and the fourteenth edition of *Wharton's Criminal Procedure*. From 2000 to 2004, she worked on Terry Nichol's defense team in the Oklahoma state capital prosecution.

For more details on "Loosening the Death Belt X" turn to page 4 in this issue of *The Guardian* or go on-line to [www.acdla.org](http://www.acdla.org) and click on "seminars."

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# President's Column

By Joseph Van Heest, Montgomery, AL



ACDLA President  
Joe Van Heest

This column is *not* about overhead. Instead, I am writing this column to offer a challenge to all ACDLA members. President John F. Kennedy once asked "Ask not what your country can do for you, ask what you can do for your country."<sup>1</sup> Stealing this phrase, I am not going to talk about what ACDLA is doing for you. Rather, I am going to answer what you can do for ACDLA. By doing for ACDLA, I can state with confidence that you will also do for all of us. How far we, as an organization, can go is directly proportional to what we, as individuals, can, and are willing to, do for ACDLA.

## Participate:

We need everyone's participation and activity. Get yourself active. Get others active. We all know criminal defense lawyers in our area who are not members of ACDLA. Why aren't they? Is \$11/month too much to pay for all the benefits we provide? I surely don't think so. We need to get others active and to get ourselves active. Identify those criminal defense lawyers in your area and invite them. Ask them why they are not members. If the answer is because they don't have a membership application, be sure to get them an application. Direct them to the website. Let them know that we accept credit card payments for applications and for seminars. We have approximately 500 members. Why not 1000? If there are 1900 people earning monies for representation of the indigent, is there any reason every one of those persons should not be a member? There are also a number of criminal defense lawyers in this State who handle only retained cases. Why aren't they members? We all know that the price of membership is very cheap. At \$135 annually (the regular membership rate) we are only talking about \$11.25 per month. In other words, there is a large pool of potential members who we need to be courting to join our organization. So doubling our membership to 1000 members is not a pipe dream. It's merely an achievable goal that will take work and everyone's participation to achieve it.

We are a growing organization: growing in membership; and growing in clout in all areas of government. The governor's office and the legislature now know of our existence thanks to last season's legislative effort. The Courts also know of us. The Administrative Office of U.S. Courts has invited our participation in several committees including one on criminal pattern jury instructions, and the indigent defense commissions study group. Over the past several years, the appellate courts began inviting us

to file *amicus* briefs on issues. We are currently in the process of filing two *amicus* briefs on issues unrelated to indigent defense.

Come to a Board Meeting and participate. BOARD MEETINGS ARE OPEN TO ALL MEMBERS. Attend, participate, get involved.

## Write:

I've read the listserv. Many of you can write and aren't afraid to do so. Write an article for *The Guardian*. We publish six issues annually. It doesn't take too long to put something together for publication and the pay-off is immense. An article for *The Guardian* is free advertising to lawyers statewide. Your name gets out to the entire membership. You develop or further develop an area of expertise. Several times weekly, I see requests on the listserv for lawyers in specific geographic areas for referrals of cases that are too far away for the referring lawyer to handle. The recognition you get from writing an article can lead to receipt of business – remember, the stuff that pays the bills! If you think about the fact that *The Guardian* is read statewide by the same people who may be referring cases to you (including those not on the listserv) the publicity is free, and such an undertaking can do nothing but enhance your reputation among your peers.

Once you have written an article you might want to consider submitting it for publication in *The Alabama Lawyer*. That opens the door to a further referral pool: those lawyers who don't practice criminal law but need the names of criminal defense lawyers to refer cases. More free advertising. It can be less valuable than the yellow pages now can it?

Get involved with our *Amicus* Committee. We currently have two cases that will require filing of *amicus* briefs in the Alabama appellate courts. A well-written *amicus* brief can enhance your reputation with the appellate courts. That helps both you and ACDLA. Several years ago, the Alabama Court of Criminal Appeals began asking our organization to submit *amicus* briefs on issues they had concerns about. Bruce Gardner even had the opportunity to have oral argument before that Court and our side won the case. Another member, Jeremy Armstrong, will remember that case because he was, at the time, the assistant district attorney in Montgomery County District Attorney's office who the oral argument was dumped on for the State. All that experience tremendously enhances your resume, your practice, and your reputation.

## Serve:

Put in some extra time. Volunteer to speak at seminars. We are always looking for speakers for our summer seminar and Four Corners seminars. The materials you prepare for a seminar make you a bona fide "expert" in the area about which you are speaking. Also, if you prepare the materials, the State Bar provides 3 hours for every hour in which you present. Speak for the hour and you receive 3 more hours. That's 6 hours teaching time for 1 hour of

*Continued on page 6*

<sup>1</sup> I am not so presumptuous to in any way liken myself to President Kennedy. To do that is a risky proposition and opens oneself up to attack. "I knew Jack Kennedy, Jack Kennedy was a friend of mine, you're no Jack Kennedy." Lloyd Bentsen, 1988 Vice Presidential Debate.

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The ACDLA welcomes articles of interest from qualified professionals. Submit articles by email to:

annscooper@hotmail.com or on 3.5" diskettes. Typewritten double-spaced hard-copy should accompany any submission on disk. ACDLA will also consider for publication articles which have appeared elsewhere. ACDLA reserves the right to select and edit material for publication.

The views expressed by authors are not necessarily the views of the ACDLA nor is the printing of advertising meant to imply an endorsement of those services or products.

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**Guardian Deadlines**

January 15, 2006  
March 15, 2006  
May 15, 2006  
July 15, 2006  
September 15, 2006  
November 15, 2006

Send camera-ready copy with payment to the ACDLA office.

To order resources, send a note on your letterhead describing the specific item you would like to order with your check to:

ACDLA  
PO Box 1147  
Montgomery, AL 36101

Please notify the ACDLA office immediately of any changes in your contact information.

If you are not on the ACDLA email discussion group and you would like to be, please send your name and email address to  
annscooper@bellsouth.net

# FROM MY PERSPECTIVE

*By Ann S. Cooper, Executive Director*

## A TIME FOR THANK YOUS

### FOUR CORNERS SEMINARS – A SPECIAL THANK YOU

By the time you receive this publication, the Annual ACDLA Four Corners Seminars will be over. Thanks to your continued membership support, these events have grown from four locations to six. Each year around 150 members participate in these training opportunities. If you were unable to attend this year in Anniston, Florence and Tuscaloosa or in Montgomery, Mobile and Enterprise, we hope you will be able to do so in 2006. Simply mark your calendar for the first two Fridays in December. We had many wonderful volunteers and site coordinators who made this year's events possible: Anniston – Wayne Love & Randy Brooks; Florence – Melinda Morgan Austin & Jeff Austin; Tuscaloosa – Mike Upton; Enterprise – Paul Young; Montgomery – Jay Lewis; and in Mobile – John Beck and Gordon Armstrong. Thanks to all of you for helping make Four Corners happen in 2005!

### CONTINUED MEMBERSHIP IN ACDLA

I would also like to say a special thank you to all of you who have made the commitment to continue membership in ACDLA in 2006. Many of you have already paid your dues for the coming year or have called to say they will be paid by December 31. Without this financial support, the ACDLA office could not remain open and we could not continue to work on your behalf here in Montgomery. Every dollar is appreciated and used to its fullest to provide services and support for you!

### KUDOS TO THOSE SUPPORTING THE LEGISLATIVE PROGRAM TO DATE

Representing the needs of Alabama's criminal defense lawyers and the clients you serve costs money. Last year, in response to the overhead issue, an unexpected \$30,000 was transferred from our general operating account to provide leadership at the Statehouse, fund meeting expenses, print and mail notices to members, make copies of legislation and subscribe to a legislative monitoring service to help us track bills and meetings. This year, our meager budget will not permit us to fund our legislative effort at the same level and in the same way. Additional funds must be raised to contract for a part time lobbyist and pay for necessary administrative expenses. This year we face passage of the Indigent Defense Commission Bill.

To date approximately \$3,000 has been raised, but our long-range goal is \$30,000. Kudos to Bruce Gardner, Chairman of the Legislative Fundraising Committee for his efforts in making phone calls and soliciting support at the grassroots level for a 2006 program. Thank you is also due to the following members for their additional financial support to date: Wilson Myers, Phillip Price, Bryan Blackwell, William Willard, Paul Young, Jake Watson, William Dawson, Patrick Tuten, Pam Scott, Larry Morgan, David Vickers, Stephen Townes, Brian Smith, Sam Jovings, Michael Lipscomb, William King, Aimee Smith, Charles Centerfit Hart, John Beck, Brenda Dixon, Jeffrey Bramer, Dana Grimes, Michael Cornwell, Brent Gourley, Glenn C. Noe and Karen Benefield. Thanks for Bruce and his committee, we expect this list of names to grow.

### THANK YOU TO THE COMMITTEE CHAIRS

The work of ACDLA is done first by the respective association committees. From these committees come recommendations for program development to the Board of Directors during the year. Chairing and attending meetings takes hundreds of hours. Hats off to the continued commitment of the following Chairpersons and their respective committee members:

Melinda Morgan Austin – CLE Committee

Richard Jaffe & John Mays – Co-Chairs – DP Committee

*Continued on page 7*



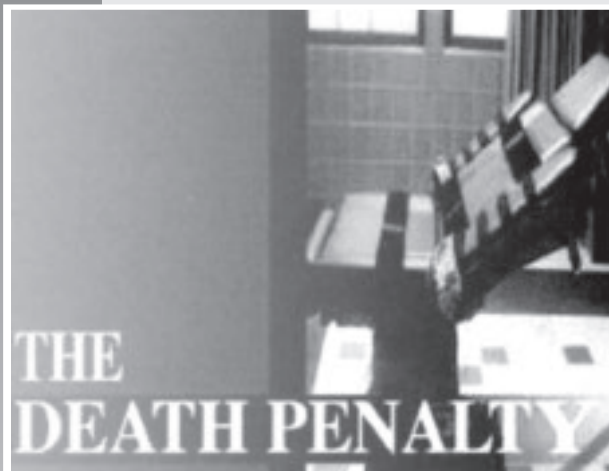
THE ALABAMA CRIMINAL  
DEFENSE LAWYERS  
ASSOCIATION

***“Loosening the  
Death Belt X:  
Tightening the Defense—  
One Life at a Time”***

A Death Penalty Seminar  
Co-Sponsored by the Cumberland  
School of Law, the University of  
Alabama School of Law and the  
American Bar Association Death  
Penalty Representation Project

Friday, January 27 and  
Saturday, January 28, 2006  
Embassy Suites Hotel, Birmingham, AL  
8 a.m. - 5 p.m. daily

12 MCLE Credit Hours  
(334) 272-0064 Conference Registration  
(205) 879-7400 Hotel



**“LOOSENING THE DEATH BELT X:  
TIGHTENING THE DEFENSE—  
ONE LIFE AT A TIME”**

*About the Seminar*

This seminar features some of the top criminal defense attorneys in the U.S. Southeast describing the life or death issues of capital casework. In this two-day event you will hear highly acclaimed death penalty lawyers talk about their experiences. Learn, first-hand, tried and true techniques with difficult clients. In addition, learn about juries—what motivates them and how they think.

Take away new insight on:

- Building the Winning Defense Team in a Capital Case
- Voir Dire: Selecting the Best Life Jurors
- Creative Use of Demonstrative Evidence
- ABA Standards – New Requirements
- A View from the Bench
- Integrating Themes and Theories
- The Role of Capital Lawyers in Assuring a Fair and Impartial Tribunal
- Instilling Residual Doubt to Save Lives
- Expert Assistance in Jury Selection
- Death Penalty Mitigation and Social Work

Registration is required, so fax, email or mail your registration today using the attached registration form or call Ann Cooper at 334/272-0064 for more information.

A room block is reserved for seminar participants at the Embassy Suites Hotel in Birmingham. Deadline for room registration is December 27, 2005. See the registration form for more details.

**AGENDA**

(Order of Speakers Subject to Change)

**Friday, January 27, 2006 – Delta and Magnolia Rooms**

- 8:50 a.m. Opening Comments and Welcome – Joseph Van Heest, President, ACDLA, Attorney, Montgomery, AL
- 9:00 a.m. “Recent Decisions in Capital Litigation,” – John Lentine, Sheffield, Sheffield & Lentine, Birmingham, AL
- 10:00 a.m. Break
- 10:15 a.m. “Building the Winning Team in a Capital Case,” – B. Michael Mears, Director, GA Public Defenders Standards Council, Atlanta, GA
- 11:15 a.m. “Voir Dire: Selecting the Best Life Jurors,” – William R. Blanchard, Blanchard Law Firm, Montgomery, AL
- 12:15 p.m. Lunch – On Your Own
- 1:30 p.m. “Creative Use of Demonstrative Evidence,” Michael Griffin, Forensic Psychologist, Psychology Department, The University of Alabama, Tuscaloosa, AL
- 2:30 p.m. “Expert Assistance in Jury Selection,” Joseph V. Guastafarro, Jury Consultant, Albuquerque, NM
- 3:30 p.m. Break
- 3:45 p.m. “ABA Standards – New Requirements,” – Derek Drennan, Jaffe, Strickland & Drennan, Birmingham, AL
- 4:45 p.m. Adjourn for Day

**Saturday, January 28, 2006 – Delta and Magnolia Rooms**

- 9:00 a.m. “Keynote Address” – Barbara E. Bergman, President, NACDL (National Association of Criminal Defense Lawyers) and Attorney, Albuquerque, NM
- 10:00 a.m. “A View from the Bench,” Judge Tommy Nail, Jefferson County Circuit Judge, Birmingham, AL
- 11:00 a.m. Break
- 11:15 a.m. Panel Discussion – “Integrating Themes and Theories: The Keys to Life,” John Robbins, Polson & Robbins, Birmingham, AL & Derek Drennan, Jaffe, Strickland & Drennan, Birmingham, AL
- 12:15 p.m. Lunch – On Your Own
- 1:30 p.m. “The Role of Capital Lawyers in Assuring a Fair and Impartial Tribunal in Light of the New Agenda,” Professor Penny J. White, University of Tennessee, College of Law, Knoxville, TN
- 2:30 p.m. “Instilling Residual Doubt to Save Lives,” William D. “Bill” Massey, Attorney, Massey & McClusky, Memphis, TN
- 3:30 p.m. Break
- 3:45 p.m. “Death Penalty Mitigation and Social Work,” Joanne J. Terrell, University of Alabama, School of Social Work, Tuscaloosa, AL
- 4:45 p.m. Wrap Up & Adjourn

*This course or a portion thereof is pending approval by the Mandatory Continuing Legal Education Commission of Alabama for a total of 12.0 hours’ credit, including 1.0 hours of Ethics.*

**Registration: \$275 for ACDLA Members by 12/27/05; \$325 after 12/27/05 and all non-members at the door.**

**Hotel Accommodations: Embassy Suites Hotel, 2300 Woodcrest Place, Birmingham, AL 35209. 1-205-879-7400**

**Ask for DP Rate of \$129 Single or Double. Room block will be dropped after 12/27/05.**

**REGISTRATION FORM**

Name: \_\_\_\_\_

Firm: \_\_\_\_\_

Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Fax: \_\_\_\_\_

E-Mail: \_\_\_\_\_

All seminar materials will be in CD-Rom format. If you would like printed handout materials, there is an additional charge of \$35 and these must be ordered in advance below.

<b>CHECK ALL THAT APPLY:</b>	<b>By 12/27</b>	<b>After 12/27</b>
<input type="checkbox"/> Early Registration – 2006 ACDLA members	\$275.00	\$325.00
<input type="checkbox"/> Non-Members at the Door	—	\$325.00
<input type="checkbox"/> Lifetime Members	N/C	N/C
<input type="checkbox"/> Print Materials (Optional and Additional)		\$35.00
	Total:	_____

\*Does not include dues.

**METHOD OF PAYMENT**

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No Refunds after January 1, 2006. Substitutions accepted.

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Email: annscooper@bellsouth.net    Phone: 334-272-0064

Fax this form to: 1-866-665-7522

Mail with payment to: ACDLA, P.O. Box 1147, Montgomery, AL 36101

## PRESIDENT'S COLUMN

(Continued from page 2)

CLE. There's a financial benefit to speaking at the summer seminar as well: we provide hotel expenses for our summer seminar speakers.

Service means speaking and educating people well beyond our own seminars. Speak to high school students. Educate the public. Speak to church members. Give time, money, and blood sweat and tears. You're doing that any way, but you can get more than you realize from your service. This past week I worked with a group of high school juniors and seniors who are preparing for a mock criminal trial. The group was broken into the prosecution and the defense. The defense consisted of only four students while the prosecution had three times that many. It's not popular to be the defense. We know that, and we've known it since the first *Law and Order* came on the air fourteen years ago. But if the students see our own enthusiasm for what we do, and for whom we are doing it, our enthusiasm becomes contagious. And our public image will begin to change.

Another example of service, one that will not put money in the lawyers' pockets, but which is absolutely worthy of mention, involves three of our own members. Melinda Morgan Austin, Jeff Austin, and Joe Carroll Daniel, left the hinterland of Northwest Alabama several weeks ago and spent several days on the Mississippi Gulf Coast working with victims of Hurricane Katrina. They did it without fanfare, and were not seeking publicity. I name them only because they are a shining example of what we all ought to aspire to be as citizens. I'll bet there were some surprised people to find out there were criminal defense lawyers providing time and money for disaster relief. I know I was not surprised at all. I would also bet that service was as gratifying as the work they do day in and day out.

### Contribute:

Not only does ACDLA benefit from your time and energy, we also, I am sorry to say, need your money. We now have a dire need for funds for our legislative program. On November 1, 2005, I sent a letter to all members requesting money for our legislative program. A copy of the letter has been reproduced in this issue of *The Guardian*. In order for us to develop the legislative presence we kicked off less than one year ago, we will need money. Last year, when we were put in the position of having to hire a lobbyist within 10 days of the February 1, 2005 Attorney General's opinion on overhead (I thought I wasn't going to talk about overhead – like I could avoid it completely) we had to dig deep into our reserve. There is no reserve left. With a full-time executive director and three major seminar programs annually, our budget, which comes virtually entirely from members' dues, is fully accounted for. We cannot engage in any further legislative program without contributions from the members.

After we prevailed at the trial court in the overhead lawsuit (of which I believe ACDLA's contribution was substantial) I heard people saying they would happily give money to ACDLA and to the legislative function. When the case was appealed (by both sides), I heard others say not one dime.... and that would be a tragedy. I know money is tight for the criminal defense bar.

I'm in this profession with the rest of you. And I've only been in private practice again for less than six months. It's rough going – no doubt about that.

The bottom line is this: Without a fully funded legislative presence this year, the legislature will take advantage of our absence and it will not be good for us or our clients. However, \$120.00, the value of just three out-of-court hours of appointed work (often less than one hour of retained work) donated to ACDLA's legislative fund, by *each* of our members, will fully fund our project. We need the money with your renewal and we need all of that as soon as possible. The legislative session begins in January. We need to be prepared, and to have a lobbyist on the payroll. But we need all of us to contribute to make it work.

Finally, I would like to try to dispel a perception that I am sure some members of the organization have about the organization and its Board – that it is clubby and a clique. ACDLA represents all of its members. ACDLA, like any other organization, is a group of diverse individuals: diverse in background and past experiences; diverse in specialized skills; diverse in political leanings; diverse in ideas and approaches to the practice of law. Our Board is no different. The Board is not a club, and it is not a clique. The people on the Board travel long distances to attend meetings several times each year and do not get reimbursed for their time or travel. They pay for their own attendance and hotel at seminars (unless they are speakers). And they are expected to attend seminars at their own expenses. They do it because of their deep belief in what we are all trying to do. Their beliefs and passion for criminal defense is not unlike yours. This year's board is vastly different from last year's. Those new members can tell you it's not a closed organization or a club. They have been very welcome and have hit the ground running. Come attend a Board meeting and watch this group in action. Participate as well. Last month, member Bill Broome attended because he happened to be in Montgomery for a Board of Bar Commissioners meeting earlier that day. He came just to report the happenings of that meeting to our Board, but was welcomed to stay and participate, and he did just that. We were lucky to have his insights and his participation, and I think he got something out of it as well.

Our Board is often comprised of people who have gotten involved in committee work as well. Our Legislative Committee is both large and active. On November 18, 2005, after this article was submitted, we had another large turnout for our Legislative Committee meeting. These are the people who are likely to be our future Board members ... that is, if we can rope them into even greater involvement than they are presently engaged. I, personally, spent two years co-chairing the *Amicus* Committee in 1996 and 1997 before I became a member of this Board.

In conclusion, ACDLA offers a lot more than most of its members probably realize. I know that my experiences in ACDLA have greatly enhanced my practice over the past ten years. If you are looking to grow your practice and your reputation as well as your over all experiences as a lawyer, (and who isn't), this organization allows many opportunities which pay off professionally and personally, financially and spiritually. ●

Joe

[jpvaneestllc@bellsouth.net](mailto:jpvaneestllc@bellsouth.net)



## PLEASE SUPPORT YOUR ORGANIZATION – DUES AND A 2006 LEGISLATIVE PROGRAM

Date: November 1, 2005  
 To: ACDLA Membership  
 From: Joseph P. Van Heest, President

Dear ACDLA Member:

**OUR BATTLE CONTINUES:** Since last February, ACDLA has been working diligently to resolve the overhead crisis as quickly as possible. We accumulated expenses in this battle for which we neither planned nor budgeted. We hired a contract lobbyist and incurred additional printing, copying and meeting expenses. These unbudgeted expenses totaled approximately \$30,000.00. Ours was a bare bones legislative budget and the money came from our general operating budget: the monies used to keep ACDLA up and running each month, including paying the salary of a full-time Executive Director. There is no money in the operating budget for future legislative efforts.

Because we could not have anticipated the February 1, 2005 A.G. Opinion and the resulting need to hire a lobbyist one week later, we now have NO FUNDS for a 2006 legislative program. However, our need for such a program is more critical now than ever before. On January 10, 2006 we expect to the introduction of legislation which will affect state-wide the indigent defense system. We must work with the legislature to assure that this legislation benefits, rather than hurts, the criminal defense bar and its clients. This requires proper financial support.

**WHAT YOU CAN DO TO HELP:** I encourage you to renew your membership as soon as possible so that we can keep the cash flow needed to stay operational. On the back of this year's dues statement is a request for a voluntary contribution to fund our 2006 legislative program. This is a call for extra monies to support a continued legislative effort. Without your support, we cannot work to assure that your voices will be heard in Montgomery and that the basic constitutional right of our clients for fair and adequate representation remains foremost in the minds of lawmakers.

Please contribute generously to our legislative effort this year and return your dues payments and contributions as soon as you can. Consider that \$120 annually is only ten dollars monthly or three out-of-court hours of appointed work. We thank you for your continued support. Should you have questions concerning this request for help, feel free to contact me at 334-263-3551 or by email to [jpvanheestllc@bellsouth.net](mailto:jpvanheestllc@bellsouth.net)

Sincerely,

Joseph P. Van Heest, President

## FROM MY PERSPECTIVE

(Continued from page 3)

Bruce Gardner, Al Pennington & Kathryn King – Co-Chairs – Amicus Committee

Bill Blanchard – Legislative Committee

Kesa Johnston – Publications Committee

Joe Van Heest – Executive Committee

### THANK YOU TO THE ACDLA BOARD

Despite soaring gas prices and time in short supply, your Board of Directors made valuable “in kind” contributions to the work of ACDLA this year. Most drove great distances to travel to bimonthly meetings in Montgomery. None receive reimbursement for the cost of these expenses. Serving you for 2005-2006:

Joseph Van Heest – Montgomery – President

Jim Roberts – Tuscaloosa – Immediate Past President

Bruce Gardner – Huntsville – Next Immediate Past Pres.

Melinda Morgan Austin – Florence – President Elect

Bill Blanchard – Montgomery – Vice President

Richard Keith – Montgomery – Secretary

Kathryn King – Cullman – Treasurer

Patrick Tuten – Huntsville – District I VP

Randy Brooks – Anniston – District II VP

Don Colee – Birmingham – District II VP

Jeff Duffey – Montgomery – District III VP

Gordon Armstrong – Mobile – District IV VP

John Beck – Mobile – District IV VP

Paul Young – Enterprise – District V VP

Mike Upton – Tuscaloosa – District VI VP

Carlos Williams – Mobile – Public Defender Rep.

### COMING UP NEXT

On January 27 and 28, 2006, ACDLA will host its annual death penalty seminar, “Loosening the Death Belt X.” This seminar will feature 12 CLEs and participants will hear 12 of the country's top capital case defenders tell how they save lives. If you are involved in a capital case or expect to be soon, you can't afford to miss this unique training opportunity. For details about registration and hotel accommodations, go on-line to [www.acdla.org](http://www.acdla.org) and click on “Seminars.” Click again on the DP Seminar brochure.

2005 was a year of struggle and accomplishment. I thank each and every member for your continued support as together we strive to make Alabama a better place for us all. ●

Ann Cooper

[anncooper@bellsouth.net](mailto:anncooper@bellsouth.net) / (334)272-0064

# A Primer on Effective “Discovery” in Criminal Cases or You Can’t Always Get What You Want...

*(but if you try sometimes, you just might find, you’ll get what you need.)*

*By John Beck, Mobile, AL*

## **INTRODUCTION**

The purpose of discovery is nicely defined in the rules. “(It) is to allow a broad search of the facts, the names of the witnesses, or any other matters which may aid a party in the presentation of his case.”

## **IN YOUR DREAMS!**

At least if you find yourself practicing criminal defense. Thanks to the forward-thinking committee members responsible for the 1973 comments to Rule 26 of the Alabama Rules of Civil Procedure, this common-sense definition is the reality that civil lawyers enjoy on a daily basis. And why shouldn’t they? Fighting over important things such as money and custody clearly justify a more meaningful “search for the truth” than such mundane matters like the freedom of a citizen accused.

The current sad state of the attitude towards the right to criminal discovery can be traced back to the English Courts typified with such holdings as, “(allowing) a person accused of a criminal offense to inspect government-held documents before the trial ‘would subvert the whole system of criminal law.’ King v. Holland, 100 Eng. Rep. 1248 (K.B. 1792).

Unfortunately, things haven’t changed a whole lot in the past 200 years.

Today, the reviewing courts in Alabama go to great lengths to remind us every five or six years that “there is no constitutional right to discovery in a criminal case...” Deloach v. State, 356 So. 2d 222 (Ala. Crim. App. 1977). The latest “reminder” from the Court of Criminal Appeals states:

“A defendant’s right to discovery exculpatory evidence does not include the unsupervised authority to search through the State’s files. Although the eye of an advocate may be helpful to a defendant in ferreting out information,...this Court has never held...that a defendant alone may make the determination as to

the materiality of the information. Settled practice is to the contrary. In the typical case where defendant makes only a general request for exculpatory material ...**it is the State that decides which information must be disclosed.** Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court’s attention, the prosecutor’s decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State’s files to argue relevance (*There is no general constitutional right to discovery in a criminal case*) (emphasis added).

We are instructed that we must rely on a prosecutor’s eye (and honesty) to turn over exculpatory evidence. Unfortunately a defense attorney’s definition of what qualifies as exculpatory is likely to be miles apart from the prosecutor’s view.

A small step in the right direction came with the Alabama Rules of Criminal Procedure and Rule 16. Unfortunately, this rule falls woefully short of authorizing defense attorneys the right to discover things that are truly needed to see that the ends of justice are accomplished. Additionally, far too many defense attorneys rely solely on this rule as the only means available to conduct a meaningful investigation into their cases. The key concept is a *meaningful investigation*; **the discovery process should only be viewed as a minute portion of any lawyer’s investigation.**

## **RULE 16**

A summary of Rule 16 shows that the State or City is required to turn over the following evidence:

All written or recorded statements made by the Defendant and co-defendants or accomplices to any law enforcement officer the existence of which is known to the prosecutor.

## A Primer on Effective “Discovery”

*Continued*

All oral statements made by the Defendant and co-defendants or accomplices to law enforcement that the prosecutor intends to introduce.

Documents and tangible objects that are material to the preparation of the Defendant’s defense, are intended for use at trial, or were obtained from or belong to the Defendant.

Results and reports of physical and mental examinations or scientific tests and experiments.

At a minimum, a motion for discovery patterned after Rule 16 should be filed in **every case**. The purpose is two-fold. First, the State is required to turn over the above-mentioned items. Second, the State will be prevented from using evidence that it did not turn over in violation of the rule.

How many times have we seen a case in Municipal Court (such as DUI) where the prosecution essentially proves their case with one last question to the police officer?

Q: Did the Defendant say anything about how much he had to drink?

A: Yes sir, he said he knew he shouldn’t have been driving in his condition but he asked me if I could follow him home since he was almost to his driveway.”

### **OUCH!**

A Rule 16 motion should prevent these surprises with a simple objection:

“Your Honor, I filed a motion for discovery which specifically asked the prosecutor to turn over any statements attributable to my client that were intended for use at trial. This statement was not provided to me and I ask that it be stricken from the record.”

A favorite response of prosecutors goes something like this:

“Your Honor, I was not aware of this statement before

trial. In fact, I was not aware of it until the officer answered my question.”

This excuse can be easily and effectively defeated by citing the imputed knowledge rule found in Ex Parte Hunter, 777 So. 2d 60 (Ala. 2000), “...Alabama law imputes to a prosecutor knowledge of the information supplied by an investigating officer’s testimony.”

Another mandatory inclusion in a standard Rule 16 motion must be a request for 404(b) evidence. Apart from a confession, prior bad acts can be the most devastating evidence to your client’s case and the most difficult for which to make an in-trial adjustment. But remember, production of Rule 404(b) evidence is only required if you ask for it first! Simply adding the following to your discovery motion can save you from a lot of heartache:

- To produce and permit the Defendant to inspect all evidence of other crimes, wrongs, or acts attributable to the Defendant and intended for use at trial for any purpose.

Nothing in the Rules requires that 404(b) evidence be requested separately with its own motion or that title “404(b)” specifically appear in the request.

### **GOING BEYOND RULE 16**

While Rule 16 is the “floor”, there is no “ceiling” for what we can obtain through an effective motion for discovery. Remembering that exceptional cases require exceptional discovery we should always seek as much information from the State about their cases. Don’t be lulled into complacency by the “open file” policy in some jurisdictions. There may be additional information in the State’s possession that is not necessarily in the State’s file. It should be self-evident that the State’s file contains only the information that is designed to aid *their case*, not yours!

When we seek to go beyond the floor of Rule 16, we must be ready to remind our judges that “the extent of discovery is within the discretion of the trial court.” Wilson v. State, 777 So. 2d 856. It is for this reason that many judges will refuse a “boilerplate” omnibus motions for discovery that goes beyond the structure of Rule 16.

*Continued on page 10*

## A Primer on Effective “Discovery”

*Continued from page 11*

Additional motions for discovery must be well-conceived and based on the necessities of each individual case. It is far more likely that you will receive a favorable ruling on your expanded discovery motion when you can give cogent and logical reasons for the relevance of each particular item that is requested.

### THE SUBPOENA DUCES TECUM

Rarely used and greatly misunderstood, the subpoena duces tecum can be a most effective tool throughout the investigative process. A subpoena should be sought when items of evidentiary value are identified as being in the custody of another individual or agency that is outside of the State’s control. The Alabama Court of Criminal Appeals has given us guidance on this subject in the case of State v. Reynolds, 819 So. 2d 72 (Ala. Crim. App. 1999). This case, interpreting Rule 17.3, stands for the following propositions:

1. The **only** time that a subpoena duces tecum should be quashed is when “their production would be ‘unreasonable or oppressive,’ **but not otherwise**.”
2. The court may modify the subpoena to prevent unreasonableness.
3. It is not a substitute for the criminal discovery process (meaning that the subpoena duces tecum is not appropriately used to gather State-held items).
4. The application for a Subpoena Duces Tecum should include the following four statements in addition to a concise statement of relevance:

- (1) that the documents are evidentiary and relevant;
- (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;
- (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and

- (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'"

### BRADY, JENCKS, AND PATE

The constitutional due process protections of these cases should oftentimes trigger appropriate motions from the criminal defense attorney.

In the watershed case of Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held, notwithstanding prosecutorial good faith, that the suppression of favorable evidence to the accused violates due process. This applies to the guilt phase and the punishment phase of the trial. A motion requiring the prosecution to disclose all Brady material should always be filed.

Unlike what we are accustomed to in Federal Court, Jencks v. has not been codified in the State of Alabama. However, the case of Ex parte Pate, 415 So. 2d 1140 very nearly follows the requirements of Jencks with one exception. Instead of being required to turn over to the Defendant any statements made by a testifying witness prior to cross-examination, the court must conduct an in-camera review of such statements and turn over to the defense any Brady material.

Most recently, in Ex Parte Morrow, No. 1021059 (Ala. 04/09/2004) the Alabama Supreme Court held:

Ex parte Pate, on which we relied in our opinion in Ex parte Key, established a two-step process for determining when a trial court should conduct an in camera inspection. A defendant must first lay a predicate for an in camera inspection by providing evidence that a statement exists, then the trial court determines, during an in camera inspection, "(1) whether the witness's statement differed in any respect from the witness's testimony at trial, and (2) whether the statement requested was of such a nature that without it the defendant's trial would be fundamentally unfair." Ex parte Key, \_\_\_ So. 2d at \_\_\_ (citing Ex parte Pate, 415 So. 2d at 1144). In Ex parte Key we also reaffirmed that this Court in Ex parte Pate adopted the "test described by the Supreme Court of the United States in Palermo v. United States, 360 U.S. 343 (1959)," \_\_\_ So. 2d at \_\_\_, and that "the threshold for verification sufficient

## A Primer on Effective “Discovery”

*Continued*

to require an in camera inspection is quite low.” \_\_\_\_  
So. 2d at \_\_\_\_.

### **“DEPOSITIONS”**

Because the Alabama Rules of Criminal Procedure do not authorize true depositions except under extraordinary circumstances, the criminal defense attorney must make use of every available resource to go a hold of prior sworn testimony. There is nothing more powerful than dismantling a prosecution witness with prior inconsistent statements in front of a jury. Additionally, the development of a cogent cross-examination without prior statements can be very difficult. Every effort should be made to get as many sworn statements as possible.

**Preliminary Hearings.** Towards that end, preliminary hearings should rarely (if ever) be waived. Because preliminary hearings are held in the District Court where there is no record, a private court reporter should always be hired or a tape recorder utilized with permission of the court. It is the one of the few opportunities we have to get testimony with no risk to our client’s freedom or his case. The prosecution witnesses are typically unrehearsed and unpolished. Key prosecution witnesses should be subpoenaed and made to testify.

**Parallel Civil Proceedings.** Oftentimes civil proceedings revolve around the same issues that are present in a criminal case. A limited cooperative effort between defense counsel and the civil lawyer most closely aligned with the Defendant can bear fruit. This situation can open up a variety of discovery tools that are otherwise unavailable. A word of caution, however: Get started early! Frequently the civil cases are stayed until the criminal case is completed. Charges of child abuse and domes-

tic abuse oftentimes find their genesis in the context of a divorce, custody dispute, or a Protection From Abuse proceeding. Cooperative discovery can yield very useful information in these cases.

**District Court and Municipal Court.** While in many cases a bench trial may feel like an act of futility, it can be a wonderfully useful tool in gathering testimony for use later on in a trial de novo. Like the preliminary hearing, a court reporter should always be employed in every case where there is even a slight chance that it will need to be tried. Rarely should a lawyer simply “stipulate to a prima facie case” unless there is an expectation of something tangible to be given in return.

### **CLOSING**

The greatest resource for “discovery” is usually our clients. Take the time to talk at length with them. It may be frustrating and it may be time consuming, but it is an absolute necessity to find many of the hidden “silver bullets” that will change the result of a case. Go to the scene! Always! Physical impossibilities posited by prosecution witnesses often become manifest only with a visit to the scene. Your client’s recollection is also usually much better at the scene in contrast to an unfamiliar lawyer’s office.

Effective discovery and investigation leads to knowledge. And knowledge leads to confidence, the most valuable commodity available to a criminal defense lawyer. Confidence in his or her abilities to try any case. Confidence that he has done everything possible to prepare his case before any trial. Confidence that is shared by her client that the lawyer will put her in the best possible posture to get the best possible result. ●

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## Part I - The Iraqi Criminal Justice System: One Attorney's Perspective

*Continued from page 1*

who resisted Ba'ath party control and were imprisoned by the regime. However, the majority of the judiciary was corrupted by the system of Ba'ath party "telephone justice" and endemic bribery. Furthermore, the judiciary regularly relied upon confessions obtained through torture. Indeed, the criminal procedure code in practice sanctioned torture as a consequence of Article 218, which allows coerced confessions to be admitted if supported by other evidence. In this regard, the provisions of the Criminal Procedure code did not clearly provide for the right of an accused person to remain silent.

The court system was plagued not only by bribery, but by excessive filing fees that, along with the endemic bribery, impaired the effective administration of Justice. Thus, the fairness of the judicial system was impaired not only by the actions of the Ba'ath party but by the culture of corruption that permeated the entire system. This corruption existed independently of the Ba'ath party and was perpetuated, in part, by the low salaries paid to judges and prosecutors. Although the CPA fiscal authority raised the salary of certain lower level judges, it lowered the salary of higher level judges.

The Iraqi judicial system was marginalized by several actions undertaken by Saddam Hussein's rule. First, the regime created a variety of special security courts that heard cases involving state security. These were courts in name only and were nothing but tools of the dictatorship. These courts were immediately abolished by the CPA. Secondly, the former Iraqi government encouraged the use of tribal courts in order to garner support for the regime from the tribal leaders. This action had the effect of diverting cases from the judicial system to these tribal courts. Although tribal courts existed prior to the Hussein era, their influence and power were greatly



"Wilson Myers (far right) with three other primary instructors for judges' training." *Photo courtesy of Wilson Myers.*

increased by Hussein for his own political ends. The tribal courts still play a significant role in adjudicating disputes.

One of the greatest challenges now facing Iraq is that the former regime left a festering legacy of property disputes that poses a significant threat to the overall stability in Iraq. These disputes center around two actions taken by the prior regime. In the north, an area with significant Kurdish population, the regime forced Kurds out of their homes and off their property, replacing them with persons of Arab ancestry. Subsequently, the Arab property owners sold the property originally given to them by the regime to other persons who

may not have had knowledge of the original improper removal of the Kurdish property owner. Thus, today there are conflicting claims to significant portions of the property with multiple claimants all having apparently good title. In the south, an area with a majority Shiite population, the Ba'ath party followed a similar tactic. Property belonging to Shiites was taken and given to Ba'ath party members. Some of those party members then sold their property to others who may not have been aware of the originally tainted transaction. Consequently, there are conflicting property claims similar to those in the north. These property disputes are major flashpoints that threaten the overall stability of the country.

After the cessation of major hostilities, Ba'athist rule was replaced by anarchy and the majority of the court buildings throughout the country were looted and severely damaged. Although the security situation has improved, there is still a grave and imminent danger that mob violence will erupt and destroy court buildings. Thus, both the legal and physical foundations of the Iraqi legal system are in disarray.

Within this environment, I arrived in Iraq to assist in the training of lawyers of judges. ●

# CAPITAL CORNER

*By John E. Mays, Decatur, Alabama*

## THE FUTURE OF ALABAMA'S DEATH PENALTY SEMINAR

Two major events have occurred since last year's death penalty conference. The first occurred when the Alabama Circuit Judges Association adopted as a model the American Bar Association Guidelines for the Appointment of Defense Counsel in Death Penalty Cases. The resolution signed by the Honorable Malcom B. Street, President, stated in part:

However, as to Guidelines 5.1 and 8.1 which apply to the qualification and experience of defense counsel appointed in capital cases these recommendations would be adhered to as closely as is practical.

These ABA standards deal with the qualifications of attorneys who are appointed to handle capital cases. Two important qualifications are that a lead counsel have assisted in a previous capital trial as second chair and that any attorney appointed in a capital case have attended a twelve hour seminar at least every other year during the time the lawyer is available for appointment in capital cases.

In compliance with these ABA standards ACDLA is sending a list every year to the Alabama Circuit Judge's Association of all attendees at our annual death penalty conference. This way Alabama's circuit

judges will have a current list of all attorneys in the state who meet the ABA standards. The standards recommend attendance at a death penalty conference every other year. Yet, no field of criminal law changes more frequently nor more drastically than capital litigation. A capital litigator can never tell when some change or innovative concept might help to save a client's life.

Alabama's death penalty seminar keeps attorneys interested in the trial of capital cases abreast of all changes in the law and any new concepts which have been effective in capital defense. Our program is becoming one of the most credible and useful in the country. All of our speakers are experienced and effective capital litigators.

The second major event occurring since our last death penalty seminar comes from the US Supreme Court. This is the case of *Rompilla v. Beard* 125 S.Ct. 2456 (2005). This case had some important dicta. These ABA standards were not adopted during *Rompilla's* trial but were promulgated and adopted during the appeal process. For this reason reference to these standards is found in a footnote to the opinion (footnote 7). These guidelines were adopted in that opinion:

... as guidelines to determine what is reasonable.

In the future our annual death penalty seminar will become something nigh to a requirement for attorneys appointed in capital cases. If these recommendations are a standard for capital litigators then it follows that attendance at a 12-hour seminar every other year on death penalty law will become a requirement for appointment in these cases.

It is because of ACDLA's commitment to comply with the ABA's Guidelines for the Appointment of Defense Counsel in Death Penalty Cases that the ABA provides them with a yearly grant to assist with putting on the seminar.

As you can see from this publication we have substantially lowered the cost of attending our seminar this year. We have done this because of overhead issues for attorneys who have the dedication to take appointed cases. Nearly all capital litigators are appointed in capital cases. A lower seminar cost is often the difference between attending or not attending a seminar. The Death Penalty Assistance Committee of ACDLA hopes, by lowering seminar costs, to reach the largest number of lawyers for the lowest cost.

Please make plans to attend. The most effective way for a lawyer to make a difference about the death penalty is to "Save one life at time."

## MARK YOUR CALENDAR:

### ACDLA's Annual Death Penalty Seminar

***"Loosening the Death Belt X: Tightening the Defense – One Life at a Time"***

**January 27 & 28, 2006 – Embassy Suites Hotel, Birmingham, AL**

Deadline for hotel – December 27

Ask for DP rate of \$129 single or double, includes full breakfast.

Call 1-205-879-7400 for reservations.

Seminar registration details available at [www.acdla.org](http://www.acdla.org) or call 1-334-272-0064



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**Important Note:** ACDLA is a 501(c)(6) non-profit organization. Approximately 20 percent of these dues ARE NOT tax deductible as business expenses because they are related to lobbying & political expenses.

**Check membership category above. Complete this form and fax it to: (334) 277-2927.**

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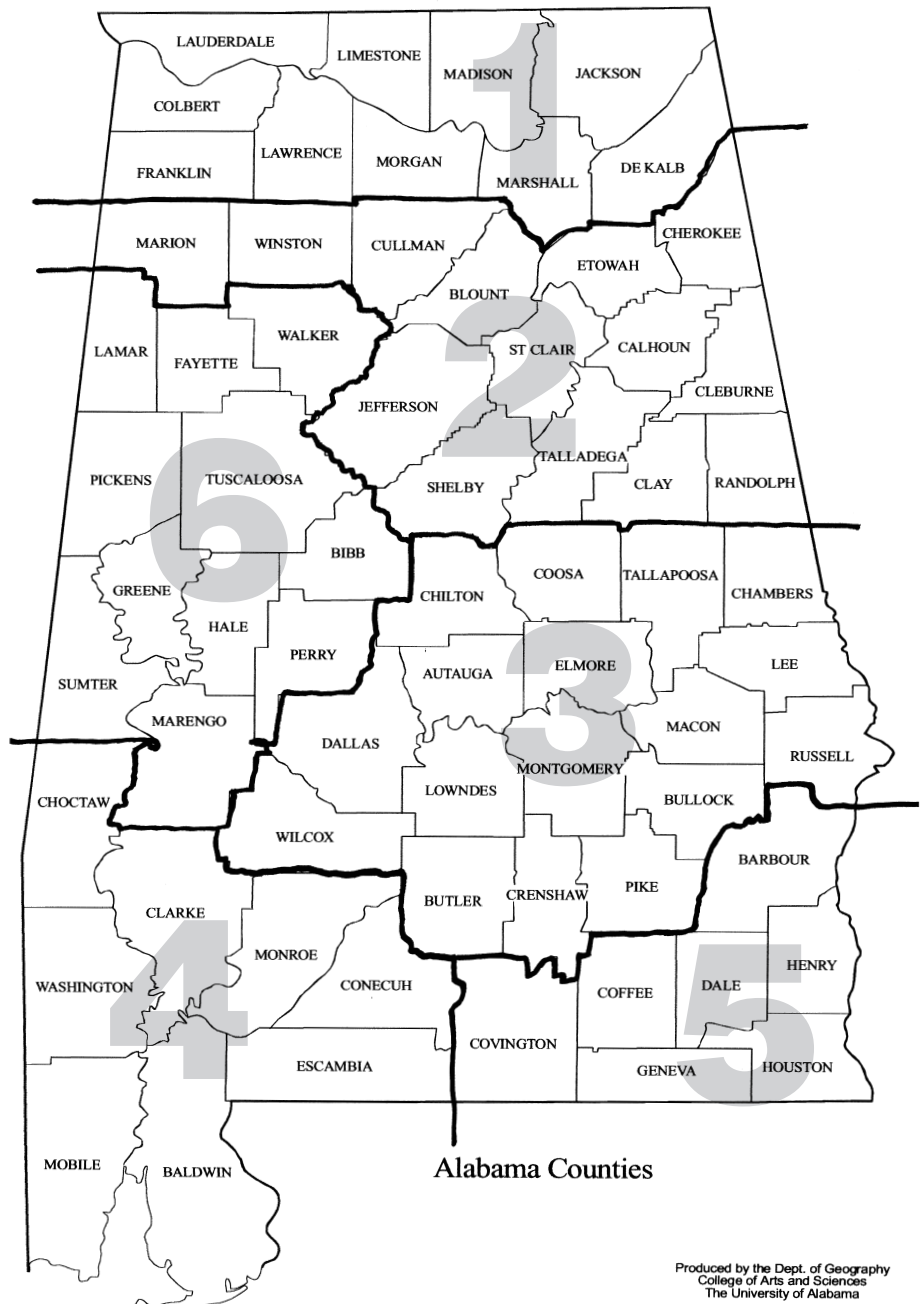
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