

The Guardian

The Newsletter of the Alabama Criminal Defense Lawyers Association

January/February/March 2006

“Celebrating 25 Years of Defending Justice”

**THE ALABAMA
CRIMINAL DEFENSE
LAWYERS
ASSOCIATION
PRESENTS...**

“Justice Must Be Won IX”

**2006 SUMMER SEMINAR
AND ANNUAL MEETING**

June 22-24, 2006

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Death Sentences Reach Record Lows Says Death Penalty Keynote



NACDL President Barbara Bergman was the keynote for the 2006 Death Penalty Seminar in Birmingham, Alabama.

On January 27 and 28, 2006, over 130 criminal defense lawyers and 20 law students attended ACDLA's "Loosening the Death Belt X" in Birmingham, Alabama. Lawyers from Indiana, Arkansas, Alabama, Georgia and Tennessee attended the two-day seminar to hear some of the nation's top capital case defenders share life-saving defense techniques.

NACDL President Barbara Bergman was the keynote speaker. Ms. Bergman talked about the future of the death penalty. She told those present that death sentences around the country are reaching record lows as the country turns toward "Life Without Parole" decisions. Bergman based her comments on "The Death Penalty in 2005: Year End Report" from the Death Penalty Information Center. "The year 2005 may be remembered as the year that life-without-parole became an acceptable alternative to the death penalty in the U.S.," she stated.

According to this report, "The declining use of the death penalty in 2005 extended the steady drop in death sentences and in the size of the death row in recent years. Although executions increased by one in 2005, they are still 39% below their peak in 1999," Bergman continued.

She concluded, "Death sentences averaged about 300 per year nationally during the late 1990s. Since then, the number of death sentences per year has dropped 55%, to 125 in 2004. The projection for 2005 is 96 death sentences (based on data from 3/4 of the year) – the lowest number since the death penalty was reinstated in 1976. In Harris County, Texas, often referred to as the "capital of capital punishment," there were only 2 death sentences in all of 2005."

For more information on this Report go to www.deathpenaltyinfo.org or call 1-202-289-2275. ●

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President's Column

By Joseph Van Heest, Montgomery, AL



ACDLA President
Joe Van Heest

ACDLA called for a public hearing before the House Judiciary Committee in opposition to HB490 (substitute), the Indigent Defense Commission Bill. On March 1, members of ACDLA gathered at the hearing to raise their concerns. After opposition testimony was heard from Jim Roberts (Tuscaloosa), Don Colee (Birmingham) and Linda Coats (Huntsville), Committee Chairman Marcel Black asked that we meet with proponents of the bill and work out a compromise measure. This letter from President Joe Van Heest directs attention to specific areas of the bill that need addressing. It has been included in its entirety for your review. By the time the reader sees this issue of *The Guardian*, lawmakers will be in the final days of the 2006 Regular Session. We are still uncertain if HB490 (Substitute) will be included on the calendar for a vote or not at this time. Please watch the listserv for updates and alerts. ●

Joe
jpvaneestllc@bellsouth.net



March 3, 2006

Hon. Gorman Houston,
Chair, Chief Justice's Task Force on Indigent Defense
300 Dexter Avenue
Montgomery, Alabama 36104-3741

Dear Justice Houston:

In our March 1, 2006 conversation following the House Judiciary Committee Public Hearing, you requested that I determine exactly what ACDLA would require in order to get behind this bill and support its passage. After polling the ACDLA Board and after extensive discussions, we are prepared to recommend the following amendments - you referred to it in the conversation, our "drop dead list."

- Setting a flat rate fee of \$75 per hour.
- Providing more local control in determining the method of indigent defense services to be provided.
- Providing more local control in appointment of public defenders and awarding contracts.

Below, I have set forth some explanation for our proposed amendments as well as the exact language changes sought. I hope the Task Force will consider and adopt these proposed amendments.

Flat Fee:

During our conversation in the hallway outside of the House Judiciary, I understood you to agree that a flat hourly rate of \$75 would not increase the cost of indigent defense, or if so, the increase would be only negligible. When one considers that the current costs of \$40 and \$60, when combined with the average office overhead expense rate of approximate \$28/hour (per Lynne Thrower's calculations at the Task Force meeting) lead to actual costs of \$68 and \$88, and the overhead expenses are not included under the fee cap, a rate of \$75/hour would likely save the State money. Additionally, the hourly rate for appeals is \$60, and the appellate courts are still paying office overhead expenses at a rate of \$35/hour for a maximum of 25 hours. Hence, for appellate work, the actual hourly rate paid by the State is \$95, and the \$875 maximum for overhead expenses

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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.

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Guardian Deadlines

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

“CELEBRATING 25 YEARS OF DEFENDING JUSTICE”

25TH ANNIVERSARY FOR ACDLA

Did you know that as of August, 2006, ACDLA is 25 years old? Early bylaws were incorporated on August 1, 1981. We are currently in the process of identifying charter members of the organization and previous Beddow winners for special recognition during the months ahead. If you know charter members or Beddow winners from early years, please contact me at annscooper@bellsouth.net or call me at 1-334-272-0064.

THANKS TO ALL WHO HELPED

“Loosening the Death Belt” held on January 27 & 28 in Birmingham brought record attendance. Special thanks is due to Death Penalty Subcommittee Co-Chairs Richard Jaffe and John Mays for their tireless efforts in making this event happen each year. Planning seminars and events is not easy and requires endless hours of making contacts and getting speaker commitments. These guys perform a wonderful task for us each year and if you see them, please tell them how much you appreciate all they do for ACDLA. We were also extremely fortunate to have NACDL President Barbara Bergman as our keynote. As a national officer, she is in great demand around the country. Despite the demands of a busy NACDL schedule, Ms. Bergman made time for us and we appreciate her efforts too.

ALABAMA LEGISLATURE – FINAL DAYS

ACDLA has been deeply involved this year with the Indigent Defense Commission legislation (HB 490-Substitute). You will find a letter to Justice Houston outlining our final list of demands in this issue of *The Guardian*. If you recall, Justice Houston chaired the Chief Justice’s Study Committee to develop this legislation for Alabama lawmakers. We are in the final days of the 2006 Regular Session and at present do not know if the legislation will make the calendar for a vote. As of this writing, it is still in the House Judiciary Committee. Once thing we can be sure of, if the measure does not pass this year, we will see it again next year whether we like it or not. Stay tuned to the listserv for details and alerts.

SUMMER SEMINAR UP NEXT

Make your plans now for “Justice Must Be Won,” ACDLA’s Summer Seminar and Annual Meeting set for June 22-24, 2006 at the Pensacola Hilton Garden Inn on Pensacola Beach. Tom Mesereau, Michael Jackson’s defense attorney, will be our keynote among a list of other respected speakers. Watch your US mail for the Summer Seminar brochure or go on-line to register at www.acdla.org and click on “Seminars.”

HOTEL ACCOMMODATIONS DISCOUNTED UNTIL MAY 28

Planning to attend the 2006 Summer Seminar? Better call the hotel right away and book your room. The deeply discounted rooms will be dropped on May 28, 2006. Call 1-866-916-2999. Ask for the ACDLA Rate of \$200 (run of house) or \$221 (Gulf Front). Better hurry! These rates won’t be held over for us. These rates reflect “pre-hurricane” pricing and won’t be offered past the deadline. ●

Look forward to seeing you all at the Beach,

Ann Cooper
annscooper@bellsouth.net / (334)272-0064

Mesereau to Keynote Summer Seminar

Thomas Arthur Mesereau, Jr., a Los Angeles, California trial attorney and former amateur boxer best known for successfully defending Michael Jackson in the 2005 child molestation trial will be the keynote speaker at ACDLA's 2006 Summer Seminar and Annual Meeting.



Thomas A. Mesereau, Jr. at the 2005 Michael Jackson trial

Mr. Mesereau's celebrity criminal defense work is balanced by his personal and professional work commitment to seeking justice for the legally underserved and "railroaded" victims of overzealous criminal prosecution offices. He devotes his time and money to notable pro

bono legal services to the African-American communities of Los Angeles and the American South. He is a founding partner of Collins, Mesereau, Reddock and Yu, L.L.P., a small general practice law firm located in Century City, California.

Don't miss this unique opportunity to hear Tom Mesereau in Pensacola. Watch your US mail for the seminar brochure or register on-line at www.acdla.org on "Seminars." ●

THE LAWYER'S ROLE IN JUVENILE DELINQUENCY CASES: GAL OR DEFENSE ATTORNEY

By Kathryn King, Cullman, AL

Every child in a juvenile delinquency or in need of supervision proceeding is entitled to counsel. In this state, there appears to be a split between circuits as to whether the juvenile judge appoints the child an attorney or a guardian ad litem. Within the circuits that appoint guardians ad litem in these cases, attorneys are split as to what their role is in representing the child. Do they act as a zealous defense attorney for the child charged with a crime, as they would in an adult criminal case, or do they act to insure the best interests of the child? Often, commitment or treatment may be in the best interest of the child, even in cases where the child does not admit to the crime, or where the state has weak evidence, or where the state may have violated the child's constitutional rights in some way. Many attorneys feel that they must act in the best interests of the child if they have been appointed the child's guardian ad litem. Others feel that they must defend the child as they would in an adult criminal case. This article seeks to argue that the U.S. Supreme Court definitively decided the question thirty-nine (39) years

ago, and that the child is entitled to a zealous defense attorney.

In *re Gault, et al.*, 387 U.S. 1, 87 S. Ct. 1428 (1967), the U.S. Supreme Court considered the case of Gerald Francis Gault, a fifteen year old Arizona boy accused of making obscene phone calls to a neighbor. The Court noted that the calls were of the "irritatingly offensive, adolescent, sex variety." *Gault*, 387 U.S. at 3. Gault was on probation at the time for being present when another boy stole a wallet from a woman's purse. He was arrested and taken to a detention home without notification to his parents. They discovered the arrest when they went looking for him and was told of the arrest by a friend. A hearing was held the next day at which the judge questioned Gault. After a second hearing, the judge committed Gault to the "state industrial school" for the duration of his minority (21) unless sooner discharged. *Gault*, 387 U.S. at 7. Gault was never given a written notice of the charges, never informed of his right to counsel, his right to remain silent, or his right to confront witnesses. Furthermore, he had no right to appeal under Arizona

law. He challenged the lower court's ruling through a writ of habeas corpus to the Arizona Supreme Court, who found no error below. *Gault*, 387 U.S. at 8. If Gault had been charged as an adult, he would have faced a fine of \$5.00 to \$50.00 and imprisonment for no more than two months. *Gault*, 387 U.S. at 29.

The U.S. Supreme Court held that a child facing delinquency or in need of supervision charges is entitled to due process of law, including notice of the charges against him, right to counsel, the right to confront and cross-examine witnesses, and the right against self-incrimination. In issuing the opinion of the Court, Justice Fortas reviewed the history of juvenile proceedings. After historically treating children charged with crimes the same as adults, the trend became to try to rehabilitate children, rather to punish. The state was considered to stand in *parens patriae* to the child. Since the intent was not to punish the child, due process rights were not considered necessary. Unfortunately, such lofty goals were often not met. Justice Fortas noted that, during this time, children were treated inconsistently and

punishments often were meted out arbitrarily. He opined that, "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." "Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." Gault, 387 U.S. at 18-19. The Court felt that the only way to protect juveniles from such arbitrariness and unbridled discretion is through the safeguards of due process.

In holding that a child is entitled to counsel when charged with a crime, the Court stated that there is "no material difference between adult and juvenile proceedings." A finding of delinquency and being subjected to loss of liberty is comparable to being found guilty of a felony. "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'" Gault, 387 U.S. 1 at 36 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

Alabama has adopted the holdings in

Gault in its rules and statutes governing juvenile procedure. Alabama Code § 12-15-2(c) imposes upon the Alabama Supreme Court the responsibility for promulgating rules to govern juvenile court proceedings. Alabama Rule of Juvenile Procedure 11 sets forth the rights of a child when taken into custody, before being questioned, upon being placed in detention, and additional rights of the child. A child must be informed of his right to communicate with his attorney when taken into custody. Rule 11(A)(2). Before being questioned about anything concerning the charges against him, the child must be informed of his right to counsel and that counsel will be provided if he cannot afford it. Rule 11(B)(1)&(2). The officer in charge of a detention facility must inform the child and his parents of his right to counsel. Rule 11(D)(1). The child has a right to counsel at all stages of the proceedings and counsel will be appointed if none has been retained where there is a likelihood that the child's freedom could be curtailed. Rule 11(F)(1)(a). Alabama Code § 12-15-63 provides that a child is entitled to counsel in all proceedings in delinquency and in need of supervision cases.

After Gault, it is unquestionable that

the counsel required by the statutes and the rules is a constitutional and due process right requiring a zealous defense attorney. Juvenile delinquency and in need of supervision cases are sufficiently similar to criminal prosecutions that a defense attorney is required. This requirement carries through the dispositional stages of such proceedings. Alabama Code § 12-15-1 requires that, "This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the juvenile court shall receive the care, guidance, and control, preferably in his or her own home, necessary for the welfare of the child and the best interest of the state." At the dispositional hearing, the attorney should advocate for the least restrictive alternative available for his client, preferably a return to the home. If counsel fails to act as defense advocate, he or she may be subject to ineffective assistance of counsel claims. If an attorney feels pressured to consider only the best interests of his client due to having been appointed guardian ad litem in such cases, he or she should express his or her concerns to the judge and ask the judge to appoint the child the defense attorney to which he is constitutionally entitled. ●

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MYERS NAMED TO INDIGENT DEFENSE COMMITTEE

ACDLA member Wilson Myers of Bay Minette, Alabama has recently been named to the National Association of Criminal Defense Lawyers (NACDL) Indigent Defense Committee. The committee addresses specific projects related to indigent defense within certain identified jurisdictions. Myers will attend quarterly meetings of the committee. ●

CAPITAL CORNER

By John E. Mays, Decatur, Alabama

WHEN CAN YOU GET AN INDEPENDENT MENTAL HEALTH EXPERT

When court budgets are tight and the comptroller is griping about fee sheets in appointed cases its good to see a case like *Morris v. State* 2005 WL3118817. This was a capital case in which the defendant had a death recommendation from the jury which the court imposed.

The defendant claimed to be mentally retarded under *Atkins v. Virginia* 536 US 304 (2002) and hence ineligible for the

death penalty. He also initially plead not guilty by reason of mental disease or defect.

The defendant, being indigent, applied to the court after entering the above plea for funds for a mental health professional to assist in the preparation of both the guilt and penalty phase of his trial. Pursuant to the defendant's initial plea the trial court ordered the standard mental health evaluation from Taylor Hardin. That evaluation basically stated that the defendant was malingering and had no mental disease or defect.

In the defendant's motion for funds

(Continued from page 5)

he alleged a history of mental illness. The request was denied and the trial judge claimed that the evaluation by the Alabama Department of Mental Health and Mental Retardation satisfied the dictates of *Ake v. Oklahoma* 470 US 68, 83 (1985) as to mental health experts available to indigent defendants.

As stated, the report of the Alabama Department of Mental Health and Mental Retardation was not helpful at all to the defendant either as to his claim of being mentally retarded (the report termed him a malinger) or as to his plea of not guilty by reason of mental disease or defect, the report stated he suffered from no mental disease or defect.

Based on the report from Taylor Hardin just before voir dire was conducted the defendant withdrew his plea of not guilty by reason of mental disease or defect and entered a plea of not guilty. The only mental reports available to him called him a malinger. Indeed, if he had no more evidence than that, the trial judge probably wouldn't even charge on the defendant's initial defense. Really, he had no choice, under the existing circumstances and in view of the court denying his motion for funds for a mental health expert, he had no choice but to withdraw his first plea. Overruling the defendant's motion resulted in his being unable to present his defense.

As to the necessity of an independent psychiatrist being available to an indigent defendant the court said:

[W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the

effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time of question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the elusive and often deceptive symptoms of insanity, *Solesbee v. Balkcom* 339 US 9, 12, 70, S.Ct. 457, 94 L.Ed. 604 (1950), and tell the jury their observations are relevant. Further, where permitted by evidentiary rules, psychiatrist can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have not training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense."

470 US at 80-81.

Additionally, the Court noted:

"By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic processes to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so. In so saying, we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of evolving practice."

470 US at 81-82 (footnote omitted).

Following its discussion of the pivotal role played by psychiatrists at criminal trials, quoted above, the Court stated:

"The foregoing leads inexorably to the

conclusion that, without the assistance of a psychiatrist to conduct a profession examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."

470 US at 82 (emphasis added).

Noting that the risk of error from the denial of psychiatric assistance was highest when the defendant's mental condition was seriously in question, the Court recognized that "a defense may be devastated by the absence of a psychiatric examination and testimony. 470 US at 83. The Court then detailed the relevant factors in Ake's case, including that Ake's sole defense had been insanity, that he had been found incompetent to stand trial and had been committed for treatment, that psychiatrists who had examined him for competency suggested that Ake's mental illness might have begun years earlier, and that state law recognized an insanity defense and placed the initial burden of producing evidence on the defendant. 470 US at 86. These factors led the Court to conclude that Ake's mental state at the time of the offense was a substantial factor in his defense and, therefore, that the trial court's denial of his request for the assistance of a psychiatrist deprived Ake of due process. The Court also noted that, because psychiatric testimony about Ake's future dangerousness was an issue at sentencing, denying Ake a psychiatrist to assist him with his defense as to that issue also constituted a due-process deprivation.

Nearing the end of its decision the court held that although the erroneous denial of funds for an independent mental health expert mandates reversal, the denial of such funds when a defendant claims to be mentally retarded and thus ineligible for the death penalty also mandates reversal. ●

CAPITAL CORNER

By John E. Mays, Decatur, Alabama

STRATEGIC USE OF MORRIS V. STATE

The recent case of *Morris v. State* 2005 WL 3118817 makes it easier for defendants in capital cases to get funds for an independent mental health expert. Yet, is this all we can do with this case to prevent the execution of our client? Let us assume we strongly suspect that our client is mentally retarded and meets the prohibition to execution delineated in *Atkins v. Virginia* 536 US 304 (2002) implemented in Alabama by:

- A. *Morrow v. State* 2004 WL 1909275
- B. *Ex parte Perkins* 851 So.2d 453, 456 (2002)
- C. *Ex parte Smith* 2003 WL 1145475
- D. *McGowan v. State* 2003 WL 22928607
- E. *Lee v. State* 2001 WL 1299241
- F. *Clemons v. State* 2003 WL 22047260

You would like two things. You want an independent mental health expert and you want the *Atkins v. Virginia* issue decided pre-trial. After all, if your client is truly mentally retarded and hence exempt from execution, why try the case with a death qualified jury? Death qualified juries are more conviction prone.

Let us assume further that your capital case is before an extremely conservative judge. You know the type. Its those who say when you request funds for an investigator to help prepare the case respond, "Investigate the case yourself."

First you tell the trial judge that *Atkins v. Virginia* and the foregoing Alabama cases are a blanket prohibition as to the execution of the mentally retarded. Second, if your client is mentally retarded, and you allege facts to support this con-

tention (school testing, special education records, etc.) then to death qualify the jury when the death penalty cannot be an option is useless and highly prejudicial (cite statistics from law review articles to the effect that death qualified juris are more conviction prone). It is improper to qualify a jury during voir dire on issue which will not be involved in the facts or law involved in the trial. You than ask for funds for a mental health expert to determine your clients:

- A. IQ;
- B. Cognitive impairment resulting therefrom;
- C. Defects in adaptive behavior;
- D. The point in the defendant's life when the foregoing problems manifested themselves.

The trial judge then tells you the state is broke, the fair trial tax fund is depleted, AOC has been pressuring judges to be more conservative on expense issues in indigent cases and, although he clearly sees your point and its merit, he must overrule your motion for funds. Is mandamus a possible remedy? Mandamus would require that the defendant be clearly entitled to the expert as a matter of law.

Consider 1975 Code of Alabama 15-24-1 thru 15-24-7, the Retarded Defendant Act. Note 15-24-3:

1. following the arrest and detention;
2. of any person for an offense against the laws of the state;
3. the defendant or the state;
4. may file an affidavit with the court having jurisdiction;
5. that the defendant has been identified as mentally retarded and has received or is presently receiving services through:
 - a. the Department of Mental Health and Mental Retardation;
 - b. a program certified by the Department of Mental Health and Mental Retardation or;
 - c. the Department of Education.

The filing of the affidavit may be used in connection with decisions relative to bail hearings, determination of place of detention and the ultimate disposition of the case.

The Retarded Defendant Act does not exclude capital defendants. See: *Stallworth v. State* 868 So.2d 1128 (2003). The defendant, whom you suspect to be mentally retarded, is entitled to file a petition and affidavit under this act, it is a statutory protection afforded retarded defendants. You are entitled to an expert to assist with the petition in order to file a meaningful and complete petition with the trial court. Nearly all genuinely mentally retarded defendants meet the criteria in 5 (b) and (c) above. Special education is under the Department of Education. Any mentally retarded child gets some assistance under 5 (b) and (c) above in the modern day.

Claiming your client is mentally retarded under the Retarded Defendant Act may get you a pre-trial determination of the issue so as to foreclose on a penalty phase in the case and it may get you a mandamus for funds for a mental health expert under 15-24-4 to be used by the court relative to the "ultimate disposition of the case." ●

Alabama Post Conviction Relief Project Recognizes Volunteers

The Alabama Post-Conviction Relief Project recently recognized its 2005 volunteer attorneys for their representation of Death Row prisoners in Rule 32 proceedings. Defense attorneys Jeff Duffey, Dan Hamm, Richard Keith, John Poti, Maryanne Melko Prince, and Domingo Soto were recognized for their volunteer representation of Alabama Death Row prisoners in rule 32 proceedings. Their contribution of their time and expertise were a benefit not only to their Death Row clients, but to Alabama's indigent defense community, and to Alabama's justice system. ●

CAPITAL CORNER

By John E. Mays, Decatur, Alabama

DON'T PLEAD GUILTY IN A LOWER COURT AND EXPECT A TRIAL DE NOVO IN CIRCUIT COURT

All attorneys who practice in district and municipal courts must immediately familiarize themselves with *In re State of Alabama v. Sorsby* 2005 WL 3441246. Once upon a time a lawyer could go to court with a client in municipal or district court, disagree with a plea bargain offered by the prosecutor or just want to buy time for the client, enter a plea of guilty to the charge, get sentenced and appeal to the circuit court for a trial de novo. This was always a poor procedure. This writer never did it that way because when the judge asks your client how he pleads to _____ offense and he responds "I plead guilty" this is certainly an admission against interest admissible in trial de novo.

Now this scenario will not get you any trial de novo. This scenario will result ipso facto in your appeal being dismissed.

Appeals, even in a court of no record, if predicated upon a guilty plea, must reserve an issue for appeal. See Rule 14.4 Alabama Rules of Criminal Procedure.

Prior to the decision in *In re State of Alabama v. Sorsby* courts relied on Rule 30.1 (a) Alabama Rules of Criminal Procedure to permit a trial de novo in circuit court from appeals originating in district or municipal courts. This is no longer the case. Said rule refers to :

A defendant convicted of an offense in a municipal or a district court shall have a right to appeal the judgment. . .

According to *Sorsby* the amendments to

current Rules 14.4 and 26.9 Alabama Rules of Criminal Procedure pre-empt and qualify Rule 30.1 (a).

So, with reference to pleas of guilty the current law grants appeals under 30.1 (1) (a) for trial de novo only if issues are reserved to appeal. This is difficult and can become a swearing contest between defense counsel and the prosecutor in the lower courts.

If you don't like the sentence, want to buy time or feel your client will not be convicted in circuit court, don't plead guilty. Simply stipulate that the city or state can make out a prima facie case and offer no evidence to rebut it. This compels the lower court to find your client guilty. Findings of guilt are certainly appealable and subject to a trial de novo. Criminal Procedure governing the taking of guilty pleas, 14.4 (1) (viii):

The fact that there is no right to appeal unless the defendant has, before entering the plea of guilty, expressly reserved the right to appeal with respect to a particular issue or issues, in which event appellate review shall be limited to a determination of the issue or issues so reserved.

See also: Rule 26.9 (b) (4) Alabama Rules of Criminal Procedure:

Inform the defendant as to defendant's right to appeal; provided, however, in case in which the defendant has entered a plea of guilty, the court shall advise the defendant of his or her right to appeal only in those cases in which the defendant:

- (i) has entered a plea of guilty, but before entering the plea of guilty has expressly reserved his or her right to appeal with respect to a particular issue or issues, or
- (ii) has timely filed a motion to withdraw the plea of guilty and the motion has been denied, either by order of the court or by opera-

tion of law. When informing the defendant of his or her right to appeal, the court shall also advise the defendant that if he or she is indigent, counsel will be appointed to represent him or her on appeal if the defendant so desires, and that a copy of the record and the reporter's transcript will be provided at no cost to the defendant for purposes of appeals, if the appeal is from a judgment and sentence of the circuit court.

One further caution is required. A client who is dissatisfied with the results of his case in city or district court comes by your office to hire you to handle his appeal. Before you take one penny of his money determine if he entered a guilty plea. If you want to handle the case you must file a motion to set aside the guilty plea or you will face summary dismissal on the appeal in the circuit court.

God help the attorney – and his malpractice carrier – who enters a plea of guilty for a client in a lower court and then fills out appeal papers and makes a bond. He has made a bond in a void proceeding unless issues are reserved. His client might get upset if his appeal is summarily dismissed in criminal court. He might ask his attorney why he charged for an appeal and trial de novo that he cannot have.

The facts of *Ex parte State of Alabama v. Sorsby* are few. The defendant plead guilty to DUI in district court. He appealed to the circuit court in hopes of a trial de novo. The state moved to dismiss the appeal under Rules 14.4 and 26.9 and the trial court denied the motion. The state mandamus the circuit court to dismiss the appeal. The mandamus was granted. ●

Booker: The New Sentencing Framework- A Time of Danger and Opportunity.

By Carlos Williams¹, Mobile, AL

One year after *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), the laws governing the sentencing of defendants in federal courts remains unsettled, and fluid. Contrary to some expectations, the now advisory Federal Sentencing Guidelines did not result in the wholesale imposition of lower sentences. To the contrary, the Sentencing Commission records reveal that sentencing levels remain the same or are slightly higher. U.S. Sentencing Commission *Special Post-Booker Coding Project* 13-15.² The political forces in Congress urging higher sentences, (i.e. The Feeny Amendment, Protect Act) persists. There remains continuing political pressure to raise mandatory minimums, which would function as an offense-by-offense Booker fix.³ At bottom, the current sentencing laws are more complex and demanding upon attorneys defending federal criminal actions.

In *Booker*, the Supreme Court held that the Guidelines violated the Sixth amendment because they were mandatory. To allow courts to continue to take the Guidelines into account without violating the Sixth Amendment, the Court "severed and excised: 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory, as well as 18 U.S.C. § 3742 (e), the appellate review section that assumed the Guidelines' mandatory nature. This left 18 U.S.C. § 3553(a) as the governing sentencing law: "Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past in determining whether a sentence is unreasonable." *Booker at 766*.

The current sentencing framework is different from the mandatory Guideline regime. It is far more complex because the court is no longer required to impose a sentence within the guideline range except in narrow circumstances. Instead, it must adhere to section 3553(a)'s mandates that the court "shall impose a sentence that is sufficient, but not greater than necessary" to satisfy the purposes of sentencing listed in subsection (2), and in determining that particular sentence, the court "shall consider" the purposes and factors listed in subsections (1) through (7). *United States v. Dean*, 414 F.3d 725 (7th Cir. 2005) ("Section 3553(a), unlike the guidelines themselves after *Booker*, is mandatory.").

This new sentencing framework requires that defense counsel present, and the court consider, a number of factors previously discouraged or prohibited under the Guidelines. As *Booker* emphasized, under the Sentencing Reform Act, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." *Booker*, 125 S.Ct. At 760 (quoting 18 U.S.C. § 3661). In this respect, *Booker* is similar to *Wiggins v. Smith*, 539 U.S. 510, 123 (2003) (Inadequate investigation of petitioner's life history for mitigating evidence for penalty phase of petitioner's murder trial prejudiced petitioner, and thus constituted ineffective assistance of counsel; mitigating evidence counsel failed to discover and present was powerful-). *Booker* thus imposes upon defense

counsel in non-capital cases the responsibility to present mitigation evidence at sentencing from a wider array of sources. Viewed differently, the defense is now armed with a greater opportunity to investigate and present mitigation evidence at sentencing. Consistent with that wider responsibility the courts are now empowered to consider that information and adjust a sentence accordingly.

The overriding sentencing principle in Section 3553(a) is parsimony after considering the complete range of relevant factors as directed by Congress, including the defendant's history and characteristics, the relative seriousness of the offense, the needs of the public, and the needs of the defendant. That is, Congress, in enacting § 3553(a) as part of the Sentencing Reform Act, provided a substantive legal standard by which a district court is to measure all potential sentences in a given case. See *United States v. Cawthorne*, 419 F.3d 793, 802 (8th Cir. 2005) (District court duty is that it shall impose a sentence sufficient but not

¹ In acknowledgment, this article, is in part, a collage of views expressed by Federal Defenders throughout the country.

² (Prepared December 1, 2005), <http://www.ussc.gov/Blakely/PostBooker120105.pdf>

³ See H.R. 1279 ("Gang Deterrence and Community Protection Act of 2005"); H.R. 3132 ("Children Safety Act of 2005"); H.R. 1751 ("secure Access to Justice and Court Protection Act of 2005"); H.R. 4437 ("Border and Immigration Enforcement Act of 2005"); H.R.3889 (Methamphetamine Epidemic Eradication Act"); H.R. 4472 ("Children Safety and Violent Crime Reduction Act of 2005")

greater than necessary.); *United States v. Neufeld*, 2005 WL 3055204 *9 (11th Cir. Nov. 16, 2005) (“Under the new advisory-guidelines system, a more-than-adequate sentence would conflict with § 3553(a)’s injunction against greater-than-necessary sentences.”); *United States v. Soto*, 2005 WL 281178 (3d Cir. Oct. 27, 2005) (The sentence must be “adequate and appropriate, not greater than necessary.”); *United States v. Acosta-Luna*, 2005 WL 1415565 (10th Cir. June 17, 2005) (the Provisions of 18 U.S.C. §3553(a), unconstrained by mandatory application of the Guidelines are now preeminent in sentencing”)

Section 3553(a) is thus not merely a directive to impose a “reasonable” sentence; rather, the statute directs a court to impose a sentence that is “sufficient but not greater than necessary.” The two standards are not the same, nor are they interchangeable. Indeed, they serve entirely different functions. The congressionally-mandated prefatory language of § 3553(a) is the substantive rule that a district court must follow in imposing a sentence. The statute provides an upper limit or a “cap,” above which the court is prohibited from sentencing a defendant, regardless of whether the sentence imposed is a guideline sentence or non-guideline sentence. In order to permit and facilitate appellate review, the court must specify the increased amounts of deterrence, incapacitation, and rehabilitation that justify any incremental increase in a sentence. Put another way, a district court must explain why a lower sentence is insufficient.

In contrast, “reasonableness” is a standard of review for the appellate courts. See *Booker*, 125 S. Ct. at 765 (Breyer, J., for remedy majority) (after determining that Guidelines must become advisory, discussing what standard of review would replace excised

§ 3742(e) of Title 18). That is, it is a measure by which the appellate courts consider the actions and decisions of the district courts, not a statutorily-required substantive rule of decision for the district courts to apply in the first instance. Although in a particular case there may be more than one sentence that might be considered “reasonable” in the ordinary sense of that word – that is, “[f]air, proper, just, moderate, [and] suitable under the circumstances”² See, e.g., Black’s Law Dictionary 1265 (6th ed. 1990) (defining “reasonable” as “[f]air, proper, just, moderate, suitable under the circumstances”) – all such potential sentences are still subject to the substantive rule of limitation expressed in § 3553(a).

Further, even as to reasonableness, when the appellate court reviews a sentence imposed after the Supreme Court’s decision in *Booker*, the Court must consider two components: “The determination of reasonableness depends not only on an evaluation of the actual sentence imposed but also on the method employed in determining it.” *United States v. Hughes*, 401 F.3d 540, 556 n.14 (4th Cir. 2005) (explaining why appellate court could not affirm pre-*Booker* sentence reviewed for plain error on the basis that it was reasonable because the district court never had an opportunity to apply the correct methodology). See *Neufeld* supra. Importantly, if a district court applies an incorrect legal standard, that sentence cannot be deemed reasonable; rather, the sentence is one that was imposed in violation of law. See *Koon v. United States*, 518 U.S. 81, 100 (1996) (in determining that the appropriate standard of review of downward departures was abuse of discretion, stating that “[a] district court by definition abuses its discretion when it makes an error of law” and that “[t]he abuse of discretion standard includes review to determine that

the discretion was not guided by erroneous legal conclusions”).

In closing, the current federal sentencing framework presents both opportunities for more effective advocacy and dangers, due to mandatory minimums and a wider discretion in sentencing. The latter discretion, however, is not unfettered. Section 3553(a) should provide a measure of restraint. One such factor the court must consider is the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. Recently, a district judge imposed a life sentence in one of my cases wherein my client was charged in a carjacking and use of weapon during a crime of violence injuring the victim. In a pending post sentence motion, I urged reconsideration pursuant to the foregoing § 3553(a) factor. Filing objections referencing a specific § 3553(a) factor is critical. In a recent memo, one of our appellate attorneys noted that, per Judge Carnes, merely objecting to a sentence on grounds that it is unreasonable under *Booker* DOES NOT - preserve a 3553(a) objection to that sentence for appeal. Counsel must make a specific reference to 3553(a) to preserve the issue. In other words, simply saying, “I object to the sentence on grounds of reasonableness” will not preserve the argument that the district court failed to properly consider, for example, the need to avoid unwarranted sentence disparity. Defense counsel must object on the ground that the sentence is unreasonable and specifically cite the 3553(a) prong that which supports the argument. This is true in revocation cases, as well as, an initial sentencing. ●

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THE CIVIL SIDE OF A CRIMINAL PRACTICE

By Jay Lewis, Montgomery, AL

It is far from uncommon for a criminal defendant to proclaim that his civil rights have been violated. Sometimes they have. Sometimes – not often, but sometimes – that violation will support a lawsuit.

My office has a fairly extensive civil rights caseload, and we frequently hear from persons who believe that their contact with the criminal justice system has left them with a civil cause of action. They often want my office to handle the criminal matter in exchange for being allowed to handle the civil lawsuit, which opportunity we have always refused. My feeling that this is a violation of Rule 1.5(d)(2), Rules of Professional Responsibility, prompted a phone call to Sam Partridge at the State Bar. It seems that the General Counsel has not issued a written opinion on this subject to date, but there is some support in the commentary to the Model Rules for the idea that a lawyer can take on a criminal defense with the fee for that defense to be paid out of any future civil recovery, so long as the client agrees to pay the bill for the criminal representation whether or not he recovers in the civil action. That approach may, however, violate the rule against acquiring a proprietary interest in the client's cause of action, so caution is always warranted.

The criminal practitioner certainly has enough to do in representing a criminal defendant without worrying about potential civil cases, but there are some common red flags that may indicate that your client has a civil case, and some cautions if you think he does.

Arrest without probable cause. This Fourth Amendment violation is trickier than it sounds, because a mere arrest without probable cause is not necessarily actionable. The question asked on summary judgment in a civil case is whether there was “arguable” probable cause, in other words whether any reasonable law enforcement agent objectively could have believed that probable cause existed. This is important, because an officer is entitled

to qualified immunity if there was even “arguable” probable cause to arrest the defendant, regardless of whether the facts later establish that probable cause did not exist. *Durruthy v. Pastor*, 351 F.3d 1080, 1089 (11th Cir. 2003). Lack of probable cause wins a criminal case, not necessarily a civil case.

Excessive force during arrest. This is also a Fourth Amendment matter. The law protects persons from “unreasonable” force, and contemplates “more than the unnecessary strike of a nightstick, sting of a bullet, [or] thud of a boot.” *Fontana v. Haskin*, 262 F.3d 871, 878 (9th Cir.2001). Harassing and abusive behavior toward an arrestee may, in some cases, rise to the level of a constitutional violation, but the courts are more likely to find that any injury growing out of other than outrageous conduct was *de minimus*, and deny recovery. See, e.g., *Jones v. City of Dothan, Ala.*, 121 F.3d 1456, 1460 (11th Cir.1997).

Abuse during incarceration. A pre-trial detainee's rights are protected under the Due Process Clause of the Fourteenth Amendment. *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir.1996). Prevailing on such a case requires a showing of deliberate indifference to a substantial risk of serious harm. *Hicks v. Moore*, 422 F.3d 1246, 1253 (11th Cir. 2005).

Abuse following conviction. Once a prisoner is convicted of a crime, the Eighth Amendment governs his treatment, whether he's being held in a jail or a prison. As a practical matter, the analysis of an Eighth Amendment case uses precisely the same deliberate indifference standard as a Fourteenth Amendment case. *Cottrell*, at 1490. Under this standard, “whether or not a prison guard's application of force is actionable turns on whether that force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm.” *Brown v. Smith*, 813 F.2d 1187, 1188 (11th Cir.1987). In other words, if the application of force exceeds what would be required to vindi-

cate a penological need, it can be considered excessive and, therefore, unreasonable.

In both Fourteenth and Eighth Amendment cases, there are viable claims that do not depend on the application of force. Interference with an inmate's legal mail, denial of exercise time, excessive lockdown, failure to furnish appropriate hygiene materials, extreme overcrowding, and other infringements may rise to the level of a constitutional deprivation.

Malicious prosecution. This tort is recognized under Alabama law and, through 42 U.S.C. § 1983, federal law, as are its relatives, false arrest and false imprisonment. Malicious prosecution, if carried out by state actors, is a violation of the Fourteenth Amendment.

The elements of a malicious prosecution claim are: (1) a judicial proceeding initiated by the defendant; (2) the lack of probable cause; (3) malice on the part of the defendant; (4) termination of the proceeding in favor of the plaintiff; and (5) damage to the plaintiff as a result. *Lumpkin v. Cofield*, 536 So.2d 62 (Ala. 1988).

This is a tort whose viability depends on the acquittal of the accused, but mere acquittal is not enough; the prosecution must also have been commenced without probable cause. While the term “probable cause” is used, in the federal context it means “arguable probable cause.” If an officer would be entitled to qualified immunity from a false arrest claim because he had arguable probable cause to make the arrest, he would also be immune from a malicious prosecution claim. *Kingsland v. City of Miami*, 382 F.3d 1220, 1233 (11th Cir. 2004).

Qualified immunity. “Qualified immunity” offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known. *Harris v. Coweta County, Ga.* 2005 WL 3501588

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(11th Cir. 2005).

There is a two-part analysis for the consideration of qualified immunity: the person claiming immunity must have been acting within the scope of his discretionary authority, and then the burden shifts to the plaintiff to show that qualified immunity is inappropriate. *Lee v. Ferraro*, 284 F.3d 1188, 1194-95 (11th Cir.2002).

To defeat qualified immunity, a plaintiff must show that the defendant violated a constitutional right and, if so, that the particular right was clearly established in the law at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Judges love qualified immunity and apply it at every opportunity. In the past, the courts had generally held that unless there had been a case finding a constitutional violation decided on facts materially identical to the facts of the case *sub judice*, the plaintiff could not meet the “clearly established” prong.

The burden on a plaintiff to defeat qualified immunity has been somewhat eased in the wake of *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), an Alabama case in which the Supreme Court opined that there need not have been an identical case, but that the unlawfulness of the state actor’s action must be apparent in light of pre-existing law.

There are other immunities that will shield a state actor, such as discretionary function immunity, state agent immunity, sovereign immunity, and the like, some statutory and some constitutional.

Municipal liability / State liability.

The Eleventh Amendment to the U.S. Constitution shields the State from suits for money damages unless the State has waived its immunity or Congress has validly abrogated it by reference to section 5 of the Fourteenth Amendment. There have been some cases of abrogation, for example, Title VII of the Civil Rights Act of 1964, and parts of the Family Medical and Leave Act. In some cases, States have waived immunity by agreeing to a waiver in exchange for receipt of specific federal funds, as in the Rehabilitation Act of 1973. In the typical § 1983 case, however, State immunity is intact. That is not to

say that State employees may not be sued, but they must be sued for money in their individual – not official – capacities. That preserves the legal fiction that the State will not be responsible for paying any judgment won. The State and its agents can, however, be sued for declaratory and injunctive relief, and that has resulted in the federally-forced construction of several new jails around Alabama.

Sheriffs occupy a singular position in that, pursuant to the Alabama Constitution, they are officers of the State, not the county. *Parker v. Amerson*, 519 So.2d 442, 443 (Ala.1987). Federal courts have generally deferred to the individual States’ denomination, with the result that in some states sheriffs are county officers and in others, like Alabama, they are State officers. State officers, of course, can avail themselves of sovereign immunity.

The sheriff, like any other State officer, is subject to suit in his individual capacity for money damages and in his official capacity for declaratory and injunctive relief, but the county he serves is rarely liable for any of his actions. Deputies enjoy the same status as sheriffs; they are State, rather than county, officials and partake of the same immunities.

Municipalities, on the other hand, enjoy a different sort of status. As they directly employ police officers, they can be held liable for police wrongdoing, *Monell v. Dep’t of Social Servs.*, 436 U.S. 658 (1978), but there are caveats. Municipalities and, in fact, supervisory police personnel, can be held liable in federal cases only if it was the execution of a municipal policy or custom that caused the constitutional violation.

Under Alabama statutory law, of course, cities can be held directly liable for injury caused by the “neglect, carelessness, or unskillfulness” of employees or agents. Ala. Code 1975, § 11-47-190. It is necessary in such cases to file a claim with the city within six months of the event giving rise to injury. Ala. Code 1975, § 11-47-23. For counties, the relevant claims period is one year. Ala. Code 1975, § 6-5-20. Interestingly, a battery may be a negligent tort under Alabama law, *City of Birmingham v. Thompson*, 404 So.2d 589

(Ala. 1981), bringing even a police beating under the statute. As to claims against both cities and counties, there are caps on damages of which the practitioner should be aware.

Pleading with particularity. Claims brought under 42 U.S.C. § 1983 against persons entitled to claim qualified immunity must be pled with particularity, averring in the complaint the facts of the matter and how those facts constitute a constitutional violation. This is called the “heightened pleading” standard. The Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), rejected the requirement of heightened pleading against entities that were not eligible to claim qualified immunity, but the standard continues to apply, especially in the Eleventh Circuit, as to claims against individuals who are subject to a qualified immunity analysis. *Marsh v. Butler County, Ala.*, 268 F.3d 1014 (11th Cir. 2001).

A cautionary note: This area of the law is fraught with peril for the unwary practitioner. In addition to the labyrinthine twists and turns in the law as to whom can be sued in what capacity for violation of which constitutional amendment and for whom qualified immunity may be available, there are practical considerations.

People who have been criminal defendants – particularly those who have been convicted – are not sympathetic plaintiffs. Juries are loathe to find against law enforcement officers, rather wanting to believe them against all evidence. Juries are especially hostile to the claims of jail and prison inmates, apparently reasoning that convicted criminals pretty much deserve whatever treatment they receive.

For those of us who toil in this most arid and unforgiving vineyard, there is a certain satisfaction in guarding the constitutional rights of those least capable by virtue of their status of asserting such rights on their own. It is a thing that simply must be done for them in order to preserve the rights of all of us. ●

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President's Column

Continued from page 2

is payable beyond the fee caps paid in appellate cases. I recall that you stated that some statistics indicate the average hourly rate paid including overhead to be \$73 or \$74 and change. A flat rate of \$75 places the overhead monies within the fee cap, and, as previously stated, will likely result in a savings.

Following is suggested language and placement for this amendment:¹

Amending Section 15-12-21(d), P.29, 15-12-22(d)(2) P.33, and Section 15-12-23(d), P.36.

P. 28, L 21 through p. 29, L.9:

"(d) Counsel appointed in cases described in subsections (a), (b), and (c), including cases tried de novo in circuit court on appeal from a juvenile proceeding, shall be entitled to receive for their services a fee to be approved by the Office of Indigent Defense Services. The amount of the fee shall be based on the number of hours spent by the attorney in working on the case and shall be computed at a rate of ~~thirty~~ ~~dollars~~ ~~(\$30)~~ ~~per hour~~ for time reasonably expended out of court in the preparation of the case. ~~Effective October 1, 2000, the amount of the fee shall be based on the number of hours spent by the attorney in working on the case and shall be computed at the rate of sixty dollars (\$60) per hour for the time expended in court and forty dollars (\$40) per hour for time reasonably expended out of court in the preparation of the case.~~ The total fees paid to any one attorney in any one case, from the time of appointment through the trial of the case, including motions for new trial, shall not exceed the following...

P.33, L. 8-13:

"(2) ~~Effective October 1, 2000,~~ the amount of the fee shall be based on the number of hours spent by the attorney in working on the prosecution of the

appeal and shall be computed at the rate of ~~sixty~~ ~~seventy-five~~ ~~dollars~~ ~~(\$60~~ ~~\$75)~~ per hour for time reasonably expended in the prosecution of the appeal, and any subsequent petition for writ of certiorari."

P.36, L 6-17:

"(d) The counsel appointed in the proceedings shall be entitled to receive for his or her services a fee to be approved by the judge appointing him or her Office of Indigent Defense Services. The amount of the fee shall be based on the number of hours spent by the attorney in working on the case and shall be computed at a rate of ~~thirty~~ ~~dollars~~ ~~(\$30)~~ ~~per hour~~ for time reasonably expended out of court in the preparation of the proceedings. ~~Effective October 1, 2000, the amount of the fee shall be based on the number of hours spent by the attorney in working on the case and shall be computed at the rate of sixty dollars (\$60) per hour for the time expended in court and forty dollars (\$40) per hour for time reasonably expended out of court in the preparation of the case.~~ The

Local Control:

As to the issues regarding more local control we do not seek any local veto power in determining the method of indigent defense services to be provided. However, ACDLA requests the following requisite to the Commission's determination as to the method of indigent defense services to be provided in a particular county or circuit.

Local indigent defense advisory boards consist of five members. Allowing three of them to participate in the discussion and vote of the Commission would give appropriate respect to the local opinions without amounting to a veto. With 13 members, if the Commission has a strong tendency toward a particular method in a particular circuit or county, the three local votes would not override the Commission. However, where the Commission is somewhat evenly split, the locals would have more clout. Most impor-

tantly, the local advisory board would have input and this would alleviate the feeling that Montgomery was imposing its will on a particular group. ACDLA believes this amendment is necessary to garner support from some of the larger communities which might otherwise be resistant to passage of this legislation.

Additionally, as we previously discussed, ACDLA requests that local advisory boards be permitted to nominate 3 names from which the appointment of a public defender or contract counsel may arrive. Jim Roberts suggested that to the House Judiciary Committee and the Committee, and Rep. Marcel Black in particular, appeared quite receptive to such a suggestion. This process would be consistent with the process used by the governor to appoint judges to fill vacancies.

Following is suggested language and placement for these two amendments:

Determining the Method of Indigent Defense Services - amending Section 3(d), P. 14; Section 3(I), P. 15; section 15-12-4(e)(1) as currently found in HB 490, P. 24; section 15-12-40(a), P. 39.

The local advisory board shall appoint three of its members to sit with the Indigent Defense Commission when the Commission is debating and voting on the method of indigent defense services to be provided in that particular area (in other words, three members from the Montgomery County advisory board would sit with the Commission when the Commission is debating and voting on the method of indigent defense services to be used in Montgomery County). The three members of the local advisory board shall have full debating and voting rights as it pertains to the decision regarding the method of indigent defense services used in that area.

Appointment of Public Defenders and Awarding Contracts - amending section 15-12-40(a), P. 39 (there may be others I missed)

The local advisory board shall nominate 3 persons to be appointed public defender if a public defender system is the method used to provide indi-

Continued on page 14

¹Bolded portions are changes from the current HB490 (Substitute). Italics are used only to highlight which portions of the letter are text from the HB490 (Substitute) as it stands and with ACDLA's proposed changes.

President's Column

Continued from page 13

gent defense services. The commission shall appoint the public defender from the list of nominees provided by the local advisory board and shall make that appointment within 30 days from the date in which the nominees are submitted to the commission. The local advisory board shall nominate 3 persons for each indigent defense contract that is to be awarded in a circuit for which the contract system is the method used to provide indigent defense services. The commission shall award the contract from the list of nominees provided by the local advisory board and shall award that contract within 30 days from the date in which the nominees are submitted to the commission.

Other Comments:

ACDLA believes that these three proposals are both appropriate and fiscally responsible in order to provide adequate defense services to the indigent. Moreover, in a spirit of cooperation and compromise, we are foregoing our previous request for a clause in the legislation providing for payment of office overhead expenses retroactive to February 1, 2005. This was the most difficult concession for ACDLA. As I am sure you are aware, there are intensely hard feelings among criminal defense and juvenile justice lawyers statewide about not only the decision to withhold office overhead payments, but how that decision was implemented. However, because we would like to see improvement in the quality of indigent defense services provided in Alabama, and it has been made clear that we will remain at an impasse if we insist on this proposed amendment, we are willing to withdraw any requirement of retroactive office overhead expense payment in this legislation.

Additionally, page 30 of HB490 (Substitute) apparently accidentally deleted the clause at Lines 25-26 that reads: *"Retrials of any case shall be considered a new case."* This has been the law for many years and is in the current code. The Task Force never discussed deleting this language and I believe it was inadvertently deleted when the proposed change immediately above was deleted.

I appreciate your willingness to work with us in a cooperative spirit to ensure that the indigent defendants of this State receive the quality of defense that they deserve and that the Constitution of the United States mandates. I hope that the Task Force can get behind our amendments and we can come together to gain passage of meaningful legislation. If you have any further questions or need to talk with me, please call me at 334/263-3551.

Sincerely,

Joseph P. Van Heest,
President, ACDLA



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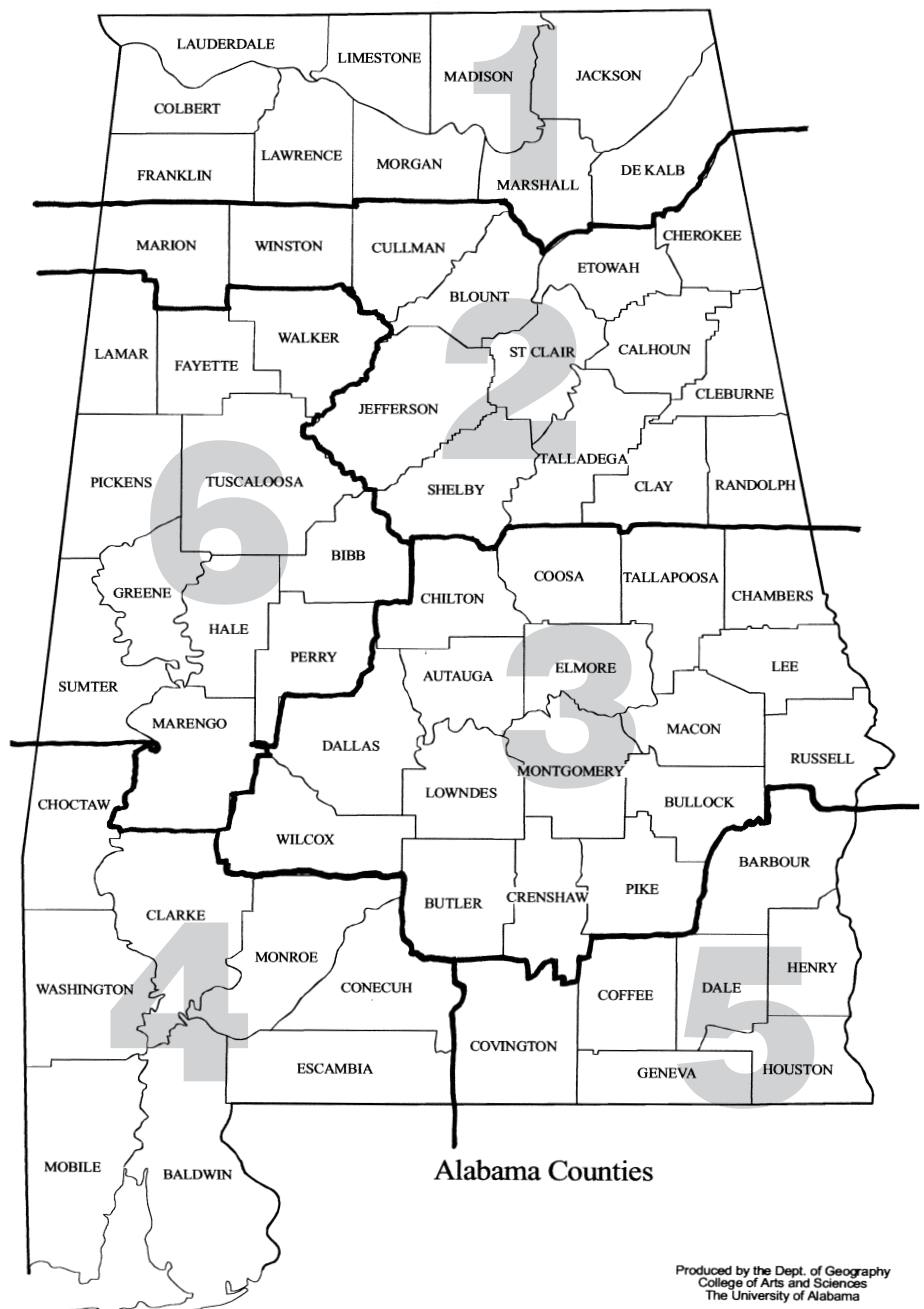
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Hilton Garden Inn

Alabama Criminal Defense Lawyers Association 2005-2006 Board of Directors

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