

The Guardian

The Newsletter of the Alabama Criminal Defense Lawyers Association

July/August/September 2006

RECORD ATTENDANCE AT SUMMER SEMINAR



(L-R) Renown criminal defense lawyer and presenter Roger Dodd talks with ACDLA member Steve Glasroth of Montgomery about cross examination.



(L) Newly-elected ACDLA President Melinda Morgan Austin and Jeff Austin (far right) join keynote speaker Tom Mesereau for a brief chat after his presentation on Saturday morning.



ACDLA members enjoy the Awards Luncheon buffet.

ACDLA Members turned out in record numbers for the 2006 Summer Seminar and Annual Meeting in Pensacola Beach. Approximately 125 members and guests attended what has been described by many as “one of the best Summer Seminars yet.” The seminar agenda was strong and even stronger was the team of criminal defense lawyers and other legal professionals heading up the presentations.

The event began on Thursday, June 22 with Paul Whaley of the Alabama Department of Corrections, Inmate Classification Division. Paul reviewed the process at Corrections and answered client specific questions. ACDLA member Bruce Gardner of Huntsville updated participants on current case law and Wilson Myers of Bay Minette shared details about his Middle East experiences building a criminal defense system in Iraq. ACDLA member John Beck of Fairhope who reviewed Pre-Trial Motions and Discovery techniques completed the day’s seminar agenda.

On Thursday evening, ACDLA members and their families gathered in the ballroom for a delicious Asian seafood reception. Guests dined on Antipasti with meats and cheeses, Tomato Bruchetta, Chicken Sato with peanut sauce, miniature crabcakes, fresh fruit, crab Rangoon, Beef Teriaki, spicy chicken wings and other delights. Toward the end of the evening political candidates were given opportunities to speak to the group, asking for its

support on judicial races, as well as the Attorney General’s race.

Friday, June 23 was a busy day at the event. Seminar speakers included Simmie Bear from the Children and Family Justice Center at Northwestern University. Ms. Bear offered information regarding new research on adolescent brain development, a valuable resource for those representing juveniles. ACDLA member Bobby Wooldridge of Tuscaloosa presented a thorough overview of the Alabama Community Notification Act and Registration Acts and reminded everyone there, “No criminal defense lawyer could properly advise his or her client in any sexual offense without knowledge of these laws.”

Next on the agenda came ACDLA member Joe Saloom. Joe’s many years of work at the Alabama Department of Forensic Sciences were evident as he reviewed the basics of firearms forensics and their use in the courtroom. Dr. Ron Acton of UAB completed Friday’s seminar agenda. Dr. Acton presented basic DNA testing principles and offered examples when results could be successfully challenged in court.

Friday was also a busy day for ACDLA business. That morning, ACDLA members were called into session to elect new officers and board for 2006-2007. The following members were elected officers: Melinda Morgan Austin of Florence-President; Bill Blanchard of Montgomery-President Elect;

Richard Keith of Montgomery-Vice President; Kathryn King of Cullman-Secretary; and Don Colee of Birmingham-Treasurer. Joe Van Heest of Montgomery was elected Immediate Past President. Jim Roberts of Tuscaloosa was elected Next Immediate Past President.

Elected as District Vice Presidents were: District I – Patrick Tuten, Huntsville; District II – Randy Brooks, Anniston and Amber Ladner, Birmingham; District III – Jeff Duffey, Montgomery; District IV – Gordon Armstrong, Mobile and John Beck, Fairhope; District V- Paul Young, Enterprise; and District VI – Mike Upton, Tuscaloosa.

At the Annual Awards Luncheon, newly elected President Melinda Morgan Austin

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President's Column

By Melinda Morgan Austin, Florence, AL



*ACDLA President
Melinda Morgan
Austin*

In this my first President's column I want to take time to thank Ann Cooper, the ACDLA Board, and ACDLA members for your support of ACDLA. The organization would not be able to function without your continued efforts. Thanks to these efforts, I can report that the Summer Seminar was a huge success. We had 125 people in attendance and some of the best speakers and presentations ever. Our CLE committee is already at work to make next year's seminar even better.

This year I feel it is crucial to our survival and our future that we refocus and redirect our efforts on membership recruitment and retention. It is only through membership recruitment and retention that we can secure the future of the organization and continue our successful, but costly legislative program and the other services and programs we have implemented and plan to implement in the future. I want to see ACDLA continue to serve our individual membership, the goals of the organization, our clients and our communities.

In focusing on our future and growth in this, our 25th year, I feel it necessary to reflect on the origins of our organization. We have no written history. Ann Cooper and I have been working over the past few months to attempt to gain as much information about our history as possible. If anyone has any additional information regarding the names of charter members or past presidents please contact us.

ACDLA was organized in 1981 by Dennis Balske, Joan Von Almon, Joel Sogol, Richard Horne, John Carroll and others who built on the idea of an organization committed to the goals of criminal defense that originated with Chuck Tarter in Birmingham in 1979, but never came to full fruition before Mr. Tarter's death.

The organizers of ACDLA recruited charter members, lawyers willing to donate \$50.00 or more to help establish the organization. Those charter members included: Jim May, Steve Glassroth, Al Pennington, Claude Boone, Tommy Kirk, Bill Clark, Jeff Dean, Drew Redden, Arthur Parker, Barry Hess, Ralph Burrow, Walter Crownover, Elno Smith, Don Holt and others.

These charter members were soon joined by Tommy Goggins, Bill Blanchard, Steve Salter, Richard Jaffe, Tommy Spina, John Mays and many others who helped build the organization into what it is today.

The stated purpose of the organization was to meet, organize, educate and promote criminal defense and criminal justice and to strive for excellence, integrity and cooperation in the field.

I am proud to say that the organization is meeting these goals. We are able to do so in large part due to the hard work and dedication of our founding members, charter members and early members. Many of those members are still active and still working to support ACDLA.

When I joined the Board a little over six years ago, it was at the urging and with the support of my law partner Don Holt. Don, like so many of our early members, remained dedicated to the goals of this organization and the "greater calling of criminal defense".

Facing the responsibilities of the presidency without Don's guidance over the past two months has been a challenge. However, it has caused me to think of Don and the other dedicated members we have lost and their commitment to the cause. I have been touched by the outpouring of assistance and support that has been offered from members, many of whom I had not previously met. As members of ACDLA we owe all of our early members a debt of gratitude for their foresight and commitment to the organization and the greater cause.

When I reflect on our past, I feel a deep sense of commitment to the legacy that each of these early trailblazers worked to build. However, I also feel a sense of urgency. Urgency for growth, for outreach, for diversity so that the legacy will live on and will survive and thrive.

I want to see us reach out to young lawyers, women lawyers, and all minorities within the bar. I want to strive for racial diversity and ethnic diversity among our membership. I want to develop an outreach program for young lawyers and lawyers new to criminal defense. I envision the list serve as the perfect catalyst for a virtual mentoring program. We are planning recruitment and outreach at the law school level and at the State Bar. We have assigned volunteers to each membership district to work as local recruiting leaders. Further, I want to challenge each existing ACDLA member to recruit one new member or renew one lapsed member before the end of the year and take advantage of the one time membership drive special to join now for 2007 and get the rest of 2006 free.

As this membership outreach develops I hope to see us develop community outreach programs helping develop and host volunteer legal clinics in the most needy communities we serve. In so doing, we can give back to the community and improve our image in the process.

We have achieved many great accomplishments developing a legislative program during Jim and Joe's leadership. To continue the program and certainly to expand the program to issues other than indigent defense and we need membership support and membership commitment because the legislative effort is a great commitment of time, money and energy.

I know if we work together we can meet the goals we have set for this year and continue to grow as an organization. I look forward to serving ACDLA in the coming year and urge each of you to contact me with your suggestions and concerns.

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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

SUMMER SEMINAR – A Record Turnout

Pensacola Beach was a popular place on June 22-24 when ACDLA members gathered for the 2006 Summer Seminar and Annual Meeting. For details about the events, please see the cover story in this issue of *The Guardian*. Be sure to check out the photos too.

LEGISLATIVE COMMITTEE MEETING

ACDLA's Legislative Committee headed up by Legislative Chairman Bill Blanchard of Montgomery, is holding its first 2007 Legislative Planning session on Tuesday, August 15 at 10 a.m. at the Alabama State Bar in Montgomery. If you can be there and join this committee, please attend. Work will begin on development of ACDLA's 2007 legislative program and will include development of our own indigent defense commission legislation, expungement and an increase in hourly fees. Lawmakers will go back into session in March, 2007 and we want to be ready to have our voice heard loud and clear. If you cannot participate in the meeting, we need your financial support to help pay for our lobbyist and related expenses. Checks payable to ACDLA, P.O. Box 1147, Montgomery, Alabama 36101 are welcome today! We must raise \$25,000 to cover the 2007 program and help offset expenses incurred during the 2006 session.

OVERHEAD UPDATE

Oral arguments will be heard in Montgomery at the Supreme Court on September 20, 2006 at 1:30 p.m. on the *Wright v. Childree* (overhead) case. If you can get to Montgomery, let's pack the court! Watch the ACDLA listserv for details and other important updates on overhead.

NEW MEMBER PROMO

Know someone who's not a member of ACDLA? They can join NOW at \$135 and receive membership through December 31, 2007. This offer is good to NEW members only. Membership applications are available elsewhere in this issue of *The Guardian* or go on-line to www.acdla.org and click on "About ACDLA" for the membership blank.

NEXT UP – 4 FREE CLES IN DECEMBER

Don't forget to mark your calendar now for Four Corners Seminars to be held on Friday, December 1 and Friday, December 8 in courthouses around the state. The schedule will be as follows:

December 1 – Enterprise, Florence & Montgomery

December 8 – Mobile, Tuscaloosa & Anniston

Watch your US mail and the listserv for details on speakers and topics. All ACDLA members paying 2007 dues get in FREE to Four Corners.

QUESTIONS/COMMENTS?

Please feel free to contact Ann Cooper at 334/272-0064.

HOW TO PROSECUTE THE VICTIM AND RAISE THE SCORE!

By Brent Gourley, Dothan, AL

Hopefully, all of the readers will have heard of the Nigerian check scams. I'm curious, though, why so few scam websites post anything on the lonely hearts version. The Nigerian check scams began with the simple email offer to share somebody's ill-gotten gains with you if you will just give us all of your personal information, including bank account numbers, and an advance fee, so we can ship the money to you...

But now a new twist. The online dating service — it works like this. Our hapless, but lonely, otherwise law-abiding citizen posts his/her picture and a bit of personal information with an internet dating service website. The very first hits s/he receive are likely to be of a very attractive person claiming to be overseas, with a sizzlin' photograph of a person well qualified to work at my favorite lunch spot or star in a Marine recruiting advertisement. The respondent travels or lives overseas visiting family, sick relatives, attending school, buying antiques for wealthy antiques dealers, or something similar and plausible. The conversation ticks on for many months as the two, now infatuated with each other, exchange all kinds of personal information. As coincidence would have it, the overseas party grew up on a street in a town just a hundred miles or so from our now love-stricken victim. Our future client may even look up the traveler's stateside address, and even call the traveler's hotel phone number. They may even speak by phone from time to time.

But after six months or, comes time for the traveler to return home after a successful semester or buying expedition or archeological dig, or an emergency departure to avoid the local war. Or the lovesick future client invites her home to meet the family. Traveler will now need assistance, as the political troubles in her African city means the local bank won't cash her/his traveler's checks. (It helps if you still think of mud huts when you hear the words "Lagos, Nigeria.") Or he needs money to ship home the antiques and his principal stateside dealer has gone bust. And now the hotel won't let her accept calls, and holds the passport until our winsome traveler pays the room bill. So Gullible sends money. But trav-

eler needs more — traveler proposes to ship the traveler's checks to Gullible. All Gullible must do is cash the checks and wire the money to an African Western Union account. Then traveler will be able to wind up his/her business in West Africa and come meet the family and engage in long-postponed salacious activity. Sounds like a deal. Gullible complies.

Well, the plane was late. Send more money to transfer the ticket. Well, we need more money pay the departure tax. And overweight air freight. And... Days go by, still no new love on the way home.

Now the unpleasant surprise. Your local PD investigator has Gullible Lovelorn in custody, handcuffs and all, busted for possession of forged instruments, 2nd degree. Seems the traveler's checks were such good forgeries that only the supposed issuing banking company could detect the crime. And traveler has the money. Even worse, Gullible spent some of the money on himself. Or local Gullible single parent spent ALL of it on self. Surely, says your local investigator, this proves evidence of intent to scam. So does the grand jury, but no surprise there.

Your writer has now successfully defended two of these cases. Dismissed. Remind the prosecutor of the banking rules. As Joe Borg so aptly said in UCC part 2 at Jones, as best I remember: "He who takes a bad check from the bad check writer, is the stickee." That's your client, the person who will be responsible for restitution, whether the case goes criminal or not. One of my clients had passed checks in two states; the bank in the other state allowed him to sign a note for the amount due, but the local Alabama grand jury indicted him. After educating the officer with print outs from a variety of scam-busting web sites, the State decided to dismiss. On the second episode, the defending victim had actually kept all the money herself. Her traveler continues to call, threatening her life. But the criminal case went away after I discussed my trial strategy with the officer; I would tell the jury that my client was a victim herself who had successfully scammed a scammer. I had an expert witness, a former victim and active victim's advocate, willing to testify.

I have described here only one version of the Nigerian 419 scam, named for the section of the Nigerian criminal code. Of course, the scammers are not all Nigerians, but West African nations contain most of them, except those in former Soviet republics. I have read that among some cultures in West Africa, a socially acceptable sign of success is great prosperity without any work. Our less-sophisticated citizenship money overseas by the boatload, hundreds of millions annually, to help scammers keep up with their neighbors.

Many scammers have accomplices in the states. Another popular variety concerns eBay. A seller will receive a check for an amount far in excess of the sales price of his item, with instructions forward the remainder to the buyer. An accomplice, who supposedly owes money to the buyer and lives in the States, will send the check to you. Again, the bank will be after your client, and, possibly, so will the D.A.

Educate your local officers, many are not aware. Do not expect any help from the federal authorities; they receive hundreds of reports daily. Our law enforcement can only act against the stateside accomplices. Scammers in Nigeria, Russia, or anywhere outside of the western world, will never be arrested. Other reports indicate these folks are small players in large organizations; some, allegedly, with government connections or other sorts of immunity.

Educate you families as well. Those most susceptible to scams are new internet users who have not been around the block yet. The internet remains incredibly useful, but its more interesting corners remain the wild, wild, west.

Here's some links for your reading enjoyment:

<http://home.rica.net/alphae/419coal/>
<http://www.crimes-of-persuasion.com/>
<http://www.fraudaid.com/>
<http://www.scambusters.com/>
<http://www.wired.com/news/culture/0,1284,53818,00.html>

Or, for the very daring, go bait the scammers yourself: <http://www.scamorama.com/>
 Brent Gourley
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RECORD ATTENDANCE AT SUMMER SEMINAR

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challenged ACDLA members to become involved in "growing the organization." Ms. Morgan Austin honored in memoriam a long-time charter member, Don Holt of Florence for his many contributions to the organization through the years. On hand to receive a special plaque honoring Don was his son, ACDLA member Ralph Holt. Ms. Morgan Austin reminded everyone present, "That charter members, like Don, have left a legacy of commitment to service to ACDLA." She called on ACDLA members to get involved and continue the legacy.

ACDLA's highest award, the Roderick Beddow Award was given to longtime ACDLA member and Mobile Attorney, Arthur Madden for a lifetime of achievement in criminal defense work. Other award recipients included President's Awards to Jim Roberts, Eric Guster, Don Colee, Bill Blanchard, Steve Glassroth, John Mays, Richard Jaffe, Brent Gourley and Linda Coats. Receiving Merit Awards were Mike Blalock, Stephen Townes, Charlotte Tesmer and Wayne Love.

The last day of the seminar proved to be the biggest. Keynote speaker Tom Mesereau of Los Angeles, California told a packed house on Saturday morning about his work dealing with high profile cases. He placed emphasis on the impact of the late Johnny Cochran on his own practice and his life. Mr. Mesereau came to Pensacola early and visited with members throughout the three-day event.

Well-known public speaker and educators Roger Dodd and John Wesley Hall came on next with Cross Examination techniques and professional ethics. These two speakers brought rave reviews and hopefully will join us again soon for full-day presentations. Also on Saturday, Dana Pittman of Pardons and Paroles presented rules and regulations and answered specific questions about client paroles.

The Pensacola Hilton Garden Inn will be the site of the 2007 Summer Seminar and Annual Meeting on June 21-23, 2007. Don't miss it! Make your plans now and mark your calendars. ●

Thankful To Be a Criminal Defense Lawyer: My Personal View

By Kesa Johnston, Roanoke, AL

Choosing to pursue criminal law was not a lifelong dream for me. I do not know when I decided it was a good idea to be overworked and underpaid but somewhere between my first year of law school and first year as an attorney I just knew this is what I wanted to do. At this point in my life, I cannot imagine doing anything else. We all have different backgrounds, different reasons and different styles but the one thing I love about criminal law and my fellow defenders is that we all seem to be dedicated to the fight for justice and those often overlooked in this country.

Many of my friends, most of my family, and all of my peers in civil practice think I live in some sort of idealistic dreamworld where I am naive enough to believe one person can make a difference and everyone has a good heart. While they may be right to some degree, I just think they are all missing the point. I could never describe to a lay person or perhaps even an attorney in a different field what it feels like to sit at a table with only your client beside you while looking across the courtroom at a DA, an assistant DA, an investigator, two officers, and what appears to be an arsenal of numerous other warm bodies. All the while there are twelve people waiting for you to make a mistake or judging your client before you ever get the opportunity to stand up and present your case. And lets not forget the judge who probably was a DA in his or her past life. Those victories are certainly the sweetest in that you overcame unbelievable odds and managed to bring a tiny ounce of hope to your client's life and you have given yourself another reason to continue the fight.

Scores of people have asked me how I can defend criminals, especially the ones I know are guilty. My response is always the same, "I am the only person standing between my client and a system that overlooks humanity. Regardless of another's perception of guilt, I refuse to have the "law" take away my sense of justice." I chose to come to rural Alabama, to a county I am not from and a place where few lawyers are truly passionate about defending the locals. Maybe I came to this place because I love a challenge or maybe because I am a little crazy. I think mainly I did it because I thought I could really make a difference. I do know this, I have made a difference. Maybe not to an entire circuit or even a county, but I have made a difference in many lives and I did it by mixing a little care with a little patience and a lot of hard work.

I lost my first trial but walked away knowing that I had done my very best and perhaps I had done more than any other person ever had for my client. My second trial was a hung jury and eventually I got a dismissal from the DA's office. My client was innocent and I may not have done everything right but I fought with everything I had. That victory affirmed my reasons for waking up each day to do whatever it takes to balance the scales.

I have never had much respect for those in our world who do not stand up for their beliefs. When I became a member of ACDLA I knew that I had found a place where my thoughts and ideas were welcome, a place where there were daily reminders that I am not alone in this fight. What we do is not an easy job and as a young attorney I can say its almost always overwhelming. I hope that others who decide to practice criminal law are not deterred by lack of decent pay, lack of respect from the general public and lack of support from the DAs, probation officers and local law enforcement. Likewise, I remain hopeful that the seasoned lawyers who get burned out and develop the occasional pessimistic outlook will continue to share their hard earned knowledge and advice. That those lawyers will remember we do appreciate the trails they have blazed and the risks they have taken in the name of justice. My heroes are not Atticus Finch or Clarence Darrow. My heroes are real, they are willing to keep fighting even when the odds are overwhelming, even when the "other side" controls their resources, even when everyone else has given up. For those people I am truly thankful!

Kesa

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Summer Seminar Highlights

Around 125 ACDLA members and guests attended the two and a half day seminar in Pensacola Beach, Florida. Shown here are a few of the many members and presenters.

For a look at more, go to www.acdla.org and click on "Seminars."

(Continued on page 11)



2006 AWARDS WINNERS

PRESIDENTS AWARDS & MERIT WINNERS



Joe Van Heest presents Bill Blanchard his award.



Joe Van Heest presents John Mays his award.



Joe Van Heest presents Steve Glassroth, and Jim Roberts their awards.



Joe Van Heest presents Wayne Love and Don Colee with their awards.



Joe Van Heest presents Steve Townes and Charlotte Tesmer their Merit Awards.

IN MEMORIAM



(L-R) Joe Van Heest and Melinda Morgan Austin honored the late Don Holt of Florence for his charter membership efforts and longtime support. Accepting the memoriam on behalf of his Father was Ralph Holt.

RODERICK BEDDOW AWARD



ACDLA's highest honor given went this year to Mobile attorney, Arthur Madden. Here Joe Van Heest presents Arthur with his plaque for a lifetime of outstanding contributions to the field of criminal defense.

CAPITAL CORNER

By John Edmond Mays, Decatur, Alabama

Alabama Appellate Court Adopts the ABA Standards for Capital Representation

On March 3, 2006 the Court of Criminal Appeals of Alabama in the case of *Davis v. State* 2006 WL 510508 clearly adopted the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases as the Alabama Standard:

Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we long have referred as 'guides to determining what is reasonable.' *Strickland [v. Washington]*. [466 US] at 688 [(1984)]; *Williams v. Taylor* [529 US] at 396 [(2000)]. The ABA guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.' ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4 1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added);] ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1982) ('The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecu-

tor initially and to the court at sentencing. . . Investigation is essential to fulfillment of these functions')."

539 US at 524-25, 123 S.Ct. 2527. In this case counsel failed to conduct the type to investigation sanctioned by the guidelines developed by the American Bar Association for attorneys representing defendants in death-penalty cases as endorsed by the United States Supreme Court in *Wiggins v. Smith*.

Also, in this case the State relied on a prior robbery conviction to prove the aggravating circumstance that Davis had previously been convicted of a crime of violence. However, counsel testified that he did nothing to investigate this prior offense. Recently, in *Rompilla v. Beard* 545 US 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), the United States Supreme Court found that counsel's performance was ineffective at the penalty phase of a capital trial because counsel failed to investigate a prior felony that the State was relying on to establish an aggravating circumstance. The United States Supreme Court stated:

"This evidence adds up to a mitigation case that actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered 'mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of [Rompilla's] culpability,' *Wiggins*, 539 US at 538. 123 S.Ct. 2527 (quoting *Williams v. Taylor* 529

US at 398, 120 S.Ct. 1495), and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing, *Strickland* 466 US at 694, 104 S.Ct. 2052."

545 US at ----, 125 S.Ct. at 2469. The same is true of this case. "The Supreme Court has made clear that the 'ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases.' *Hamblin v. Mitchell* 354 F.3d 482, 486 (6th Cir. 2004) (quoting *Wiggins* 539 US at 524, 123 S.Ct. 2527). Those standards provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigation evidence,' which should include investigation into 'medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.' *Wiggins* 539 US at 524, 123 S.Ct. 2527 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6 (1989) (emphases added))."

Moore v. Parker 425 F.3d 250, 261 (6th Cir. 2005) (footnote omitted) (Martin J., dissenting). Here, the Rule 32 testimony revealed that counsel failed to conduct the type of reasonable investigation sanctioned by the ABA. Indeed, had this claim not been procedurally barred we would be compelled to grant relief and order a new sentencing hearing. ●

If a Defendant is Convicted of Sexually Abusing a Child After the Child Has Recanted The Conviction May Be Constitutionally Infirm

By John Edmond Mays, Decatur, Alabama

Lets take a scenario. These are the cogent facts. A child has accused the defendant of improperly fondling her. She knows the defendant; he is a friend or a family member. By the time of trial she recants her accusation and express regret over ever making the accusation. The prosecution in their case-in-chief introduces the prior accusation under some exception to the hearsay rule (excited utterance, medical diagnosis and treatment, etc.).

In our scenario there would usually be an absence of forensic evidence and probably no corroborating witnesses. The sole evidence against the defendant is the original complaint which was later recanted by the child. It thus becomes a scenario with a single piece of incriminating evidence offered in the prosecutions case-in-chief.

A conviction under the above facts would be constitutionally infirmed. The scenario set out above is tailor made for a motion under 20.1, 20.2, 20.3 Alabama Rules of Criminal Procedure.

A conviction under these facts violates the Winship Doctrine. See: *In re Winship* 397 US 358, 362 (1970). This was the case wherein the Supreme Court made proof beyond a reasonable doubt a constitutional requirement under the due process clause of the Fourteenth Amendment. See also: *The Insufficiency of Prior Inconsistent Statements to Convict* 65 NCL Rev. 1, 5 (1986). The state must prove

beyond a reasonable doubt that a crime was committed, *Winship* at 362, 372. Lets take this principal a step further. The evidence to convict a defendant "beyond a reasonable doubt" must be substantial and raise more than a suspicion of guilt. See: *US v. Yoakam* 116 F.3d 1346, 1349 (10th cir. 1997).

Ergo, the due process clause limits the jury's ability to convict. See: *Jackson v. Virginia* 443 US 307, 319 (1979).

Now for the next step. In our scenario the initial accusation of the child which the prosecution admitted was hearsay. Albeit an exception to the hearsay rule but clearly admitted for no other conceivable purpose than to prove the matter asserted. The accusation may be rooted in an exception to the hearsay rule but it was admitted with no procedural safeguards such as the right of confrontation and cross-examination. The Sixth Amendment is not an empty procedural formality. It allows the jury to observe and evaluate the mood, actions, expressions and answers of the accuser first hand. In our scenario that is completely absent. The accusation was presented to the jury in a way totally out of context from the demeanor under which it was made and it is the only evidence the prosecution has and it has been recanted by the witness.

When a witness recants a statement they *ipso facto* demonstrate their ability to lie. Sixty-one percent of all child abuse accusations are unsubstantiated. See: Administration for

Children and Families Homepage: Child Abuse Presentation: An Overview <http://nccanch.acf.hhs.gov/topics/prevention/raising/overview/problem.cfm> (assessed Nov. 8, 2004.) It is quite possible if the accusation had been subject to cross-examination when made that it would never have led to a prosecution.

Two statements are made. One that the child was improperly sexually fondled and one that the child was not improperly sexually fondled at all. The veracity of the statement is at issue. The sole question before the jury in our case is, "Which statement is true, #1 or #2?" A single unreliable, uncorroborated, unsworn out of court statement of a child which that child later recants cannot alone foster a belief on the part of the jury that the defendant is guilty beyond a reasonable doubt. To do so is a classic case of surmising the guilt of an accused. The quantum of proof beyond a reasonable doubt is lacking. See: *Baugh v. State* 862 So.2d 756, 762 (FL 2003). Guilt by hunch or intuition is not proof beyond a reasonable doubt.

There must be more than a sexual abuse victim's prior inconsistent statements, even though repeated on several occasions, to support a conviction. See: *State v. Green* 667 So.2d 756, 757 (FL 1995). "... a prior inconsistent statement standing alone is insufficient as a matter of law to prove guilt beyond a reasonable doubt; *Green* at 760. See also: *Baugh* at 757; *Snowden v. Singletary* 135 F.3d 732, 739 (11th Cir. 1998). ●

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Summer Seminar Highlights

Continued from page 6



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