
The Guardian

The Newsletter of the Alabama Criminal Defense Lawyers Association

October/November/December 2006

Reverend Dr. Joseph Lowery to Headline ACDLA Death Penalty Seminar

ACDLA is proud to announce its headline speaker for “Loosening the Death Belt, XI,” the Reverend Dr. Joseph Lowery. Dr. Lowery will address the two-day event which begins on Friday, January 26 and concludes on Saturday, January 27, 2007 in Birmingham at Embassy Suites Hotel.

Outspoken civil rights activist the Reverend Joseph Lowery was born on October 6, 1921, in Huntsville, Alabama. Considered the dean of the civil rights movement, Lowery began his education in Huntsville, spending his middle school years in Chicago before returning to Huntsville to complete high school. From there, he attended Knoxville College, Payne College and Theological Seminary, and the Chicago Ecumenical Institute. Lowery earned his doctorate of divinity as well.

Lowery began his work with civil rights in the early 1950s in Mobile, Alabama, where he headed the Alabama Civic Affairs Association, an organization devoted to the desegregation of buses and public places. During this time, the state of Alabama sued Lowery, along with several other prominent ministers, on charges of libel, seizing his property. The Supreme Court sided with the ministers, and Lowery's seized property was returned. In 1957, Lowery and Dr. Martin Luther King, Jr. formed the Southern Christian Leadership Conference (SCLC), and Lowery was named vice president. In 1965, he was named chairman of the delegation to take demands of the Selma to Montgomery March to Alabama's governor at the time, George Wallace.

Lowery is a co-founder and former president of the Black Leadership Forum, a consortium of black advocacy groups. The Forum began protesting apartheid in South Africa in the mid-1970s and continued until the election of Nelson Mandela. In 1979, during a rash of disappearances of Atlanta's African American youth, Lowery provided a calm voice to a frightened community. After becoming president of the SCLC in February of 1977, Lowery negotiated covenants with major corporations for employment advances, opportunities and business contracts with minority companies. He has led peace delegations to the Middle East and Central America. In addition to serving as pastor to several churches over the years, Lowery's efforts to combat injustice and promote equal opportunities has led to the extension of provisions



to the Voting Rights Act to 2007, the desegregation of public accommodations in Nashville, Tennessee and the hiring of Birmingham, Alabama's first black police officers.

After serving his community for more than forty-five years, Lowery retired from the pulpit in 1997. He also retired in January of 1998 from the SCLC as president and CEO. Despite his retirement, Lowery still remains active. He works to encourage African Americans to vote, and recorded a rap with artist NATE the Great to help spread this message.

Lowery has received numerous awards, including an NAACP Lifetime Achievement Award, the Martin Luther King Center Peace Award and the National Urban League's Whitney M. Young, Jr. Lifetime Achievement Award in 2004. Ebony has twice named him as one of the Fifteen Greatest Black Preachers. Lowery has also received several honorary doctorates from colleges and universities including, Dillard University, Morehouse College, Alabama State University and the University of Alabama.

Lowery is married to Evelyn Gibson Lowery, an activist in her own right.

Don't miss this unique opportunity to hear one of our Country's most outspoken warriors for justice. Dr. Lowery will speak on Saturday, January 27 at 9 a.m. For a look at the other roundup of featured speakers, please see the seminar agenda in this issue of *The Guardian*.

Pre-registration is advised. Go to www.acdla.org and click on “seminars” for the brochure, or simply use the form attached in this issue of *The Guardian*.

Questions? Contact Ann Cooper at 334/272-0064.

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President's Column

By Melinda Morgan Austin, Florence, AL



ACDLA President
Melinda
Morgan Austin

"It's That Time of Year Again"

Fall has spread across Alabama and the leaves have turned to gold and red. I hope you have been able to take a moment with your families and enjoy this beautiful time of year. This year the season brought important local and statewide political campaigns, a lot of talk and often heated political debate on the ACDLA list serve. At times this has resulted in requests to curb the expression of opinions on the list serve.

The main purpose of the list serve is and always will be to promote criminal defense. Last year the Board of Directors adopted a list serve protocol in an attempt to direct list serve users back to the intended purpose of the list serve and limit "off topic" posts. Recently, Ann Cooper has re-posted that protocol for your review. As criminal defense lawyers, it has never been our intention to advocate the abolition of our members' First Amendment Rights. However, I would urge everyone to review the protocol and avoid abusing the list serve. We must be mindful of the list serve protocol and treat all ACDLA members with respect and professional courtesy. Also, be sure and remember the list serve is not and never can be totally secure. Never post anything that could bring harm to you or your client if forwarded outside the membership.

In other news, this is dues time at ACDLA. By now all of you should have received your dues statements for 2007. Included in that statement this year was a letter from Richard Keith, Chairman of the Legislative Fundraising Subcommittee and myself. The letter re-states the basic goals of the legislative committee and reminds you that in order to have an effective legislative program ACDLA must raise \$25,000.00 to meet the cost associated with the program.

Being a member of a small firm in a small town and a relatively young lawyer, married to a younger lawyer, I, as well as anyone, can understand the financial burdens that accompany the practice of law. In recent weeks, each of us has been bombarded by requests for contributions from politicians and various organizations. Every person and agency around us needs more money. I understand the dilemma each member faces because Jeff and I are just like you.

As President of ACDLA, I cannot emphasize enough the dilemma that the Association faces. Each year we are called upon to do more and more for our members, with few and fewer funds to do so. Each year the cost of running the Association increases just as the cost of running your business increases. Unlike a business, ACDLA is a non-profit entity. Our ultimate goal is to bring in enough money to cover the cost of the programs and services we provide. This is becoming more and more difficult to do without jeopardizing the quality of our programs. Very often we cannot add new services because the funds aren't there to cover them.

We launched our legislative program three years ago out of dire necessity. We still face those same issues but now we have established ourselves as a voice that will be heard in Montgomery. If we are forced to end our program now because of a lack of funding we will likely never again be taken seriously.

Many believe that an effective legislative program can be had without the cost of a lobbyist and subscription to the legislative service. However,

those committee members who have been in the trenches the past three years have told us otherwise. Unless we have members with lobbyist experience willing to shut down their law practice and focus full time on the legislative program, we cannot be effective without incurring the cost.

Your continued support of ACDLA at this difficult time is vital. I implore each of you to do three things:

1. Re-new your membership in ACDLA and continue to be active in this great organization. If you are not a member of a committee contact Ann Cooper or me and join a committee.
2. Give an additional donation to the Legislative Program when you renew. Give as little or as much as you can afford. Remember those Charter Members willing to donate \$50.00 to establish ACDLA. If 500 renewing members gave \$50.00 to the legislative fund we would meet our goal.
3. Use this issue of the Guardian as a tool to reach out to and recruit lawyers in your area who are practicing criminal defense but who are not members of ACDLA. Membership growth is crucial to the survival of ACDLA.

In September, ACDLA Board members held informational meetings in Mobile, Birmingham, Huntsville and Florence reaching out to attorneys practicing criminal defense. We meet with over 250 attorneys, most non-members, to inform them of the work ACDLA continues to do on overhead, indigent defense and new issues like expungement. (See the update on our Legislative Subcommittees in this issue.) If you know peers in your area that are not currently ACDLA members, ask them to join. There is much work to be done in Montgomery and we need the support of every criminal defense lawyer in Alabama.

Our other ACDLA committees continue to work hard. In September, Steve Glassroth presented oral argument before the Supreme Court, on behalf of our amicus committee in the matter of Wright v. Childre, the overhead case. Steve did an excellent job as amicus for ACDLA and NACDL and our arguments were well received by the Court. (Steve will be leaving Alabama to head up a public defenders office in Georgia. We will miss him greatly and wish him every success in his new post.) As of this writing, we are still awaiting a Supreme Court decision on the overhead case.

The Death Penalty Committee has completed the 2007 Death Penalty Seminar agenda. The event will be held January 26 and 27 in Birmingham, Alabama. This seminar promises to be one of the best ever with a great mixture of in-state speakers and nationally recognized experts, including a keynote address by civil rights advocate, the Reverend Dr. Joseph Lowery of Atlanta, Georgia. See this issue of *The Guardian* for details.

Finally, the Summer Seminar Committee is putting the finishing touches on topics and securing speakers for the 2007 Summer Seminar to be held June 21- 23, 2007 in Pensacola at the Hilton Garden Inn. Watch for details to come.

ACDLA continues to be hard at work assisting all criminal defense lawyers in Alabama. Now is the time for all criminal defense lawyers to assist ACDLA. I continue to enjoy serving ACDLA this year and I encourage 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:

anncooper@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
anncooper@bellsouth.net

FROM MY PERSPECTIVE

By Ann S. Cooper, Executive Director

FOUR FREE CLE'S HEADED YOUR WAY!

If you have not already registered to attend one of six FREE CLE programs in December, don't hesitate to do so now. Go on-line to www.acdla.org and click on "Seminars." Click again on "Four Corners" brochure. Simply print it out, complete and fax it to the number on the form. If you have paid your 2007 dues, you get in free. Four Corners Seminars features 24 speakers in six locations – three on December 1 and December 8. These will begin in Enterprise, Florence and Montgomery on December 1 and conclude in Mobile, Anniston and Tuscaloosa on December 8. Topics include Ethics, The Community Notification Act, Juvenile Issues, as well as Sentencing Guidelines. Pre-registration is recommended, as materials are limited. All materials are on CD Rom.

SPEAKING OF DUES

The coming year will bring with it many challenges, especially at the Legislature.

ACDLA wants to be able to keep you informed each and every step of the way. To do this costs money. All 2006 ACDLA memberships will expire on December 31, 2006. If you have not already paid your dues, please do so. All expired memberships will be removed from the ACDLA listserv on January 15, 2007. Please don't allow your membership to lapse.

"LOOSENING THE DEATH BELT XI" – JANUARY 26 & 27, 2007

ACDLA's annual death penalty seminar, "Loosening the Death Belt," will be held January 26 & 27, 2007 in Birmingham at Embassy Suites Hotel. The roundup of speakers includes some of the finest capital case defenders in the United States. The Reverend Dr. Joseph Lowery, an outspoken civil rights activist and Alabama native, will be the featured keynote speaker. Dr. Lowery has spent his life working on civil rights issues and has received numerous awards for his work to combat injustice. Don't miss this unique opportunity to hear the "Dean of the Civil Rights Movement." Pre-registration is advised. Go to www.acdla.org and click on "seminars" for the death penalty brochure or call 1-334-272-0064 for details. Pre-registration discounts are \$275 for members by January 10 and \$325 for all afterward.

EMBASSY SUITES HOTEL OFFERS DISCOUNTS – BUT HURRY!

Embassy Suites Hotel located at 2300 Woodcrest Place in Birmingham is the site of the 2007 death penalty seminar. Special DP Rates are being offered at the hotel until January 10, 2007. Ask for the DP Rate of \$129 single or double by calling 1-205-879-7400. Room includes full breakfast, manager's cocktail reception in the evenings, plus lodging.

LAWMAKERS BACK IN SESSION IN MARCH – FUNDS STILL NEEDED

Alabama lawmakers will go back into Regular Session on March 6, 2007. ACDLA is working closely with its Legislative Committee to prepare for critical issues certain to arise. Meeting with lawmakers, monitoring bill introductions and hiring a lobbyist costs money. If you have not already given to the ACDLA Legislative Fund, please do so. Send your check to ACDLA, P.O. Box 1147, Montgomery, AL 36101. The goal is \$25,000 for the 2007 program. To date, only 30 percent of that goal has been reached. To have an effective, cohesive program we must reach our goal.

MARK YOUR CALENDARS NOW FOR SUMMER

"Justice Must Be Won," ACDLA's annual summer seminar and annual meeting will be held June 21-23, 2007 at the Hilton Garden Inn on Pensacola Beach, Florida. Watch for details about this seminar as speakers are currently being lined up. You can book your room now by calling 1-850-916-2999 and ask for the Alabama Criminal Defense Lawyers group rate of \$212-234. The room block discount will be dropped on June 1, 2007.

I look forward to seeing you all in Birmingham at the Death Penalty Seminar,

Ann Cooper
anncooper@bellsouth.net

Successful Strategies for Representing Child Sex Offenders

By Hillary Harrison Gulden, Attorney at Law, West Palm Beach, FL

This article was originally published in Children's Rights, Vol. 8 No. 3, Summer 2006. ©2006 by the American Bar Association. Reprinted with permission.

The term "child sex offender" evokes emotion. It affects experienced police officers, child welfare agents, judges, prosecutors and defense attorneys. Unfortunately the term is so emotional that these cases are often not given the amount of attention that the accused so deserve putting them at risk, regardless of guilt, for life-long consequences.

On March 15, 2006 the Children's Rights Litigation Committee along with co-sponsors the ABA-CLE Center and the National Juvenile Defender Center presented a free teleconference Successful Strategies for Representing Child Sex Offenders. Program faculty addressed these difficult cases on three major levels: Motion Practice, Trial Practice, and Placement, Treatment, and Rehabilitation.

Program faculty Dr. Barbara Bonner from the National Center on Sexual Behavior of Youth ("NCSBY") opened the discussion with important statistics on the sexual behavior of adolescents, such as:

- one third (1/3) of all sex offenses against children are committed by an adolescent
- adolescent sex offenders are mostly driven by curiosity in comparison to the motives of their adult counterparts
- the rate of recidivism among child sex offenders is five to fourteen percent (5-14%)
- there are currently no predictable factors in determining what may cause a child to commit a sex offense

Dr. Bonner illuminated that the children who were already in treatment centers, and therefore adjudicated, varied in race, education, socioeconomic background, athletic interest, and academic achievement so much so that group counseling sessions often look like "student council meetings." Though it is difficult to generalize about juvenile offenders, two instruments are under development to determine risk factors for child sex offenders, (1) the Juvenile Sex Offender Assessment Protocol II (J-SOAP-II), being developed by Robert Prentky, PhD and Sue Righthand, PhD, and (2) Estimate of Risk of Adolescent Sexual Offense Recidivism (ERASOR), being developed by James Worling,

PhD. Both instruments are currently being validated for accuracy. Their breakdowns, however, may be helpful to defense counsel when arguing for the least restrictive placement on behalf of their client during pre-trial custody arguments.

PRE-TRIAL

The defense of a child accused of a sex offense begins as soon as the attorney receives the file. Speaker Elton Anglada, from the Defender Association of Philadelphia, recommends meeting with the accused, finding out about the child (usually a boy), his family, neighborhood, school, academic record, etc. In some cases, the prosecution may provide preliminary reports often referred to as "Psycho-Sexual" or "Psycho-Bio-Educational-Sexual." However, Mr. Anglada's observation is that many inexperienced attorneys make the mistake of jumping into trial strategy without thoroughly reading that report or getting to know their client. Mr. Anglada asserted that these cases cannot be picked up ten minutes before trial and tried like a standard drug possession or burglary, but instead that you "must turn over every stone." In order to present the best defense, the attorney must research the story they are going to tell at trial. To start, ask these questions:

- Who is your client? Who is he as a person?
- Has he ever been a victim?
- Who are those closest to him? Find out and establish a rapport with them.
- Who is the complainant? How do they know each other?
- How was the incident first reported and to whom?
- What were the circumstances around the incident being reported, told, discovered?

If the complainant is a ten year old girl who is small and frail and the accused is a fourteen year old boy who looks as if he is an adult in stature, a defense attorney may struggle to prove consent due to their appearances. So, before starting on legal strategy, find out the background of all the related parties.

Also, become comfortable with the terminology of the case. It does not reflect well when defense counsel stumbles over crucial terms. While we are all taught from an early age that there are appropriate and inappropriate discussions, these cases are not the times to use the etiquette your mom taught. To challenge the

accusation, the defense attorney must give the sense of confidence and comfort with the material. If the terms are uncomfortable, do what you can to make yourself comfortable before addressing the court on a particular matter.

Pre-trial custody is a difficult issue in most of these cases. Dr. Bonner's research clearly shows the low recidivism rate of juvenile offenders; however, due to the emotional volatility of the charges, and the fact that many adult offenders do reoffend in contrast to their juvenile counterparts, it is often difficult to convince a judge that the lowest restrictive placement is at home. Defense counsel must educate the judges. Statistics on recidivism rates for juveniles, instruments on risk assessment, and expert testimony can all assist an attorney in their pleas to have their client released (to find this information visit the National Center on Sexual Behavior of Youth <http://www.ncsby.org/>). If defendants are released Dr. Bonner points out that in any treatment, parental supervision with child sex offenders is key.

PRE-TRIAL MOTIONS

Faculty member Suzanne Meiners-Levy of the Office of the Metropolitan Public Defender, Nashville, TN emphasized the power of pre-trial motions in child sex offense cases as having two purposes: 1. Gives the defense an opportunity to flesh out the prosecutor's case and discover what that case is relying on for trial, and 2. Heavy pre-trial motions will reveal which prosecutors are not willing to invest the time in that particular case. The simple prospect of having the complainant come into court prior to trial one or more times may sway the prosecutor to the negotiating table. The panel discussed a handful of pre-trial motions, some of which were offered in the accompanying materials:

- Motion to Sever
- Motion Challenging the Application of the Statute to the Petition
- *Crauford v Washington* Motions/Tender Years Motion
- Motion to Ascertain Witness/Alleged Victim's Competency to Provide Relevant Testimony by Conducting a Pre-Trial Taint Hearing
- Motion for Admission of Defense Evidence
- Motion for Trial by Jury

Where there are more than one accused, defense counsel should seriously consider filing a Motion to Sever and objecting to any joinder.

The prejudice is far too high according to Ms. Levy and, therefore, this motion should be almost an automatic filing.

The panelists concurred that the majority of child sex offender cases that they have been involved with are often nothing but normal adolescent sexual curiosity where one of the two children is charged criminally. There is also a disproportionate amount of children who are monitored by child welfare and in special education or treatment programs who are reported as sex offenders due to mandatory reporting requirements which means that there is an unjust application of the criminal statute. Ms. Levy regularly files pre-trial motions objecting to the application of the statute to the petition. She articulates that in most instances the statute the child is charged under was designed in response to "sensationalist" cases where an adult has preyed upon and often murdered a child who is in the "protected class," especially those that create a strict liability. And due to the unjust application of the statute, there might be an opportunity to challenge prosecutorial discretion as well.

Crawford v. Washington, 541 U.S. 36 (2004) abolished the Roberts' reliability rule for hearsay and on the issue of marital privilege the Supreme Court held that the only reliability test for hearsay is cross examination. The effect of Crawford has varied in each jurisdiction in its application to the juvenile courts and "Child Hearsay Statutes." Child Hearsay Statutes allow for an adult to testify instead of the child so long as the court determines that such testimony is reliable (also referred to as tender years or outcry). Mr. Anglada warns that before a practitioner considers such a motion to question if the testimony of the adult really hurts the defense. He urges consideration that cross examination of an adult can be much harsher than that of a small child. Furthermore, there is an opportunity, especially injury trials, to reveal the unreliability of the hearsay, motive, and bias that defense counsel would not otherwise have in cross examining the complainant. Once the tender years' motion is filed, there is an opportunity to pre-try the case which can be invaluable. This highlights the panel's earlier lessons that trying a child sex offender case starts early through investigation. Based solely on initial discovery resulting from a tender years motion, a practitioner might have enough information to discern the prosecution's strategy.

Challenging the complainant's competency to testify is also an opportunity to procure his or her school records and psychological evaluations. Ms. Levy explains that this investigation into the complainant can often be an effective tool in testing the prosecution's willingness to proceed on the case. The more times the

alleged victim has to come to court, the more records that are requested, the more investigation that is done can all create a hesitancy for the complainant to proceed to trial. Information received from a competency motion may reveal evidence to bolster the defense around a rape shield statute as well.

Taint motions (in limine motions) are used to analyze how the incident was reported. Ms. Levy explains that a child's memories about interactions are subject to manipulation by police or their agents. Nationally there are movements to avoid taint during the investigation of these sensitive cases; however, law enforcement and child welfare are frequently not trained on these matters. A taint motion brings out the details. These pretrial motions give an opportunity to put the alleged victim on the stand and get a sense of their story, who they spoke to. This testimony can reveal other people who should be subpoenaed for trial. This motion also provides a sense of the police interaction with the complainant.

Understanding how the investigation of the incident occurred can reveal how to beat it, according to faculty member Angela Vigil of Baker & McKenzie. If the victim was encouraged to make a statement and from that statement the entire investigation is focused solely on the accused, then the investigation may have been tainted. If the statements made by the complainant are deemed unreliable in pre-trial hearings, there is the possibility to argue "fruit of the poisonous tree" and suppress the remainder of the investigation. Ms. Vigil and Mr. Anglada both clarify that these suppression motions are rarely granted on the basis of unreliability of the statement. Yet, the granting of the motion supports the trial defense in that it begins to unravel weaknesses in the investigation. Ms. Vigil asserts that defenders are most effective when they get the particulars: How was the evidence collected? How was it stored? Was the evidence tested? At what stage of the investigation was it gathered? How was the evidence handled? Was the evidence ever stored at an incorrect facility? Did law enforcement investigate motives for the complaint to be made?

Ms. Levy also reminded practitioners that children hate talking to police about sex. This can result in false confessions, so aggressive pre-trial motions can paint a good picture for a judge as to the weaknesses in the investigation and the taking of the child's statements. Ms. Vigil pointed out that in her experience police often use parents to encourage their own children to confess. The parents are lured into becoming agents for the police due to the emotional volatility of these cases.

Pay close attention to time lines in the

petition. If the time of the incident is alleged to have occurred within a three (3) week period, Ms. Vigil warns that this could certainly halt an alibi defense. Make sure the petition is filed accurately and that all assertions are compliant with local rules.

Many jurisdictions do not have jury trials for adolescents charged in the juvenile courts. In the jurisdictions that do, defense counsel should make the decision to file a Motion for Jury Trial strategically (though these motions are rarely granted). In Ms. Vigil's sample motion provided in the materials, she argues against *McKeiver v. Pennsylvania, 403 U.S. 528 (1971)*. She advised that defenders use the policy language of the local juvenile court acts to facilitate such a motion.

TRIAL

A child sex offense trial hinges on the defense's cross examination of the prosecution key witness(es) and the decision to put the accused on the stand. Most defense attorneys can recall at least one decision to put a client on the stand that they lived to regret. There is not a blanket rule for these cases. Ms. Vigil recommends not considering it as an option until the practitioner has spent approximately eight (8) nonconsecutive hours with the accused throughout three (3) meetings. Preparation of the accused is crucial. If the adolescent takes the stand and is unsure of himself, he may portray himself as unreliable or untruthful.

In cross examination of small children, the panel agreed, "Be nice" and be aware of your physical placement and presence in the courtroom. Some members of the panel stand between the complainant and the accused to avoid fear responses from the complainant. Others stand between the complainant and the prosecution as the witness will often look to the prosecution for strength. There are varied opinions as to approach as well. Speaking kindly may sound almost mocking to an adult but can be effective with a child. Addressing the witness as an authority figure is another tactic. Ms. Vigil advises to mix and match what is best for the individual trial persona remembering that a hardened police-type cross examination of a child can lose the case for your client.

TREATMENT

Knowing the treatment facilities that are available, their methodology, approach and routines is imperative according to Ms. Levy who cautions defenders to know the theoretical underpinnings of the facilities that clients are being sent to. Punitive treatment facilities can often require that the client confess to crimes which they may not have committed prior to

Continued on page 6

Successful Strategies

(Continued from page 5)

being released. Some places still use lie detectors that are adult focused. Also, be aware that in some jurisdictions the client might be required to register as a sex offender depending on the charge and the language of the plea or sentencing/disposition.

Dr. Bonner points out that there is no systematic evaluation for child sex offender treatment facilities. She advises that parental involvement in treatment is very important in adolescents. Some programs require the parents to regularly participate in their child's treatment. Treatment for adolescents, she advises, should not mirror adult sex offender programs. The focus should remain on the developmental stage, education and environment rather than simply on the offense. While no study currently exists comparing any two major treatment programs, one is currently being done which is expected to have results in three to five years.

The panel cautions against reports on the child (e.g. Psycho-Sexual) that are being performed by the treatment facilities. There is an inherent conflict of interest if that treatment facility is recommending inpatient treatment in their own facility. Most jurisdictions call for the least restrictive option for the child. Practitioner's in those situations may have to consider having an independent report prepared.

In evaluating a treatment facility, Dr. Bonner recommends visiting the Association for the Treatment of Sexual Abusers website (www.atsa.com) to investigate which programs are voluntary members of the association. While Dr. Bonner cautions that ATSA is not a complete analysis of a program, it does provide some objective standard with which to ascertain higher quality programs.

To hear the teleconference and access the materials visit our <http://www.abanet.org/litigation/committees/childrights/materials.html> which links to the call. This call is complimentary.

Hillary Harrison Gulden is a real estate attorney in West Palm Beach, Florida. Her passion for juvenile justice began when she worked at the Palm Beach County Public Defender's Office. She has been an associate editor for the CRLC Newsletter since 2002. If you have any questions or comments, she welcomes you to email her at hbg@gulden-law.com. ●

ACDLA Legislative Update

The ACDLA Legislative Committee has already begun work for the 2007 Legislative Session under the direction of Committee Chairman Bill Blanchard of Montgomery. Bill has divided the work of the committee into various subcommittees charged with specific tasks. Here's a look at these committees, their directives and membership. If you would like to participate on any of these, please email Ann Cooper at annscooper@bellsouth.net

Legislative Subcommittees – Directives and Members

Review and Recommendation Subcommittee –

This subcommittee functions primarily when the Legislature is in session, reviewing the ALLRS Report and the bills pertaining to criminal law and procedure. It will periodically recommend action (support/defeat/no action) to the full committee. The members of this subcommittee should plan to meet frequently during the legislative session:

- Bill Whatley, Montgomery
- Robert Tuten, Huntsville
- Angela Walker, Northport
- Eric Guster, Birmingham

Fundraising Subcommittee –

This subcommittee is currently raising much-needed funds for the 2007 legislative program. Its fundraising goal is \$25,000 by February 1, 2007. These funds will be used to hire a lobbyist, subscribe to the ALLRS legislative monitoring service for copies of bills and status of bills during the session, as well as various meeting expenses associated with meeting with state lawmakers during the session.

- Richard Keith, Montgomery, Chair
- Paul Whitehurst, Northport
- Tiffany McCord, Montgomery

Indigent Defense Subcommittee –

This subcommittee is active prior to and during the session. The principal function of this subcommittee is to develop and coordinate an ACDLA legislative plan for dealing with the current indigent defense crisis in Alabama. Should it turn out to be either necessary or appropriate for the ACDLA to propose its own indigent defense legislation, then this subcommittee shall be responsible for drafting the legislation and having it ready by February 1, 2007.

- Joe Van Heest, Montgomery, Co-Chair
- Jim Roberts, Tuscaloosa, Co-Chair
- Bill Blanchard, Montgomery

- Bill Clark, Birmingham
- Melinda Morgan Austin, Florence
- Susan Harmon, Lafayette
- Hays Webb, Tuscaloosa
- Don Colee, Birmingham

ABA Standards Subcommittee –

This subcommittee will review the ABA standards on capital defense and determine whether it is feasible to make all or part of it a part of the law in Alabama. It will be active prior to the legislative session and will have a goal of presenting draft legislation by February 1, 2007.

- Bill Clark, Birmingham
- Richard Jaffe, Birmingham
- Wayne Love, Anniston
- Patrick Tuten, Huntsville

Expungement Subcommittee –

This subcommittee will review the proposed new juvenile code and make a report to the full committee regarding provisions contained therein bearing on juvenile delinquency cases. The Juvenile Justice Subcommittee may also make recommendations to the full committee about the proposed juvenile code, and about other legislation that may be needed to improve the juvenile justice system from time to time.

- Marion Chartoff, Montgomery
- Kesa Johnston, Roanoke



MEMBERS GATHER AT SUPREME COURT – On September 20, 2006, ACDLA members gathered at the Alabama Supreme Court to hear oral argument on the *Wright v Childree* overhead case. Shown here are just a few members who came to hear Steve Glassroth of Montgomery argue on behalf of the Alabama Criminal Defense Lawyers Association, as well as the National Association of Criminal Defense Lawyers. A decision is still pending.

CAPITAL CORNER

MINDING THE MIND

By Katherine Hunt Federle

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On March 1, 2005, the United States Supreme Court in *Roper v. Simmons*¹ held that it was cruel and unusual punishment to execute those convicted of committing a capital offense before the age of eighteen. Noting that evolving standards of decency, as embodied in legislative enactments, determine which punishments are so disproportionate as to be cruel and unusual², the Court found that because the majority of states had rejected the juvenile death penalty, "our society views juveniles... as categorically less culpable than the average criminal."³ Juveniles are more immature and thus more prone to impetuosity and irresponsibility, "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and lack a well-formed character.⁴ "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."⁵

The decision in *Roper* does not rest on any of the recent developments in brain research;⁶ nevertheless that research itself is extraordinarily compelling. It has become clear that brain development proceeds in stages, generally from back to front.⁷ Some of the brain regions that reach maturity earliest – through proliferation and pruning – are those in the back of the brain. These regions control vision, hearing, touch, and spatial processing.⁸ The very last part of the brain to mature is the prefrontal cortex, the part of the brain involved in planning, setting priorities, organizing thoughts, suppressing impulses, and weighing the consequences of one's actions.⁹ Thus, there is strong evidence to suggest that when it comes to maturity, organization and control, key parts of the brain related to judgment are the last to develop. For teens, this means that their brains are not yet mature.¹⁰

In fact, the maturation process extends well past eighteen. "The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences and other characteristics that make people morally culpable... Indeed, age 21 or 22 would be closer to the 'biological' age of maturity."¹¹ Consequently, if juvenile brains are not fully developed, then mental processes, particularly those which utilize immature regions like the frontal lobe, would be more difficult. This necessarily raises interesting questions about the culpability of juveniles and may suggest that children should not be held accountable for their actions.

For example, the research may suggest that children, especially those under fourteen, may lack the requisite mental state for the offense. Because the prefrontal cortex is not fully developed, adolescents cannot rely on the prefrontal cortex to make decisions. Rather, they rely on the amygdala, a more primitive part of the brain responsible for gut reactions. Thus, adolescents may be more prone to taking risks. If, as the research suggests, the immature brain relies on the amygdala rather than the prefrontal cortex, can we actually say the child has formed the specific intent to commit the offense? Of course, the science has not advanced far enough to quantify its effect, which necessarily limits its use.

Nevertheless, it is extremely valuable to raise questions about the child's ability to form the mens rea. The child's attorney should consider a forceful challenge to the circumstantial evidence that inevitably makes up proof of specific intent. One of the law's peculiarities is the fuzzy way in which the courts approach mens rea, relying heavily on proof of actus reus as evidence of criminal intent. One approach may be to consider using expert testimony to establish the reality of adolescent brain development as a way to challenge the state's circumstantial evidence of specific intent. In other words, because the prefrontal cortex is not yet hardwired to the rest of the brain, it may be possible to argue that the juvenile's gut reaction is qualitatively different from the mental processes associated with higher order thinking characteristic of the prefrontal cortex. Thus, the adolescent may lack the specific intent – or in Model Penal Code terms, the purpose or knowledge – for the offense.

Similarly, the brain research raises questions about competency to stand trial. However, the research may say both too much and too little about the competence of juveniles. It may say too much because the research suggests that most children may lack the ability to think abstractly and to anticipate consequences – the very kind of thinking we ask our clients when assisting us in the preparation of their cases. It may also suggest that the paradigm client simply may not exist – at least if he is under the age of 25. The problem of course may be that our competency standard is an unrealistic one – and in fact we may

know this already. It could explain why, for example, so few criminal defendants are found incompetent to stand trial.

On the other hand, the research does not truly explain why some children commit crimes nor does it tell us whether our clients are competent in any meaningful way. It would be disturbing to think that all our juvenile clients are incompetent because we then would be placed in the situation where we would be asking for a finding of incompetence. That in turn, may expose our juvenile clients to longer periods of institutionalization.

How likely is it that children may be incompetent? The MacArthur Juvenile Adjudicative Competence Study,¹² for example, found that children between the ages of 11 and 13 had a poorer understanding of trial matters, poorer reasoning and recognition of relevance of information for a legal defense than did the fourteen- and fifteen-year-olds who, in turn, performed significantly more poorly than the sixteen- and seventeen-year-olds. The researchers found no significant differences between the sixteen- and seventeen-year-olds and young adults. Intelligence scores also were significantly related to the competence assessment, but there was a relationship between age and performance that was independent of intelligence.

The study also indicated that adolescents were much more likely to make choices in compliance with the perceived desires of authority figures – thus they were more likely to recommend waiving constitutional rights in interrogation than adults or to accept a plea offer. Significantly, the study did not examine communication and other abilities that might be important to assisting counsel. Nor did the study take into account how these juveniles would fare if given proper legal advice and assistance.

But the study does suggest that we should take into account developmental incompetence, particularly for younger children. And the study does raise real questions about whether these children should be held accountable at all because of their immaturity.

It is, of course, easiest to see how the research would apply to dispositions. Because medical research suggests that juveniles are less culpable for their actions, this evidence is relevant to considerations of treatment and punishment. It is very clear that our juvenile justice systems have taken an increasingly punitive approach to the treatment of juvenile offenders. The purposes and goals of the juvenile system are often schizophrenic, focused more on safety and punishment than rehabilitation and treatment. Moreover, the increasing use of judicial waivers, prosecutorial discretion, and legislation mandating transfer of youth to criminal court, along with use of blended sentencing provisions, which allow courts to impose adult time on a juvenile offender as young as ten years of age in juvenile court, are indicative of this trend. Nevertheless, the brain research does provide strong evidence that we should not hold minors as accountable as adults because their brains are different and they lack the same decision making capacity as adults. To do otherwise is not only unsound as a scientific matter but immoral.

To learn more about the research referred to in the article and how to apply it to the representation of juvenile defendants, visit the Children's Rights Litigation Committee website to listen to a tele-conference on *Roper v. Simmons* and how it affects practice in the courtroom. (<http://www.abanet.org/litigationcommittees/childrights/home.html>).

Katherine Federle is Professor of Law and Director, Justice for Children Project, The Ohio State University Michael E. Moritz College of Law. She is also one of the co-chairs of the child welfare subcommittee of the Children's Rights Litigation Committee.

¹125 S.Ct. 1183 (2005).

²*Id.* at 1190.

³*Id.* at 1194 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

⁴*Id.* at 1195.

⁵*Id.* at 1195.

⁶See Deborah W. Demo, *The Scientific Shortcomings of Roper v. Simmons*, 3 OHIO ST. J. CRIM. L. 379 (2006). Nevertheless, the Court clearly was curious about these developments, given the number of questions asked during oral argument. See Aliya Haider, *Roper v. Simmons: The Role of the Science Brief*, 3 OHIO ST. J. CRIM. L. 369 (2006).

⁷Claudia Wallis & Kristin Dell, *What Makes Teens Tick*, TIME Magazine (May 10, 2004).

⁸See also, Elizabeth Sowell et al., *Mapping Cortical Change Across The Human Life Span*, 6 Nature Neuroscience 309-315 (March 2003); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationship During Postadolescent Brain Maturation*, The Journal of Neuroscience 21(22): 8819-8829 (November 2001).

⁹*Id.*; Wallis, *supra*.

¹⁰"FRONTLINE: Inside the Teenage Brain, Adolescent Brains are Works in Progress,"

Interview with Jay Giedd available at <http://www.pbs.org/wgbh/pages/frontline/shows/teen-brain/work/adolescent.html> (2002).

¹¹*Adolescent Brain Development and Legal Culpability*, Winter 2003 A.B.A. Criminal Justice Section.

¹²Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003).



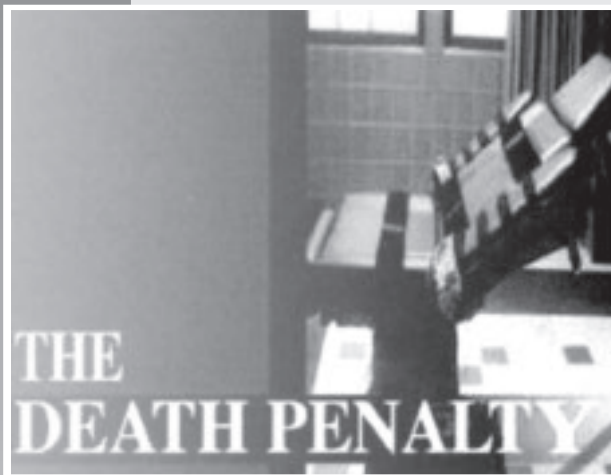
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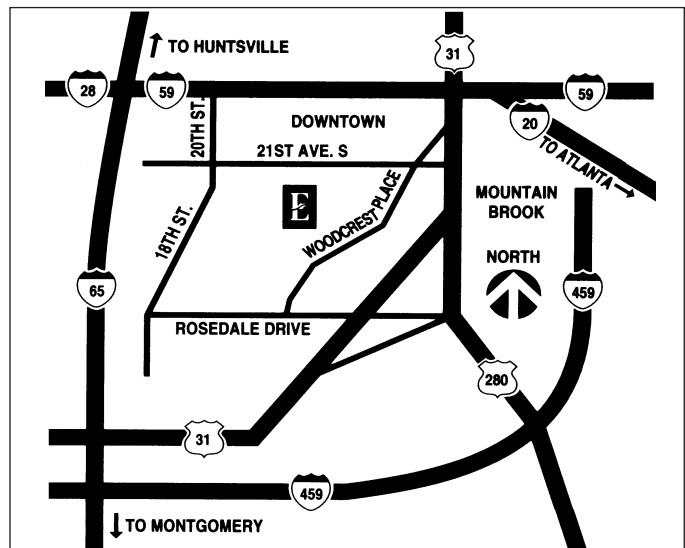
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(Order of Speakers Subject to Change)

Friday, January 26, 2007 – Delta and Magnolia Rooms

- 8:50 a.m. Opening Comments and Welcome – Melinda Morgan Austin, Holt, Mussleman, Holt & Morgan, Florence, AL
- 9:00 a.m. “Pre-Trial & Trial Motions in Capital Cases,” – John Mays, Attorney at Law, Decatur, AL
- 10:00 a.m. Break
- 10:15 a.m. “Crawford, Confrontation and Ethics,” – Professor Penny J. White, University of Tennessee, College of Law, Knoxville, TN
- 11:15 a.m. “Mental Health Issues in Capital Cases,” – John Niland, Attorney at Law, Texas Defender Service, Houston, TX
- 12:15 p.m. Lunch – On Your Own
- 1:30 p.m. “The Unique Principles of Voir Dire in Capital Cases,” – James E. Boren, Attorney at Law, Baton Rouge, LA
- 2:30 p.m. “Constructing an Opening Statement in the Penalty Phase,” – Richard Jaffe, Attorney at Law, Jaffe, Strickland & Drennan, Birmingham, AL
- 3:30 p.m. Break
- 3:45 p.m. “Jury Selection and Use of Jury Selection Experts,” – Joseph V. Guastaferrro, Jury Consultant, Atlanta, GA
- 4:45 p.m. Adjourn for Day

Saturday, January 27, 2007 – Delta and Magnolia Rooms

- 9:00 a.m. “Keynote Address: “The Death Penalty-Fighting Injustice” – Rev. Dr. Joseph Lowery, Atlanta, GA
- 10:00 a.m. “Representing Clients with Mental Retardation and Fetal Alcohol Spectrum Disorders” – William J. Edwards, Attorney at Law, Office of Public Defender, Los Angeles, CA
- 11:00 a.m. Break
- 11:15 a.m. “Working as a Team to Save Your Client’s Life,” – William D. “Bill” Massey and Lorna McClusky, Attorneys at Law, Memphis, TN
- 12:15 p.m. Lunch – On Your Own
- 1:30 p.m. “Developing and Presenting Mitigation: The Basics,” – Russ Stetler, Attorney & Director Investigation & Mitigation, NY, Capital Defenders Office, New York, NY
- 2:30 p.m. “Preserving Your Client’s Life by Preserving the Record,” – A Panel Discussion: Steve Strickland & Derek Drennan, Attorneys at Law, Jaffe, Strickland & Drennan, Birmingham, AL; and Lorna McClusky, Attorney at Law, Massey & McClusky, Memphis, TN
- 3:30 p.m. Break
- 3:45 p.m. “Closing Argument in the Penalty Phase of a Capital Case,” – Chris Adams, Attorney and Director, The Office of Georgia Capital Defender, Atlanta, GA
- 4:45 p.m. Wrap Up and Adjourn

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