

# The Guardian

The Newsletter of the Alabama Criminal Defense Lawyers Association

April/May/June 2009

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

*"Justice Must Be Won XVII"*

## 2009 SUMMER SEMINAR AND ANNUAL MEETING

June 18-20, 2009

Pensacola Hilton (Formerly Hilton Garden Inn)  
Pensacola Beach, FL

### Conference Registration

334-272-0064 or on-line at

[www.acdla.org](http://www.acdla.org) "Seminars"

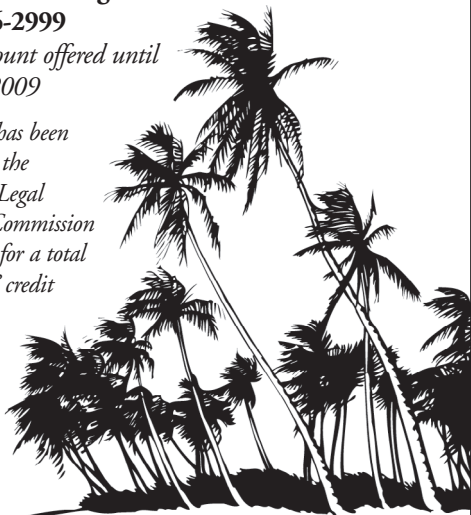
Early Bird Discount by June 1, 2009

### Hotel & Condo Registration

1-866-916-2999

Hotel Discount offered until  
June 10, 2009

*This course has been  
approved by the  
Mandatory Legal  
Education Commission  
of Alabama for a total  
of 11 Hours' credit*



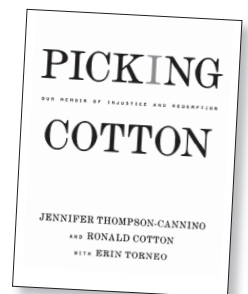
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## "PICKING COTTON"

### Co-Author to Keynote Summer Seminar

ACDLA is pleased to announce Jennifer Thompson-Cannino as keynote speaker for the 2009 "Justice Must Be Won" Summer Seminar and Annual Meeting. Ms. Thompson-Cannino's story has been told in the compelling New York Times bestseller, *Picking Cotton*. She has also been seen in recent weeks on the CBS news show 60 Minutes retelling the message of injustice and mistaken identity. She will speak at 9:15 a.m. on Saturday, June 20. Agenda details may be found inside this issue of *The Guardian*.



### Jennifer Thompson-Cannino

lives in North Carolina with her family. She speaks frequently about the need for judicial reform, and is a member of the North Carolina Actual Innocence Commission, the advisory committee for Active Voices, the Constitution Project, and Mothers for Justice. Her op-eds have appeared in the *New York Times*, the *Durham-Herald Sun*, and the

Tallahassee Democrat. Don't miss this opportunity to hear this compelling story on wrongful conviction.

"Justice Must Be Won XVII" will be held June 18-20, 2009 at the Pensacola Beach Hilton. If you have not already registered, please do so today! Complete details are inside this issue of *The Guardian*.

"In July 1984, Thompson-Cannino, a white college student in Burlington, N.C., was raped by a black intruder. She identified her assailant in a lineup as Cotton; he was sentenced to life plus 50 years. When he secured a new trial in 1987, he found himself charged with a second attack and sentenced to two life sentences plus 54 years. DNA evidence at a new trial, eight years later, exonerated him of both charges. Authors Thompson-Cannino and Cotton offer this riveting account of their separate, yet connected, lives through those years. The first two parts describe their dreadful experiences: for her, in the "[s]aliva swabs, vaginal swabs, pubic hair combings" of the rape kit; for him, being "sprayed like a dog getting defleaed" at the prison. Thompson-Cannino describes the invasive procedures following a rape, unsettling police procedures (the lineup), unfamiliar legal stages (such as a probable cause hearing) and the disturbing trial. Cotton leads readers through the events following a conviction (the several prisons, adjustments to the prison norm, the alternating hope and despair of the judicial stages). Redemption is the subject of the third part, where Thompson-Cannino and Cotton forge a path to genuine friendship in advocating for the wrongfully convicted. Together they have produced a well-modulated and generously balanced memoir—at once a devastating and uplifting crash course in the criminal justice system."

— *Publisher's Weekly*

# President's Column

By Richard Keith, Attorney, Montgomery, AL



ACDLA President  
Richard Keith

Dear ACDLA Member:

This is my last President's column and it has been a pleasure to serve each and every one of you. Our legislative program has been a primary focus of this presidency. At this time, HB59, the Expungement Bill by Representative Chris England, has passed the House and now goes to the Senate for consideration. We appreciate your continued support of this effort by calling lawmakers urging them to pass HB59.

This past year has been a difficult one for this organization. We continue to face the uncertainties of change in our indigent defense system. Leadership has been forced to make hard decisions to support Indigent Defense Commission legislation knowing full well we are a membership divided on the issue. We have been asked to go to a negotiating table for several years now to assist in the creation of the best possible indigent defense system Alabama can afford.

This whole process has put tremendous pressure on our Board, our executive director, the membership and our limited resources. I commend everyone for their patience and willingness to try to understand what we face both as a non-profit organization with a small staff and limited resources, and as providers of indigent defense services to the state.

As of this writing, Alabama's Indigent Defense Commission Bills, SB86 (Bedford) and the House version HB214 (Knight) are on the respective chamber calendars for floor votes. These are not perfect bills. There are segments that could be improved. These changes can be made either this year or legislatively next year.

At this time, we cannot say "proof positive" that either of these bills will pass the 2009 Session when the Alabama Legislature adjourns sine die on May 12.

We can be sure that if these bills die on the calendar or on the floor, we will see them again next year, and the next, and the next. ACDLA will be left to stand on an open battlefield trying to represent the best long-term needs of our members and clients, despite growing government budget limitations and members who don't want change, fearing the uncertainties that lie ahead.

How did we get to this place?

Around the country, forty-seven of our sister states have had to face the realities of limited indigent defense funds. Alabama is not an exception. None of these state programs are perfect and some are under funded, but Ladies and Gentlemen I tell you, the lawmakers have issued a verdict, and that verdict is we are fast running out of money to pay for indigent defense.

In 2007, Alabama's indigent defense budget was \$47.2 million. In 2008, it grew to \$67 million. The entire unified judicial system budget for Alabama for 2009 is projected at \$177 million. Facing this reality, lawmakers have pointed to Alabama's fee declarations and asked for explanations. We have met personally, one-on-one, with them to explain what the totals represent (multiple year billings, huge expert witness fees in capital cases, etc.), and after each meeting we come away with the same conclusion. Lawmakers are desperate to control costs and want to eliminate any possibility of abuse of the system. They see an Indigent Defense Commission as the best possible way to make this happen. As ACDLA leadership, we don't all agree the proposed IDC legislation is the way to go. We have listened to and read emails from members who are against any show of support for this legislation. Most point to the imperfections of the bill, but no one comes to the table with helpful recommendations.

Finding a way to make this system perfect is impossible. We must work with what we have to begin this journey. Solutions must come legislatively and they must come together soon. If we don't work together with the decision makers at the Statehouse, we will likely see drastic cuts in indigent defense payments or delayed payments when funds run short before year's end. That's a dilemma none of us wants to consider.

I want to thank all the leadership who have worked hard for years now to come to Montgomery to meet with government agency heads, testify before committee hearings at the Statehouse and meet with the ACDLA Legislative Committee. I want to commend these fine folks for doing these things despite harsh criticism and little support.

I want each of you to know that all efforts made by this organization to negotiate with all the state parties on this legislation, have been done with the best of intentions and towards finding the best possible solutions for Alabama's indigent defense dilemma. There are no personal agendas at play, just a group of some of the finest criminal defense lawyers in Alabama trying to move towards positive change.

Ladies and Gentlemen, the verdict has been given. It is up to each of us to decide to participate as a united voice in ACDLA or struggle against each other at a time where we need to be working together to find solutions.

I appreciate your continued support of this fine organization and I again challenge you to get involved with its many committees and programs. As Margaret Mead once said, "Never doubt that a small group of thoughtful committed citizens can change the world. Indeed it's the only thing that ever has."

I am counting on you.

Sincerely,

**Richard Keith, President**  
rkk@rkeithlaw.com

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Lawyers Association**

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**Editor:** Ann Cooper

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

**[annscooper@bellsouth.net](mailto:annscooper@bellsouth.net)**

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**

March 15, 2009  
June 15, 2009  
September 15, 2009  
December 15, 2009

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](mailto:annscooper@bellsouth.net)**

# FROM MY PERSPECTIVE

*By Ann S. Cooper, Executive Director*

## **2009 REGULAR SESSION ENDS MAY 12**

The 2009 Regular Session of the Alabama Legislature can best be described as a time of many ups and downs for ACDLA. The Legislative Committee worked very hard this past session on two major issues – expungement and a new indigent defense system. As of this writing, legislation to address both issues awaits final action on the floors of the House and Senate. The session will conclude (sine die) on May 12. Whether you supported the issues or not, members who made trips to Montgomery to testify before committees, made phone calls to lawmakers, sent emails or letters are all to be commended for getting involved in the legislative process. Hopefully in the days ahead, we will be able to find common ground on the basics of indigent defense delivery in our state.

## **SUMMER SEMINAR – BEST EVER!**

Please make every effort to register to attend the 2009 “Justice Must Be Won” seminar set for June 18-20, 2009 in Pensacola. The roundup of speakers and topics is included in this issue of *The Guardian*, along with complete registration details. You may also go on-line at [www.acdla.org](http://www.acdla.org) and select “seminars” for the same information in electronic form. Sign up now and save \$50! Pre-registration is \$325 until June 1. After that time registration for ACDLA members jumps to \$375.

## **SPECIAL GUEST SPEAKER – PICKING COTTON CO-AUTHOR**

Jennifer Thompson-Cannino, co-author of **Picking Cotton**, is our special guest keynote this year. ACDLA is very fortunate to have her with us to tell her heart wrenching story of wrongful conviction. Ms. Thompson-Cannino will be on hand for a special book signing for anyone interested in picking up a copy of the book.

## **AWARDS LUNCHEON TO FEATURE OUTSTANDING WORK**

Annually ACDLA sponsors its Awards Luncheon during the Summer Seminar and Annual Meeting. This year will be no exception. Special recognition will be paid to those criminal defense lawyers making outstanding contributions to the Association and to the profession. The Beddow Award winner, ACDLA's highest honor will also be given, and to that member contributing a lifetime of excellence to the field. Be sure to wear your Hawaiian shirt, an annual luncheon tradition and join in the fun and celebration.

## **2009 ANNUAL MEETING**

The Annual Meeting of ACDLA will be held at 9:30 a.m. on Friday, June 20. Members present will elect new board members for 2009-2010. The program will also include an overview of this past year's legislative efforts and there will be an opportunity for members to ask questions and dialogue with leadership.

## **CALL FOR COMMITTEE VOLUNTEERS**

Each year ACDLA calls for committee volunteers to get involved in the various programs of the organization. We need members to volunteer to serve—committing time and talents in the following areas:

- *Amicus Curie* Committee – prepares briefs at request of members after board approval
- CLE Committee – works to plan and assists in coordination of seminar details
- Death Penalty Subcommittee – works to plan January death penalty seminar
- Legislative Committee – works on legislative issues specific to criminal defense
- Membership Committee – works to build the organization
- Publications Committee – works to plan and coordinate contributing writers for *The Guardian*

If one of these committees appeals to you, please contact me at 334/272-0064 or via email to [annscooper@bellsouth.net](mailto:annscooper@bellsouth.net)

## **2008-2009 BOARD – A SPECIAL THANK YOU**

As Executive Director I would like to take this opportunity to thank the outgoing board for their time and talents this past year and for their continued support of this organization. I have never worked for a finer group of leadership.

As I move into my tenth year of service to ACDLA, I am very optimistic about the future of this fine organization and I appreciate each and every opportunity to serve it.

Together we can grow. There is a place for us. Tell your peers.... it is ACDLA.

See you in Pensacola!

Ann Cooper  
[annscooper@bellsouth.net](mailto:annscooper@bellsouth.net)

# Burying Bullets – Multiple gunshot wound cases.

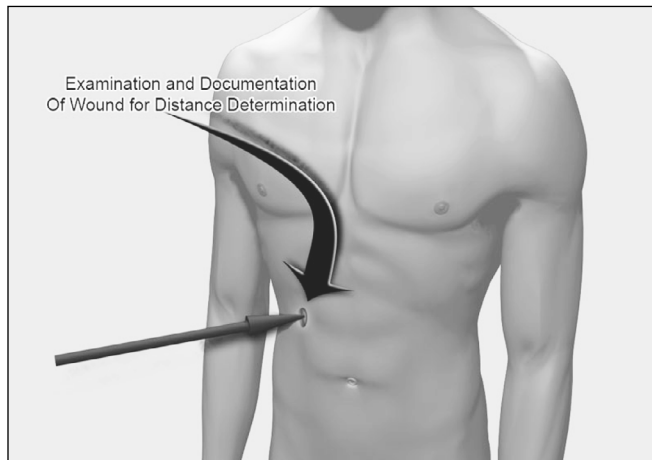
*By James Lauridson, MD, Montgomery, AL • Joseph Saloom, Attorney, Montgomery, AL*

One of the most time-consuming cases faced by a medical examiner is the autopsy of a person killed by multiple gunshot wounds. This is especially true in cases involving small caliber projectiles, and large or overweight victims.

It is standard practice for the forensic pathologist to x-ray the body to identify and localize the presence of bullets. However, in spite of x-rays, these bullets can be very difficult to locate in the tissues. Recovery can be tedious and frustrating. Nevertheless, it is the job of the forensic pathologist to recover all bullets and significant fragments of bullets and jackets. It is substandard practice for a forensic pathologist to recover only a few projectiles on the assumption that examining all projectiles is unnecessary. It is possible that more than one weapon was involved and this information will be lost by not recovering every projectile. Obtaining only a representative sample is inadequate.

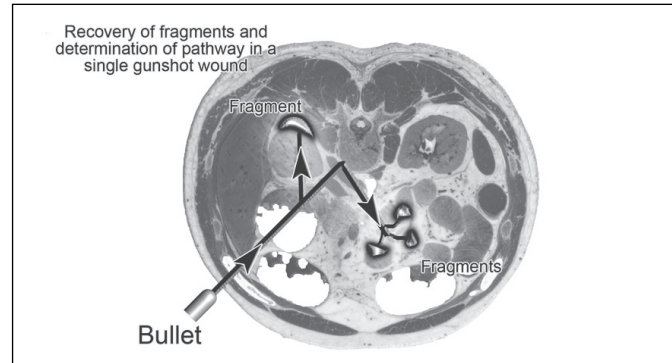
**Beware that written reports and medical examiner testimony may not clearly indicate that all the projectiles were not recovered.** Only examination of the x-rays, photographs, and projectiles recovered may reveal this fact. Obviously such a lapse in autopsy protocol provides a strong and credible point of defense. It might even be a reason to exhume the body for a complete examination.

A second area of concern in multiple gunshot cases is failure of the medical examiner to clearly identify related entrance and exit wounds and the intervening pathway in the body. Without this information the direction of the shots, and the injuries caused by each shot, cannot be established. There is a temptation for the forensic pathologist to simply state that because of the multiple gunshot wounds, the pathways within the body cannot be established. In some extreme cases, this is true, however, it should not be taken for granted. **When directionality and pathways were not established by the medical examiner important information for a case is lost.**

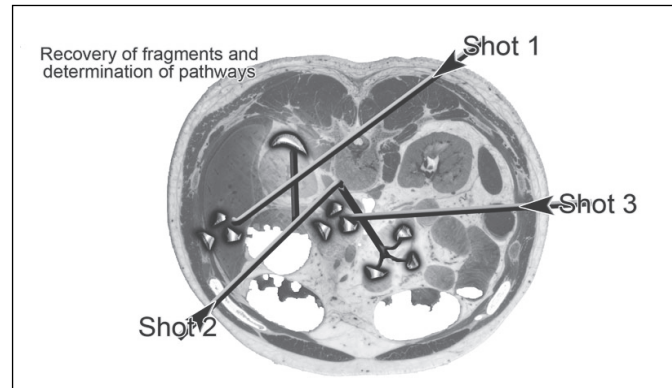


### SINGLE GUNSHOT WOUND TO THE ABDOMEN

Examination and documentation of a gunshot wound, establishes whether a wound is an entrance or exit wound and allows for estimation of the distance of the shot.



At autopsy, accurate determination of the bullet pathway as well as recovery of all of the bullet fragments is essential documentation of a gunshot wound.



In cases of multiple gunshot wounds, accurate determination of pathways and recovery of bullet fragments is also essential documentation. •

### Characteristics of Gunshot Wounds Determined at Autopsy

- Distance of Shot
- Direction of Projectile
- Pathway of Projectile in Body
- Recovery of Projectile

### Determining if all the projectile is recovered

- Examine X-ray to determine the number of projectiles/fragments in the body
- Examine photographs and ballistics report to establish actual number of projectiles/fragments recovered

# Does the “Good Faith” Exception Under *Leon* Apply When The Officer Who Applies For The Warrant Also Serves It And The Probable Cause For That Warrant Is Lacking?

By John E. Mays, Decatur, Alabama

It happens daily in courtrooms across the country. The defendant’s attorney gets the trial court to rule on the issue of probable cause to obtain a search warrant and the court agrees that probable cause is lacking. The defendant congratulates his counsel on presenting a meritorious argument to the court and then the district attorney rises and says, “Even though probable cause to issue the warrant may be lacking, the officer who executed it acted in “good faith” and the evidence should still be admissible under *Leon*.”

Let us now raise another issue in this scenario. Assume now that the same officer who presented deficient information to the issuing magistrate also executes the warrant. Isn’t that somewhat like allowing the officer to take advantage of its own wrong?

Let’s assume these facts. The defendant has a prior conviction for possession of controlled substance of which the officer is aware. This officer has just stopped this defendant for a minor traffic violation and the defendant consented to a search of his vehicle. Pursuant to that consent the officer finds two rocks of crack in the defendant’s glove compartment. The defendant then says, “That’s not mine and I never saw it before.” The arresting officer calls another unit to the scene and the patrolman arriving says “I know that guy. He is a well known addict.” The arresting officer gets the address of the defendant’s residence from his driver’s license and applies for a search warrant. Additional crack is found in the defendant’s residence pursuant to the search conducted by the arresting officer. The defendant challenges the search warrant on the grounds that there existed no probable cause to link the defendant’s home with any contraband. The court agrees with the defendant but is pondering the effect of *Leon* on these facts.

The case of *US v. Zimmerman* 227 F3d 426 (3<sup>rd</sup> Cir. 2002) at 438 is in point at this issue:

“Good faith is not a magic lamp for police officers to rub whenever they find themselves in trouble.” *US v. Reilly* 76 F.3d 1271, 1280 (2nd Cir. 1996) and particularly when the affiant is also one of the executing officers, it is somewhat disingenuous, after having gone to the magistrate with the paltry show-

ing here, to suggest, as the government suggests, that at bottom it was the magistrate who made the error and the search and seizure are insulated because the officer’s reliance on that error was objectively reasonable.

That factual issue in *Zimmerman* was that the officers who applied for the search warrant did not establish a sufficient nexus between illegal activity or possession of contraband at that defendant’s residence.

Why bother to cite *Zimmerman*, a Pennsylvania Third Circuit case? Because it is clearly the rule in Alabama. See *Ball v. State* 868 So.2d 474, 475 (2003). That is a dissenting opinion by Justice Cobb but the majority opinion is “affirmed by Unpublished Memorandum”.

The case of *US v. Leno* 468 US 897 at 926 (1984) states that whether a police officer serving a search warrant can rely on probable cause supporting it is determined by whether the affidavit was sufficient to:

... create disagreement among thoughtful and competent judges as to the existence of probable cause.

Ergo, if there is no evidence to connect the premises to be searched with criminal activity or contraband, then no officer who executes such a search warrant can claim good faith. That proposition of law was also set out in *Ball*, supra and it cites *US v. Hendricks* 743 F.2d 653 at 654 (9th Cir. 1984) for rule that:

It is critical to a showing of probable cause that the affidavit state facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises to be searched.

If this be not present, an officer cannot rely on the good faith exception in *Leon* to save his search. This holds doubly true if he was the one who provided the faulty probable cause to the issuing magistrate. Although *Ball*, supra is a dissenting opinion that dissenting opinion was adopted by the Alabama Supreme Court in *Ex parte Green* 2008 WL 2780788 at p. 8. •

# Summer Seminar Speakers and Topics

Hear some of the country's biggest names and brightest minds in criminal defense today

## ■ Jennifer Thompson-Cannino

Winston-Salem, NC, *Keynote* - "Wrongful Conviction"

Ms. Thompson-Cannino is co-author of the *New York Times* bestseller, *Picking Cotton: Our Memoir of Injustice and Redemption*.

Ms. Thompson-Cannino's story as a rape victim and ultimate advocate for judicial reform is a remarkable one. Don't miss this powerful real life tale of injustice and redemption from the perspective of two victims – the accused Ronald Cotton and his accuser, Jennifer Thompson-Cannino. Ms. Thompson-Cannino lives in North Carolina with her family. As an advocate for judicial reform she is a member of the North Carolina Actual Innocence Commission, the advisory committee for Active Voices, and the Constitution Project. Her op-eds have appeared in *The New York Times*, the *Herald-Sun*, and the *Tallahassee Democrat*.

## ■ Dr. Jim Lauridson

Montgomery, AL, (Forensic Pathology, Internal Pathology & Anatomic Pathology)  
"Dealing with Errors in the Autopsy Report"

Learn how errors in an autopsy report won the dismissal of a recent infant death case in the 24th Circuit.

## ■ Rick Sandefer

Attorney, Pinson, AL  
"The Defense of Post Traumatic Stress Syndrome" (PTSD)

Recent reports indicate that one of the major consequences of all warfare is PTSD. Some studies indicate that as many as 18% of returning combat veterans struggle with some significant mental health issues. Department of Defense medical authorities now estimate that as many as 30% of returning Army Reserve and Guard members struggle with such issues four to six months after returning. Incidents of violence, domestic violence and alcohol/chemical dependency issues continue to climb from this group. Learn more about "defending the defender," and others who suffer with PTSD, as well as learn how to recognize when to use PTSD as a defense.

## ■ Larry Daniel

Guardian Digital Forensics, Raleigh, NC  
"Digital Forensics for Attorneys"

Understand the effectiveness of computer forensics as a defense tool for sex crimes, civil, cyber-stalking and domestic cases.

## ■ Dr. John Matthew Fabian

(Board Certified Clinical & Forensic Psychologist)  
Cleveland, OH

"How to Utilize Forensic Psychological Evaluations Within Internet Online Solicitation and Pornography Sex Crime Cases"

Be able to recognize diagnostic issues associated with Pedophilia; Paraphilia not otherwise specified (non-consenting) subtype: Antisocial Personality Disorder (APD) Psychopathy (severe criminal personality); Exhibitionism; Substance abuse; dependency and intoxicated states.

"Sexually Violent Predator Risk Assessment and the Law"

Dr. Fabian will also cover the science of sex offender risk assessments as applied to federal sex offenders in Adam Walsh Act civil commitment hearing proceedings.

## ■ Jennifer Sellers

Attorney  
Montgomery, AL

"How Classification at DOC Affects Your Client"

Hear from a former State classification specialist how classification at the Department of Corrections affects your clients.

## ■ PLUS OTHERS:

### Richard Jaffe,

Attorney  
Birmingham, AL  
"Winning Trial Themes: From Voir Dire through Jury Instructions"

### John Mays

Attorney  
Decatur, AL  
"Search Warrants in Drug Cases"

### Patrick Mahaney

Attorney  
Montgomery, AL  
"DUI Defense Update"

### Kathryn King

Attorney  
Cullman, AL  
"Case Law Update" •

## AGENDA

### ***“JUSTICE MUST BE WON XVII”***

(Order of Speakers Subject to Change)

#### THURSDAY, JUNE 18, 2009

Noon – 1:00 p.m.	Registration
1:00 p.m. – 2:00 p.m.	“Case Law Update” – <i>Kathryn King, Attorney, Cullman, AL</i>
2:00 p.m. – 2:15 p.m.	Break
2:15 p.m. – 3:15 p.m.	“DUI Update” – <i>Patrick Mahaney, Attorney, Montgomery, AL</i>
3:15 p.m. – 4:15 p.m.	“The Defense of Post Traumatic Stress Syndrome” – <i>Rick Sandefer, Attorney, Pinson, AL</i>
4:30 p.m. – 6:00 p.m.	<b>President’s Reception</b>

#### FRIDAY, JUNE 19, 2009

8:00 a.m. – 8:30 a.m.	Registration
8:30 a.m. – 9:30 a.m.	“Digital Forensics for Attorneys” – <i>Larry Daniel, Guardian Digital Forensics, Raleigh, NC</i>
9:30 a.m. – 10:30 a.m.	<b>2009 ACDLA Annual Meeting</b>
10:30 a.m. – 10:45 a.m.	Break
10:45 a.m. – 11:45 a.m.	“How to Utilize Forensic Psychological Evaluations within Internet Online Solicitation and Pornography Sex Cases” – <i>Dr. John Matthew Fabian, Cleveland, OH</i>
11:45 a.m. – 12:45 p.m.	“Sexually Violent Predator Risk Assessment and the Law” – <i>Dr. John Matthew Fabian, Cleveland, OH</i>
1:00 p.m. – 2:30 p.m.	<b>2009 Awards Luncheon</b> – <i>Wear Your Hawaiian Shirt!</i>
2:30 p.m. – 3:30 p.m.	“Winning Trial Themes: From Voir Dire through Jury Instructions” – <i>Richard Jaffe, Attorney, Birmingham, AL</i>
3:30 p.m.	<b>Seminar Adjourns for the Day</b>
3:45 p.m.	ACDLA Board of Directors Meeting

#### SATURDAY, JUNE 20, 2009

8:15 a.m. – 9:15 a.m.	“How Classification at DOC Affects Your Client” – <i>Jennifer Sellers, Attorney, Montgomery, AL</i>
9:15 a.m. – 10:15 a.m.	“Picking Cotton: A Story of Injustice & Redemption” – <i>Jennifer Thompson-Cannino, co-author and member of North Carolina Actual Innocence Commission, Winston-Salem, NC.</i>
10:15 a.m. – 10:30 a.m.	Break
10:30 a.m. – 11:30 a.m.	“Dealing with Errors in the Autopsy Report” – <i>Dr. Jim Lauridson, Forensic Pathologist, Montgomery, AL</i>
11:30 a.m. – 12:30 p.m.	“Search Warrants in Drug Cases” – <i>John Mays, Attorney, Decatur, AL</i>
12:30 p.m.	<b>Seminar Concludes</b>

*This course has been approved by the Mandatory Continuing Legal Education Commission of Alabama for 11.0 CLEs.*

### HOTEL ACCOMMODATIONS:

#### PENSACOLA HILTON

12 Via de Luna Drive, Pensacola Beach, FL 32561 • 1-866-916-2999  
Rates: Ask for the ACDLA Rate of \$248 up

#### HILTON TOWER CONDOS

12 Via de Luna Drive, Pensacola Beach, FL 32561 • 1-866-916-2999  
Rates: Ask for the ACDLA Rate of \$329 up • 1, 2 & 3 BR condos available.

***ALL HOTEL AND CONDO DISCOUNTS WILL DROP JUNE 10, 2009***

**REGISTRATION FORM  
ACDLA 2009 SUMMER SEMINAR  
ANNUAL MEETING**

**Please sign me up!**

Name(s): \_\_\_\_\_

Firm/Agency: \_\_\_\_\_

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

City: \_\_\_\_\_

State: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

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

**Method of Payment:**

\_\_\_\_\_ Check (Payable to ACDLA)

Amount Enclosed \_\_\_\_\_

\_\_\_\_\_ Visa \_\_\_\_\_ Mastercard

Name on Credit Card: \_\_\_\_\_

Expiration Date: \_\_\_\_\_

Credit Card# \_\_\_\_\_

Signature: \_\_\_\_\_

***ALL MATERIALS WILL BE IN CD ROM FORMAT.***

***Sorry, no refunds after June 10,  
but substitutions are welcomed.***

Return this form to:

ACDLA, P.O. Box 1147, Montgomery, AL 36101

By fax to: 1-866-665-7522

By Email to: [annscooper@bellsouth.net](mailto:annscooper@bellsouth.net)

**REGISTRATION FEES:**

**\$325 – ACDLA Members by June 1, 2009**

**\$375 – Non-members and all registrants after  
June 1, 2009**

**Free to Lifetime Members**

**Free to Presidents Club Members**

**CASE CONFERENCING ON CAPITAL  
CASES AT SUMMER SEMINAR**

The ACDLA Death Penalty Assistance Committee will offer case conferencing on-site at the Summer Seminar and Annual Meeting for state and federal death penalty defense attorneys. If you are interested in participating in a case conference opportunity, please contact us no later than June 1. *Pre-registration is essential if we are to be able to provide this service on an individual basis.* An experienced death penalty litigator will be assigned to each person requesting this service. There will be no time constraints and members of the Death Penalty Assistance Committee will make every effort to fully answer all your questions so that you will leave with an effective plan to save your client's life.

■ **WHAT TO BRING:** Participants must bring their case files and all discovery provided to date.

■ **COST:** This service is provided free to all registered ACDLA Summer Seminar participants.

■ **WHO WILL HELP:** The lawyers sitting with you for case conferencing will be the best capital defense attorneys in Alabama.

***Sign Me Up! Deadline for Case Conferencing  
Registration – June 1***

\_\_\_\_\_ Yes, I would like to schedule case conferencing during the Summer Seminar. I understand there is no extra charge for this service.

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

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

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

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

Email: \_\_\_\_\_

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# New Approaches to Jury Selection and *Voir Dire*

By Karen Steele, Attorney, Oregon and Inese Neiders, Jury Consultant, Ohio

It's no longer news that *voir dire* should incorporate the story of our clients and the story of their defense. Nor should it be news that we should avoid becoming complacent or set in our ways when it comes to jury selection and *voir dire*. Let's face it — we don't live in the same world we did even five or ten years ago. As Bob Dylan put it, "the times, they are a changin'." What do these changin' times have to do with jury selection and *voir dire*? The times reflect what's going on in our communities and so must our juries reflect those times.

We have what we consider to be a good jury questionnaire from our collaboration a few years ago. Does that mean we can use it today? Perhaps, but not without first considering and evaluating each question for cohesiveness with our case and today's thinking.

Our prior collaboration was in a death penalty case, so, by way of example, we'll discuss a few changes that have happened in that area by way of example -- the changes that translate easily into other areas of criminal defense.

Ten years ago, a debate on the death penalty might have focused more on its deterrent effect (or not) or morality. Today we see more discussion and debate on cost-effectiveness. In state after state there are legislative proposals to abolish the death penalty for no other reason than to save money. New Mexico repealed the death penalty on March 18, 2009.<sup>1</sup> States like Colorado, Kansas, Maryland, Montana, New Hampshire, Virginia, and Washington report consideration of legislation to get rid of the death penalty because of its expense. Colorado's proposal would move funds formerly dedicated to death penalty prosecution to solving cold-cases.<sup>2</sup> This move combines cost-consciousness with respect for crime victims. Even in states with no pending death penalty legislation there's an increase in public debate — just check out your local opinion pages or today's equivalent, the local blogs. Tough economic times cause reevaluations of all sorts, including reevaluations of public spending. Rest assured that prospective jurors will have made similar reevaluations. It's up to you to take advantage of that new thinking.

How can you utilize the new thinking in both

your *voir dire* of the prospective jurors as well as in your overall case? In one recent capital case we're aware of, Alabama attorney Larry Morgan asked a prospective juror about her understanding of "life without parole." That exchange led directly into a discussion of the cost inefficiency of the death penalty. Attorney Morgan let that juror talk and talk and talk until she got to the point where she voiced the opinion that it did not make sense to pursue a sentencing option when it would cost up to three times<sup>3</sup> the cost of a true life sentence. Finally, the prosecutor woke up with an objection. In a matter of minutes all of that information and that juror's final conclusion was in that Alabama courtroom for all to think about and for the defense attorneys to use in weaving the fabric of their case.<sup>4</sup>

Who is going to be able to sit on your jury during these difficult economic times?<sup>5</sup> Will they be able to forego their wages or salary for the time your case will take? Will they be willing to impose upon their bosses during these times when jobs are scarce and highly valued? Special attention needs to be given these areas during *voir dire*. Make sure your jurors won't have the extra stress of worrying whether their job will still be there after your case, or whether they'll still have a roof over their heads and food on the table. And, keep an eye out for a skewing of the jury pool — those called as well as excused — and the panel that makes it in for questioning for constitutionally infirm excusal procedures and fair cross section problems.

Then there's the matter of innocence. During the past few years scores of those formerly convicted have been set free because they were later proven innocent. Laws have been passed across the country allowing for DNA testing and the like. Recently in Tennessee there was news that the DNA of Paul House, a man who spent more than two decades on death row, does not match the DNA found under the fingernails of his supposed victim. Americans do not favor exacting the ultimate, permanent punishment when there is a chance of innocence. "The exonerated" (those formerly under sentence of death and subsequently shown to be innocent) speak to this. Currently-

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litigated cases like that of Troy Davis in Georgia speak to this. Transformations like that of Rev. Carroll Pickett of Texas speak to this. What was once theory is now evidence-based experience. People have become aware of these cases and situations and transformations. They are now primed and sensitized to innocence and residual doubt, strengthened by the testimony of honest and reliable witness testimony and scientific testing.

Conventional wisdom about victims has changed as well. It used to be taken for granted that “victims” (however defined) were wholly aligned with the prosecution. Now we’ve learned that victims, given the opportunity, often have a different voice from that of the prosecution, if only given the chance. Through the dedication and persistence of some of our own as well as some of their own, a death sentence is no longer understood to be the only way victims can have some semblance of “closure.” In fact, we see an increasing number of victims who no longer want to relive the events of the crime time and again, and instead would choose a quiet resolution short of death. What are the issues that are important to the victims in your case? Chances are they will also be important to the folks on your jury.

And what about the case and client-specific evidence that you’ll present to your jury and will want to explore with them during *voir dire*? Notions of mitigating evidence have changed dramatically, from both legal and social science perspectives. One need only consider the flow from *Lockett* through *Penry* and *Wiggins*, and beyond to realize that mitigation practice is a radically different creature than it was just a few short years ago. Content and packaging – how you tell your client’s story, and how consistently you do it – remains fundamental. Another component is what your “average” jurors will be receptive to, what they will want to know, what they will forgive not knowing. How to determine this? Studies, such as those conducted by the Capital Jury Project or a number of other scientists, are invaluable to learning how juries work and what’s important to them. And, perhaps too obviously, the local media and blogs are invaluable in finding out what’s stirring up the pot in your community and what’s settling to the bottom. Again, the times (and attitudes) are a changin’.

We’ve talked about changing times and the need to adjust plans for *voir dire* and jury selection both for the case and for the times. That doesn’t mean we can forget the perennials: bias, race, gender, sexual orientation, and age. These attitudes are changing also, as are methods for measuring them more accurately.

Methods and techniques for jury selection have also improved. We’ve discussed questionnaires and *voir dire*, but other methods are available, one of the more popular being the mock jury. This works particularly well if the judge is reluctant to use questionnaires or is inclined to eviscerate the questionnaire. If funding is available, a survey can also be a source of important information.

As we pointed out, the situation today regarding jury selection has changed considerably in recent years, and these changes can be advantageous for our clients – but only if we’re aware of the new developments and modify our approaches accordingly. •

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<sup>1</sup>Although a good portion of the legislative debate on the death penalty repeal bill centered on cost-consciousness, Governor Richardson’s signing statement focused on the permanency of death as punishment. He noted that “the system to impose this ultimate penalty must be perfect and can never be wrong. But the reality is the system is not perfect – far from it.” Remarks of Gov. Richardson, 3/18/2009, and found at: [http://www.governor.state.nm.us/press/2009/march/031809\\_02.pdf](http://www.governor.state.nm.us/press/2009/march/031809_02.pdf). The bill Richardson signed replaces the death penalty with the sentencing option of life without the possibility of parole.

<sup>2</sup>Attorney April 21, 2009, the Colorado House passed death penalty repeal legislation by a vote of 33 to 32. The legislation, which is now under consideration in the Colorado Senate, would repeal the death penalty and instead devote funds to solving “cold cases.” Legislative analysts estimate the bill could save Colorado about \$800,000 a year and put \$883,000 a year toward solving cold-case murders.

<sup>3</sup>Attorney Morgan used data from the recent Maryland Commission which calculated the cost of a death sentence to be three times that of a true life sentence.

<sup>4</sup>The lawyers, Larry Morgan and Alan Mann, are, as this article is being written, awaiting the judge’s decision in *Alabama v Jamal Woods* as to either an imposition of a life sentence or the start of their client’s penalty phase trial in Madison County, Alabama. The authors thank attorneys Morgan and Mann for their contribution to this article as well as mitigator Cyrus Johnston whose dedication is an inspiration.

<sup>5</sup>Excluding or excusing jurors of lower economic status may very well result in a jury lacking minority representation. The Sixth Circuit’s grant of habeas relief in *Smith v Berghuis*, 543 F2d 326 (CA6 2008) is a case in point. Non-statutory excusals, such as childcare of transportation issues, disproportionately impacted African American communities. 543 F2d at 333, 340.



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