
The Guardian

The Newsletter of the Alabama Criminal Defense Lawyers Association

October/November/December, 2003

JUDY CLARKE Heads Top Speaker List at DP Conference

San Diego Public Defender Judy Clarke will headline "Loosening the Death Belt VIII" on January 30 and 31 in Birmingham. Ms. Clarke, an Asheville, NC native, has been a criminal defense attorney for nearly 25 years. Since that time she has been hailed as the "patron saint of defense lawyers."

Ms. Clarke helped convince jurors that Susan Smith didn't deserve to die for killing her two young sons in South Carolina in 1995. She then donated her \$83,000 fee from the case to South Carolina's Post Conviction Defender Organization, an agency that defends the poor against criminal charges. Her co-counsel, David Bruck, has called her a "one-woman Dream Team."

She was appointed co-counsel for Theodore Kaczynski (Unabomber case). Other career milestones include being the first public defender and second woman elected to the office of President of the National Association of Criminal Defense Lawyers. She is also a widely published author of legal articles and co-author of the **Federal Sentencing Manual**, the benchmark treatise on the federal sentencing guidelines system.

Judy Clarke will give the keynote address at the death penalty conference at 9 a.m. on Saturday, January 31.

Other speakers include top capital case experts including Steve Harmon, Riverside California, Bill Massey, Memphis, Tennessee, Deborah Grohs, Castle Rock, Colorado, Denise LeBoeuf, New Orleans, Louisiana, Steve Glassroth, Montgomery, Alabama, Chris Adams, Atlanta, Georgia, Jodie English, Richmond, Indiana, Natman Schaye, Tucson, Arizona



and John Mays, Decatur, Alabama.

Don't miss this opportunity to hear experienced capital case defense. Topics include:

- "Themes and Theories: The Integration of Life"
- "Voir Dire: Letting the Jury Know Death is Different"
- "Cross Examining Prosecution Mental Experts"
- "Impact of Wiggins: Making the Courts Comply"
- "Presenting Mitigation to a Jury: Telling the Client's Story"
- "Protecting the Record and Constitution; and Keeping the Jury"
- "Opening Statements"
- "Closing Statements"
- "Countering and Lessening Aggravating Circumstances"
- "Litigating Death Penalty Issues Pre-Trial"
- "Difficulties Encountered in the Death Penalty Practice"

Register now for "Loosening the Death Belt VIII" to be held January 30 and 31 at Embassy Suites Hotel in Birmingham, Alabama.

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President's Column

By Bruce A. Gardner, Huntsville, Alabama



ACDLA President Bruce A. Gardner addresses the members at the 2003 Annual Meeting.

IT'S TIME TO PAY DUES

By now, each of you should have received the ACDLA membership renewal forms for 2004. As many of you know, your Board of Directors recommended a significant dues increase for 2004. The Board's recommendations were approved by the general membership at our annual meeting in Pensacola, Florida. Despite the overwhelming approval of the increase, I continue to hear and read a significant amount of criticism about it. I am taking the opportunity given to me in this forum to address those of you with lingering concerns and doubts about the need for, and the wisdom of, a dues increase.

Whether you practice in a large firm, as a public defender, or as a sole practitioner like myself, I am sure you recognize that the cost of doing business continues to rise. The same principal applies to this Association. The cost of running the Association continues to rise. For too long the Association stayed alive financially on revenue generated by our events, i.e. the Death Penalty Conference, the Summer Seminar and Four Corners. While many small associations operate this way, your Board made the decision to try and cover our monthly operating expenses out of dues income. This protects the Association financially in the event that one of our seminars fails to produce enough revenue.

Many of you, myself included, have been members of the President's Club for many years. In the past, this category of membership allowed you to attend our two major seminars without a registration fee. The original idea behind the President's Club was a good one – the Association received an immediate boost of cash at the beginning of a calendar year. However, President's Club became “too good of a deal” for the Association to absorb. The price of such a membership did not offset the cost of two events, plus leave funds to pay the monthly overhead of running the office.

Many of you in the previous President's Club have been long-time supporters of this Association. Many of you have served with distinction as officers on the Board, or have given generously of your time in support of the Association. I encourage all of you to renew your commitment financially to this Association. Please consider becoming a Life Member of the Association. Regardless of your decision, please renew your membership at any level. We really need you more than your money.

I have served on the Board since 1997. In that time, I have seen wonderful things happen in our Association. The quality of the seminars we conduct gets better every year. The upcoming Death Penalty Conference promises to be the best ever. Our annual Four Corners Seminar (this year with a “fifth corner”) provides you with an opportunity to hear great speakers and essentially pick up four free CLE hours.

The Association provides a list-serve that allows you instant electronic access to the talent that exists in this group. All you need is a computer and e-mail service to take advantage of the list-serve. Our Executive Director advised me that only forty percent of our membership is signed up for this most valuable service. I encourage all of you who read this message to get on the ACDLA list-serve. I, myself, have been helped numerous times by other members who post suggestions on how to handle a particular legal problem. This service alone will make you glad that you joined ACDLA.

This Association is now looked to as the voice of criminal defense lawyers in Alabama. The ACDLA has been asked by the appellate courts to appear as amicus in significant criminal cases with broad impact. Our Association is working closely with the Alabama State Bar on issues related to the death penalty and indigent defense. In short, slowly but surely we are building an Association that provides quality services to our members at a most reasonable cost.

Please renew your membership as soon as possible, and consider changing your category of membership to a higher level. I look forward to seeing many of you at Four Corners and Death Penalty. Until then,

Happy Trails!

Bruce A. Gardner, President

bruce@gardnerlaw.org

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PO Box 1147
Montgomery, AL 36101
(334) 272-0064

Publication Committee Co-Chairs:

Joe Van Heest
Email: joe_van_heest@fd.org
Jim Roberts
Email: TideSteel@aol.com

Editor: Ann Cooper

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

March 15, 2004
May 15, 2004
July 15, 2004
September 15, 2004
November 15, 2004

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@acdl.org

FROM MY PERSPECTIVE

By Ann S. Cooper, Executive Director

START THE NEW YEAR RIGHT

ACDLA will start the New Year right with its annual death penalty conference, "Loosening the Death Belt VIII." You won't want to miss this powerful program aimed at defending capital cases. Last year criminal defense lawyers from six states were in attendance. This year we expect even more. We are very proud to include Cumberland School of Law, the University of Alabama School of Law, as well as the American Bar Association Death Penalty Representation Project in the list of co-sponsors in 2004.

The hotel site, Embassy Suites, is holding our room block until January 8, 2004. It is very important that you reserve your room right away. Call 1-205-879-7400 and ask for the Death Penalty rate of \$124 single or double. Pre-registration is highly advised. Call the ACDLA office at 334/272-0064 or go on-line to register at www.acdla.org Visa and MasterCard are accepted. You may register by mail by using the form located elsewhere in this issue of *The Guardian*.

RENEW NOW

If you haven't renewed your ACDLA membership for 2004, the upcoming death penalty conference should be a good reason to do so. Membership will save you \$50 off the event registration fee if you are a member in good standing for 2004. Membership renewal forms may be found in this issue of *The Guardian* or you may go on-line at www.acdla.org and renew. Please remember... To qualify for the discounted early conference registration rate, you must be a paid 2004 member.

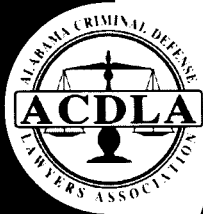
Important Note: All 2003 memberships expire on December 31, 2003. Those members not renewing after that date must be removed from our active membership lists, including the listserv. Please don't let this happen.

Happy Holidays

On behalf of the Board of Directors of ACDLA,

let me say Happy Holidays to you and yours and

may 2004 be a safe and meaningful year!



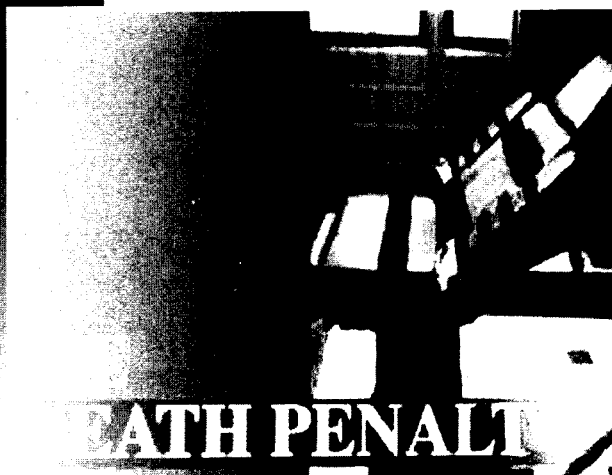
THE ALABAMA CRIMINAL
DEFENSE LAWYERS
ASSOCIATION

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

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

Friday, January 30 and
Saturday, January 31, 2004
Embassy Suites Hotel, Birmingham, AL
8 a.m.-5 p.m. daily

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



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

About the Seminar

This seminar features some of the top criminal defense attorneys in the U.S. Southeast describing the life or death issues of capital casework. In this two-day event you will hear highly acclaimed death penalty lawyers talk about their experiences. Learn, first-hand, tried and true techniques specializing in court testimony and working with difficult clients. In addition, learn about post-conviction issues and how they can affect both you and your client.

Take away new insight on:

- “Voir Dire: Letting the Jury Know Death is Different”
- “Themes and Theories: The Integration of Life”
- “Cross Examining Prosecution Mental Experts”
- “Impact of Wiggins: Funds for Mitigation – Making the Courts Comply”
- “Presenting Mitigation to a Jury: Telling the Client’s Story”
- “Protecting the Record and Constitution – and Keeping the Jury”
- “Opening Statements”
- “Litigating Death Penalty Issues Pre-trial”
- “Countering and Lessening Aggravating Circumstances”
- “Difficulties Encountered in the Death Penalty Practice”... and more!

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

A room block is reserved for seminar participants at the Embassy Suites Hotel in Birmingham. Deadline for room registration is January 8, 2004. See the registration form for more details.

AGENDA

FRIDAY, JANUARY 30, 2004 – BALLROOM

- 8:50 a.m. Opening Comments and Welcome – *Bruce A. Gardner*, Attorney at Law, Huntsville, AL & President, ACDLA
- 9:00 a.m. “Themes and Theories: The Integration of Life” – *William D. “Bill” Massey*, Massey & McClusky, Memphis, TN
- 10:00 a.m. Break
- 10:15 a.m. “Voor Dire: Letting the Jury Know Death is Different” – *Deborah Grohs*, State Public Defender’s Office, Castle Rock, CO
- 11:15 a.m. “Cross Examining Prosecution Mental Experts” – *Denise LeBoeuf*, Director, Capital Post-Conviction Project of LA, New Orleans, LA
- 12:15 p.m. Lunch – On Your Own
- 1:30 p.m. “Impact of Wiggins: Funds for Mitigation – Making the Courts Comply” – *Stephen Glassroth*, Attorney at Law, Montgomery, AL
- 2:30 p.m. “Presenting Mitigation to a Jury: Telling the Client’s Story” – *Steven L. Harmon*, Harmon and Harmon, Riverside, CA
- 3:30 p.m. Break
- 3:45 p.m. “Protecting the Record and Constitution; and Keeping the Jury” – *Chris Adams*, NACDL Resource Counsel, Southern Center for Human Rights, Atlanta, GA
- 4:45 p.m. Adjourn to Reception
- 5:15 p.m. Reception for Speakers & Participants – Ballroom Lobby, Embassy Suites Hotel Birmingham, AL

SATURDAY, JANUARY 31, 2004 – BALLROOM

- 9:00 a.m. “Keynote Address” – *Judy Clarke*, Public Defenders of San Diego, San Diego, CA. Ms. Clarke has been a criminal defense attorney for nearly 25 years. Her plea bargain for Ted Kaczynski in the “Unabomber” case, as well as her work to save the life of Susan Smith in South Carolina has made her a prominent name in capital case defense.
- 10:00 a.m. “Opening Statements: A Demo and Lecture” – *Jodie English*, Attorney at Law, Richmond, IN
- 11:00 a.m. Break
- 11:15 a.m. “Closing Statements: A Demo and Lecture” – Speaker – TBA
- 12:15 p.m. Lunch – On Your Own
- 1:30 p.m. “Countering and Lessening Aggravating Circumstances” – *John Mays*, Attorney at Law, Decatur, AL
- 2:30 p.m. “Panel Discussion: Difficulties Encountered in the Death Penalty Practice”
- 3:30 p.m. Break
- 3:45 p.m. “Litigating Death Penalty Issues Pre-trial” – *Natman Schaye*, Attorney at Law, Tucson, AZ
- 4:45 p.m. Wrap up & Adjourn

Application has been made with the Mandatory Continuing Legal Education Committee of the Alabama State Bar for 12 CLE credit hours for this event.

REGISTRATION FORM

Name(s) _____

Firm _____

Address _____

City/State/Zip _____

Phone _____

Fax _____

E-Mail Address _____

I would like handouts in: Print Format CD Rom Format

	By	After
CHECK ALL THAT APPLY:	12/31	12/31
<input type="checkbox"/> Early Registration – 2004 ACDLA members	\$300.00	\$350.00
<input type="checkbox"/> Early Registration – Public Defenders	\$300.00	\$350.00
<input type="checkbox"/> Non-members ACDLA	\$350.00	\$350.00
<input type="checkbox"/> Materials Only	\$75.00	\$75.00
	Subtotal:	_____
	Total:	_____

*Registration does not include dues

METHOD OF PAYMENT

Check-Payable to ACDLA MC VISA

Credit Card No. _____

Name on card _____

Billing Address _____

Expiration Date _____

No Refunds after January 8, 2004. Substitutions accepted.

Signature _____

Email: annscooper@acdla.org, Phone: 334-272-0064

Fax this form to: 334-277-2927

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

OTHER TOP NAMES TO SPEAK AT DEATH PENALTY CONFERENCE:

CHRIS ADAMS defends people accused of capital murder throughout the Deep South, consults on cases around the country, and writes a column for *The Champion*. Chris strives to be a "Storyteller for Justice" for his clients. Recently he has persuaded jurors in two retrials to allow his clients to leave Alabama's death row—one visits the parole board in 2004 and the other visits his mother every day after being exonerated. Mr. Adams practices law out of the Southern Center for Human Rights in downtown Atlanta and is the Death Penalty Resource Counsel for the National Association of Criminal Defense Lawyers. The Southern Center's death penalty project challenges discrimination in the imposition of the death penalty using a strategy that combines litigation, community involvement and public education. Prior to joining the Southern Center, Chris was a trial attorney in the Public Defender's Office in Charleston, S.C. For more than 7 years he defended poor people accused of crimes in felony trial courts. He also wrote a column on Evidence in *The Advocate*, the S.C. Association of Criminal Defense Lawyers magazine. Chris' law degree is from Georgetown. He is currently serving on the Board of Directors of the Law Center at Georgetown.

JODIE ENGLISH practices law in Richmond, Indiana. She was admitted to bar in 1979 in North Carolina, to bar in 1985 in Georgia; and to bar in 1990 in Indiana. She is a J.D. graduate of the Northeastern University School of Law. Ms. English is a Life Member of the National Association of Criminal Defense Lawyers (NACDL). In addition, she has been a member of the Executive Board of the Indiana Association of Criminal Defense Lawyers since 1994. Other memberships include the Indiana Public Defender Council, the Indiana Supreme Court Rules Committee, and the Governor's Commission on Juvenile Code Reform. In the aftermath of a countywide corruption scandal, Ms. English was appointed by then Governor Evan Bayh to serve as Prosecuting Attorney, Wayne County, Indiana. She has served as a faculty member for the premier criminal defense training programs nationwide:

NCDC's Trial Practice Institutes, the Institute for Criminal Defense Advocacy in San Diego, Western Trial Advocacy Institute in Laramie, Wyoming, the Clarence Darrow Death Penalty College in Ann Arbor, Michigan, NLADA's Life in the Balance, and the Bryan Schechmeister Death Penalty College at Santa Clara University School of Law, California. She has taught CLE programs in 25 states, as well as being an invited member of a team of NACDL trial advocates who went to Moscow, Russia in 1996 to assist the Russians in implementing their new constitution's right to trial by jury. She has served as a training consultant for IPDC members throughout Indiana, and in that capacity mentors lawyers on actual cases and coordinates training programs for Indiana criminal defense practitioners. She has been a part of Indiana defense teams that have won a term of years for two cop killers who had previously been sentenced to death, and assisted in the last trial of a juvenile death penalty case in Indiana, which also resulted in a term of years.

STEPHEN GLASSROTH is a native of New York City. He received his B.S. degree from the State University of New York at Buffalo in 1973 and in 1979 received his J.D. from Northeastern University School of Law in Boston, Massachusetts. Two weeks after graduating law school he moved to Montgomery, Alabama, took the bar exam and has practiced law there since his 1979 bar admission. Once a civil practitioner and criminal defense lawyer, Steve currently concentrates his practice in trial and appellate work involving criminal cases in both federal and state courts. He is experienced in the defense of all types of serious felonies, including capital cases, other street and drug crimes, child sex/physical abuse cases, complex criminal litigation and white collar criminal defense. Steve is serving his second term as a member of the Board of Directors of the National Association of Criminal Defense Lawyers (NACDL). He is a frequent speaker and has given CLE presentations to numerous organizations throughout the country. While he embraces most of the 10 Commandments, Steve is, nevertheless, the named plaintiff in a

successful federal lawsuit that challenged Alabama's Supreme Court Justice's placement of a monument to them in the rotunda of the state judicial building, *Glassroth v. Moore*. The U.S. Court of Appeals affirmed the case for the Eleventh Circuit and in November 2003, the U.S. Supreme Court denied the Moore petition for *writ of certiorari*.

DEBORAH GROHS is a Deputy State Public Defender in the State of Colorado. She heads a three-county office along the Colorado Rockies' front range. Prior to her current position, Ms. Grohs was a Public Defender in Cook County, Illinois and has extensive experience in capital litigation. She has handled death penalty cases both in Colorado and Illinois. Ms. Grohs represented one of the Texas 7. Commenting on her client's extradition back to the State of Texas, she received both hate mail and love letters due to her public statement that "the State of Texas has an insatiable appetite for the death penalty." Ms. Grohs is on the faculty of the Bryan Schechmeister Death Penalty College at Santa Clara Law School in Santa Clara, California. She also trains attorneys and investigators throughout the country on death penalty litigation and general trial practice. If she had some free time, Ms. Grohs would like to fly her trained hawk, break in her hiking boots and graduate to the black diamond ski runs.

STEVEN L. HARMON received his undergraduate education at the University of California at Los Angeles, graduating in 1969. In 1972, he was awarded a J.D. from Loyola University of Los Angeles School of Law. Mr. Harmon was admitted to the California Bar in 1972. Since that time, he has been practicing in Riverside County, specializing in criminal defense. He is on the faculty of National Criminal Defense College based in Macon, Georgia, the Institute for Criminal Defense Advocacy in San Diego, California, and the Death Penalty College at University of Santa Clara Law School. He has been a guest speaker at various legal and community programs and

Continued on page 7

SPEAKERS

Continued from page 6

has defended many murder cases throughout his career, including death penalty cases. Mr. Harmon is a member of the State Bar of California. He is a past Secretary, Treasurer, Vice President and President of the Riverside County Bar Association. He is admitted to practice before numerous federal district courts.

DENISE LEBOEUF is director of the Capital Post-Conviction Project of Louisiana. She began representing clients facing death in 1989; she works in state and federal courts, primarily in Louisiana, at trial, on direct appeal, and in post-conviction. She is especially interested in the litigation of mental health issues, and in the ways in which race and poverty increase the traumatic burden carried by many clients. Ms. LeBoeuf was co-author of the winning brief to the U.S. Supreme Court in *Kyles vs. Whitley*, and co-counsel in the three subsequent retrials that finally freed Curtis Kyles from Death Row. She has also suffered the execution of her clients. In addition to direct representation, Denny serves as a consultant to other lawyers in capital cases and frequently serves as a trainer at national capital defense seminars. In December 2001, she traveled to Moscow with Sister Helen Prejean and activist Bud Welch, to speak to the Russian parliament and people about the American death penalty. She is a member of the Board of the Louisiana Association of Criminal Defense Lawyers, the Executive Board of the Moratorium Campaign, and has been a member of the National Board of the American Civil Liberties Union since 1992.

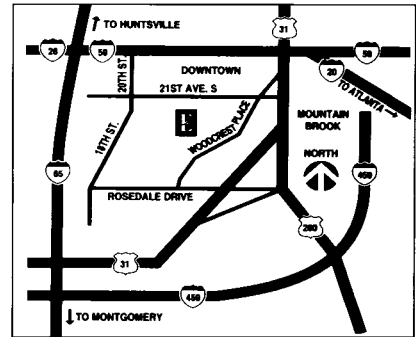
WILLIAM D. "BILL" MASSEY'S office is located in Memphis, Tennessee, and he has practiced criminal defense since 1981. Board certified as a Criminal Trial Specialist in Tennessee and as a Criminal Trial Advocate by the National Board of Trial Advocacy, Bill has fought the good fight in the state and federal courts many times. Over the past ten years, Bill has handled 16 cases noticed for death. His first death penalty trial resulted in a 35-minute "not guilty" verdict, despite a four page detailed confession by the accused. Fifty percent of his cases have resulted in a sentence of 20 years or less and 43 percent have ended with a sentence of 8 years or less. He is a believer in advocacy and techniques of persuasion, and he enjoys

sharing with other lawyers. His favorite forum is the Tennessee Criminal Defense College, which he founded five years ago. He annually serves as its senior instructor. A frequent speaker on advocacy related topics for the Tennessee Association of Criminal Defense Lawyers (TACDL) and the National Association of Criminal Defense Lawyers (NACDL), Bill is a soldier in the battle. In 2001, TACDL presented him with the Lionel Barrett, Jr. Award "for outstanding work in the death penalty arena."

JOHN E. MAYS is a graduate of the National Criminal Defense College. He is Board Certified in Criminal Advocacy by the National Board of Trial Advocacy. He served for six years on the Board of Directors of the Alabama Criminal Defense Lawyers Association and was President of the Morgan/Lawrence County Criminal Defense Lawyers Association for four years. In addition, he is a Life Member of the National Association of Criminal Defense Lawyers. He currently practices in Decatur, Alabama exclusively in the field of criminal trial practice. He has authored four publications, "Defending Child Abuse Cases in Alabama," "Defending Domestic Violence Cases in Alabama," as well as "Defending Death Penalty Cases in Alabama," a publication in its second printing. His most recent work is "The Use of Computers in Criminal Trials."

NATMAN SCHAYE is a native of Freeport, Illinois. He attended law school at the University of Arizona and has been in private practice in Tucson since 1981. His practice is limited to the defense of felony cases at the trial, appeal and post-conviction levels in state and federal courts. Mr. Schaye has represented many capital cases. He is an active member of the National Association of Criminal Defense Lawyers and has served on its Board of Directors from 1994 to 2000 and from 2001 to 2003. He has co-chaired *The Champion* Advisory Board for ten years and previous co-chaired the Death Penalty Defense Committee for seven. Natman is a charter and life member of the Arizona Attorneys for Criminal Justice and currently co-chairs the CLE Committee. He writes and teaches on a variety of criminal defense topics around the country. He cares a great deal about his clients, his brothers and sisters in criminal defense, and the Bill of Rights.

DEATH PENALTY CONFERENCE SITE



EMBASSY SUITES HOTEL

Birmingham, Alabama

2300 Woodcrest Place

Birmingham, AL 35209-1321

(205) 879-7400 Fax (205) 870-4523

Rate \$124.00 s/d

LOCATION Off Hwy 31 and Hwy 280 in the SouthBridge Office Park. Easily accessible from Interstates 65 and 20/59. Two miles from downtown and eight miles from Birmingham International Airport. From downtown, exit 126A and follow Hwy 31 South to the 21st Avenue South exit. At the end of the exit, go straight through the light and up the hill. Embassy Suites Hotel is on your right.

TRANSPORTATION Complimentary transportation to and from Birmingham International Airport, as well as shuttle service to major businesses, shopping and entertainment within a five-mile radius of the hotel (based on availability).

ACCOMMODATIONS Each of our 242 Spacious Two-Room Suites offers a private bedroom and a separate living room with sofa bed, well-lighted work/dining area, microwave, refrigerator and coffee maker. Other amenities include two telephones with voice mail and data port; two remote control cable televisions with ESPN, HBO and Nickelodeon (LodgeNet movies available for charge); hair dryer, iron and ironing board. Large executive one-bedroom suites with a conference table for eight people, and two-bedroom/two-bath suites are also available. Every suite overlooks the towering trees, fishpond and waterfalls of our peaceful garden atrium.

Developing the Theory of the Case

By Jim Roberts, Office of the Public Defender, Tuscaloosa, AL

Developing the theory of a case is essential for a successful trial. However, to succeed in a criminal defense trial, where so often we deal negative predispositions, developing the best theory is even more important. The theory will provide the tone and emphasis of the presentation of our client's case. It will dictate the tactical structure from pre-trial endeavors like interviewing, fact investigation and legal research to all facets of the trial including jury selection, witness examinations, opening statements and closing arguments.

The theory should be developed early in the process so that evidence necessary to support the theory is not lost. Of course there is a certain dichotomy present in that the evidence which is gathered will play a lead role in the development of the theory. Therefore, initially, a number of defense theories may present themselves for consideration, but may be disposed of as more evidence is gathered and the newly gathered evidence rules out some initial theories. For instance, in a rape case where the client is denying relations with the accuser, the initial theory might be mistaken identity. However, if the DNA results confirm the client had relations with the accuser, mistaken identity would no longer be a viable theory.

As cases proceed toward trial, multiple theories are often under consideration. Inconsistent theories should be explored during the pretrial process, but as the facts develop, one theory will normally be more dominant. During pretrial, the theories under consideration should be reduced so as to minimize any potential confusion that may result from inconsistencies. For example, in a shooting case, the "wrong man" theory would be inconsistent with a self defense theory. If we were to proceed to trial with these two inconsistent theories, we would be forced to argue that the client was not the one who shot the victim and even if he was, he acted in self defense. To do so, we would be forced to argue against one of our own theories in order to persuade the jury to accept the other theory. The resulting confusion would likely be detrimental to the case. Since we should never ride two horses during a trial, we must settle on the theory that is best supported by the law and the facts during pretrial.

While developing a theory, we must strive to maintain a balanced and objective perspective in assessing our options. It is all too easy for us to view a developed theory from a slanted or biased viewpoint and miss what others see as glaring weaknesses. Like writing an article, the author may read the same misspelled word time after time without ever noticing it, but the first time reader is likely to catch it immediately. We must thoroughly assess the strengths and weaknesses of each theory and cannot allow an attachment to a theory to gloss over the weaknesses of that theory. Presenting that theory to a first time listener, may help us see what had otherwise gone unnoticed.

There are two components to a case theory, the factual theory and the legal theory (the legal theory is not the law but the attorney's interpretation of the law). They are inextricably linked through the law as it exists, the facts as they are developed and, most importantly, the client's objectives. A good case theory must be legally sound, logical, simple, and believable.

While we often don't like the law as it stands, the theory must still be legally sound. A legally sound theory is not only designed to establish that the client is morally entitled to relief, but also to ensure

that the theory will stand under the scrutiny of the law. A great case theory means nothing if the jury never hears it. Therefore, the case theory must be legally sound so that it will be admissible at trial and, in the event we actually lose a trial (I know none of us ever lose), survive on appeal. To do this, we must make sure our case theory is based on the evidence and the law, either as the law currently exists or on a good faith argument for extending, modifying or changing the existing law.

This does not mean that we cannot be creative when developing a legally sound theory. In constructing our legally sound theory, we should consider two approaches: Affirmative Defenses and Prosecution Weaknesses. First, consider the affirmative defense possibilities. The law provides an affirmative defense for almost every offense and creative thinking can provide the theorist with others, leading to that good faith argument for extending, modifying or changing the existing law which, in effect, creates new law. A creative theorist was able to extend the affirmative defense of self defense to encompass the battered woman who may not have been subject to an immediate danger under conventional thinking, but through creative legal reasoning, was found to be in such danger.

Second, the prosecution's weaknesses may provide a legally sound theory. This may be done by contending that either the prosecution's legal theory is legally insufficient (for example, arguing that the statute under which the defendant is charged is unconstitutional on its face.); the prosecution should be barred due to a procedural defect (such as violation of the client's speedy trial rights); the facts as presented do not support the legal theory being utilized by the prosecution; or the jury cannot find the defendant guilty beyond a reasonable doubt. Regardless of the approach, the case theory must be legally sound.

A good case theory must also be logical. To be logical, it must possess some internal consistency both legally and factually. As mentioned above, one of the prosecution's weaknesses we can attack is that the facts do not support the prosecution's legal theory. That inconsistency can be exploited in our favor. Likewise, our opponent can exploit an illogical theory that relies on law that is inconsistent with the facts. The facts upon which our theory is based must reinforce each other rather than contradict each other. In the best sense, one fact should not only support the other but lead to the inevitable conclusion that is the defense theory.

It is equally important that the theory be simple and believable. The main objective of a good case theory is to lead the jury to conclude that the defendant has been wrongfully accused. Avoiding overly complicated theories is necessary to meeting that objective. A simple theory maximizes the use of undisputed facts and does not rely on evidence that is implausible or just plain inadmissible. A simple theory is also more likely to be believable and a jury must believe our theory if they are to be lead to the conclusion we seek. If a theory contradicts the jurors' common sense based upon their everyday experiences, they will not believe it or believe us. Furthermore, we must believe in the theory ourselves because the jury will see through us if we do not and our credibility is our most precious asset.

Finally, once we have settled on our case theory, we must determine the most effective way to communicate that theory to the jury.

(Continued on page 9)

Developing the Theory of the Case

Continued from page 8

This is done through our theme. The theme of our case is the persuasive case summary developed to motivate the court or jury to find for the defendant. It is a positive, affirmative statement that encapsulates the entire theory. The theme should be short and memorable. For instance, where the case theory is based on the battered-woman syndrome, the theme might be "she had no way out." When a theme is short and memorable, it is more likely the jury will remember what we have said and carry that theme, and by necessity, our theory, into the deliberation room with them. Hopefully, the theory the jury carries with them to that room will be the theory that sets our clients free. ●

Jim Roberts is a Public Defender in Tuscaloosa County. He is an active Board member of ACDLA and can be reached by email at: tidesteel@aol.com

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CAPITAL CORNER

By John E. Mays, Decatur, Alabama

A LOOSE STANDARD IS ADOPTED FOR TRIAL JUDGES TO OVERTURN JURY RECOMMENDATIONS FOR LIFE.

The case of *Tomlin v. State* 2003 WL 22272851 is a case that justifies careful study by those of us who try capital cases. The first column of the third page of the opinion tells us that Alabama now accepts "execution impact evidence" as a non-statutory mitigating factor.

However, the most crucial point of the case deals with the standards the trial Judge Should apply when deciding whether or not to override the recommendations of the jury. In this case there were two defendants. One was the actual killer and the other hired the actual killer. Two people were killed in the same act. This made the crime capital and supplied the single aggravating circumstance. Tomlin was the person who hired the murderer. The actual triggerman received a death sentence. Tomlin received a 12-0 recommendation of life without possibility of parole. The difference in these two punishments mandated the trial judge to override the jury's 12-0 recommendation and sentence Tomlin to die. His order said:

For our judicial system to say, under the circumstances of this case, that the hit man should be sentenced to death but the hirer, the planner, the cold avenger and co- executioner should be sentenced to life without parole is an aberration; a freak that cannot be allowed.

The statement is a gross deviation from the requirements of 13A-5-47 (e). The trial judge makes findings as to each mitigating circumstance and each aggravating circumstance, considers the recommendation by the jury and finally makes a determination if the aggravating factors outweigh the mitigating ones. 13A-5-47 (e) limits what the trial judge can do; determine the mitigating circumstances and the aggravating circumstances and weigh them giving due consideration to the recommendation of the jury. The trial judge absolutely cannot make a proportionality finding. Disparity in sentencing can be a mitigating factor, it cannot be an aggravating factor. All aggravating factors are statutory and there are no exceptions. See: 13a-5-49; *Ex parte Stewart* 659 So. 2D 122 (1993).

Proportionality of sentencing as between two or more co-defendants is the statutory duty of our two appellate courts and not the trial judge. See: 13A-5-53 (b) (3). Hence, the trial judge overruled the jury's recommendation not on the finding of another aggravating circumstance nor any reweighing of mitigating and aggravating circumstances but upon a wholly different factor and one not within the trial judge's statutory prerogative. See: *ex parte Hayes* 518 So. 2D 768. 780 (1986 opinion on rehearing).

Our Supreme Court found something else seriously wrong with the trial judge's override of the jury recommendation. In *Ex parte Carroll* 852 So. 2D 833, 836 (2002) that court held that (1) the jury's recommendation for life imprisonment without parole was a mitigating factor to be considered by the court and (2) that the weigh to be given the mitigating circumstance was to be determined by the numerical vote by the jury. In *Carroll* they called a vote of 10 for life without parole and 2 for death "overwhelming support" for life. In *Tomlin* the vote was 12 for life and 0 for death. That recommendation must be accorded "great weight".

The *Tomlin* court answers one or more crucial questions about judge overrides. Can the trial judge override the jury's recommendation based on the evidence known to the trial court and not the jury? After all, evidence can be presented at the actual judge sentencing hearing which was not heard by the jury in the penalty phase. Further, the judge has a pre-sentence report that the jury certainly didn't. The answer to the foregoing question is yes, but only under limited circumstances. The court may consider evidence that lessens the weigh of a mitigating factor (p.4) *Tomlin* held that proportionality of sentencing between the triggerman and his hirer:

...cannot be properly used to determine a mitigating circumstance.

This consideration of proportionality by the trial judge was improper.

This case directs us to be vigilant at the sentencing hearing to insure that any factor used to override the verdict by a jury in favor of death is (1) an aggravating circumstance or (2) lessens the weight of a mitigating circumstance. Other reasons for doing so are not within the trial judge's statutory prerogative. ●

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ACDLA EGROUP TIPS

by Brent Gourley, Dothan, Alabama



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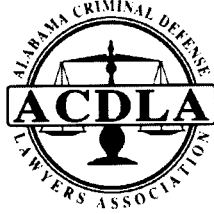
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