
The Guardian

The Newsletter of the Alabama Criminal Defense Lawyers Association

January/February/March 2010

GEORGIA DEATH ROW EXONEREE TO KEYNOTE DEATH PENALTY SEMINAR

Billy Moore spent almost 17 years on Georgia's death row for a murder that he admits committing. He had his sentence commuted to life in 1991, after the victim's family spoke out against his execution. He was paroled a year later, making him the only death row prisoner who admitted his guilt to have been freed. He has spent the last 12 years determined to show that the death penalty is no solution to crime.



The Georgia parole board, which can commute death sentences, did so for Moore at the urging of his victim's family and a number of other advocates, including Mother Teresa.

In Moore's case, there was redemption and forgiveness, and there is hope and new life.

Some, no doubt, will dismiss Moore's experience as a phony jailhouse conversion. But, if so, he's kept up the act a long, long time.

Today, at 57, he is a Pentecostal minister who lives in Rome, Ga., and travels the country, speaking to young people, old people, churches, temples and anyone who will listen to his story about truly amazing grace.

Make your plans now to hear Billy Moore's unbelievable tale. Also be prepared to learn from some of the top capital case defenders around about wrongful convictions and how to defeat them. Register now for "Loosening the Death Belt XIV" set for January 29 and 30, 2010 in Birmingham at the DoubleTree Hotel.

OTHER SPEAKERS AND TOPICS INCLUDE:

"Mistaken Eyewitness," – Kathryn L. "Sunny" Lippert, Attorney, Bessemer, AL

"Faulty Forensic Evidence: Part I-Ballistics" – Dr. James Lauridson, Forensic Pathologist and Joe Saloom, Attorney, Montgomery, AL

"Faulty Forensic Evidence: Part II – Bunter Marks" – Lawden Yates, Attorney, Blountsville, AL

"MI/MR Ineffective Assistance Issues" – Kathryn M. Kase, Texas Defender Service, Houston, TX

"Ethics or Avoiding Malpractice" – John Wesley Hall, Attorney, Little Rock, AR

"False Confessions" – Kathryn M. Kase, Texas Defender Service, Houston, TX

"Appellate Representation of Capital Defense and Preservation of Record" – Stephen Strickland, Attorney, Birmingham

"Police and Prosecutorial Misconduct" – Christopher W. Adams, Attorney, Atlanta, GA

"Using Snitches and Other Cooperating Witnesses" – Christopher W. Adams, Attorney, Atlanta, GA

This Course has been approved by the Mandatory Continuing Legal Education Commission of Alabama for a total of 12.0 hours' credit, including 1 (one) hour of Ethics

To register for this event, see page 7.

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President's Column

By Kathryn King, Attorney at Law, Cullman, AL



*ACDLA President
Kathryn King*

Dear Members:

The year is passing quickly and I find myself with my tenure as president of this fine organization half over. The Legislative Committee and the Board are gearing up for the new legislative session which will start early this year. The Expungement Bill, HB81, was pre-filed in recent days and we hope to

move it through the legislative process quicker than last year. Should Governor Riley veto the bill again this session, we will have ample time for lawmakers to override his veto by starting out early in the session. We are also keeping our eyes and ears open for any other legislation which may be introduced which would affect the practice of criminal defense, particularly the Indigent Defense Commission bill. We anticipate that this bill will be introduced again this year, but it has not been pre-filed as of this writing. Rest assured that the Legislative Committee will study this and all bills related to criminal defense closely. We will pass information about those bills on to you as they come to our attention.

I want to urge all of you, again, to get active in this organization. Please attend Legislative Committee meetings and Board meetings. The more involved you are in the decisions that are made concerning this organization, the happier you will be about decisions that are made.

Membership renewal notices have been sent out and membership numbers are coming in. Several members have participated in the member-get-a-member campaign and have received T-shirts as a reward for recruiting a new member. Membership numbers appear to be increasing from last year, but they are not nearly where we would like them to be. I want to urge each of you to recruit at least one new member this month. If each of us recruited just one new member, our membership

would double and there is so much more that we would be able to accomplish for our members and our clients.

The Four Corners Seminars were successful. We had well over one hundred attendees state-wide, and we've gotten a lot of positive feedback on our topics and speakers. I attended the Huntsville seminar and was very impressed with the speakers and the valuable information that they shared on each topic. Sam Partridge from the State Bar Office of the General Counsel spoke for an hour on ethics topics and managed to make the topic interesting and stimulating.

I want to remind everyone of the upcoming Death Penalty Seminar in January. The Death Penalty Seminar always provides so much crucial information for defending death cases, and the comradery between the participants is something that we all need from time to time. I promise that everyone who attends will enjoy a life-affirming experience. I always come away from this seminar with a renewed sense of conviction about the importance of what we do.

We will also be conducting a one day seminar on drug crimes and drug searches in April. This seminar will be held at the Huntsville, Alabama Westin Hotel adjacent to the lovely Bridge Street Shopping Complex, which I understand is a wonderful place to shop and has several good restaurants, including one in the movie theater. This will be a great seminar in a place that you just may want to stay for the night.

I look forward to seeing all of you in the next few months at one or another of our seminars. As always, I am proud of the work that you all do every day, unpopular as it is, and I am deeply honored to serve as your President.

Kathryn King
kaking@hiwaay.net

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

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.

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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

FROM MY PERSPECTIVE

By Ann S. Cooper, Executive Director

2010 – MORE CLES THAN EVER!

ACDLA is making a commitment to offer 9 CLEs in 2010. These will cover 4 hour, 6 hour and 12 hour formats throughout the year. To be able to do this will require support from our many fine member lawyers and we hope you will find the seminar(s) that best meets your requirements and sign up as soon as possible. Here's a look at the offerings:

January 29 & 30, 2010 – “Loosening the Death Belt XVI” – 12 CLEs, includes 1 hour Ethics, DoubleTree Hotel, Birmingham

April 30, 2010 – “Drug Crimes, Drug Searches” – 6 CLEs, Westin Hotel, Huntsville

June 17-19, 2010 – “Justice Must Be Won” – 12 CLEs, Pensacola Beach Hilton, Pensacola Beach, FL

October 8, 2010 – “DUI Defense: Advanced Techniques” – 6 CLEs, Beau Rivage, Biloxi, MS

To register, watch for the seminar brochure coming by US mail, check the latest Guardian closest to that event or go on-line to www.acdla.org “Seminars.”

ALABAMA LAWMAKERS GET BACK TO WORK

On January 12, Alabama lawmakers will gather in Montgomery for the opening of the 2010 Regular Session of the Alabama Legislature. As with every session, anticipating which bills will be introduced and move through both chambers successfully to be signed into law by the Governor is always a challenge. ACDLA's Legislative Committee under the direction of Jim Roberts of Tuscaloosa, has been working for some time with Rep. Chris England on an expungement bill. HB 81, the Expungement Bill, has now been prefiled. We expect to see a few other bills from the Chief Justice that we saw last year. The Indigent Defense Bill will likely revisit the Statehouse in the weeks ahead. Stay tuned to the listserv for updates as soon as they are available and if there is a call to action, please get involved. ACDLA is your advocate in Montgomery, but lawmakers pay a lot of attention to their constituents.

DEATH PENALTY SEMINAR COMING JANUARY 29 & 30, 2010

The first seminar of the new year is always “Loosening the Death Belt.” If you are a capital case defender, I urge you to register and attend this critical training. Complete details may be found in this issue of *The Guardian*. You can save \$50 if you register before January 15.

DEATH PENALTY KEYNOTE TO VISIT CUMBERLAND

Rev. Billy Moore of Rome, Georgia, ACDLA's death penalty seminar keynote, will visit Cumberland School of Law for a group discussion on capital punishment on Thursday, January 28, 2010. If you can attend, please go to the Moot Courtroom at 3:30 p.m. that day. You will get a brief overview of Mr. Moore's story which will be told at the seminar on the following day and hear interesting questions from law students. We appreciate Cumberland's hospitality, inviting us back to its campus each year for this special opportunity to discuss critical criminal defense lawyer issues with law students.

See you in Birmingham!

Ann Cooper
annscooper@bellsouth.net

LAW OFFICE MANAGEMENT FOR NEW LAWYERS IN SMALL FIRMS OR SOLO PRACTICES

By Bryan S. Blackwell. Attorney at Law, Dothan, AL

Whew! You have made it through four years of college, maybe worked for a number of years, graduated from law school, passed the bar exam – now what? The job market is pretty scary out there. If you hang out your shingle as a solo practice lawyer, here are a few tips from the school of hard knocks.

1) BE ORGANIZED

a. Contacts – Make sure you have a program to keep track of all you come in contact with – fellow attorneys, judges, law enforcement, other court personnel, etc. Put it down as soon as you obtain the information in a case management program, Outlook contacts or a spreadsheet. I suggest starting off with Microsoft Outlook because of its universal use and ease of learning. If you have to look up a number, you will have to look it up again.

b. Accounting – Keep track of your cash flow. Get a certified public accountant (CPA) as soon as possible and let him or her do your taxes for you. Attorneys are on the I.R.S. hit list for audits.

Use Quicken or another business accounting program. Keep track of your expenses and income stream. This is easier said than done but is crucial if you are to be able to help those in need.

c. Have a business plan. Know who your customers (or clients as we call them) are and how you can provide services that will earn income from them.

2) KNOW YOUR AREA

a. Know the judges. Know their likes, dislikes and quirks.

b. Know the lawyers. Fellow lawyers are your best referral source. Keep track of which attorneys refer you cases, and the quality of those cases.

c. Know the people who work in the courthouse. They can be your best friends and help you with all types of legal issues and problems. If not, they can mess with you mercilessly. Take time to talk with them and get to know them.

d. Know the law enforcement personnel. What you don't know can hurt you. Even though you are on opposing sides of a criminal case, you can learn more by being polite and friendly to police than by being rude. Not to say that you should kow-tow to them but many times I have learned crucial information about an officer or case just by talking with them.

e. Know the jurors. Know the people in your community. What are they like? Are they mostly very conservative, more liberal or in between. What is the perception of crime in your community? How many minority people live there and in what areas? What is the history of racial relations there?

3) YOU ARE ALWAYS MARKETING

a. “Pick up” lines. When someone asks what type of attorney are you, what do you say? “I do a little bit of everything” does not have the sizzle of “I help people who have been accused of crimes. Some of them are guilty and some are not, but I help them all to

the best of my ability.” Be specific and action oriented.

b. Website. Every organization and company has a website. There are many great website designers out there, and you need not use one in your town. I would not pay for a Lexis or West website starting off in practice.

c. Social Internet sites. You can get exposure through Facebook, LinkedIn or Twitter. Just make sure it is good exposure. Don't annoy your contacts with a lot of legal related information that is not of general use. Just let them know you are out there.

d. Professional organizations. You made a great choice to become a member of ACDLA. Now use it. Go to seminars and meet people. Use the listserv. Look at the wiki for case materials. Consider joining certain other associations if you feel the need, such as NACDL.

e. Look like a lawyer. Wear a business suit to work (both male and female lawyers). You never know when you might run into a potential client.

f. Business card – always carry several with your contact information on it to pass out to people you meet, who are potential clients or friends or relatives of same.

g. Meet with others. Doing lunch at our desks is the bane of solo lawyers. Get out and do lunch with colleagues or others in your line of business.

h. Referrals – make sure you document both referrals you make to others and those that come back to you from bondsmen, judges, noncriminal attorneys or those from other towns, etc.

g. Brochure – get a firm brochure made with your information as well as some general information on your area of practice. Of course, you must comply with state bar rules on advertising, such as the disclaimer. However, being able to hand potential clients information on you and your practice is invaluable.

h. Media contacts and press releases. Make friends with people at the newspaper and television station. Advertise your new practice with them. Make yourself available as an expert for interviews or background materials. Be cautious about talking about your own cases though.

i. Telephone book advertising has become much more expensive. Anything beyond a bold listing is really a judgment call. Scrutinize the yellow pages carefully before making a decision. In most areas there are several telephone books, so if you miss or cut back on one, there is always another coming out in a few months. Get professionally prepared copy if you do go with anything bigger than a listing; the ones prepared by the company are usually quite poor.

4) GET SOME GOOD CLIENTS AND REJECT THE BAD ONES

Warning signs of bad clients are ones who want something for nothing (can I pay you later?), are demanding, want you to be unethical or underhanded, are looking for the cheapest lawyer they can find, have had a prior attorney on the case, or those you just

don't like. Trust your intuition, it is almost always right. You can save yourself a lot of money by not taking on demanding clients than by firing them later once they have enough on you to file a bar complaint or sue you.

Document everything in your notes – all phone calls, meetings, work on the case (including time spent on it). Document all important steps in the case, especially at the beginning and the end in writing.

Get a complete history of your potential client. Check their records on the computer (AlaCourt, etc) to verify their story.

5) BE FRUGAL

a. There are many free tools available on the Internet such as Google Scholar for case law (including US District Court cases not on Casemaker) and free software. The state bar has many resources available through the LOMAP program run by Laura Calloway.

b. Time off for your staff and yourself is a great low cost morale builder. I have closed for several years on Friday afternoons, and have not looked back, although I have worked many of those without disturbances from phone calls or clients dropping by. I do make an exception for people coming by with money.

6) GET SOME HELP

a. Good secretarial help is essential for any lawyer with a (hopefully) high volume practice such as criminal defense or most any solo practice. Poor quality "help" is conversely just as detrimental. Make sure you screen any potential candidates closely, just as any other employer would. You are literally trusting this person with your livelihood, so be sure you know with whom you are dealing.

b. Virtual "assistants" are available for both telephone call answering and dictation. This would be particularly helpful in a new practice, as you pay for what you use, not dead time.

c. Professional colleagues, both locally and in organizations such as ACDLA, can be quite helpful with tips on practice, business and life. Find a mentor who will work with you and who sees the development of new lawyers as an aid to the profession.

7) GET PAID

a. Credit cards are a great way to ensure your clients pay you. PayPal can be used without any equipment other than a computer.

b. Professional looking bills which are calculated monthly and sent regularly are crucial to staying in business. Make sure credit is given for payments so that the client is not rebilled for payments he has made. You should bill before case concluded, as there is a bell curve in the likelihood of getting paid from the time the client first calls until the case is concluded.

c. Get an upfront retainer from the client, at least as much as you think it will take to conclude the case (it will really take 1.5 to 2 times that much). Never quote an exact fee (except on a flat fee case, of course). You cannot charge a nonrefundable retainer under state bar rules, so keep good time records to justify your fees.

d. Your retainer agreement should be signed by and copied to client. No work should be engaged without a written and signed agreement.

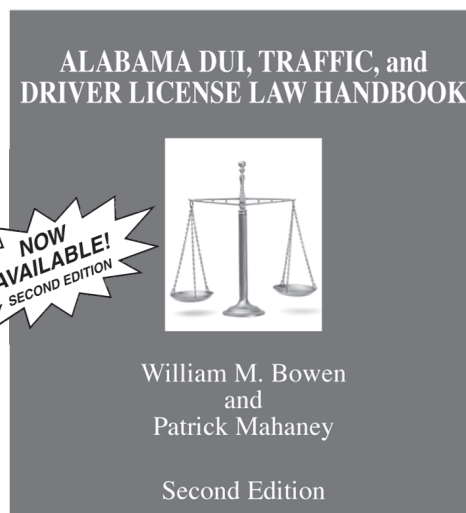
WHAT DO YOU NEED TO GET STARTED:

- Code/practice books or online access. I prefer to have the books along with the computer, but I am old fashioned.
- A base computer (I'd recommend a notebook, but you could get by with a desktop PC if you don't do work outside the office). What you already own will usually work at the start.
- A cellphone with information handling capabilities such as a BlackBerry, Droid or iPhone. Handle calls, get email and get Internet access from outside your office. Many lay people are using them instead of laptops (not that I would suggest it as a substitute). Get an unlimited data plan.
- One or more external USB hard drives for backup
- A multi-function (scanner/copier/fax/printer) printer. It depends on what your needs are, but probably based on a laser printer unless you have a need for color.
- An office software suite. It could be Microsoft Office, but you might prefer something else.
- A PDF creation tool. There are free PDF creation programs, but you may like Adobe Acrobat Professional for any lawyer because of all the extra things it can do for you.

This is a topic which could be discussed endlessly, but I do not have enough space to do so. I hope at least a few good ideas have been imparted to the "next generation" of lawyers! LOL ●

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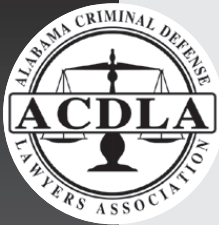


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*“Loosening the
Death Belt XIV:
Tightening the Defense
– One Life at a Time”*

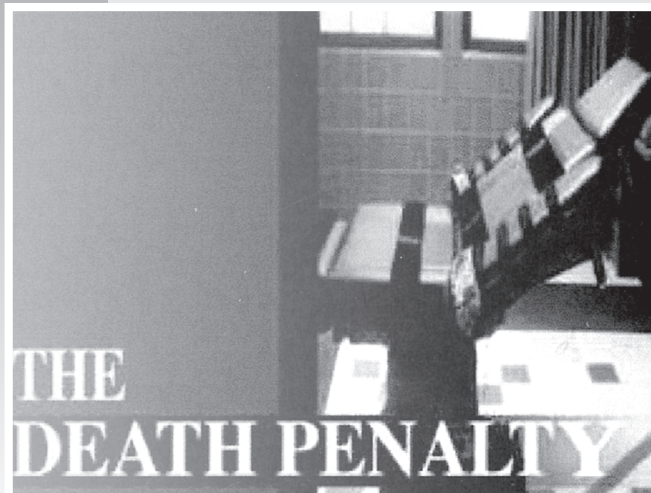
Friday, January 29 and
Saturday, January 30, 2010

DoubleTree Hotel
808 So. 20th Street
Birmingham, AL

*Presented by the Alabama Criminal
Defense Lawyers Association.*

*Co-sponsored by Cumberland School of Law
and The University of Alabama School of Law.*

*Application has been made to the Mandatory Continuing
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12.0 hours' credit, including 1 hour of Ethics.*



THE
DEATH PENALTY

**“LOOSENING THE DEATH BELT XIV:
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. 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 experience. Learn, first-hand, tried and true techniques.

Take away new insight on:

- Using Snitches and Other Cooperating Witnesses
- Police and Prosecutorial Misconduct
- Mental Illness/Mental Retardation Ineffective Assistance Issues
- Ethics or Avoiding Malpractice
- Appellate Representation of Capital Defense and Preservation of Record
- Faulty Forensic Evidence: Part I - Ballistics
- Faulty Forensic Evidence: Part II – Bunter Marks
- Mistaken Eyewitness
- Jury Instruction in Capital Cases
- The Thoughts of a Death Row Exoneree



ACDLA is pleased to present keynote speaker, former death row inmate and minister, Billy Moore. Mr. Moore comes to this seminar to discuss death penalty administration and present a case for rehabilitation. He spent nearly 17 years on Georgia's death row for a 1974 robbery and murder he admits he committed. He was twenty hours away from the electric chair on August 21, 1990, when the parole board commuted his sentence to life. Don't miss this very special “anti-death penalty” message.

As an extra bonus this year, Billy Moore will be at Cumberland School of Law on the campus of Samford University in Birmingham on Thursday afternoon, January 28. There will be a group discussion on capital punishment for all in attendance. Everyone is welcome to attend this event.

Registration is required for the seminar on Friday and Saturday, January 29 and 30, 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 DoubleTree Hotel in Birmingham. Deadline for room registration is January 15, 2010. See the registration form for more details.

AGENDA

(Order of Speakers Subject to Change)

Thursday, January 28, 2010

3:30 p.m. Billy Moore – Death Row Exoneree- “Capital Punishment” Group Discussion, Moot Courtroom, Cumberland School of Law, Samford University, Birmingham, AL - (Free & Open to Public)

Friday, January 29, 2010

8:50 a.m. Opening Comments and Welcome – Kathryn King, President, ACDLA, Attorney, Cullman, AL
 9:00 a.m. “Mistaken Eyewitness,” – Kathryn L. “Sunny” Lippert, Attorney, Bessemer, AL
 10:15 a.m. Break
 10:30 a.m. Keynote Speaker: “Death Penalty Administration vs. Rehabilitation,” - Death Row Exoneree & Minister Billy Moore, Rome, GA
 11:30 a.m. Lunch – On Your Own
 12:45 p.m. “Faulty Forensic Evidence: Part I-Ballistics” – Dr. James Lauridson, Forensic Pathologist and Joe Saloom, Attorney, Montgomery, AL
 2:45 p.m. Break
 3:00 p.m. “Faulty Forensic Evidence: Part I (cont.)
 4:00 p.m. “Faulty Forensic Evidence: Part II – Bunter Marks” – Lawden Yates, Attorney, Blountsville, AL
 5:00 p.m. Adjourn for day

Saturday, January 30, 2010

9:00 p.m. “False Confessions” – Kathryn M. Kase, Texas Defender Service, Houston, TX
 10:00 a.m. “Ethics or Avoiding Malpractice” – John Wesley Hall, Attorney, Little Rock, AR
 11:00 a.m. Break
 11:15 a.m. “MI/MR Ineffective Assistance Issues” – Kathryn M. Kase, Texas Defender Service, Houston, TX
 12:15 p.m. Lunch – On Your Own
 1:30 a.m. “Appellate Representation of Capital Defense and Preservation of Record” – Stephen Strickland, Attorney, Birmingham
 2:30 p.m. Break
 2:45 p.m. “Police and Prosecutorial Misconduct” – Christopher W. Adams, Attroney, Atlanta, GA
 3:45 p.m. “Using Snitches and Other Cooperating Witnesses” – Christopher W. Adams, Attorney, Atlanta, GA
 4:45 p.m. Wrap Up & Adjourn

Application for this Course has been made to the Mandatory Continuing Legal Education Commission of Alabama for a total of 12.0 hours’ credit, including 1 (one) hour of Ethics

HOTEL ACCOMMODATIONS:

Must be made by January 15, 2010

- DoubleTree Hotel, 808 So. 20th St., Birmingham, AL
- Reservations: 1-205-933-9000. Ask for “Loosening the Death Belt” rate of \$119, single or double. This rate does not include deck parking which is extra.

REGISTRATION FORM

Name: _____

Firm: _____

Address: _____

City/State/Zip: _____

Fax: _____

E-Mail: _____

All seminar materials will be in CD-Rom format.

	By 1/15/10	After 1/15/10
<input type="checkbox"/> Early Registration – 2010 ACDLA members	\$325.00	\$375.00
<input type="checkbox"/> Non-Members	\$375.00	\$375.00
<input type="checkbox"/> Lifetime Members	N/C	N/C
	Total:	_____

No Refunds after January 15, 2010. Substitutions are accepted.

METHOD OF PAYMENT

Check-Payable to ACDLA MC VISA

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Signature _____

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

Moving Technology out of the Office and into the Courtroom

Paul W. Brunson, Jr., Clayton, AL.

A number of years ago I took over an existing law office in Clayton, Alabama. It was quite an experience for a “just out of law school” attorney. On the credenza behind my desk were two “phones.” One worked and the other didn’t. I later found out that the other “phone” was a dictating/transcribing device. The older lawyer from whom I had rented the space said that the only way to make it in “this business”, was to work smarter and to out work the DA. I have always taken this to heart.

As soon as I could afford it, I purchased a used computer and printer for my office. I never quite got the hang of dictating a complaint or motion, and fortunately was able to type about as fast as I could talk. So, after completing whatever it was that I was working on, I would then load the document to a disk and let my secretary “clean it up.” Today everybody has their own state-of-the-art computer, tied to an in-house network with several shared printers. And of course we have the WEB, Westlaw, Alacourt, and the ACDLA Listserv. Things have certainly changed since I began my practice.

A couple of years ago, I sat in on a civil trial between a giant Plaintiff’s firm and an equally large Defense group. The technology they were using was incredible. Each firm had their own IT department! Look, I’m just a little ole “sole practitioner.” How could I possibly compete on a scale with these firms, or for that matter, with the multi-million dollar organization of our District Attorney. Well, fortunately for me, my youngest son is the Assistant Director of Computer Research at the University of Alabama and he wrote LETS and a number of other programs. So, a few phone calls later and I was on my way. I had the benefit of a family member who is knowledgeable in computer technology, you may not, however there are many resources to which one may avail oneself in this area - I urge you to seek them out.

How many times while in court has opposing counsel, or the judge for that matter, cited case law in opposition to your motion or legal theory which you missed during your research? Numerous times I’m sure. So how do you proceed; what’s the answer? A laptop with an “air-card” connected to Westlaw or some other source will help you find those obscure cases when confronted with them in open court. I also have a downloaded version of “Pattern Jury Instructions - Criminal” from ABICLE, stored on the laptop’s hard drive. In addition, having a laptop with you in court is helpful for drafting on-the-spot motions or other court documents. Anybody with average computer skills can get this far, and the next step isn’t that much harder.

With a little help from WordPerfect X4, you can store your voir dire questions, notes on witness questioning, points concerning motion arguments, and your opening statement and closing arguments. But, should you stop there? In college, most of us learned “to tell them what you are going to say, tell them, and then tell them what you said.” In the current world of technology, one may go a step further in order to emphasize a point - “show them while you are telling them.”

When I initially began trying cases the only tool in our courtroom with which to emphasize evidence was a blackboard. To write

on the blackboard, I had to have my back to the jury. I never knew if the jury was paying attention and following along or completely disinterested and going to sleep. There were several things that I will never forget that happened when I did my first “opening” and “closing” with PowerPoint 2007. First, the incredible concentration by the entire jury on my every word. It was as if the judge had told them there was going to be a pop quiz after the “lecture” and you had to pass. I stood directly in the line-of-sight between the jury box and the PowerPoint screen and was able to gauge the response of every jury member. The look on the ADA’s face when I finished was priceless. Halfway through the State’s second witness, the judge sent the jury out and told the ADA that he had better find something my client would plead to or he (the Judge) was liable to throw the whole thing out.

Enough of the war stories, let’s talk about the “hardware.” That same laptop, you use for your in-court research, when equipped with Microsoft Office Suite 2007 will work fine for your PowerPoint presentations. Caveat: Make sure you have a fairly large capacity battery and access to an electrical outlet to keep the battery charged. The next step is to take a college level course on Introduction to PowerPoint 2007. The 2003 version is OK, but the updated 2007 version is better and easier. I took the course on-line from Wallace Community College. It is rather inexpensive and takes about six hours per week, for six weeks to complete. I found it “fun” and “rewarding.” I went to Office Max and purchased a “wide format” screen for around \$100.00. My last purchase was the LCD projector, which I bought on Ebay. This cost is significant and will run between \$600.00 and \$2000.00. The major consideration is the intensity of the device. You need at least a 3000 lumen projector. I have a NEC NP60 multimedia projector and it is “adequate,” but I would rather have a 5000 lumen model.

I am confident that the time and money you invest in these tools will be worthwhile when used in court. I know they have been for me. PowerPoint has the flexibility to make changes “on the run.” During preparation, I have placed lines in my presentation (both opening and closing) which after pre-trial motion denials and/or after the trial has concluded, would not be appropriate. Using these tools, I can quickly remove or add items with relative ease and without disrupting the continuity of my presentation.

Imagine David and Goliath - David’s struggle is analogous to ours. Since most of us are sole practitioners, we need every advantage we can get and we need to make the most of it. A professionally prepared presentation is well within our reach, both from a practical standpoint and financially. I can assure you that it is personally gratifying to have the jury look at their watch or anywhere else while the ADA is presenting his case and then have that same jury spellbound and riveted on your every word. I firmly believe that both you and your client will benefit, in what is generally a no-win situation. As Mikey says, “Try it, you’ll like it!” ●

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TRY A MANDAMUS TODAY (DID I MENTION IT'S FREE?)

By Paul Whitehurst, Attorney, Northport, AL

Interlocutory mandamus petitions to appellate courts are often overlooked by us regular lawyers. For years the lawyers in the big civil firms have used mandamus as a vehicle to go right to their favorite appeals court from adverse rulings. It's almost like they want to show the trial judges that they're not intimidated by the threat of "home cooking."

In criminal cases the state files a lot of mandamus petitions. Those have less to do with an ego battle with the trial judge and more to do with trying to reverse rulings that are perceived as fatal to their cases.

There's no reason criminal defense attorneys can't follow the same trend. In fact it's really surprising how few mandamus petitions we file. It could be that most attorneys are intimidated by appellate practice, and, compared to normal appellate practice, there are no clearly delineated rules for mandamus. It's kinda like the wild west. But that's really the beauty of mandamus.

§12-3-11 Ala. Code 1975 grants the Court of Criminal Appeals the authority to exercise original jurisdiction and determine writs of mandamus in relation to matters in which it has appellate jurisdiction.

Ex parte Vance, 900 So.2d 394 (Ala. 2004) sets out the general rules for mandamus:

Mandamus is a drastic and extraordinary writ to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court. *Ex parte Sears, Roebuck & Co.*, 895 So.2d 265 (Ala. 2004) (quoting *Ex parte Mardis*, 628 So.2d 605, 606 (Ala. 1993) (quoting in turn *Ex parte Ben-Acadia, Ltd.*, 566 So.2d 486, 488 (Ala. 1990))). The petitioner bears the burden of proving each of these elements before the writ will issue. *Ex parte Glover*, 801 So.2d 1, 6 (Ala. 2001) (citing *Ex parte Consolidated Publ'g Co.*, 601 So.2d 423 (Ala. 1992)). *Vance*, 900 So.2d at 397

The biggest hurdle in mandamus is showing the lack of an adequate remedy. The courts have grappled with when an appeal is an adequate remedy. The leading case on this issue is *Ex parte Spears*, 621 So.2d 1255, 1256-57 (Ala.1993) which states:

It is now a well-established general rule in this state that if the matters complained of can ultimately be presented by an appeal, a writ of mandamus will not be issued. *Ex parte Fowler*, 574 So.2d 745 (Ala.1990). However, this Court, exercising its discretion, has recognized certain exceptions to this general rule in specific cases where appeals are not considered to be adequate to prevent "undue injury." See, e.g., *Ex parte Nissei Sangyo America, Ltd.*, 577 So.2d 912 (Ala.1991) (mandamus proper to review discovery rul-

ings); *Ex parte Insurance Co. of North America*, 523 So.2d 1064 (Ala.1988) (mandamus proper to enforce a trial court's compliance with this Court's mandate); *Ex parte Rush*, 419 So.2d 1388 (Ala.1982) (mandamus proper to enforce a statutory or constitutional right to a jury trial); *Ex parte Weissinger*, 247 Ala. 113, 22 So.2d 510 (1945) (mandamus proper to vacate certain interlocutory rulings in divorce cases); see, also, *Ex parte Brooks*, 264 Ala. 674, 89 So.2d 100 (1956); and *Brittain v. Jenkins*, 263 Ala. 683, 83 So.2d 432 (1955), and the cases cited therein. The rationale underlying the recognition of these exceptions has not always been crystal clear. For example, the remedy by appeal that will make mandamus review unavailable was described by this Court in one case as "one competent to afford relief on the very subject matter in question, and which is equally convenient, beneficial, and effectual." See *East v. Todd*, 284 Ala. 495, 499, 226 So.2d 153, 156 (1969). Matters of expense and public interest have also been considered important factors in some cases. See, e.g., *Ex parte Weissinger*, supra. On the other hand, in *Ex parte Moss*, 278 Ala. 628, 179 So.2d 753 (1965); and *Ex parte Brooks*, supra, this Court stated that expense and inconvenience were not controlling in determining whether a party had an adequate remedy by appeal.

The appellate courts have allowed certain issues in criminal cases to be presented by mandamus rather than appeal. Those include denial of probation, *Ex parte Rivers*, 669 So.2d 239 (Ala.Cr.App. 1995); denial of a motion to recuse, *Ex parte Fowler*, 863 So.2d 1136 (Ala.Cr.App. 2001) writ quashed 863 So.2d 1146 (Ala. 2003); double jeopardy violations, *Ex parte Ziglar*, 669 So.2d 133 (Ala. 1995); dismissal of a de novo appeal to circuit court, *Ex parte Fagan*, 892 So.2d 443 (Ala. Cr.App. 2004); denial of a request to proceed in forma pauperis, *Goldsmith v. State*, 709 So.2d 1352 (Ala.Cr.App. 1997); and failure to notify defendant of dismissal of his Rule 32 petition (out of time appeal), *Ex parte Johnson.*, 806 So.2d 1195 (Ala. 2001).

The only record the appeals court has in a mandamus is the petition and the response. That can be good for the petitioner. It's like writing a complaint in a civil case. You get to allege the facts that you want. They are accepted as true unless they are disputed by the respondent. *Ex parte Benford*, 935 So.2d 421 (Ala. 2006) It's a good idea to attach all the pertinent documents to the petition. The form for the petition is essentially the same as an appellate brief. Rule 21(a) A.R.A.P.

A frequent stumbling block is the timeliness of the peti-

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Self-Defense and the Level of Proof to Get the Issue to a Jury

By: John Edmond Mays, Attorney, Decatur, AL

You have a homicide case where the victim and the defendant have had problems in the past. They get into a fight and the defendant shoots the victim who is unarmed. The only conceivable defense is self-defense. However, when you get to the end of the case the trial judge tells you, "I don't think you brought out enough evidence to demonstrate that your client was in reasonable fear of death or serious bodily harm before he shot the deceased so I'm not going to give you a self-defense instruction. I will however, charge on manslaughter." When this happens what do you do besides faint or apologize to your client for misadvising him or her?

1975 Code of Alabama 13A-3-23 states that a person may use deadly physical force in self-defense or the defense for another person if the person reasonably believes that another person is using or about to use unlawful deadly physical force. Suppose at the close of the defense's case the state argues that the defendant failed "to produce any evidence that the deceased was about to use deadly physical force against him when he shot the deceased." and "failed to produce any evidence that he could not have retreated with complete safety." This occurred in *Williams v. State* 938 So.2d 440 (2005):

Contrary to the State's contention, Williams did not have to present evidence that Martin was, in fact, about to use deadly physical force against him; rather, Williams only had to present evidence implicating that he **reasonably believed**, that Martin was about to use deadly physical force against him. As this court explained in *King v. State* 478 So.2d 3185 (1985), (emphasis that of the court).

As to the level of proof required the threshold is quite low. See: *Williams v. State* at 445:

If there is any evidence, however slight, tending to support that the defendant 'acted in self-defense', the issue should be submitted to the jury. *Domingus v. State* 11 So. 90 (1892), however, **'unsatisfactory and inclusive to the judicial mind'** the evidence of self-defense may appear. *Burns v. State* 155 So. 561, 562 (1934) (emphasis that of the court).

Remember in our fact scenario there was some prior difficulty between the defendant and the deceased and on the day of the killing there was a fight. Take note of *Williams v. State* at 445:

In determining whether to charge the jury on self-defense; evidence most favorable to the defendant should be considered and if there is the **slightest evidence** tending to prove a hostile demonstration which can be reasonably interpreted as placing the accused, at the time of the killing, in apparent imminent danger to life or other grievous bodily harm then the matter of self-defense becomes a question for the jury. *Byrd v. State* 57 So.2d 388, 391 (1952) (emphasis that of the court).

If the defendant believed that the deceased was about to use deadly physical force against him then two things are necessary. This belief on the part of the accused must be (1) honestly entertained and (2) the belief must be a reasonable belief. Note: *Williams v. State* at 446:

The law requires that a belief of imminent peril and urgent necessity to slay in self-defense, though it may be based on appearances must be both well founded and honestly entertained. *Williams v. State* SOSO 59 (1909). A merely "honest" belief, unless a reasonable one, that the killing was necessary, will not make it justifiable. "It is not an honest, but a reasonable belief, that justifies. An honest belief may not be a reasonable belief; it may be the offspring of fear, alarm or cowardice, or it may be the result of carelessness or irrationality. A reasonable belief, generated by the attendant circumstances – circumstances fairly creating it – honestly entertained, will justify a homicide; but not an irrational belief no matter how honest it may be." *Holley v. State* 75 AL 14, 19 (1883); *Howard v. State* 420 So.2d 828, 832 (1982).

The question is not merely what the defendant believed, but also what did he have a right to believe. See Comments to 13A-3-23.

Now in our scenario suppose that the worst of the worst occurs. You inform the trial judge of all the foregoing law and he responds, "Based on what I have heard about

that fight I just don't believe it was reasonable for the defendant to believe that he was in imminent danger of having deadly force used against him. The deceased was unnamed and fighting the defendant with clearly non-lethal force." Now what? Return to *Williams v. State* at 477:

It is solely for the jury to determine whether any particular inference that may possibly be drawn from given facts is or is not a reasonable inference, and not for the court to substitute its judgment for theirs in passing upon the character of inferences afforded by the evidence.

Please take careful note of *Domingus v. State* 11 So. 190, 192 (1892) wherein a trial judge was reversed for charging a jury that from certain facts they might reasonably infer that the defendant was not in imminent danger.

The issue of whether it was reasonable for the defendant to feel that he was in peril from deadly physical force is for the jury in all cases and not for the court. *Williams*, supra at 447. See also: *Perkins v. Boyce*, Criminal Law 1116 (3^{ed} 1982):

It is to be noted that reasonableness is determined by a standard – a reasonable person under the same or like circumstances – and the determination is made by the jury. *Perkins* at 1117 a self-defense instruction should be given when any evidence is given showing the defendant's subjective belief that the use of force was necessary. *Perkins* at 1115-16 quoting *People v. Lockett* 413 NE2d 378, 381 (1980).

The prosecutor, consumed by a desire to send your client to prison for life, makes the following argument "Well, I'll concede the point about the use of deadly force. What I won't concede is that the defendant couldn't safely retreat before he shot the victim. He didn't prove he couldn't retreat in safety before he shot." The defense responds that they thought the deceased was either armed or had access to a pistol even though that belief turned out to be incorrect. If the defendant's belief was reasonable then it follows that he would not want to "turn his back and run from an armed assailant". For help here turn to *Weaver v. State* 500 So.2d 1278, 1279 (1986):

An instruction on self-defense is warranted if there is evidence, however, weak or doubtful in credibility, indicating that the defendant could not, or it reasonably appeared from the circumstances that the defen-

dant could not, retreat with complete safety, i.e., without increasing or apparently increasing his peril. The question of whether one could have retreated is one of reasonableness and thus, is necessarily a question for the jury. ●

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TRY A MANDAMUS TODAY

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tion. Rule 21(a)(3) A.R.A.P. sets a presumptively reasonable time as the time for filing an appeal. That's considered to be 42 days from the date of the trial court's order. If filed outside of that time Rule 21(a)(3) requires the petition to include a statement of good cause why the petition was not timely filed.

Problems arise when the trial court is asked to "reconsider" its ruling. In civil procedure parlance it would be called a motion to alter, amend, or vacate. The Court of Criminal Appeals currently does not view this as extending the presumptively reasonable time for filing a mandamus petition relying on the Supreme Court's decision in *Ex parte Troutman Sanders, L.L.P.*, 866 So.2d 547 (Ala. 2003) which dealt with an interlocutory order in a civil case. Consequently, it's very important to include the statement of good cause if there's any question about timeliness.

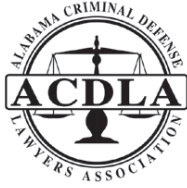
This doesn't mean we shouldn't file motions to reconsider. To the contrary, they should always be filed if possible because they could avoid the necessity of a mandamus. I suggest they be filed immediately upon receipt of an adverse ruling. They should include everything you may need to include in the record on the mandamus petition. That gives the trial court plenty of time to reconsider. If no ruling on the motion to reconsider is made within 42 days of the original ruling then it's a good idea to file the mandamus petition rather than wait and gamble with your time.

If the Court of Criminal Appeals denies the mandamus then you may appeal that ruling to the Alabama Supreme Court by filing another mandamus petition. See Rule 21(e) A.R.A.P.

Another nice thing about mandamus is that there's no filing fee. Rule 21(a)(2) A.R.A.P. It's indeed rare when our clients aren't stuck with fees.

That's about all there is to it. Many of our clients can benefit from mandamus. Judges will have more respect for attorneys who they know will stand up for their clients. It could even result in better settlements if prosecutors see we are willing to fight for the clients. There's no down side. ●

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