

# THE LAW OFFICE OF THE SOUTHERN CENTER FOR HUMAN RIGHTS



# HUMAN RIGHTS REPORT

2008 Annual Newsletter of the Southern Center for Human Rights

In December 2007, SCHR President and Senior Counsel Stephen Bright argued *Snyder v. Louisiana* before the United States Supreme Court. The Court considered whether it was permissible for the prosecutor – notorious for both his racism and his bloodlust in prosecuting capital cases – to strike all five prospective Black jurors so he would be able to ask an all-white jury to return with a death sentence to avenge the O.J. Simpson verdict. In a 7-2 opinion, the Court reversed Allen Snyder's conviction and sentence of death on the basis of racial discrimination at jury selection, holding that the prosecutor's motives for striking potential jurors were "highly speculative" and "suspicious."

*Ben Cohen, a death penalty attorney at the Capital Appeals Project in New Orleans and part of the SCHR extended family, reflects on Steve Bright's second successful Supreme Court argument, and the work of SCHR.*

## FROM JEFFERSON PARISH TO THE UNITED STATES SUPREME COURT

On Tuesday, December 4, 2007, I exited the Capital South metro station and walked up into a cold wind three blocks to the court house, as the sun rose over the white topped buildings of the District of Columbia. I was heading to the United States Supreme Court for the argument in *Snyder v. Louisiana*, 522 U.S. \_\_\_ (2008), the first capital case to reach the high court during my decade as a Louisiana death penalty lawyer. At 7:00 a.m., a long line of people eager to hear the argument already snaked down the steps. In the front of the line stood Mary Sinclair, a veteran investigator with the Southern Center for Human Rights, who greeted me with a hug. Ten years ago when I started working at SCHR, Mary had been my first (and unquestionably best)

## A PERSONAL NOTE

teacher in the art of witness interviews and victim outreach.

Waiting in the cafeteria for the argument to begin, I took pictures of my colleagues Marcia Widder and Jelpi Picou from the Capital Appeals Project, who had brought *Snyder* to the Supreme Court, and Steve Bright onto the case. With them was Shareef Cousin, who spent five years under sentence of death in Louisiana before he was exonerated and ultimately left Angola Prison to become an SCHR community organizer. Lawyers for the Jefferson Parish District Attorney's Office appeared in the background, reminding me that for every person fighting for someone's life, there is someone fighting equally hard for death.

Shareef's presence always brings me some calm, in part because he is such a decent guy and recognizes when a silence is comfortable and conversation unnecessary. But also because he was intimates with the guys on Louisiana's death row; he remains close with not only Allen Snyder, but also my first clients Ed Harris and Lawrence Jacobs from Jefferson Parish. His presence brings a tiny bit of them – and the peace they offer – out of Angola Prison's death row.

Allen Snyder's case was about whether prosecutors in Jefferson Parish had improperly removed jurors based upon their race with peremptory challenges (jury strikes with which they can remove any juror at their discretion). Prosecutors had used five strikes to remove all of the African Americans from the jury and then

argued in the closing argument that 'down here, in Jefferson Parish, the good citizens wouldn't let Snyder get away with it the way O.J. Simpson had.' Given the sentencing options of death or life without parole, there was little chance that Snyder would 'get away' with anything, and as even a couple of dissenting black-robed justices noted along the way, it was an argument that could only have been made to a jury from which Black people were removed.

Jim Williams, the prosecutor who struck all of the African-American jurors, had played a hand in sending five African-American defendants to death row prior to the *Snyder* case. He had been chastened for hiding evidence and failing to disclose favorable material to the defense; and had been pictured in *Esquire* magazine in front of a miniature electric chair bearing the characterization of each of the men he had sent

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## DIRECTOR'S LETTER

This morning, I received from Tony Amsterdam – the most brilliant legal mind in the modern fight against capital punishment, and this year's Frederick Douglass Award honoree – a poignant definition of strategy in the fight for social justice. "You turn conditions of injustice," Tony wrote, "into issues of injustice by forcing law-makers and decision-makers to choose to perpetuate or change those conditions, so that they feel the active responsibility for subjecting other human beings to conditions they themselves would find unendurable."

Tony suggests that while the strategy has remained the same, our tactics have changed (*In his own words*, page 6). To be effective, one must be clear about what kind of political era – progressive or regressive – you are operating in.

While a good tactician is clear about political context, it also helps to remember that both sides of the chessboard can have strategy.

At SCHR, we believe that, particularly in the Deep South and particularly since the end of the Civil War, those who oppose progressive social change have consistently *and strategically* turned to the criminal justice system to divide, discredit, and destroy progressive movements. Call it the criminalization strategy.

This perspective has had some recent converts. Researching an article about whether U.S. corporations that had used forced labor can be found liable for profiting from slavery, chief of the *Wall Street Journal's* Atlanta Bureau Douglas Blackmon ended up writing *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*. In it, Blackmon describes how petty criminal laws were used for 75 years after the end of the Civil War to re-enslave tens of thousands of African Americans who were arrested on vagrancy and other petty charges, convicted, and then leased out to railroads, mines, and plantations as slave labor. This convict lease system not only provided cheap labor, but also was strategically used to maintain the white power structure by criminalizing Black men and women at a moment when freedom was nearly within grasp.

It is not a coincidence that the moment of greatest progress for racial justice in this country came when the movement found a counter-strategy to stop the Southern states' criminalization strategy in its tracks: during the civil rights movement, Black students threatened with arrest turned around and asked to be arrested; when Martin Luther King Jr. was jailed, he wrote his Letter from the Birmingham Jail; in provoking a violent response from law enforcement, freedom riders turned the Sheriff's deputy with his German Shepherd from being a symbol of law enforcement into being a symbol of brutality.

Forty years after the death of Martin Luther King, Jr., we are both inspired by how the civil rights movement outmaneuvered attempts to criminalize its leaders and masses, and aware that the criminal justice system today is massively larger and more powerful than it has ever been in American history. That both things are true reminds us it has been – and will be – a long struggle, with a knock-out blow unlikely on either side.

What SCHR brings to the fight is a variety of tactics that constitute our day to day work: we represent individuals, both in cases where the impact is larger than the one client, and where the best result is to save one person's life (see the articles on Allen Snyder's case in the U.S. Supreme Court, and LaSamuel Gamble's death sentence reversal, in this newsletter); we bring class actions to force wide-scale changes; we organize those who find themselves criminalized for being Black or poor (see SCHR News on the opposite page for an update on our campaign against for-profit probation in Americus, Georgia); we lobby for the good and resist the bad in Georgia's legislature; and we build coalitions and leverage our legal victories to shrink the size of the criminal justice system.

In the thick of things, the right tactical decisions are not always obvious. We are lucky to have the wisdom of masters like Tony Amsterdam.



Lisa Kung  
Director

**SCHR SUES ALABAMA DEPARTMENT OF CORRECTIONS FOR VIOLATION OF OPEN RECORDS ACT** In September 2007, SCHR filed a lawsuit challenging a policy of the Alabama Department of Corrections that blocks the public's access to all public writings relating to deaths, injuries, stabbings, beatings, and use of force within the state prison system. This lawsuit was filed after SCHR received numerous reports of prisoners being seriously injured and killed at Donaldson Correctional Facility in Bessemer, Alabama. When SCHR submitted an Open Records Act request asking the Department to release public records regarding these incidents, the Department refused to provide a single document.

According to current Department policy, all documents relating to deaths, stabbings, and excessive force in the prison system are confidential and not subject to Alabama's Open Records Act. The lawsuit, *Barksdale v. Allen*, survived a motion to dismiss in January 2008. It is currently in the discovery phase. Attorneys Jake Watson and Herman Watson of Huntsville, Alabama are co-counsel.

# SCHR News

**COALITION RALLIES TO END FOR-PROFIT PROBATION** In Americus, Georgia, SCHR community organizers, community members, the local chapter of the NAACP, NUBIA, and the Prison and Jail Project are leading a community effort to end for-profit misdemeanor probation.

People charged with misdemeanors in this South Georgia town – and throughout the state – who cannot immediately pay their fines that day in court are placed under the control of a for-profit company. The for-profit corporation – which provides no supervisory services – collects at least \$35 a month in “supervision” fees for the term of probation, so a poor person ends up paying 200-500% more than a person of means would pay for the same offense.

The Coalition to End For-Profit Probation is pressuring the city council to end its contract with Middle Georgia, which is collecting fees from 1,000 Americus residents on any given day. There are only 12,000 adults in Americus. The number of for-profit misdemeanor probation companies has proliferated throughout Georgia since being authorized in 2000, contributing to Georgia's embarrassing distinction as the state with more people under some form of correctional control (prison, jail, parole, probation) per capita than any other state in the nation.

**DISTRICT ATTORNEY ATTEMPTS TO INVALIDATE GEORGIA'S SENTENCE REVIEW PANEL AND REINSTATE HUNDREDS OF REDUCED SENTENCES** Thirty years ago, Georgia's legislature created the Sentence Review Panel, a body of judges tasked with reviewing prison sentences for excessive harshness. In 2003, the Panel granted a 7-year reduction in sentence to Sandra Widner, a woman imprisoned for killing her allegedly abusive boyfriend. When the South Georgia District Attorney who prosecuted Ms. Widner found out about this, he filed a lawsuit in Atlanta to reinstate Ms. Widner's original sentence and declare the Panel unconstitutional. Without making Ms. Widner a party or even sending her notice of the proceedings, the District Attorney obtained a court Order eliminating the 7-year sentence reduction. Ms. Widner was previously due to be released from prison in 2009. The Order, if upheld, will require Ms. Widner to stay in prison until 2017. It will also leave hundreds of other people granted sentence reductions vulnerable to actions to reinstate their original sentences.

In March 2008, SCHR attorneys Gerry Weber and Sarah Geraghty represented Ms. Widner before the Georgia Supreme Court. Attorneys C. Allen Garrett, Jr. and Hayley Ambler of Kilpatrick Stockton co-counseled the case. A decision is expected soon.

**ALABAMA COMMISSION MOVES TO CLOSE TUTWILER PRISON FOR WOMEN** This Spring, an Alabama Commission representing a dozen government agencies issued a startling recommendation: close Tutwiler Prison for Women, the state's main medium/maximum security facility for women. The recommendation was surprising not for what it said – it takes only 5 minutes inside the decrepit facility to realize that it is time to shut the place down – but for who said it: the *Commission on Women and Girls in the Criminal Justice System*, which includes representatives from the Department of Corrections, the Board of Pardons and Paroles, the Department of Human Resources, and other institutional players. The Commission was created in 2006 in response to women prisoners' organizing efforts, spurred by SCHR's class-action litigation regarding unconstitutional conditions at Tutwiler.

The Commission's recommendations were a result of ongoing pressure and advocacy by the Alabama Women's Resource Network (AWRN), a project of SCHR. AWRN's advocacy was also instrumental in the state of Alabama bringing home all of the women incarcerated out of state. Over 300 women had spent four years in a private prison in Louisiana.

This spring the Commission was extended, expanded, and charged with implementing its recommendations. In concert with recommending the closure of Tutwiler, the Commission also recommended expanding community-based treatment options so women whose criminal behavior stemmed from drug addiction could be treated in the community rather than shipped off to prison. The full report is available at <http://parca.samford.edu/commission/report2008.pdf>. In the coming year, AWRN will work to ensure the Commission's Report is fully implemented.

**SOUTHERN PUBLIC DEFENDER TRAINING CENTER CELEBRATES ONE-YEAR ANNIVERSARY** The highlight of the Southern Public Defender Training Center's (SPDTC) inaugural year was its first training, held in Birmingham, Alabama. Ten attorneys from New Orleans' newly reconstituted Orleans Public Defender office were joined by five new public defenders from the Fulton County (Atlanta) Public Defender office, and one attorney from New Orleans' Juvenile Regional Services for 14 days of “boot camp” style immersion learning, led by two dozen of the best indigent defense experts nationwide. This Class of 2007 reconvened for its second training six months later to learn new skills, reconnect, and recharge. SPDTC is gearing up for its 2008 class this summer. For more information on the Training Center, please visit [www.southerndefender.org](http://www.southerndefender.org). **On Thursday, June 26th, SCHR and SPDTC are hosting a benefit reception and concert at Georgia State's Rialto Center in Atlanta. For more information, please visit SCHR at [www.schr.org](http://www.schr.org).** ■

# DEATH SENTENCE VACATED

## SCHR CLIENT WINS ALABAMA CIRCUIT COURT DECISION

When SCHR took on LaSamuel Gamble's case in 2002, Mr. Gamble had been on Alabama's death row for five years without a lawyer. Convicted of capital murder at the age of 20, Mr. Gamble survived a childhood marked by severe poverty, violence, and neglect. On death row, he began to participate in the sports league, and is an avid basketball player and sports trivia ace.

In September 2007, the Circuit Court of Shelby County, Alabama, vacated Mr. Gamble's death sentence, finding the death penalty in his case to be "arbitrary, disproportionate, and fundamentally unfair."

After a decade on death row (and 6 years of post-conviction appeals filed by SCHR), Mr. Gamble was finally given his day in court. On June 6-8, 2006, the circuit court held an evidentiary hearing at which SCHR attorneys William Montross and Vanessa Buch introduced evidence in support of Mr. Gamble's claims. Among these were claims that Mr. Gamble was not afforded effective assistance of counsel when his trial attorneys failed to present any evidence in mitigation at the penalty phase of his trial, and that Mr. Gamble's death sentence violated fundamental fairness because his co-defendant no longer faces execution.

At his trial in 1997, the uncontested evidence presented to the jury established that Mr. Gamble's co-defendant was the lone trigger-man (Mr. Gamble did not shoot either of the two victims). Nevertheless, along with his co-defendant, Mr. Gamble was convicted of capital murder and sentenced to death.

Several years later, the imbalance between their relative culpability and punishment became further exaggerated. Pursuant to the United States Supreme Court's 2004 decision in *Roper v. Simmons*, 540 U.S. 1160 (2004), Mr. Gamble's co-defendant was granted relief and re-sentenced to life without the possibility of parole. In *Roper v. Simmons*, the United States Supreme Court found it an unconstitutional violation of the Eighth Amendment to execute someone who was a juvenile at the time of the offense. At the time of alleged crime in Mr. Gamble's case, his co-defendant – the uncontested triggerman – was shy of his 18<sup>th</sup> birthday, while Mr. Gamble was eight months beyond his. As a result, Mr. Gamble's co-defendant was relieved of his death sentence, leaving the incongruous result that the co-defendant triggerman could not be executed while Mr. Gamble remained under sentence of death.

In *Roper v. Simmons*, the State of Alabama, – through the Office of the Attorney General – had filed a brief in the United States Supreme Court as *amici curiae* urging the Supreme Court to allow the execution of juveniles. In its brief, the Alabama Attorney General used Mr. Gamble's case as an example of the inequities that would result

if the United States Supreme Court were to bar the execution of juvenile offenders. According to the State's brief, if the execution of juvenile offenders was prohibited, "Gamble – who was 18 at the time but did not actually kill anyone – would face the death penalty, but [his co-defendant] – who at 16 executed two people with startling coolness – would get a free pass. Surely the Eighth Amendment does not, as a matter of constitutional principle, mandate such a bizarre result."

"OUT OF PLAIN FAIRNESS AND SIMPLE EQUITY IN LIFE, IT'S NOT FAIR TO LEAVE THE PERSON ON DEATH ROW WHO DIDN'T KILL ANYONE . . ."

At the evidentiary hearing, SCHR attorneys reminded the court of the Alabama Attorney General's rationale for executing teenagers, and turned it into an argument for Gamble's life. Robbie Owens, the District Attorney of Shelby County who prosecuted Mr. Gamble at his 1997 trial, under questioning by SCHR attorney Vanessa Buch, affirmed the "bizarre result" articulated by the State and testified that, "out of plain fairness and simple equity in life, it's not fair to leave the person on death row who didn't kill anyone and take the person off death row who did." Mr. Owens further testified that, had he known back in 1997 that Mr. Gamble's co-defendant and the uncontested trigger-man would be exempt from the death penalty, he would not have sought death for Mr. Gamble.

In addition, testimony presented at the evidentiary hearing demonstrated the wealth of mitigating evidence that should have been presented to the jury at trial. At the penalty phase of Mr. Gamble's trial in 1997, his trial counsel had not presented *any* mitigating evidence to the jury; instead, they simply read aloud to the jury a list of statutory mitigating circumstances. In sharp contrast, at the state post-conviction hearing, SCHR presented numerous witnesses and countless documents revealing that Mr. Gamble's childhood and development were marked by poverty, neglect, abuse, violence, substance abuse, residential instability, and cognitive limitations.

On September 5, 2007, on the basis of the evidence and arguments presented by SCHR on behalf of Mr. Gamble, the circuit court granted relief on two grounds. First, the court found that Mr. Gamble's trial counsel were ineffective for failing to obtain and present available mitigating evidence. The Court noted that while the judge and jury at Mr. Gamble's trial knew a great deal about the crime for which Mr. Gamble was charged, "[i]n contrast, the jury and [the] Court knew very little about Mr. Gamble." Second, the court found the fact that "the more culpable [co-defendant] no longer faces execution, while the lesser culpable Mr. Gamble remains on death row . . . to be arbitrary, disproportionate, and fundamentally unfair."

The court vacated Mr. Gamble's death sentence, and mandated that he receive a sentence other than death. ■



# LEGISLATIVE SUMMARY

## 2008 GEORGIA GENERAL ASSEMBLY

The 2008 session of the Georgia General Assembly marked the fourth year in which the Governor's office, the House, and the Senate were all under Republican control. The unusually long and rancorous session, which dragged on until April 4, was dominated by massive infighting between Republican leadership in the Senate and the House. The bickering derailed the Republicans' own agenda: to come up with a new water use plan, to reform the tax code, to resolve the crisis in the funding of the state's trauma-care network, and to find a way to pay for much-needed road improvements throughout the state. Instead, by the time the dust had settled and the final gavel fell, little had been accomplished other than measures that enhance the power of the already powerful, line pockets of private corporations and further disenfranchise poor people. As in years past, rhetoric-spouting legislators pursued legislation to more severely punish those who come in contact with Georgia's criminal justice system.

With control of state government now fully in the hands of conservative Republicans, much of SCHR's legislative work at the Capitol is to minimize the damage possible in this new political climate. A typical day from this past session had SCHR Public Policy Director Sara Totonchi spending the morning working to squash a bill that would have shipped Georgia prisoners to work for Halliburton in Iraq, and the afternoon drawing on allies to bottle up a bill imposing the death penalty for doctors who perform abortions. By testifying on pending bills at hearings, building relationships with legislators on both sides of the aisle and solidifying coalitions to support or oppose a range of legislation, SCHR has become part of Georgia's strange and oftentimes frightening political landscape. Below is a summary of SCHR's major legislative issues in 2008.

### SEX OFFENDER RESIDENCE RESTRICTIONS

Politicians smarting from the judiciary's rejection of their 2006 sex offender law – ridiculed in editorials across the state as “counter-productive,” “as wisely crafted as a concrete canoe” and “just plain stupid” – passed a modified version of the derided and rejected law in an attempt to wipe the egg from their face.

SCHR's litigation challenging the 2006 law had stopped enforcement of its most extreme limitation: the provision banning people on the sex offender registry from living within 1,000 feet of a school bus stop. That provision alone would have made all of Georgia off limits to anyone on the registry. The Georgia Supreme Court in *Mann v. Department of Corrections*, 282 Ga 754 (2007) then overturned the 2006 sex offender residence restrictions altogether. Sheriffs across the state, burdened with enforcing a law that made it harder for them to keep track of people on the registry, breathed a sigh of relief.

Advocates for children and women also understood the absurdity of using a residency restriction to stop sexual violence. When Republican leadership in the House proposed **Senate Bill 1** to re-establish the residency restrictions rejected by *Mann*, several advocacy groups for women and children, including Voices for Georgia's Children and the Georgia Network to End Sexual Assault, voiced their opposition to the bill. Their message was clear: residency restrictions in SB 1 will do nothing to protect us from sexual offenders.

Despite the valiant efforts of many, the General Assembly passed a modified version of the sex offender residency restrictions. This bill will once again commit taxpayer resources to a law that has no demonstrated positive effect and that may, in fact, place women and children at greater risk of victimization by forcing sex offenders underground and increasing the likelihood of subsequent sex offenses by severing their ties to stabilizing forces like their church, families, and treatment providers. Similar to Georgia's last sex offender residency law, SB 1 contains numerous constitutional problems and SCHR will continue to challenge it in the courts.

### INDIGENT DEFENSE

SCHR, alongside public defenders and the criminal defense bar, heavily lobbied against **House Bill 1245**, a bill designed to chip away at the state's new public defender system. HB 1245 gave Governor Sonny Perdue and county governments more influence over the public defender council by having the agency's director serve at the pleasure of the governor (rather than the council) and by adding more county commissioners to the council's board of directors. The bill also weakened the right to counsel by changing an indigent person's right to counsel from within 72 hours of arrest to within three business days of the person submitting an application for a public defender, and by redefining “indigent” for misdemeanor and probation revocation cases from 125% to 100% of the federal poverty guidelines.

The Georgia Public Defender Standards Council, which oversees the statewide system of public defenders, received \$40.4 million in state funds for the 2009 fiscal year. The funding for the council was about \$1 million less than what had been requested by Governor Sonny Perdue but over \$2 million more than the Senate recommended. As part of next year's budget, GPDSC received \$800,000 in emergency stopgap funding to defend its growing load of capital cases.

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# ANTHONY AMSTERDAM

Tony Amsterdam, the legendary dean of the capital defense bar, has been described by his fellow attorneys as “the most extraordinary legal mind of anyone I know,” able to “take a pile of coal dust and make a diamond out of it.” (George Kendall and David Kendall, respectively). Justice Byron White is reported to have called Amsterdams’ argument in *Furman v. Georgia* the best he had ever heard. At NYU Law School, where Amsterdam now teaches, the students’ favorite of the many stories about Amsterdam’s lawyering recounts how he cited an old Supreme Court case by volume and page when asked for support of an argument. When one of the judges on the three-judge panel flipped through the 210 U.S. volume and announced that there was no such case on the page cited, Amsterdam insisted that the volume must have been mis-bound. Indeed it had been, with the case located, by a mistake of the printing office, in volume 211 U.S. Countless attorneys with capital cases have sent drafts of their pleadings to Amsterdam and received back revisions and entire reworkings, often at 3:00 in the morning and always brilliant.

SCHR is honored to have Tony Amsterdam join us on October 2, 2008, for our annual Frederick Douglass Awards Dinner in Washington, DC. In the meantime, he answered questions from SCHR staff:

## In his own words

Q.

Your lawyering career has spanned 5 decades, in which you have worked tirelessly against capital punishment and in the defense of freedom of speech and civil rights. How has your view of the law as a means to pursue social justice changed over the years?

A.

The strategy hasn’t changed much, but the tactics have. American culture is radically bipolar, fascinated on the one hand by a complex of progressive, egalitarian, humane, *generous* impulses; captivated on the other hand by a complex of repressive, authoritarian, savagely punitive, *mean* impulses. American history has always oscillated abruptly back and forth between fairly short periods in which one or the other of these warring complexes was the lodestar of the law-making and law-enforcing Establishment. So if you play the game for a half century, you are bound to find yourself working in two very different eras: an era in which you can at least try to use the machinery of the law to move society a little closer to the ideal state in which every individual human being is given a decent opportunity to realize his or her own unique human potential; and an era in which the best you can do with the law is to try to minimize the depth of its descent into inhumanity and oppression.

The strategy in both eras is similar. You turn *conditions* of injustice into *issues* of injustice by forcing law-makers and decision-makers to *choose* to perpetuate or change those conditions, so that they feel the *active responsibility* for subjecting other human beings to conditions they themselves would find unendurable. The tactics are different. In progressive eras, you are trying to persuade the decisionmakers to live up to the professed ideals of the American Dream. That’s primarily what we were doing in the 60s, the 70s, the early 1980s. In regressive eras, you are trying primarily to increase the visibility of the abominable decisions that the decisionmakers are making, so as to intensify the legacy of shame that those decisions bequeath to the next progressive era, which will hopefully repudiate them. That’s primarily what we are doing now.

You recently told the NYU Law School’s Magazine that when you started taking capital cases, it “wasn’t some sort of ideological opposition to the death penalty.” Rather, “it was all about race initially.” Is it still about race? Or, asked another way, what about race and the criminal process today captures your attention?

It’s still about race but it’s no longer *only* about race. Racial discrimination still pervades every part of the legal process by which death is dealt out to some people while other people guilty of the same crimes or worse are spared. That, in its own right – or wrong – is an evil worth fighting. But when you have been in the fight for very long – when you do death cases for decades – you are forced to learn about a lot of other evils worth fighting as well.

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I won't go into them all. From the standpoint of your question, the lessons of inescapable experience fall into two large categories:

First, race is only one of the features of otherness that explain why, out of the large number of persons apprehended for committing capital crimes in this country, a relative few become lightning rods for our society's discharge of xenophobic, lethal vindictiveness. Nobody gets sentenced to death and executed unless prosecutors and jurors can convince themselves that he or she is not a human being made in God's image just like them. The more death cases you handle, the more you realize how narrow a view of God's image it is possible for some prosecutors and jurors to have. And you've got to wonder fundamentally whether a system that dispenses life and death according to particular prosecutors' and jurors' ability or inability to see something of God's creation in the defendant can deliver evenhanded justice in any case.

Second, there are many more things wrong with the death penalty than its unequal application. You may start doing death-penalty defense work because you are troubled by the inequality problem, but it's not long before the others hit you in the gut. One of the first death cases I handled for a client who was not born poor and black, I got into by accident. (He happened to need a stay, and his case presented issues identical to those in which we had just gotten a stay for an impecunious, African-American client. So we agreed to help out in getting the stay.) Turned out this guy was innocent. The real murderer confessed to a priest, but the priest was obliged to preserve the secrecy of the confessional. The Pope asked the Governor to commute this client's death sentence but could not explain why. The Governor did not commute the sentence. The client was executed. So, is it still only about race? It can't be.

If the American Medical Association says that physicians cannot participate in executions but the courts say that doctors must participate in executions to minimize unnecessary pain, do we have the perfect-storm for an end to capital punishment?

The recent Baze decision illustrates the truism that the U.S. Supreme Court, as presently constituted, will do whatever it needs to do to permit executions. Keeping the road to the death house unobstructed is its number one priority in deciding any capital case (and any federal habeas case, and many other criminal-procedure cases). If a majority of the Court needs to produce a submarine or a satellite to steer the death penalty under or over any perfect storm, you can bet that it will come up with the perfect contraption.

When you mooted Stephen Bright for his Snyder argument in the U.S. Supreme Court, you had him on his feet for 2 hours and pushed him very hard on a number of points. Were you surprised by Alito's opinion?

No. Every Supreme Court case I've seen has presented some very difficult, complex issues that, as a logical matter, the Court should have to resolve in order to decide the case. In every case, we wrestle with those issues; we invest a whole lot of time in thinking them through thoroughly and coming up with the best possible answers to questions the Justices may have about them in oral argument. In eight cases out of ten that we win, the Court's opinion makes these issues look easy or ignores them completely. (I'd say that that is true in ten out of ten of the cases that we lose, but I'm biased.) Judges – conspicuously including Supreme Court Justices – want to make their results look convincing. The tougher an issue is which stands in the way of the result an opinion reaches, the less likely the opinion will face up to the issue. We would like to believe that the Court has done a better job of addressing the issues in its opinions when it rules for us than when it rules against us. But that's a combination of self-righteousness and sour grapes. The plain fact is that judges are always prone to duck or simplify hard issues in their opinions.

There is a Chinese axiom: "A judge decides a case for ten reasons and tells you one." Yup. And the one that he or she tells you will be the one that is susceptible to the fewest and most easily dispatched objections. ■

number of Blacks than whites. See [www.blackstrikes.com](http://www.blackstrikes.com) for their landmark study.

But the statistics painted a clear picture of how business was done in Jefferson Parish. Richard Bourke of the Louisiana Capital Assistance Center had done an assessment of thousands of prosecutors' strikes over hundreds of trials in Jefferson Parish and found that although Jefferson Parish is 22.9% Black, there is no effective Black voice in over 80% of criminal trials, because prosecutors strike three times the number of Blacks than whites. See [www.blackstrikes.com](http://www.blackstrikes.com) for their landmark study.

### RIGHT ANSWER, WRONG QUESTION

In the courtroom, the best part of watching Steve argue Allen Snyder's case wasn't Steve describing the judge's passive – obsequiously tolerant to the prosecution – role in questioning the State's discriminatory intent:

MR. BRIGHT: I – I think the judge was present, but he was quite passive. One of the more remarkable aspects of this jury selection is when he grants a defense strike for cause, the prosecutor, Mr. Williams, says – are you crazy? And the judge says: No. And they go right on to the next fact. You know, I – I practiced law for 30 years.

JUSTICE SCALIA: It sounds like the right answer to me.  
(Laughter.)

MR. BRIGHT: Right answer; wrong question. (Louder laughter.) I've often wondered about that, but I've never articulated it.

Nor was it the moment in which, as if reciting Scripture, Steve Bright held on to exacting details of *voir dire* to make it painfully clear to everyone in the room – even, it seemed, the prosecutor – that race played a part in the prosecutor's decision to strike African-American jurors.

For me, the best part was at the end when Steve, after he gathered his things, after he shook hands with the prosecutor, turned back towards us, reached out and got hold of my elbow, and said, in his ordinary voice, "How did we do?"

It was that same generosity, that matter-of-fact inclusion of all of us, that twinkling optimism, that had gotten me into this work in the first place – getting up before dawn to catch the bus downtown, to volunteer in the SCHR office on Poplar Street in Atlanta. It was Steve who then sent me to Louisiana, to work with Clive Stafford Smith at the Louisiana Capital Assistance Center (LCAC).

### RUBBER-STAMPING RACIAL DISCRIMINATION

When I arrived in Louisiana ten years ago, a 7-2 United States Supreme Court opinion striking down a conviction and death sentence based

upon racism seemed a far away impossibility. My first two clients at LCAC were Ed Harris and Lawrence Jacobs. Along with Allen Snyder, these two young men were part of a list of eighteen African-American defendants convicted and sentenced to death in Jefferson Parish by almost all-white, or all-white juries. Jefferson Parish – as has now been dramatically depicted in a number of amicus briefs to the U.S. Supreme Court – is a David Duke-electing, deeply segregated community on the outskirts of New Orleans. In recent memory, it was there that sheriffs' deputies

stood on the bridge leading to New Orleans in the days after Hurricane Katrina, turning away evacuating Black residents at gunpoint.

The trial courts in Jefferson had become so comfortable rejecting claims of racism that prosecutors walked into courts wearing ties featuring hanging nooses. Billy Sothern and Clive Stafford Smith, at LCAC, were the first lawyers to call the prosecutors on their callous disregard for (or perhaps it was their embrace of) the sordid history of lynchings of young Black men in Louisiana. When Sothern filed his motion, the news reports of which were ultimately cited in a *Snyder Amicus Brief of Nine African-American Jefferson Parish Ministers*, the prosecutors argued that it made no difference that the prosecutors' sartorial choices revealed their racism and viciousness: "what we wear in the courthouse, as long as it is not in front of the jury, doesn't matter." Even when *The New York Times* featured the fashion accoutrements of the prosecutors, they remained unashamed and unabashed.

The Louisiana Supreme Court insulated itself from having to make judgment calls about what actually happened in a trial courtroom by creating a standard in which they would only reverse if a prosecutor specifically mentioned the race of the defendant or the juror. Anything short of a prosecutor saying "I am striking Juror Brown because he is a single Black male without children" – as the Jefferson Parish Prosecutor had done in Ed Harris' case – would be tolerated. The prosecutor in one Jefferson Parish case informed the trial court "Batson," (the case that had held that race discrimination in jury selection was unconstitutional) "was an old case that did not really apply." This was a rule to permit race-based jury selections to go unchecked, not one that could ferret out the racial bias that infiltrated especially capital proceedings.

Arguing before the U. S. Supreme Court in *Snyder*, the State of Louisiana asked for a rule that would be similarly deferential to whatever the prosecutor claimed was his reason for getting rid of a potential juror. We were there to see whether Louisiana's *laissez faire* response to race-based decisions would be tolerated. The prosecutor from Jefferson Parish asked for the "benefit of the doubt for the trial judge"

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*Stephen Bright after arguing the Snyder case before the U.S. Supreme Court*

who was “hearing or not hearing what was said, the tone of voice, the demeanor, the mannerisms.” This was little more than asking for the ink for the rubber stamp.

It was Justice Souter, tuned into Steve Bright’s eloquent argument, who caught what we had been saying:

JUSTICE SOUTER:

There – there isn’t much reason, is there, to think that the trial court was being very critical of the prosecutor’s answers?

My recollection is that, after the O. J. Simpson remark had been made in final argument – that the ultimate resolution of that involved the trial judge saying that one reason that was not a racially significant remark was that the prosecutor had neither – had mentioned neither the race of the defendant nor the race of O. J. Simpson. *Now that is not a critical mind at work, is it?*

Justice Souter’s observation applied not just to the district court but as well to the entire system of courts in Louisiana, which had uncritically licensed prosecutors to remove African Americans from jury service. From Souter’s observation, Justice Alito’s opinion followed.

Writing the majority opinion in *Snyder v. Louisiana*, Justice Alito – a recent George Walker Bush appointee – observed that the State’s explanations for striking Black jurors were suspicious, of the sheer implausibility of the State’s explanation.

The Snyder decision holds that in determining whether prosecutors had impermissibly struck jurors because of their race, the appellate courts cannot simply rubber-stamp the explanations, or turn a blind eye. The Supreme Court sent Mr. Snyder’s case back to the Jefferson Parish courts for a new trial.

As important as this moment is for Mr. Snyder – it is his first chance for a fair trial – it matters as much or more for the citizens of Jefferson Parish, throughout Louisiana, and across the Deep South. It is not simply that a jury from which African Americans were not discriminated against might provide Mr. Snyder justice tempered with understanding, might appreciate the circumstances of Mr. Snyder’s life and crime, or might offer the mere possibility of redemption and not demand his execution. Rather, the question involves whether we accept a justice system in which racial discrimination is tolerated. In this battle of life and death, these cases often say less about the clients we serve, and more – with Steve at my elbow – about us. ■

*Ben Cohen is Of Counsel at the Capital Appeals Project of New Orleans Louisiana. After graduating from the University of Michigan Law School, Ben volunteered at the Southern Center for Human Rights in 1997, before heading to the Louisiana Capital Assistance Center in New Orleans. Cohen helped create the Capital Appeals Project in 2002, and has successfully handled capital cases at all levels of capital proceedings, securing relief for a significant number of defendants in Louisiana. Ben is married and has two young boys.*

## *In Memorium*

### ROBERT F. BENSING

This year marks the 10<sup>th</sup> anniversary of the loss of our friend and colleague, Robert F. Bensing. Bob died on February 3, 1998, from injuries sustained in a traffic accident. He had just won a case where prisoners had been abused and beaten during a series of “shakedowns” at the prisons personally led by then-Commissioner of Corrections Wayne Garner, and was on his way home after giving the good news to a group of clients in a South Georgia prison. We continue Bob’s work, carrying on down that road less traveled, inspired and comforted by the example of this sweet, gentle man, who lived his life with a steady and quiet grace, in service to others.

### DARRELL GRAYSON

After more than 15 years of struggle for his life, our friend and client Darrell Grayson was executed by the state of Alabama on July 26, 2007. When asked for a final statement, Darrell said only “peace” and gave a peace sign to those observing the execution. Darrell faced his death with remarkable composure, not avoiding the reality he faced, but talking thoughtfully about his life and death, maintaining his sense of humor and his sense of the absurdity of it all. Steve Bright wrote to SCHR staff the night of Mr. Grayson’s execution:

*These evenings are the sad and terrible part of our work, but they should not overshadow the importance of providing legal representation and support and comfort to Darrell and others who have no one else and need us so desperately. We will, as we always have, get past the sadness, disappointment and anger of this moment and go on to help others in ways large and small. And we will carry on until, as Eleanor Roosevelt once said, “our consciences grow so tender that we will act to prevent human misery rather than avenge it.”*

It took more than forty years for Georgia lawmakers to create a uniform, statewide public defender system. A broad coalition of attorneys, civil and human rights organizations, clients, and lawmakers spanning the political spectrum supported and passed legislation in 2003 and 2004 as a first step towards something we can be proud of: a system of circuit-wide public defender offices supported by state funding and providing quality representation. The 2008 session marked a step backward, in this ongoing struggle. Given Georgia's disgraceful history of assembly-line style criminal defense – more interested in moving cases along speedily than in defending the basic rights of poor people accused of crime – SCHR remains committed to not only saving, but strengthening, Georgia's public defender system.

#### EYEWITNESS IDENTIFICATION REFORMS

In the last eight years, thanks to the work of the Georgia Innocence Project, DNA evidence has exonerated seven Georgia prisoners who were convicted on the basis of faulty eyewitness testimony. The Georgia General Assembly approved **House Resolution 1078** which provided a \$1.2 million payment to Willie "Pete" Williams who spent 22 years in prison for a crime he didn't commit.

**House Bill 997** and **House Resolution 1071**, endorsed by both a bipartisan study group and the House Judiciary Non-Civil Committee, would have required Georgia law enforcement agencies to develop written procedures on how to administer eyewitness identifications by 2009; by 2011, an officer trained in those best practices would have had to supervise eyewitness ID procedures. Vindictiveness, however, won the day: a vote on the bill was blocked by the House Rules Committee because the bill's sponsor, state Rep. Stephanie Stuckey Benfield (D-Atlanta), had voted against House Speaker Glenn Richardson's proposed tax cuts.

#### DEATH PENALTY

A stealth attempt to allow the death penalty by a non-unanimous jury vote was blocked by SCHR's quick work pulling together people of faith, criminal defense attorneys, and others interested in stopping the expansion of the death penalty. When House Majority Whip Barry Fleming (R-Harlem) amended a bill to allow a judge to decide the ultimate sentence if a jury votes at least 10-2 in favor of death, he was taking a second shot at a similar proposal that had been defeated the year before. Representatives Ed Lindsey (R-Atlanta) and Robert Mumford (R-Conyers), argued against the non-unanimous jury amendment on the House floor, saying that it would overturn centuries-old legal precepts that give juries the power to render life and death decisions in capital cases. "Today we're imposing a new line at 10, next year it'll be nine, next year it will be eight, next year it'll be zero, because we've chosen no longer to trust juries," said Lindsey. "Well I'm here to tell you that that is an enormous step backwards for our civil society."

The Senate removed the non-unanimous jury amendment. By a 44-7 vote the following day after Senators Preston Smith (R-Rome), Kasim Reed (D-Atlanta), and Seth Harp (R-Midland) spoke eloquently and forcibly against the House amendment which would have made death sentences far more common in Georgia. As the use of the death penalty declines in the rest of the country, southern states are pursuing death with increased vigor. We expect politicians will come back next year with other schemes to increase the use of the death penalty in Georgia.

#### UNDOCUMENTED IMMIGRANTS

Last year's legislature passed laws to cut undocumented immigrants off from basic services like health care. This year's legislature took another step in the wrong direction, and started passing laws to criminalize the very existence of undocumented immigrants. **Senate Bill 350** passed with almost no opposition, imposing a mandatory two-day prison sentence for driving without a valid Georgia driver's license. **Senate Bill 978's** passage allows for the impoundment of undocumented residents' vehicles if they are involved in an accident, even as a victim. During the debate, Rep. James Mills (R-Gainesville) argued: "The state of Georgia's door is being kicked down. Immigrants are coming from Iraq, Iran, Irania, Jordan. We don't know where they're from." Irania, indeed.

SCHR owes a debt of gratitude to our allies at the Georgia General Assembly, including: the Georgia Association of Criminal Defense Lawyers, Georgians for Alternatives to the Death Penalty, the Georgia Network to End Sexual Assault, the Georgia Innocence Project and the Mexican American Legal Defense and Education Fund. Though our numbers are small, we are strengthened by our partnerships. Thank you for your tireless efforts and righteous advocacy!

# NEW STAFF JOIN SCHR



## **Deborah Alberto, Investigator/Paralegal — March 2008**

Deborah investigates post-conviction death penalty cases. Prior to joining SCHR, Deborah owned a private investigations agency in Florida. Her experience includes investigative work for a group of plaintiffs' lawyers on a major water contamination case in Plant City, Florida, and more than a decade as a journalist, most recently at *The Tampa Tribune*. Deborah holds a B.A. in Psychology from the University of South Florida.

## **Lauren Brown, Investigator/Paralegal — December 2007**

Lauren is the primary investigator for a pre-trial capital case, and also investigates conditions and practices at prisons and jails in Alabama. Prior to joining SCHR, Lauren worked for Unite Here as a labor organizer in Pennsylvania and Mississippi. She holds a B.A. in Economics from Mills College in Oakland, California.



## **Kori Chen, Community Organizer — January 2008**

Kori engages community members to recognize the power of taking collective action in transforming the criminal justice system. He previously worked in New Orleans with Safe Streets Strong Communities as part of the Movement Activist Apprenticeship Program, an intensive community organizing training program run by the Center for Third World Organizing. Kori holds a B.A. in Sociology from the University of California at Santa Cruz.



## **Renée Floyd Myers, Operations & Communications Director — June 2007**

Renée is responsible for the day-to-day operations at SCHR and its print and electronic communications. She was previously the Director of Finance and Communications for the Center for Law & Renewal, where she was co-editor of the book *Transforming the Field of Law & Justice - A Collection of Essays*. Renée has been a public relations consultant for nonprofit organizations and a freelance graphic designer. She received an M.P.A. in Nonprofit Leadership & Administration from Western Michigan University and a B.S. in Psychology from Michigan State University.



## **Brooke Sealy, Staff Attorney — September 2007**

Brooke works on civil litigation with a focus on prison conditions in Georgia and Alabama and collateral consequences of criminal convictions. Prior to joining SCHR, she completed the E. Barrett Prettyman Fellowship with the Georgetown University Law Center's Criminal Justice Clinic. As a Prettyman Fellow, she represented the accused poor in misdemeanor and felony cases in the District of Columbia while supervising clinical law students in their representation of misdemeanor clients.

Brooke received a J.D. in 2005 from Columbia Law School. While in law school, she interned at SCHR, the Legal Action Center, and the Public Defender Service for the District of Columbia. Additionally, she was Managing Editor for *A Jailhouse Lawyer's Manual*. In 2005, she was selected as the "Outstanding Public Interest Student of the Year." Brook received a B.A. and B.S. from the University of Pittsburgh in 2002. She is a member of the bar in Alabama and the District of Columbia.



## **Lauren Sudeall, Staff Attorney, Soros Justice Fellow — September 2007**

Lauren is developing a strategy for combining capital litigation with related civil litigation, grassroots organizing, and media outreach to attract attention to injustices in the criminal justice system and to gather community support behind more structural reform. Prior to receiving a J.D. from Harvard Law School in 2005, she interned at SCHR, represented indigent defendants in municipal court as part of the Criminal Justice Institute, and served as Treasurer and Vice President of the Harvard Law Review where she authored a note entitled "Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems."

Lauren served as a law clerk to Judge Stephen Reinhardt on the U. S. Court of Appeals for the Ninth Circuit and then as a law clerk to Justice John Paul Stevens on the United States Supreme Court. During the latter, she was awarded a Kaufman Fellowship from Harvard Law School in honor of her commitment to public interest work and selected as a 2007 Soros Justice Fellow by the Open Society Institute. Lauren received a B.A. in Political Science from Yale University in 1999 and is a member of the Georgia bar.



## **Gerry Weber, Senior Staff Attorney — September 2007**

Gerry focuses on charting new paths for SCHR's litigation and shaking up a criminal justice system that lacks justice. Prior to joining SCHR he served as Legal Director of the American Civil Liberties Union of Georgia for 17 years where he litigated significant issues of constitutional law. He also is currently an Adjunct Professor at Emory University School of Law and Georgia State College of Law in constitutional litigation and the first amendment and has a part-time private practice in those areas. Gerry clerked for the Honorable Carolyn Dineen King, Chief Judge of the United States Court of Appeals for the Fifth Circuit. He was named one of the "21 Young Lawyers Leading Us Into the 21<sup>st</sup> Century" by the American Bar Association and "Top 40 Achievers under 40" by *Georgia Trend* magazine.



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