Greater Birmingham Criminal Defense Lawyers Association

Caselaw Update

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Normally this handout covers cases from the previous 12 months. Due to COVID and CLE cancelations, however, this handout covers both 2020 and 2021. But this is not a complete list of all the published cases. This covers major and/or noteworthy published Court of Criminal Appeals, Alabama Supreme Court, and Eleventh Circuit criminal decisions from 2020 and 2021. For the most part, cases that aren’t included are fairly routine cases that are cumulative, federal ACCA cases that don’t deal with Alabama law, procedural Rule 32 cases, procedural federal habeas cases under §§ 2254 and 2255, and § 1983 civil rights cases.

Crazy Case

[***United States v. Pacheo-Romero***](https://cases.justia.com/federal/appellate-courts/ca11/19-14446/19-14446-2021-04-28.pdf?ts=1619625684)**, 995 F.3d 948 (11th Cir. April 28, 2021)**

Two attorneys from one firm were retained to represent 6 co-defendants charged with conspiracy to possess with intent to distribute meth. The magistrate judge expressed concern about the conflicts and ultimately ordered that the attorneys be removed from all 6 cases. The magistrate then inquired into how much of the retainer the attorneys had actually earned and whether a portion of it should be paid to reimburse the expenses of appointed counsel for all 6 defendants, which is permissible under 18 USC § 3006A(f). Instead of cooperating, the attorneys pretty much ignored the orders and deadlines of the magistrate judge regarding turning over accounting and billing information to determine what had been earned and later ignored orders to turn over $15,000 of the $21,000 received until the appropriate earned fee could be determined. Eventually contempt proceedings began, at which point the attorneys said they didn’t have $15,000 in the bank. Ultimately, the attorneys turned over the money and it was determined that they were entitled to received $8,000 of the $15,000 back. They appealed and lost after trying to claim the procedural aspects—the only part of § 3006A(f) that can be appealed—were not followed.

PRESERVATION

[***Lane v. State*,**](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-15-1087.pdf?ts=1590786021) **CR-15-1087 (Ala. Crim. App. May 29, 2020)**

Lane was convicted of capital murder and sentenced to death before having his conviction vacated due to a violation of his right to counsel of his choice. On retrial, the State presented prior testimony of five witnesses from the original trial who didn’t testify at the new trial. Although defense counsel filed a motion in limine on the testimony, it was denied and not raised again. On appeal, the issue was raised as a violation of the confrontation clause because the prior trial was void due to the structural error nature of the choice of counsel violation. Because it wasn’t properly preserved, Crim. App. reviewed for plain error and held that it was not plain error because there has never been a prior decision by the Alabama courts or the United States Supreme Court to that effect.

 The court also rejected issues regarding Lane’s arrest, jury selection, lay opinion testimony by a detective, and double jeopardy.

Fourth Amendment

[***United States v. Gonzalez-Zea***](https://cases.justia.com/federal/appellate-courts/ca11/19-11131/19-11131-2021-04-30.pdf?ts=1619812915)**, 995 F.3d 1297 (11th Cir. April 30, 2021)**

Fourth Amendment case. ICE was watching a house for a known fugitive because a utility account had been opened for the house with a social security number linked to the fugitive. Before dawn, ICE saw a man leave the house and stopped the car. Gonzalez-Zea was the driver and not the fugitive. He did, however, inform the agents that he was illegal and lived alone. He also gave them permission to search the house, where they found guns and ammo. On appeal, the Eleventh Circuit held that ICE had reasonable suspicion to make the stop based on the facts of the investigation, even if there was no traffic violation. The court also rejected challenges to the length of the stop and whether the search of the house was actually consensual.

***[State v. Gray](https://acis.alabama.gov/displaydocs.cfm?no=1075176&event=6180UO8HG)*, CR-19-1110 (Ala. Crim. App. April 23, 2021)**

The court reversed the circuit court’s order granting the motion to suppress. The case involved an admittedly pretextual arrest warrant for simple gambling and suppression was granted on those grounds. Crim. App. reversed, however, because although the simple gambling warrant was pretextual, the smell of marijuana when they arrived to execute the warrant gave officers probable cause to obtain a search warrant for the house where marijuana, paraphernalia, and a stolen gun were found.

[***United States v. Pendergrass***](https://cases.justia.com/federal/appellate-courts/ca11/19-13681/19-13681-2021-04-22.pdf?ts=1619123452)**, 995 F.3d 858 (11th Cir. April 22, 2021)**

Pendergrass was convicted of 5 counts of Hobbes Act robbery and firearm in furtherance of a crime of violence. Court rejected arguments about statutory dismissal of a juror, pretrial continuance, and modous operandi evidence. Court also rejected arguments about geo-location data because the admission of the evidence was harmless. Notably, the Court took the position of assuming without deciding that the evidence shouldn’t have been admitted.

[***Watson v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1075167&event=6180UNKF1)**, CR-18-0377 (Ala. Crim. App. April 23, 2021);** [***George v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1075168&event=6180UNMVL)**, CR-180435 (Ala. Crim. App. April 23, 2021)**

These are post-*Carpenter* cell tower location information cases. The Alabama Supreme Court reversed Crim. App. and held that this type of evidence is scientific in nature, therefore it requires an expert witness. These opinions are Crim. App. officially remanding with specific instructions to hold a hearing to determine whether the witness was qualified as an expert and whether the testimony would meet the admissibility requirements of 702(b). This will be one to watch going forward.

[***Lawson v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1069096&event=6020TQX7G)**, CR-19-0471 (Ala. Crim. App. March 12, 2021)**

After pleading guilty to cocaine possession, Lawson challenged the denial of his motion to suppress on the grounds that the inventory search was unconstitutional. On appeal, the court affirmed on entirely different grounds – that the warrantless search was permissible under the automobile exception, an argument the State raised for the first time on appeal. This ruling continues the hypocrisy of allowing the State to raise unpreserved issues on appeal, yet denying review of a defendant-appellant’s unpreserved arguments.

[***United States v. Knights***](https://cases.justia.com/federal/appellate-courts/ca11/19-10083/19-10083-2021-03-10.pdf?ts=1615393861)**, 989 F.3d 1281 (11th Cir. March 10, 2021)**

 New opinion after panel rehearing. Fourth Amendment case where Officers saw Knights and others around a car around 1am with Knights leaning into the car. Believing they may be trying to steal the car, officers approached since it was a high crime area with gang activity. When they approached, officers smelt marijuana. After Knights said the marijuana was all gone, officers began to search for drugs finding pills on Knights, firearms, scales, smoked marijuana, and a scale. Knights admitted to owing the gun despite being a felon. Knights challenged the seizure and search. The Court held that the initial interaction was consensual. The Court rejected the idea that race can play a role in the analysis of whether a seizure occurred.

[***United States v. Morales***](https://cases.justia.com/federal/appellate-courts/ca11/19-11934/19-11934-2021-02-05.pdf?ts=1612558879)**, 987 F.3d 966 (11th Cir. February 5, 2021)**

Main issue is whether the good faith exception applies when a search warrant was supported by 2 separate trash pulls 3 days apart that occurred 2 weeks before the warrant application was done. The Court did not address the substantive search issue because it determined that the good faith exception applied.

[***Powers v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1064159&event=5Z30UOA1J)**, CR-18-1196 (Ala. Crim. App. February 5, 2021)**

 Matter of first impression on the question of whether a search warrant for the premises and containers inside the premises allows police to search the purse of a person who was present when the warrant was executed but does not live at or own the premises. Federal courts have split over this issue with two different tests: (1) proximity/physical possession test and (2) relationship test. The Eleventh Circuit has expressed support for the relationship test which concerns the person’s relationship to the premises and the officers understanding of that relationship. Crim. App. adopted the relationship test. For Powers, the search was valid because officers had information that she was more than a mere transient visitor and had information that she usually possessed meth, which was the basis of the warrant for the house.

[***United States v. Trader***](https://cases.justia.com/federal/appellate-courts/ca11/17-15611/17-15611-2020-11-25.pdf?ts=1606316449)**, 981 F.3d 961 (11th Cir. 2020)**

The Court affirmed Trader’s convictions related to enticing a minor and possessing and distributing child porn. The court rejected Trader’s argument that *Carpenter v. United States* required the government to obtain a warrant to access Kik information from Trader’s cellphone. The court explained that *Carpenter* carved out an exception to the third party doctrine that was limited to obtaining cell-cite location information as a basic privacy concern due to the necessity of cellphones in modern life, not any and all information and data connected with a person’s cellphone. Notable for how restrictive the 11th Circuit is going to treat Carpenter:

[*Carpenter*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044792536&pubNum=0000708&originatingDoc=Ia50b26802ff011ebb8aed9085e1cb667&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) did not decide even whether cell-site location information always falls outside the third-party doctrine's reach. It left open the possibility that the government could obtain less than seven days’ worth of cell-site location information without a warrant. [*Carpenter*, 138 S. Ct. at 2217 n.3](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044792536&pubNum=0000708&originatingDoc=Ia50b26802ff011ebb8aed9085e1cb667&refType=RP&fi=co_pp_sp_708_2217&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2217). It likewise left open the possibility that the government could collect cell-site location information in real time or through “tower dumps” not focused on a single suspect. [*Id.* at 2220](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044792536&pubNum=0000708&originatingDoc=Ia50b26802ff011ebb8aed9085e1cb667&refType=RP&fi=co_pp_sp_708_2220&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2220). And the Court made clear that it did not address “other business records that might incidentally reveal location information.” [*Id.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044792536&pubNum=0000708&originatingDoc=Ia50b26802ff011ebb8aed9085e1cb667&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) The Court “d[id] not express a view on matters not before [it],” lest it “embarrass the future.” [*Id.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044792536&pubNum=0000708&originatingDoc=Ia50b26802ff011ebb8aed9085e1cb667&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (internal quotation marks omitted). Indisputably, email addresses and internet protocol addresses were not at issue in [*Carpenter*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044792536&pubNum=0000708&originatingDoc=Ia50b26802ff011ebb8aed9085e1cb667&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The third-party doctrine applies, so the government did not need a warrant to obtain Trader's email address or internet protocol addresses from Kik.

[***Weeson v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0790.pdf?ts=1608150622)**, CR-18-0790 (Ala. Crim. App. December 16, 2020)**

Wesson was convicted of 55 counts of possession of obscene material and one count of possession with intent to disseminate. He received 55 consecutive 4 year sentences for obscene material and a 10 year sentence for intent to disseminate.

On appeal, Wesson challenged the AT&T records request under 18 U.S.C. § 2703 and 19 U.S.C. § 1509, which Crim. App. rejected. The court also rejected claims related to a denied mistrial after an investigator became emotional while testifying and sufficiency of the evidence. The court reversed and remanded for new sentencing, however, because the 4 year sentences were split like Class C felonies have to be under the statute.

[***United States v. Mastin***](https://cases.justia.com/federal/appellate-courts/ca11/18-14241/18-14241-2020-08-26.pdf?ts=1598448634)**, 972 F.3d 1230 (11th Cir. 2020)**

In considering the appeal of a suppression issue, the court explicitly extended the rule in *Michigan v. Summers*, 452 U.S. 592 (1981), that officers may detain occupants of the premises where a lawful search warrant is being executed to arrest warrants.

[***Adams v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-1083.pdf?ts=1581109224)**, CR-18-1083 (Ala. Crim. App. February 7, 2020)**

Production of obscene material case. Adams appealed suppression based on stale warrant information and warrant information was not based on first-hand knowledge or corroboration. Court joined other states in holding that cyber tips from an internet company can be reliable because of federal mandatory reporting requirements. The court also joined other states in holding that the traditional 4th amendment staleness tests do not apply to data stored on computers due the nature of the data and storage.

[***Ex parte George***](https://cases.justia.com/alabama/supreme-court/2021-1190490.pdf?ts=1610121914)**, 1190490 (Ala. Jan. 8, 2021)**

As a matter of first impression, the Alabama Supreme Court held that testimony about historical cell-site data of defendant’s cell phone is scientific testimony.

[***United States v. Watkins***](https://cases.justia.com/federal/appellate-courts/ca11/18-14336/18-14336-2020-12-03.pdf?ts=1607032870)**, 981 F.3d 122 (11th Cir. 2020)**

The court reversed the grant of a motion to suppress by the district court. After cocaine was discovered in packages at the post office, law enforcement placed GPS trackers and fake cocaine in the packages and put them back into circulation. Due to the odd circumstances around the packages, agents suspected a USPS supervisor. The trackers stopped working for several hours, but one of them reactivated as agents searched the post office. The reactivated tracker informed the agents that one package was at Watkins’s house. Watkins was already the main suspect and the agents intended to go make a knock and talk visit. When they arrived, Watkins admitted to the drugs and how it was done. The magistrate denied Watkins’s motion to suppress, but the district court overruled the R&R. The district court found that the use of the warrantless trackers became illegal once they were in Watkins’s home. The Eleventh Circuit reversed because it agreed with the magistrate that the inevitable discovery exception applied under the circumstances of the case.

[***United States v. Bruce***](https://cases.justia.com/federal/appellate-courts/ca11/18-10969/18-10969-2020-10-08.pdf?ts=1602190834)**, 977 F.3d 1112 (11th Cir. 2020)**

Court rejected a claim that officers lacked reasonable suspicion for an investigatory stop based on an anonymous tip. The court held that based on the area, time of day, time frame between 911 call and response, and contemporaneous description of events by 911 caller, the tip carried sufficient indicia of reliability and reasonable suspicion existed. Curtilage argument was not preserved and lack evidentiary support.

[***United States v. Yarbrough***](https://cases.justia.com/federal/appellate-courts/ca11/18-10624/18-10624-2020-06-11.pdf?ts=1591907443)***,* 961 F.3d 1157 (11th Cir. 2020)**

Government appealed suppression of evidence obtained during a warrantless protective sweep. Based on concerns of another dangerous individual in the house following the arrests of Yarbrough and his wife, officers performed a protective sweep during which they found 2 shotguns. Based on that seizure, Yarbrough was charged as a felon in possession. The Court ultimately concluded that the protective sweep didn’t violate the Fourth Amendment because the sweep was limited in time and scope and justified by the officer’s observations at the scene.

[***Earl v. State*,**](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0332.pdf?ts=1590786025) **CR-18-0332 (Ala. Crim. App. May 29, 2020)**

The court reversed and remanded based on Fourth Amendment violation under *Florida v. Jardines*. Officers suspected Earl of selling drugs out his apartment and car. They brought a drug dog into the apartment courtyard for a warrantless sniff search. Dog alerted at the apartment door. Based on that the officers obtained a warrant and found drugs. It is irrelevant whether both the dog and officer or just the dog enters the curtilage. Because the warrant was defective, every else was too. Solid discussion of curtilage and warrant requirements/defectives.

Fifth Amendment

***[Steele v. State](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0355.pdf?ts=1608150619)*[,](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0355.pdf?ts=1608150619) CR-19-0355 (Ala. Crim. App. December 16, 2020)**

Suppression of custodial statement case. After being *Mirandized* and questioned, Steele said: “All right. Can I wait on a lawyer or something? I just want to get this shit over with." The Investigator responded with “What’s that” and Steele continued talking. Court affirmed the denial of suppression because it was not an unequivocal request for a lawyer and Steele kept talking.

[***Battles v. City of Huntsville***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0116.pdf?ts=1602874818)**, CR-19-0116 (Ala. Crim. App. October 16, 2020)**

*Batson* reversal. City struck all black venire members for weed related reasons but didn’t strike a white jury with the same issues and didn’t properly counter the racial reasons at trial, so the other reasons were waived. This case is notable because it is a *Batson* win, but looking deeper it is really a case where the State failed to cover its ass more than anything else. Judge McCool has a separate opinion where he does his thing of “here is how you do this legally.”

[***Kipp v. Davis***](https://cases.justia.com/federal/appellate-courts/ca9/16-99004/16-99004-2020-08-19.pdf?ts=1597856616)**, 971 F.3d 939 (9th Cir. 2020)**

Kipp was sentenced to death for the murder and attempted rape of Antaya Howard. At trial, the prosecution allowed the State to present evidence regarding an unadjudicated murder-rape Tiffany Frizell in Los Angeles. Kipp argued that evidence of the other murder-rape was inadmissible under state evidentiary law (akin to our 404(b)). He also argued the admission of the evidence violated his federal due process rights. The Ninth Circuit Court of Appeals ultimately concluded that the state court violated Kipp's due process rights by allowing introduction of evidence of other murder. This case is notable for how federalizing a 404(b) claim could pay dividends for your client down the road in federal court.

***[McKathan v. United States](https://cases.justia.com/federal/appellate-courts/ca11/17-13358/17-13358-2020-08-12.pdf?ts=1597242666)*, 969 F.3d 1213 (11th Cir. 2020)**

The court reversed the district court’s denial of habeas relief. McKathan was convicted of possession of child pornography and sentenced to 27 months followed by lifetime supervised release. While on supervised release, McKathan provided access to his phone to his probation officer as required under the terms of supervised release. The probation officer found images of child porn on the phone. McKathan went back to prison. Subsequently, McKathan was indicted for new child porn charges based on the images found on his phone by the probation officer. Counsel moved to suppress on Fourth Amendment grounds but not Fifth Amendment grounds. After being convicted, McKathan filed a § 2255 petition alleging ineffective assistance of counsel for failing to raise Fifth Amendment grounds.

Because McKathan’s supervised release could have been revoked if he refused to turn over and provide access to his phone, the Fifth Amendment’s protection against self-incrimination automatically applied. The government could compel McKathan to turn over his phone for supervised release purposes, but; under *Minnesota v. Murphy*, 465 U.S. 420 (1984);because it required McKathan to incriminate himself, the evidence could not be used as the basis for new charges.

[***Jones v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0332.pdf?ts=1590786019)**, CR-19-0332 (Ala. Crim. App. May 29, 2020)**

Reversed for an illegal Class C felony sentence and on DJ grounds because 1st degree sexual abuse is a lesser included of 1st degree rape.

[***Ex parte State***](https://cases.justia.com/alabama/supreme-court/2020-1180639.pdf?ts=1584111924)**, 1180639 (Ala. March 13, 2020)**

In a situation where mistrial has occurred, Rule 15.4, Ala. R. Crim. P., authorizes a trial by jury to determine whether an indictment should be dismissed because the first mistrial was caused to the prosecutor’s intentional misconduct. Here, a mistrial was declared when the accuser was allowed to refer to her handwritten notes during her testimony unbeknownst to the defendant until counsel saw the notes during the middle of her testimony. After the Court of Criminal Appeals ordered a jury trial on the intentional misconduct issue, the Supreme Court reversed. The court concluded that a defendant must present substantial evidence that “could rationally support a conclusion that the State acted intentionally to goad the criminal defendant into filing a motion for a mistrial.” Here, the defendant made no such showing.

SCIENTIFIC ISSUES

[***United States v. Butler***](https://cases.justia.com/federal/appellate-courts/cadc/17-3080/17-3080-2020-04-14.pdf?ts=1586876478)**, 955 F.3d 1052 (D.C. Cir. 2020)**

Decades ago, Butler was convicted of murder based partially on FBI forensic testimony that a hair found on the victim was microscopically identical to Butler’s hair. In 2015, it was acknowledged that this was crap; and, in 2016, Butler moved to vacate his sentence. The district court denied that motion holding that the testimony was immaterial to Butler’s conviction. On appeal the D.C. Circuit court reversed holding that the testimony was material because it provided critical corroboration to testimony that on the original direct appeal the Court had reliability concerns about.

[***Howard v. Mississippi***](https://cases.justia.com/mississippi/supreme-court/2020-2018-ca-01586-sct.pdf?ts=1598553246)**, 300 So. 3d 1011 (Miss. 2020)**

Howard was convicted of a 1992 rape and murder before being sentenced to death. Howard was connected to the crime through the use of bite mark evidence found on the victim’s body. At the time, this type of evidence was allowed by the American Board of Forensic Odontology, but since then the ABFO has revised its guidelines to prohibit this type of testimony. On new post-conviction proceedings after DNA testing was done, Howard presented evidence that what male DNA had been found excluded him as the source and testimony that discredited the bite mark evidence. The trial court found that this was not “newly” discovered evidence, but the Mississippi Supreme Court disagreed. The DNA evidence showed male DNA with Howard excluded as a source. This was new evidence of a different perpetrator. Moreover, the bite mark evidence was new because the testimony was accepted at the time of trial but since has been entirely disallowed by the ABFO. Because the bite mark evidence “by far the State’s most important evidence” and the exclusion of Howard as the source of the DNA, a new trial was warranted.

Sixth Amendment

[***Morgan v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0169.pdf?ts=1590786024)**, CR-18-0169 (Ala. Crim. App. May 29, 2020)**

Here, the court considered the implications of *McCoy v. Louisiana* as a matter of first impression. Under *McCoy*, the defendant determines the overall objective of his defense and counsel may not proceed in a way that runs counter to that objective. In *McCoy*, defense counsel conceded McCoy’s guilty over McCoy’s express and loud objection in an effort to accept responsibility and hope for a life sentence instead of a death sentence. SCOTUS reversed and held that counsel’s actions violated the Sixth Amendment. In Morgan, the CCA considered a McCoy challenge in the context of a murder case where the defendant, during trial but outside the presence of the jury, expressed his frustration with counsel pursuing a self-defense theory instead of a "I didn't do it" theory. Ultimately, the court denied relief under *McCoy*, finding that counsel never conceded Morgan's culpability to the jury, and, moreover, there wasn't any indication that counsel was not following Morgan's preferred defense from the outset of trial. Basically, the record wasn't clear that counsel usurped Morgan's right to choose the defense and, moreover, the court didn't think the case presented was tantamount to a confession of guilt.

***[Wilson v. State](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0469.pdf?ts=1608150619)*, CR-19-0469 (Ala. Crim. App. December 16, 2020)**

Speedy trial case. Wilson asserted his speedy trial right after a 97 month delay. But in the intervening years he did not appear for trial and was later convicted of an unrelated murder. After pleading guilty to the charges, Wilson appealed on speedy trial grounds. Going through the *Barker* factors, the Court acknowledged that multiple factors weighed somewhat against the State, but ultimately rejected Wilson’s arguments because he had failed to show how he was prejudiced by the delay.

[***Cartwright v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-16-1166.pdf?ts=1581109226)**, CR-16-1166 (Ala. Crim. App. February 7, 2020)**

The court affirmed Cartwright’s manslaughter conviction for the death of his three year old son. On appeal, the court rejected arguments that his right to a speedy trial had been violated because half of the 49 month delay was due to waiting for the autopsy report and that Cartwright had not demonstrated how he had been prejudiced by the delay. The court also rejected arguments that the circuit court should have allowed Cartwright to present evidence of his mental disability because Alabama does not allow for such evidence as a defense.

Waiver of counsel/Faretta issues

[***Tuomi v. Secretary, Florida Department of Corrections***](https://cases.justia.com/federal/appellate-courts/ca11/17-14373/17-14373-2020-11-13.pdf?ts=1605294027)**, 980 F.3d 787 (11th Cir. 2020)**

[***United States v. Wilson***](https://cases.justia.com/federal/appellate-courts/ca11/17-12379/17-12379-2020-10-27.pdf?ts=1603807232)**, 979 F.3d 889 (11th Cir. 2020)**

[***United States v. Muho***](https://cases.justia.com/federal/appellate-courts/ca11/18-11248/18-11248-2020-10-22.pdf?ts=1603402230)**, 978 F.3d 1212 (11th Cir. 2020)**

Ineffective Assistance of Counsel

[***State v. Petric***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-17-0505.pdf?ts=1597431617)**, CR-17-0505 (Ala. Crim. App. August 14, 2020)**

Affirmance of a Rule 32 win at circuit court. Circuit court held that counsel was ineffective in regards to the investigation and that failure was compounded by counsel’s discussion in opening of a theory that counsel would have known to be unworkable if the investigation had been properly done. This case shows the benefit of defending Rule 32 relief granted by a circuit court judge who also oversaw the trial.

***[Okeowa v. State](https://acis.alabama.gov/displaydocs.cfm?no=1075171&event=6180UNUYZ)*, CR-19-0273 (Ala. Crim. App. April 23, 2021)**

 Okeowa filed a Rule 32 petition claiming that trial counsel was ineffective for failing to investigate her citizenship status before Okeowa pleaded guilty to third-degree theft charges and ICE began removal proceedings. Crim. App. essentially distinguished *Padilla v. Kentucky*, 559 U.S. 356 (2010), in affirming the denial of Okeowa’s Rule 32 petition because trial counsel was never made aware of Okeowa’s legal resident status and had no reason to investigate it. Court said it would be best practice to be informed of citizenship/immigration status but not ineffective to not do so unless there is a reason to investigate it and take it into consideration.

Evidentiary issues

[***Bowden v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0157.pdf?ts=1597431617)**, CR-19-0157 (Ala. Crim. App. August 14, 2020)**

Major murder win on irreversible hearsay evidence. Bowden was convicted of killing his girlfriend but argued that it had been self-defense. At trial, the state presented hearsay through the victim’s mother that she had previously stabbed the defendant in self-defense. On appeal, the court held that this was inadmissible hearsay and not admissible under Rule 404(b). The court also agreed with Bowden that this error was compounded by the circuit court’s exclusion of medical records from when the victim took Bowden to the hospital after she stabbed him. The victim told medical personal that Bowden had been stabbed in a drug deal gone bad. Because this would have impeached the claim that the victim stabbed Bowden in self-defense, it should have been admissible once the hearsay had been admitted. Moreover, because Bowden claimed self-defense and both the hearsay and impeachment went to self-defense, the circuit court’s errors were harmful.

[***United States v. Clotaire***](https://cases.justia.com/federal/appellate-courts/ca11/17-15287/17-15287-2020-06-30.pdf?ts=1593522031)**,** **963 F.3d 1288 (11th Cir. 2020)**

Here the court considered challenges to multiple aspects of the defendant’s convictions for conspiracy to commit access device fraud, access device fraud, and aggravated identity theft that involved using bank ATM videos to identify the accused. The court held that ATM photos are business records for self-authentication purposes. The video is self-authenticating and the still photos are just a form change, not new evidence. And there was no confrontation clause right to cross-examine the person who pulled the photos from the video because the photos aren’t testimonial, and neither are the business records certifications. The court also rejected arguments that the court abused its discretion in limiting cross-examination of witnesses to the point of restricting Clotaire’s ability to present a full defense.

[***States v. Hill***](https://cases.justia.com/federal/appellate-courts/ca11/19-10647/19-10647-2020-01-03.pdf?ts=1578081644)**, 946 F.3d 1239 (11th Cir. 2020)**

Federal supervised release case following an Alabama arrest. Exclusionary rule does not apply to supervised release evocation proceedings.

[***S.E. v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0593.pdf?ts=1584127825)**, CR-18-0593 (Ala. Crim. App. March 13, 2020)**

The court affirmed S.E.’s convictions for 2nd degree rape and incest. Rule 412’s exceptions for a defendant’s constitutional rights does not allow for a defendant to cross examine an expert about a victim’s prior sexual conduct to rebut testimony that the victim lacked the ability to consent. Also held that incest corroboration deficiencies must be preserved for appeal just like accomplice corroboration.

[***Hughes v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-17-0768.pdf?ts=1581109227)**, CR-17-0768 (Ala. Crim. App. February 7, 2020)**

Court affirmed after rejected a vagueness challenge to the animal cruelty statute. Determined that as a matter of first impression Rule 407’s bar on remedial measures does not apply in criminal cases and even if it did it wouldn’t matter here. Other issues included failure to show *Strickland* deficiency for denial of right to testify and sufficient evidence existed.

[***Jackson v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0454.pdf?ts=1581109226)**, CR-18-0454 (Ala. Crim. App. February 7, 2020)**

Issue dealing with reading a prior statement into the record. Not preserved and meritless but a good example of not preserving specific issues while preserving other ones. Court remanded for new sentencing because a 10 straight on a Class C is illegal.

SELF DEFENSE/Jury Issues

[***Todd v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1064162&event=5Z30UOI5A)**, CR-19-0239 (Ala. Crim. App. February 5, 2021)**

 Todd challenged the procedural and substantive aspects of his self-defense hearing. The substantive aspect was mooted by the jury’s verdict. The procedural aspect concerned the timing of the hearing which was held after striking the jury but before swearing them in. This violated § 13A-3-23(d), which requires a pre-trial hearing that occurs before trial commences. Trial commences with the beginning of jury selection. Therefore, the circuit court erred in holding the hearing after trial began.

 But this error was harmless and invited. The error was invited because Todd was indicted in 2017 and in 2018 informed the circuit court and state of his intent to pursue a self-defense claim, but waited until 4pm on March 6, 2019, the Wednesday before trial started to file for an immunity hearing. Nor did Todd object to the timing of the hearing until after jury selection had started. The error was harmless because he raised self-defense with the jury.

Important note: Crim. App. makes clear that the defendant has to file for immunity early enough to allow sufficient time for a pre-trial hearing to take place and must take into consideration the time necessary to file a petition for writ of mandamus challenging an adverse pretrial ruling.

[***Varnado v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1069091&event=6020TQKDE)**,CR-18-0673 (Ala. Crim. App. March 12, 2021)**

Varnado was convicted of 3 counts of capital murder and one count of attempted murder. On appeal, the court reversed the capital murder convictions because the circuit court erred in not instructing the jury on heat-of-passion manslaughter. The evidence at trial was sufficient to warrant the instruction. The court affirmed the attempted murder conviction.

[***Robertson v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0476.pdf?ts=1594409420)**, CR-18-0476 (Ala. Crim. App. July 10, 2020)**

A good stand-your-ground jury instruction win. Conflict that ended in the death started in the walkway between houses. Issue was whether Robertson was entitled to a self-defense jury instruction No evidence from trial showed that Robertson wasn’t allowed to be on the property regardless of the fact that it didn’t belong to him. And as long as the person has a right or permission to be on the property, they can act in self-defense. Therefore, Robertson was entitled to the jury instruction.

[***United States v. Brown***](https://cases.justia.com/federal/appellate-courts/ca11/17-15470/17-15470-2021-05-06.pdf?ts=1620342038)**, 996 F.3d (11th Cir. May 6, 2021) (en banc)**

En banc decision in the juror-holy spirit case. En banc majority reversed the panel because it was not clear enough that the juror’s professions about the holy spirit were demonstrative of juror misconduct sufficient to warrant removal.

[***Teasley v. Warden, Macon State Prison***](https://cases.justia.com/federal/appellate-courts/ca11/19-12224/19-12224-2020-11-03.pdf?ts=1604413912)**, 978 F.3d 1349 (11th Cir. 2020)**

A 2254 case involving juror bias. Teasley was convicted in state court of murder, aggravated assault, and possession of a firearm. During voir dire the potential jurors were asked if they would have issues remaining unbiased. One juror raised his hand but was not questioned further or struck. Teasley was denied state post-conviction relief, but the district court granted federal habeas relief. The Eleventh Circuit reversed the grant of relief. There was not enough evidence to show that bias to say that the state court was unreasonable as required for federal habeas relief with the only evidence being the juror raising a hand.

[***United States v. Grow***](https://cases.justia.com/federal/appellate-courts/ca11/18-11809/18-11809-2020-10-21.pdf?ts=1603287031)**, 977 F.3d 1310 (11th Cir. 2020)**

Grow was convicted of conspiring to and committing healthcare fraud and money laundering. The court affirmed after determining that there was sufficient evidence to support the convictions and that the district court did not coerce the jury when it informed the jury on a Friday that it had another trial scheduled for the next week. The court specifically informed the jury that it could take as much time as was needed and the jury continued to deliberate through noon the following Monday before returning tis verdict. The case was remanded for sentencing because the general verdict did not specify whether the conspiracy verdict was for wire fraud or healthcare fraud and the 20 year sentence exceeded the maximum for conspiracy to commit healthcare fraud.

guilty pleas

[***Ex parte Blackman***](https://cases.justia.com/alabama/supreme-court/2020-1190105.pdf?ts=1591975817)**, 1190105 (Ala. June 12, 2020)**

The court granted a writ of mandamus directing the circuit court to set aside an order setting Blackman’s case for trial. Blackman pleaded guilty. Afterwards the judge sua sponte ordered the withdrawal of Blackman’s guilty plea after the State decided to present aggravating factors for sentencing not included in the plea agreement. The court considered the timeliness aspects of the mandamus petition before holding that the circuit court violated Blackman’s right against double jeopardy by forcing him to proceed to trial on charges he had already pleaded guilty to.

[***Henderson v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0527.pdf?ts=1581109223)**, CR-18-0527 (Ala. Crim. App. February 7, 2020)**

Guilty plea withdrawal/HFOA case. Notice and timing requirements for HFOA are procedural, not substantive issues. Remanded for hearing on withdrawal of the guilty plea even though defendant doesn’t want to withdraw his plea.

Sentencing

[***Ex parte McGowan***](https://cases.justia.com/alabama/supreme-court/2021-1190090.pdf?ts=1619796609)**, 1190090 (Ala. April 30, 2021)**

 The Alabama Supreme Court overruled the Court of Criminal Appeals’ decision that overruled *Enfinger*. Basically, the Alabama Supreme Court held that when there is an illegal split, the circuit court lacks jurisdiction to revoke. There has to be a new sentencing hearing and a legal sentence imposed.

***[Bishop v. State](https://acis.alabama.gov/displaydocs.cfm?no=1086154&event=63D0U1AWV)*, CR-19-0726 (Ala. Crim. App. July 9, 2021)**

On his 7th Rule 32 petition since 2010, Bishop finally won one. His sentence is illegal under *McGowan* because at the time of his offense § 13A-5-6(c) mandated a minimum 10 year period of supervised release following prison. Because the circuit court’s sentencing order did not include that mandatory language, the sentence is illegal and Bishop is entitled to have his Rule 32 petition granted followed by a resentencing hearing with counsel.

***[McGuire v. State](https://acis.alabama.gov/displaydocs.cfm?no=1086153&event=63D0U17U3)*, CR-19-0714 (Ala. Crim. App. July 9, 2021)**

McGuire appealed the summary dismissal of his Rule 32 petition seeking to set aside his convictions. Most of the claims, however, were non-jurisdictional and long since time barred. The jurisdictional claims lacked merit. The weird part of this decision is that on appeal of the Rule 32 dismissal, the State suddenly decides it needs to ask the Court of Criminal Appeals to remand the case to the circuit court for the circuit court to enhance McGuire’s sentence—15 years after he pleaded guilty—because the circuit court—15 years ago—did not properly sentence McGuire under the HFOA. The State tried to claim that this rendered the sentence illegal under *McGowan*. The Court of Criminal Appeals rejected this argument on multiple grounds. Namely (1) that the circuit court always had jurisdiction to sentence McGuire even if it didn’t invoke its authority to apply a sentencing enhancement that should have been mandatory and (2) what the State asks for would violate the United States Constitution.

***[Sartain v. State](https://acis.alabama.gov/displaydocs.cfm?no=1086157&event=63D0U1J39)*, CR-20-0391 (Ala. Crim. App. July 9, 2021) (per curium)**

Sartain’s appeal was dismissed pursuant to *Ex parte McGowan* because his 10 year split with 2 years in community corrections followed by 5 years of probation was an illegal sentence. Specifically the 5 years of probation exceeds the statutory authority of § 15-18-8(b). Therefore, the circuit court lacked jurisdiction to revoke because the entire sentence was illegal. And because there was no indication of whether Sartain’s sentence followed a jury trial, plea agreement, or blind plea, if it was from a plea agreement Sartain must be allowed to withdraw the plea.

***[United States v. Cook](https://cases.justia.com/federal/appellate-courts/ca11/20-13293/20-13293-2021-05-27.pdf?ts=1622129468)*, 998 F.3d 1180 (11th Cir. May 27, 2021)**

Vacated because the record was insufficient for meaningful review of the denial of a motion for compassionate release.

[***United States v. Taylor***](https://cases.justia.com/federal/appellate-courts/ca11/20-10742/20-10742-2021-05-21.pdf?ts=1621605638)**, 997 F.3d 1348 (11th Cir. May 21, 2021)**

Taylor was convicted of being a felon in possession of a firearm. The district court sentenced Taylor to 3 months above the guidelines range, but below what the government requested, and imposed search conditions for his supervised release, including on his computers. Taylor objected to the search conditions for his computer because his crime had nothing to do with electronics. The district court found that the electronic search conditions were appropriate in light of his history with drugs because electronic devices could have evidence of drug activity. As a matter of first impression, the 11th Circuit held that although electronic search conditions are normally reserved for sex offenders, they are permissible for frequent recidivists or those who habitually violate the conditions of supervised release. In this case, the district court did not abuse its discretion in requiring the electronic search conditions.

[***United States v. Stevens***](https://cases.justia.com/federal/appellate-courts/ca11/19-12858/19-12858-2021-05-19.pdf?ts=1621429238)**, 997 F.3d 1307 (11th Cir. May 19, 2021)**

The First Step Act does not require district courts to consider § 3553(a) sentencing factors in its analysis of whether to grant a motion to reduce sentence under the FSA, but the district court must still explain why it decided to grant or deny the motion so that there is a reasoned decision for appellate review.

[***United States v. Garcon***](https://cases.justia.com/federal/appellate-courts/ca11/19-14650/19-14650-2021-05-18.pdf?ts=1621348245)**, 997 F.3d 1301 (11th Cir. May 18, 2021)**

Garcon pleaded guilty to 500 or more grams of cocaine with intent to distribute under § 841. At sentencing, he asked that the First Step Act’s safety value provision be used to avoid the mandatory minimum. The district court interpreted § 3553(f)(1) as a conjunctive list. Meaning that defendants are only excluded from safety valve relief if § 3553(f)(1)(A), (B), and (C) apply. On appeal, the 11th Circuit reversed. Section 3553(f)(1)’s list is disjunctive. Meaning if any of (A), (B), or (C) apply, a defendant is not eligible for safety value relief.

[***United States v. Dominguez***](https://cases.justia.com/federal/appellate-courts/ca11/19-11378/19-11378-2021-05-13.pdf?ts=1620912641)**, 997 F.3d 1121 (11th Cir. May 13, 2021)**

As a matter of first impression, “sexual activity” under 18 U.S.C. § 2422 does not require “actual or attempted physical contact between two persons,” and, therefore, neither does § 2G2.2(b)(5) of the USSG, which calls for a 5 level enhancement when a defendant has a pattern of activity involving sexual abuse or exploitation of a minor. Dominguez argued that the sentencing enhancement could apply because he never engaged in physical contact or attempted to when he sent penis pictures to a 9 year old and asked for pictures. The court disagreed and sided with the 4th Circuit which has held that there is no requirement of contact or attempted contact.

[***United States v. Edwards***](https://cases.justia.com/federal/appellate-courts/ca11/19-13366/19-13366-2021-05-13.pdf?ts=1620909040)**, 997 F.3d 1115 (11th Cir. May 13, 2021)**

Motions for relief under the First Step Act do not have to be brought under § 3582. The FSA allows for motions brought direct under the FSA. The court also held that a district court can impose different periods of supervised released as part of a reduced sentence under the FSA as long as the sentence is reduced.

[***United States v. Bryant***](https://cases.justia.com/federal/appellate-courts/ca11/19-14267/19-14267-2021-05-07.pdf?ts=1620414039)**, 996 F.3d 1243 (11th Cir. May 7, 2021)**

As an issue of first impression, USSG 1B1.13 applies as a policy statement that governs all motions under § 3582(c)(1)(A) for sentence reduction. But the other extraordinary and compelling reasons aspect of 1B1.13 does not give district court’s free reign to determine that a sentencing reduction is warranted. Only BOP can find extraordinary and compelling reasons.

***[Hydrick v. State](https://acis.alabama.gov/displaydocs.cfm?no=1075178&event=6180UODWP)*, CR-20-0019 (Ala. Crim. App. April 23, 2021)**

The court dismissed the appeal because the circuit court lacked jurisdiction to alter Hydrick’s sentence because more than 30 days had passed. After Hydrick failed to report to begin her 3 year sentence, the circuit court altered the sentence to 5 years. But because more than 30 days had passed, the circuit court lacked jurisdiction to do so.

[***Pack v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1064160&event=5Z30UOCRB)**, CR-19-0005 (Ala. Crim. App. February 5, 2021)**

 When a defendant has multiple misdemeanor convictions, the defendant can be sentenced to separate consecutive counts of probation for each of the misdemeanors. Seven misdemeanors can allow for 7 consecutive probationary terms.

[***United States v. Jones***](https://cases.justia.com/federal/appellate-courts/ca11/19-11505/19-11505-2020-06-16.pdf?ts=1592327021)**, 962 F.3d 1290 (11th Cir. 2020)**

First impression interpretation of First Step Act. May be useful for statutory interpretation purposes in other cases. To determine eligibility for sentencing reductions under FSA, the DC must look at the offense for which the defendant was sentenced, not the amount of crack involved in the offense. The amount can play a role in how a sentencing is reduced, but not in eligibility for a reduction. Judges can consider judicially made findings regarding quantity rather than being restricted to jury made quantity findings.

This case involves four defendants convicted of crack-cocaine offenses. The appeals consider district courts denying their requests for resentencing pursuant to the First Step Act of 2016. Congress amended the crack-cocaine/powder cocaine disparity in the Fair Sentencing Act of 2010, but limited its application to defendants who were sentenced on or after the effective date of the Fair Sentencing Act. The First Step Act allowed defendants sentenced prior to the Fair Sentencing Act to receive the benefits of that statute. This opinion details four different scenarios and ultimately affirms two denials and remands two cases for reconsideration of the petitions.

[***United States v. Russell***](https://cases.justia.com/federal/appellate-courts/ca11/19-12717/19-12717-2021-04-15.pdf?ts=1618495248)**, 994 F.3d 1230 (11th Cir. April 15, 2021)**

Under *Jones*, the First Step Act does not apply when the imposed sentence is equal to the lowest sentence that would have been available under the Fair sentencing act. But when the DC has discretion to reduce the sentence it must explain the decision to not reduce the sentence with enough detail for meaningful review.

[***United States v. Tigua***](https://cases.justia.com/federal/appellate-courts/ca11/19-10177/19-10177-2020-06-26.pdf?ts=1593183650)**, 963 F.3d 1138 (11th Cir. 2020)**

Defendants who pleaded guilty before the FSA became effective but sentenced after are ineligible for the safety valve because the FSA only applies to convictions after the effective date.

[***United States v. Denson***](https://cases.justia.com/federal/appellate-courts/ca11/19-11696/19-11696-2020-06-24.pdf?ts=1593025230)**, 963 F.3d 1080 (11th Cir. 2020)**

First Step Act hearings are not a critical stage and defendants have no right to a hearing on the motion for relief, much less attend a hearing.

[***United States v. Eason***](https://cases.justia.com/federal/appellate-courts/ca11/16-15413/16-15413-2020-03-24.pdf?ts=1585062031)**, 953 F.3d 1184 (11th Cir. 2020)**

As an issue of first impression, Hobbes Act robbery does not qualify as a crime of violence under U.S.S.G. § 4B1.2(a). Hobbes Act Robbery is too broad to fit under the crime of violence requirement for career offender enhancement.

[***United States v. Martinez***](https://cases.justia.com/federal/appellate-courts/ca11/18-12950/18-12950-2020-07-14.pdf?ts=1594755050)**, 964 F.3d 1329 (11th Cir. 2020)**

Court considered whether § 2K2.1(b)(6)B)’s enhancement for a unlawful possession of a firearm with knowledge, intent, or reason to believe it would be sued or possessed in connection with another felony offense applied when the defendant admitted he planned to sell the gun for drugs. Based on the amount he intended to buy and the other evidence found during the stop, the DC did not err in finding that Martinez intended to involve the gun in drug trafficking offense, even if it was just to trade the gun for drugs. This applies regardless of whether it was a potential future drug trafficking offense because Martinez made clear that what he intended to do, so it was proven that he possessed with intent to involve it in a drug offense.

[***Baggett v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-1097.pdf?ts=1594409421)**, CR-18-1097 (Ala. Crim. App. July 10, 2020)**

Old sexual abuse of a child case where the offenses occurred in the 80s and 90s under old statutes. Challenges to hearsay, sufficiency, and sentencing. Reversed and remanded on sentencing because the old statutes had sexual abuse of a child as a class C instead of B. 3 consecutive 20 year sentences were illegal.

[***Saulter v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0986-0.pdf?ts=1590786027)**, CR-18-0896 (Ala. Crim. App. May 29, 2020)**

Saulter pleaded guilty with a negotiated plea of 20/3. At the plea hearing, the circuit court discussed the plea but did not inform Saulter that if he did not appear for sentencing, the court would not follow the plea agreement. Saulter did not appear for sentencing and was arrested 3 years later. The circuit court sentenced him to 20/5 and Saulter sought to withdraw his plea, which was denied. Crim. App. reversed and remanded because the circuit court abused its discretion in not allowing Saulter to withdraw his guilty plea after the court did not follow the terms of the plea and the plea did not expressly condition its acceptance on his appearance at sentencing.

[***Morrow v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0794.pdf?ts=1584127826)**, CR-18-0794 (Ala. Crim. App. March 13, 2020)**

Reversed and remanded for new sentencing because the Class C sentences weren’t split.

[***Jones v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0332.pdf?ts=1590786019)**, CR-19-0332 (Ala. Crim. App. May 29, 2020)**

Reversed for an illegal Class C felony sentence and on DJ grounds because 1st degree sexual abuse is a lesser included of 1st degree rape.

*Miller* Cases

[***Jones v. Mississippi***](https://www.supremecourt.gov/opinions/20pdf/18-1259_8njq.pdf)**,** **141 S. Ct. 1307 (2020)**

If you are doing *Miller* cases, you have to win at the hearing. Because there is no real meaningful appeal of these cases because it is all in the discretion of the trial court. The Eighth Amendment does not require any special findings of fact. The Court basically walked back a fair bit of *Montgomery v. Louisiana*’s language about *Miller*.

[***Bracewell v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-17-0014.pdf?ts=1608150624)**, CR-17-0014 (Ala. Crim. App. December 16, 2020) (per curium)**

The Court reversed and remanded the case on return from remand. The circuit court abused its discretion by treating Bracewell’s age as an aggravating factor instead of mitigating. The case is remanded for the circuit court to reconsider its opinion in the appropriate light under *Miller* and *Ex parte Henderson*. Important to understand how much of an outlier this case is.

[***In Matter of Monschke***](https://www.courts.wa.gov/opinions/pdf/967725.pdf)**, 482 P.3d 276 (Supreme Court of Washington March 11, 2021)**

The Washington Supreme Court extended the protections of *Miller*/*Montgomery* to defendants aged 18-21. ““Modern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood. For some purposes, we defer to the legislature’s decisions as to who constitutes an “adult.” But when it comes to mandatory LWOP sentences, Miller’s constitutional guarantee of an individualized sentence—one that considers the mitigating qualities of youth—must apply to defendants at least as old as these defendants were at the time of their crimes.”

[***Gregory Wynn***](https://acis.alabama.gov/displaydocs.cfm?no=1080456&event=6270OLFO5)**, CR-19-0589 (Ala. Crim. App. May 28, 2021)**

 The Court of Criminal Appeals’ first *Miller* case following *Jones*. Basically, everything is just as it has been and there is no meaningful review.

Probation/community corrections

***[S.K.G. v. State](https://acis.alabama.gov/displaydocs.cfm?no=1086156&event=63D0U1GCA)*, CR-19-0976 (Ala. Crim. App. July 9, 2021)**

Unlike sentencing, a probationer does not have an unqualified right to allocution in a probation revocation.

[***Knight v. State***](https://acis.a.gov/displaydocs.cfm?no=1075177&event=6180UOB6F)**, CR-19-1128 (Ala. Crim. App. April 23, 2021)**

Community Corrections revocation reversal because the state only presented hearsay evidence to support revocation.

[***Gann v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1075179&event=6180UOGLS)**, CR-20-0196 (Ala. Crim. App. April 23, 2021)**

Community corrections revocation reversal because the record did not make clear that Gann had properly waived his right to a formal revocation hearing.

[***McKinnie v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1075169&event=6180UNPKP)**, CR-18-0875 (Ala. Crim. App. April 23, 2021)**

Probation revocation was affirmed on return from remand due to a defective revocation order. Sufficiency of evidence for revocation is an issue that must be preserved.

[***Muhammad v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0006.pdf?ts=1594409421)**, CR-19-0006 (Ala. Crim. App. July 10, 2020)**

Probation revocation. Reversed and remanded because there was no record. “In response, the court reporter sent a letter stating that "the hearings held on August 19, 2019 and August 26, 2019 were not on the record; therefore, there are no transcripts of these hearings available." This is mostly notable for the Jefferson county folks who will not be at all shocked to learn this was in Judge Jones’ courtroom.

[***Hyche v. Stat***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0899.pdf?ts=1581109225)***e*, CR-18-0899 (Ala. Crim. App. February 7, 2020)**

Reversed and remanded because no clear that a revocation hearing occurred due to lack of record.

[***Jones v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-1242.pdf?ts=1602874818)**, CR-19-0581 (Ala. Crim. App. October 16, 2020)**

Probation revocation reversed because State failed to show that Jones had constructive possession of the guns and marijuana. The fact that he was present in the house wasn’t enough.

**POSTCONVICTION MATTERS**

[***K.D.D. v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1069097&event=6020TQZO9)**, CR-19-1086 (Ala. Crim. App. March 12, 2021)**

K.D.D. appealed the summary dismissal of his petition for a writ of error coram nobis stemming from his delinquency adjudication. The decision had three rulings of note. First, while the rules of preservation generally apply to post-conviction litigation, petitioners are not required to file a post-judgment motion to preserve summary dismissal. Second, the Court rejected the State’s argument that K.D.D. invited error (i.e., not having an evidentiary hearing) by refusing to appear virtually instead of in person. Third, the Court of Criminal Appeals ordered the juvenile court to grant K.D.D.’s request to be free of the banishment provision contained in his delinquency order because banishment isn’t legal under the Alabama Constitution.

[***P.C. v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0050.pdf?ts=1590786017)**, CR-19-0297 (Ala. Crim. App. May 29, 2020)**

Rule 32 denial reversed and remanded with instructions to allow P.C. to withdraw his guilty plea after not being informed of the lack of parole for production of obscene material.

**EXPUNGEMENT**

[***Ex parte Khouly***](https://acis.alabama.gov/displaydocs.cfm?no=1064166&event=5Z30UOSZI)**, CR-20-0020 (Ala. Crim. App. February 5, 2021)—expungement**

 Khouly tried to expunge a sexual abuse of a child less than 12 years old charge that had been dismissed with prejudice. His daughter filed an affidavit saying she had been forced to make the charge by her mother and it was false. Circuit court denied the petition on the grounds that the offense is a violent offense that cannot be expunged. Crim. App. affirmed.

**BAIL**

[***Ex parte State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0960.pdf?ts=1602874820)**, CR-19-0960 (Ala. Crim. App. October 16, 2020)**

State filed a mandamus asking for the circuit court to be forced to revoke bail after Coffey committed a new offense. Court granted the petition because a condition of bail is to not commit another offense.

Restitution

[***King v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1069094&event=6020TQRQ1)**, CR-19-0249 (Ala. Crim. App. March 12, 2021)**

 King challenged the restitution ordered following her first-degree theft guilty plea. The court affirmed most of the restitution, but reversed another part of it. The reversed part of the restitution was for items that did not fall into the categories of items listed in the information against King

[***Brewster v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0836.pdf?ts=1590786025)**, CR-18-0836 (Ala. Crim. App. May 29, 2020)**

Court vacated the circuit court’s fine order for reimbursement of attorney’s fees because the circuit court did not take into consideration the defendant’s ability to pay the fine. Did not address the broader question of whether a circuit court can impose a fine for reimbursement of attorney’s fees when those attorney’s provided ineffective assistance that lead to habeas relief.

[***State v. R.B.F***](https://law.justia.com/cases/alabama/court-of-appeals-criminal/2020/cr-18-0902.html)***.*, CR-18-0902 (Ala. Crim. App. March 13, 2020)**

As a matter of first impression, for restitution purposes the defendant has the burden of demonstrating the lack of ability to pay restitution rather than the State having the burden of proving ability to pay.

[***Fitzgerald v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-1017.pdf?ts=1608150615)**, CR-19-1017 (Ala. Crim. App. December 16, 2020)**

 Fitzgerald was ordered to pay $3,563.01 in restitution for the damage to a stolen vehicle that he was convicted of receiving and for personal property missing from the vehicle. On appeal Crim. App. reversed the $1,065 Fitzgerald was ordered to pay for the stolen property because there was nothing to show any proximate cause between the missing property and Fitzgerald receiving the stolen vehicle.

Indictment Issues

***[State v. Stallworth](https://acis.alabama.gov/displaydocs.cfm?no=1075173&event=6180UO0DO)*, CR-19-0546 (Ala. Crim. App. April 23, 2021)**

 Court reversed the circuit court’s order dismissing the indictment against Stallworth on what was basically insufficient evidence. Under Rule 13.5(c)(1), Ala. R. Crim. P., circuit courts have limited authority to dismiss an indictment pretrial in certain circumstances and insufficient evidence is not one of those circumstances. It has been held permissible when the state invites error under *Ex parte Worley* 102 So. 3d 428 (Ala. 2010).

***[United States v. Deason](https://cases.justia.com/federal/appellate-courts/ca11/17-12218/17-12218-2020-07-17.pdf?ts=1595008851)*, 965 F.3d 1252 (11th Cir. 2020)**

Deason was convicted of one count of attempted online enticement of a minor and 6 counts of attempted transfer of obscene matter to a minor. On appeal, he challenged the specificity of the indictments, which the court held was invited error after challenging the original indictment and not challenging the superseding indictment, and challenged whether screenshots of obscene videos could be sufficient to prove obscene materials, which the court held was perfectly okay under precedent. Failed to establish plain error for prejudice from screenshots/testimony instead of actual videos; potential duplicitous indictment; and the DC’s failure to independently instruct the jury to cure any potential duplicity problems.

[***Scott v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0211.pdf?ts=1608150618)**, CR-19-0211 (Ala. Crim. App. December 16, 2020)**

Material variance in an attempted robbery. Indictment charged Scott with attempting to steal US currency. Evidence showed that the victim only had a laptop in his hands when Scott attempted the robbery. Under *Hayes v. State*, 65 So. 3d 486 (Ala. Crim. App. 2010), there is a material variance when the indictment alleges theft of a specific type of property and the evidence shows that only a different type of property was stolen. *Hayes* was distinguishable here because Scott had borrowed the victim’s phone and used it to call around asking for gas money and because the victim had offered Scott a few dollars. Therefore there was circumstantial evidence that Scott wanted the victim’s money.

**SPECIFIC OFFENSES**

[***Ex parte Land***](https://cases.justia.com/alabama/court-of-appeals-criminal/2021-cr-19-0947.pdf?ts=1628276412)**, CR-19-0947 (Ala. Crim. App. August 6, 2021)—impersonating a police officer**

A person does not violate § 13A-10-11 when they impersonate a FBI agent. This a statutory interpretation case. Based on the various statutes involved, § 13A-10-11 only prohibits someone from impersonating a state officer, not a federal officer.

[***United States v. Roberson***](https://cases.justia.com/federal/appellate-courts/ca11/18-14654/18-14654-2021-05-27.pdf?ts=1622147447)**, 998 F.3d 1237 (11th Cir. May 27, 2021)—Federal Bribery**

As a matter of first impression, federal bribery charges under 18 U.S.C. § 666(a)(2) do not have an “official act” requirement like 18 U.S.C. § 201. The court also rejected claims regarding the sufficiency of the evidence, constructive amendment, and severance.

[***United States v. Castaneda***](https://cases.justia.com/federal/appellate-courts/ca11/19-12623/19-12623-2021-05-19.pdf?ts=1621432839)**, 997 F.3d 1318 (11th Cir. May 19, 2021)—Enticement of a minor**

Enticement of a minor case. The court rejected arguments that the indictment should have been dismissed due to outrageous government conduct because this defense is comparable to Sasquatch. The court also rejected arguments that evidence of child porn that was used to show intent should have been suppressed because the computers were turned over by private individuals who found child porn, not state actors, and the search warrant for the computers was based on what those individuals found. The court also rejected an argument that an expert on “computer mediated communication on sexual topics” should have been allowed to testify because the proffered testimony couldn’t satisfy Daubert.

[***Clemons v. City of Saraland***](https://acis.alabama.gov/displaydocs.cfm?no=1069092&event=6020TQMSB)**, CR-19-0046 (Ala. Crim. App. March 12, 2021)—resisting arrest**

Clemons appealed her conviction for resisting arrest following an appeal at circuit court. Case provides a good overview of resisting arrest when the defendant has been acquitted of the conduct she was being arrested for. Clemons also challenged her conviction on grounds of prosecutorial misconduct, but the Court rejected those arguments.

[***Ruiz v. State***](https://acis.alabama.gov/displaydocs.cfm?no=1069095&event=6020TQUGA)**, CR-19-0307 (Ala. Crim. App. March 12, 2021)**

Ruiz appealed his reckless murder conviction on grounds of sufficiency and denial of motions suppress his statement and BAC. This case caught some media attention because Ruiz is an immigrant that didn’t speak English and was 19 at the time, had a .0169 BAC, and had a wreck that killed someone around 6 am. And then he was sentenced to 99 years for reckless murder plus 3 months in jail for minor-in-possession that would be consecutive to the 99 year sentence.

***[Shrove v. State](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0043.pdf?ts=1608150621)*, CR-19-0043 (Ala. Crim. App. December 16, 2020)**

 Crim. App. reversed and remanded the dismissal of Shrove’s Rule 32 petition. Shrove had previously pleaded guilty to soliciting a child by computer in violation of § 13A-6-110, but under the old version of the statute, which Crim. App. held in Tennyson v. State, 101 So. 3d 1256 (Ala. Crim. App. 2012), did not criminalize soliciting with an undercover adult that the defendant thought was a child.

 On appeal, Crim. App. held that the Tennyson had retroactive effect because it interpreted a statute in a way that narrowed the scope of criminality prohibited by the statute. As a result, Tennyson established a new substantive rule that carries retroactive effect. Therefore, Shrove was entitled to Rule 32 relief.

[***United States v. Johnson***](https://cases.justia.com/federal/appellate-courts/ca11/19-10915/19-10915-2020-12-02.pdf?ts=1606933886)**, 981 F.3d 1171 (11th Cir. 2020)-922**

As a matter of first impression, the court held that a 922(g)(9) conviction for possession of a firearm by a prohibited person based on a misdemeanor domestic violence conviction has 3 elements in light of *Rehaif v. United States*.

As we explain below, we conclude that a person knows he is a domestic-violence misdemeanant, for *Rehaif* purposes, if he knows all the following: (1) that he was convicted of a misdemeanor crime, (2) that to be convicted of that crime, he must have engaged in at least “the slightest offensive touching,” *United States v. Castleman*, 572 U.S. 157, 163, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014) (internal citations omitted), and (3) that the victim of his misdemeanor crime was, as relevant here, his wife.

*Johnson*, 2020 WL 7051499, at \*1.

[***Senter v. United States***](https://cases.justia.com/federal/appellate-courts/ca11/18-11627/18-11627-2020-11-13.pdf?ts=1605277827)**, 983 F.3d 1289 (11th Cir. 2020)--924**

The court reversed and remanded for a grant of habeas relief. Senter filed a 2255 petition in light of *Johnson* striking down the residual clause of § 924. One of the convictions used against Senter was an Alabama attempted first-degree robbery from 1988, an offense which no longer exists. The court held that this offense could not be sued for ACCA purposes because the offense no longer exists and no longer has elements.

[***United States v. Green***](https://cases.justia.com/federal/appellate-courts/ca11/17-10346/17-10346-2020-11-25.pdf?ts=1606341653)**, 981 F.3d 945 (11th Cir. 2020)--924**

New opinion. As an issue of first impression, RICO does not qualify as a crime of violence under 18 U.S.C. § 924(c), therefore the 924 convictions were vacated. The Court also remanded one co-defendant for resentencing due to the district court’s failure to adequately explain the basis of the sentence.

[***Brooks v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-1171.pdf?ts=1599852617)**, CR-18-1171 (Ala. Crim. App. September 11, 2020)—constructive possession**

Drug conviction reversed and rendered. Prosecuted as constructive possession of cocaine found in a cigarette pack in the backseat of the car. Based on *Perry v. State*, 534 So. 2d 1126 (Ala. Crim. App. 1988), there was insufficient evidence to show constructive possession based solely on Brooks proximity to the cocaine.

[***Gordon v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0643.pdf?ts=1599852621)**, CR-19-0643 (Ala. Crim. App. September 11, 2020)—self-defense**

Defendant must challenge denial of immunity based on self-defense in a writ of mandamus before pleading guilty. *Smith* applies regardless of whether defendant goes to trial or pleads guilty.

[***Born v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0605.pdf?ts=1599852618)**, CR-18-0605 (Ala. Crim. App. September 11, 2020)—shooting into an occupied vehicle**

The court affirmed in part, reversed and rendered in part, and remanded with instructions. The court reversed and rendered a conviction for shooting into an occupied vehicle when there was no evidence showed that it was occupied. The court reversed and remanded because a Class C felony sentence wasn’t not split. The court rejected other sufficiency claims, an Eighth Amendment claim, and to reconsider its ruling that immunity based on self-defense must be raised through a writ of mandamus.

[***S.M.B. v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-1129.pdf?ts=1597431620)**, CR-18-1129 (Ala. Crim. App. August 14, 2020)—sexual abuse/misconduct**

 Youthful offender appeal where defendant had been adjudicated for sexual misconduct and first-degree sexual abuse. Challenges were made to the sufficiency of the evidence. The court affirmed the adjudication for sexual misconduct but rendered the sexual abuse adjudication because the state failed to show overcoming forcible compulsion.

[***Contreras v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0108.pdf?ts=1594409418)**, CR-19-0298 (Ala. Crim. App. July 10, 2020)—Felony Murder**

Here, Contreras in Rule 32 argued that counsel was ineffective for failing to argue that the catch-all phrase contemplating “any other felony clearly dangerous to human life” contained in § 13A-6-2(a)(3) was unconstitutionally vague. Contreras based his argument on the rulings in *Johnson v. United States* and *Sessions v. Dimaya*, where the Supreme Court had struck down similar “residual clauses” in two federal statutes. The Court of Criminal Appeals rejected this argument, explaining that the federal law contemplated “idealized version” of violent crimes, whereas Alabama law looks to real-world conduct to make a determination under the catch-all phrase.

[***United States v. Caniff***](https://cases.justia.com/federal/appellate-courts/ca11/17-12410/17-12410-2020-04-09.pdf?ts=1586440841)**, 955 F.3d 1183 (11th Cir. 2020)—Federal Child Porn**

New opinion. § 2251(d)(1) conviction reversed/§§ 2422(b) and 2251(a) convictions affirmed. A private text message does not serve as notice of a request for child porn under § 2251(d)(1). Followed by sufficiency and challenges to the detective’s testimony.

[***Lang v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0612.pdf?ts=1590786022)**, CR-18-0612 (Ala. Crim. App. May 29, 2020)—Criminal Solicitation**

Solicitation to commit murder conviction reversed on sufficiency grounds. A vague request to kill someone that does not include a specific victim does not show intent to solicit murder. Nor did the state sufficiently corroborate the solicitee’s testimony. Factually bound decision which the State has petitioned for cert on with the Alabama Supreme Court.

[***Grant v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-19-0357.pdf?ts=1594409418)**, CR-18-0355 (Ala. Crim. App. July 10, 2020)—Reckless Murder**

Quality discussion of how a non-killer defendant can be convicted of reckless murder either as an accomplice or through reckless conduct that contributed to the murder.

[***N.C. v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-17-1134.pdf?ts=1590786022)**, CR-17-1134 (Ala. Crim. App. May 29, 2020)—terrorist threat**

Court reversed delinquency adjudication for terrorist threat on insufficiency grounds. Sending a girl a picture of a Columbine shooter was not sufficient to show intent to make a terrorist threat against her or the people she sent it to or the school. A perceived threat does not establish proof of intent to making a threat.

**COMPETENCY**

***[United States v. Cometa](https://cases.justia.com/federal/appellate-courts/ca11/19-11282/19-11282-2020-08-03.pdf?ts=1596470447)*, 966 F.3d 1285 (11th Cir. 2020)**

Cometa, a veteran, was charged with assaulting a veteran affairs psychiatrist and resisting VA officers with a firearm. Cometa was evaluated for competency and initially found incompetent. After being restored, Cometa was determined to be competent and proceeded to trial. On appeal, Cometa argued that the court should have ordered further competency evaluations, but the Court rejected those arguments based on previous competency evaluations and Cometa’s demeanor. Seems questionable since the district court expressed concerns about Cometa’s competency.

Death Penalty

Alabama and the Eleventh Circuit have released a number of death penalty decisions so far this year. Most of these retread old ground or concern procedural aspects of Rule 32/federal habeas. So instead of detailing every case, we have just provided a list of case that deal with substance and the issues the Courts discussed.

[***Thomas v. Attorney General, State of Florida***](https://cases.justia.com/federal/appellate-courts/ca11/13-14635/13-14635-2021-03-31.pdf?ts=1617219052)**, 992 F.3d 1162 (11th Cir. March 31, 2021)**

2254 case that is a great illustration of what not to do.

[***Broadnax v. Commissioner, Alabama Department of Corrections***](https://cases.justia.com/federal/appellate-courts/ca11/20-12600/20-12600-2021-05-07.pdf?ts=1620401481)**, 996 F.3d 1215 (11th Cir. May 7, 2021)**

Alabama death penalty 2254 case dealing with IAC. Good example of the problems related to fighting convictions at the Rule 32 and federal habeas level

[***Raheem v. GDCP Warden***](https://cases.justia.com/federal/appellate-courts/ca11/16-12866/16-12866-2021-04-26.pdf?ts=1619454658)**, 995 F.3d 895 (11th Cir. April 26, 2021)**

Georgia death penalty case on 2254 dealing with IATC related to mitigation investigation, competency to stand trial, prosecutorial misconduct. Multiple claims had procedural default issues and whether there was a showing of cause to excuse the procedural default.

[***Francis v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-1090.pdf?ts=1608150614)**, CR-19-1090 (Ala. Crim. App. December 16, 2020)**

Francis was convicted of capital murder for killing a victim who was less than 14 years old and sentenced to death after an 11-1 verdict. Because of when it happened, this killing a victim under the age of 14 was not an aggravator, so the State had to prove another aggravator. The State convinced the circuit court that Francis’ prior conviction in North Dakota for accomplice to aggravated assault, was a prior felony that could be used for the “previously convicted of a capital offense or a felony involving the use or threat of violence to the person” aggravator.

On appeal, Crim. App. reversed the death sentence. The circuit court compared the conduct involved in the North Dakota statute to Alabama law and determined it would be a felony under Alabama law. But the appropriate analysis was whether the offense was a felony under North Dakota law. Under North Dakota law, the conviction was a misdemeanor because Francis was sentenced to less than a year in prison.

[***Presnell v. Warden***](https://cases.justia.com/federal/appellate-courts/ca11/17-14322/17-14322-2020-09-16.pdf?ts=1600293640)**, 975 F.3d 1199 (11th Cir. 2020)**

Death penalty 2254 case. Court held that the state court’s determination that trial counsel were not ineffective for failing to look into Presnell’s mother’s alcohol consumption during pregnancy was not contrary to clearly established federal law.

[***Belcher v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-18-0740.pdf?ts=1608150617)**, CR-18-0740 (Ala. Crim. App. December 16, 2020**)

Death Penalty cases. Court rejected plain error argument regarding mug shot during voir dire; death qualifying the jury; Batson issues; introduction of DNA report/confrontation; plain error prior bad acts; plain error co-defendant statements; crime-scene/autopsy photos; hearsay; defendant’s statements; prosecutorial misconduct; accomplice corroboration; complete defense; jury instructions; mistrial based on juror seeing Belcher in shackles; penalty phase instructions; Hurst/Ring; especially heinous, atrocious is vague; overlap is unconstitutional; and sentence is disproportionate.

[***Franks v. GDCP Warden***](https://cases.justia.com/federal/appellate-courts/ca11/16-17478/16-17478-2020-09-16.pdf?ts=1600288266)**, 95 F.3d 1165 (11th Cir. 2020)**

Death penalty 2254 case. Unique Georgia appellate/IATC procedural issues. Court held that trial counsel was not ineffective for failing to pursue defenses related to cognitive deficits and childhood and substance abuse.

[***LeCroy v. United States***](https://cases.justia.com/federal/appellate-courts/ca11/20-13353/20-13353-2020-09-16.pdf?ts=1600284637)**, 975 F.3d 1192 (11th Cir. 2020)**

LeCroy sought to have his execution postponed because his counsel could not met with him in person due to COVID. The court held that neither the DC nor the Eleventh Circuit has the authority to postpone a federal inmate’s execution except through a stay, which LeCroy had not requested. Moreover, he was not entitled to relief on the merits if the court had the authority.

[***Nance v. Commissioner, Georgia Department of Corrections***](https://cases.justia.com/federal/appellate-courts/ca11/20-11393/20-11393-2020-12-02.pdf?ts=1606939275)**, 981 F.3d 1201 (11th Cir. December 2, 2020)**

As a matter of first impression, claims that the only method of execution available violates the Eighth Amendment must brought as part of a § 2254 petition, not a § 1983 complaint. Because a challenge to the sole method allowed is really a challenge to the sentence itself, the appropriate vehicle for the claim is habeas relief, not a civil claim. And by extension this means that any such claim must be brought in the initial federal habeas petition because successor petitions are not allowed.

[***Clemons v. Commissioner, Alabama Department of Corrections***](https://cases.justia.com/federal/appellate-courts/ca11/16-13020/16-13020-2020-07-30.pdf?ts=1596144636)**, 967 F.3d 1231 (11th Cir. 2020)**

Death Penalty 2254 case involving Atkins/equitable tolling. Clemons was not eligible for equitable tolling for his non-Atkins issues because his original Rule 32 was not properly filed and the clock ran out for federal habeas. The Rule 32 was not properly filed because Rule 32 counsel relied on the word of an unnamed person at the Shelby county clerk’s office that there was no filing fee for Rule 32 petitions. Because it was attorney negligence, equitable tolling did not apply. The court held that the state court Atkins decision was not an unreasonable application of law based on issues with his IQ scores and adaptive functioning. Moral of the story: pay the damn filing fee to cover your ass and the client’s.

[***State v. Petric***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-17-0505.pdf?ts=1597431617)**, CR-17-0505 (Ala. Crim. App. August 14, 2020)**

Affirmance of a Rule 32 win at circuit court. Circuit court held that counsel was ineffective in regards to the investigation and that failure was compounded by counsel’s discussion in opening of a theory that counsel would have known to be unworkable if the investigation had been properly done. This case shows the benefit of defending Rule 32 relief granted by a circuit court judge who also oversaw the trial.

***[Brooks v. State](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-16-1219.pdf?ts=1594409420)*[,](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-16-1219.pdf?ts=1594409420) CR-16-1219 (Ala. Crim. App. July 10, 2020)**

Rule 32 appeal where Crim. App. rejected arguments about ineffective assistance related to investigation, suppression issues, conflict of interest, victim impact testimony; arrest jurisdiction; and *Brady* violations.

[***Osgood v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-13-1416.pdf?ts=1590786020)**, CR-13-1416 (Ala. Crim. App. May 29, 2020)**

Return from remand after a new penalty phase where jury was waived. Challenge the waiver on multiple fronts. Decent analysis of the continuance aspect of it. Addressed overlap in light of *Hurst* when jury sentencing is waived.

[***Lewis v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-14-1523.pdf?ts=1590786023)**, CR-14-1523 (Ala. Crim. App. May 29, 2020)**

Rule 32 appeal dealing with conflicts, ineffective claims, and *Brady*.

[***Lindsay v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-15-1061.pdf?ts=1581109223)**, CR-15-1061 (Ala. Crim. App. February 7, 2020)**

3rd time up after 2 remands for defective orders. The CC did not err in its analysis of insanity as a mitigating circumstance based on prior Alabama and federal cases. The court found no issue with the aggravating circumstances on its own review.

[***Capote v. State***](https://cases.justia.com/alabama/court-of-appeals-criminal/2020-cr-17-0963.pdf?ts=1578688225)**, CR-17-0963 (Ala. Crim. App. January 10, 2019)**

Issues: (I) Lay opinion testimony (plain error); (II) authentication of ∆’s supposed letters; (III) *Bruton* violation; (IV) Autopsy photos; (V) Hearsay; (VI) Court relied upn evidence never formally admitted (plain error); (VII) jury instruction on accomplice liability (plain error); (VIII) video authentication; (IX) State bolstered witness credibility; (X) *Batson*; (XI) Flight instruction; (XII) Prosecutorial misconduct; (XIII) gang affiliation; (XIV) *Hurst*; (XV) indictment didn’t allege aggravators; (XVI) mitigating evidence; (XVII) Reasonable doubt instruction; (XVIII) Court informed jury its verdict was a recommendation; (XVIII) death qualified jurors; (XX) grossly disproportionate.

[***Jenkins v. Commissioner, Alabama Department of Corrections***](https://cases.justia.com/federal/appellate-courts/ca11/17-12524/17-12524-2020-06-29.pdf?ts=1593468054)**, 963 F.3d 1248 (11th Cir. 2020)**

2254 DP case—denial affirmed. Penalty phase IATC regarding investigation and *Atkins* claims. Couldn’t show deficiency because trial counsel in charge of penalty phase didn’t testify at Rule 32 stage and is dead now. Without Jenkins couldn’t overcome presumption of strategic decision. Couldn’t satisfy the IQ part of *Atkins* with a 76 IQ and didn’t argue Flynn effect in state court.

[***Knight v. Florida Department of Corrections***](https://cases.justia.com/federal/appellate-courts/ca11/18-12488/18-12488-2020-05-01.pdf?ts=1588357856)**, 958 F.3d 1035 (11th Cir. 2020)**

2254 DP case. The court reviewed de novo prejudice prong of IATC but found no prejudice because the evidence presented in state habeas court only strengthened the evidence from sentencing rather than added to it.

[***James v. Warden, Holman Correctional Facility***](https://cases.justia.com/federal/appellate-courts/ca11/17-11855/17-11855-2020-04-28.pdf?ts=1588087853)**, 957 F.3d 1184 (11th Cir. 2020)**

2254 DP case. Denial affirmed because James could not show he would have allowed counsel to present mitigation evidence if he had been better advised.

[***Sealey v. Warden, Georgia Diagnostic Prison***](https://cases.justia.com/federal/appellate-courts/ca11/18-10565/18-10565-2020-03-31.pdf?ts=1585683047)**, 954 F.3d 1338 (11th Cir. 2020)**

2254 death penalty case. IATC claims for mitigation in failing to call a witness and for failing to further investigate mental health. Farretta, Gregg, and continuance issues weren’t exhausted and couldn’t show cause and prejudice to overcome the procedural bars.

***[In Re: James Dailey](https://cases.justia.com/federal/appellate-courts/ca11/19-15145/19-15145-2020-01-30.pdf?ts=1580410886)*, 949 F.3d 553 (11th Cir. 2020)**

Death row successor petition denied. 3 claims: (1) actual innocence; (2) *Brady*; ad (3) IAC. The claims are all time barred under 2244 and are meritless too.

SCOTUS 2019 term

[***McKinney v. Arizona***](https://www.supremecourt.gov/opinions/19pdf/18-1109_5i36.pdf)**, 140 S. Ct. 702 (2020)**

Following federal habeas relief for an *Eddings* violation, the Arizona Supreme Court reweighed the evidence in *McKinney*’s case and affirmed his death sentence. SCOTUS affirmed and held that the Arizona Court was allowed to do so under *Clemmons v. Mississippi* and rejected arguments that *Clemmons* violates *Ring*/*Hurst*. The Arizona Court’s reweighing was more akin to harmless error review than a true resentencing. The Court explained that this isn’t a problem because *Ring*/*Hurst* do not require the jury to weigh aggravators and mitigators, they only require the jury to make a factual finding of an aggravator. Moreover *Ring*/*Hurst* aren’t retroactive and this case was on collateral review.

This case essentially sinks any arguments that *Hurst* requires a unanimous jury verdict for death. As long as the aggravator is established, death is permissible. Alabama has already rejected these arguments in *Bohannon*, but now they have cover from SCOTUS.

[***Holguin-Hernandez v. United States***](https://www.supremecourt.gov/opinions/19pdf/18-7739_9q7h.pdf)**, 140 S. Ct. 762 (2020)**—Sentencing

Generally, a defendant must preserve error in federal court to avoid plain error review. The Court held that arguing for a specific sentence or less because the sentencing factors did not support a longer sentence preserved a claim that anything more was unreasonable. In arguing over a sentence, there is no need to specifically address the reasonableness of the sentence when the defendant is otherwise arguing for a lesser sentence because the DC is supposed to imposes sentences that are sufficient but not greater than necessary.

[***Shular v. United States***](https://www.supremecourt.gov/opinions/19pdf/18-6662_gfbi.pdf)**, 140 S. Ct. 779 (2020)*—***ACCA categorical case

ACCA sentencing enhancement case where the Court addressed with § 924’s serious drug offense enhancement requires a comparison to a generic offense. The Court held that it does not and explained that it only requires that the state offense involve the conduct specified in the federal statute. Shular claimed that his Florida drug convictions did not have a knowledge requirement and, therefore, could not be used for sentencing enhancements. Unanimous Court disagrees.

[***Ramos v. Louisiana***](https://www.supremecourt.gov/opinions/19pdf/18-5924_n6io.pdf)**, 140 S. Ct. 1390 (2020)—Unanimous juries**

The Sixth Amendment’s right to jury trial is fully incorporated upon the states and convictions require unanimous verdicts. The Court overturned *Apodaca v. Oregon*, which held that the unanimity requirement is not incorporated upon the States. Really only effects Oregon directly and some pending cases in Louisiana. The Court has already granted cert on a Louisiana case to determine whether the ruling applies retroactively during the 2020 term.

[***Kahler v. Kansas***](https://www.supremecourt.gov/opinions/19pdf/18-6135_j4ek.pdf)**, 140 S. Ct. 1021 (2020)—insanity defense**

Unlike many states, Kansas does not prohibit the prosecution of the mentally ill who cannot understand the moral wrongness of their conduct. Instead Kansas allows defendants to argue that he or she lacked the necessary mens rea due to mental or after conviction to justify a reduced sentence or commitment to a mental health facility does not violate due process. The Court granted cert. to determine whether this system violates Due Process. The Court held that Kansas’s system does not because it does not violate fundamental principles as justice. The Court noted that Kansas has not abolished mental sanity defenses; Kansas has functionally switched from addressing insanity as a guilt issue to a punishment issue.

[***Kansas v. Glover***](https://www.supremecourt.gov/opinions/19pdf/18-556_e1pf.pdf)**, 140 S. Ct. 1183 (2020)—Fourth Amendment**

The Court considered whether it is reasonable for an officer to initiate a traffic stop after running a vehicle’s tag and discovering the registered driver’s license has been revoked. In this situation reasonable suspicion can be inferred and justify a *Terry* stop because it is common sense that drivers with revoked licenses continue to drive and States have a vital interest in restricting driving to those who are qualified.

[***Andrus v. Texas***](https://www.supremecourt.gov/opinions/19pdf/18-9674_2dp3.pdf)**, 140 S. Ct. 1875 (2020)—Death Penalty IATC**

The Court held that trial counsel performed ineffectively in multiple aspects. “[C]ounsel was, by his own admissions . . . barely acquainted with the witnesses who testified during the case in mitigation.” What evidence that was presented at sentencing tended to aggravate rather than mitigate. And counsel “failed to conduct any independent investigation of the State’s case in aggravation.” The Court reversed the Texas Court of Appeals because the deficiency was clear and remanded for further consideration of prejudice because it did not appear to have been considered.

This is an example of a very badly investigated, prepared, and tried death penalty case. How bad? This was the first time in a decade that the United States Supreme Court granted habeas relief for ineffective assistance of counsel in a death penalty case. And this is very much the exception. While they have granted cert and ruled in the defendant’s favor regarding other issues, the Court has largely washed its hands of ineffective assistance claims in death penalty cases.

SCOTUS 2020 Term

[***Torres v. Madrid***](https://www.supremecourt.gov/opinions/20pdf/19-292_21p3.pdfhttps%3A/www.supremecourt.gov/opinions/20pdf/19-292_21p3.pdf)**, 141 S. Ct. 989 (2021)**

For Fourth Amendment purposes, a person is seized when the police exert force, even if it is unsuccessful. Torres was shot by police while fleeing. She later sued under 1983. The question was whether officers unlawfully seized Torres when she was struck by bullets or whether officers had to physically seize her.

[***Borden v. U.S.*,**](https://www.supremecourt.gov/opinions/20pdf/19-5410_8nj9.pdf)

ACCA case: convictions involving a reckless mens rea do not qualify as violent felonies for sentences purposes.

[***United States v. Geer***](https://www.supremecourt.gov/opinions/20pdf/19-8709_n7io.pdf)**,**

Holding: In felon-in-possession cases under **18 U.S.C. § 922(g)(1)**, an error under [***Rehaif v. United States***](https://casetext.com/case/rehaif-v-united-states) is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon.

[***Terry v. United States***](https://www.supremecourt.gov/opinions/20pdf/20-5904_i4dk.pdf),

Holding: A sentence reduction under the First Step Act is available only if an offender’s prior conviction of a crack cocaine offense triggered a mandatory minimum sentence.

[***Edwards v. Vannoy***](https://www.supremecourt.gov/opinions/20pdf/19-5807_086c.pdf)**, 141 S. Ct. 1574 (2021)**

 *Ramos v. Louisiana*’s unanimous jury verdict does not apply retroactively because it is a procedural rule, not a substantive rule. The Court also foreclosed the possibility of any new rule every qualifying as a watershed rule under *Teague* and ended the watershed exception for retroactivity.

[***Caniglia v. Strom***](https://www.supremecourt.gov/opinions/20pdf/20-157_8mjp.pdf/)**, 141 S. Ct. 1596 (2001)**

 The community caretaking exception to the Fourth Amendment does not justify warrantless searches and seizures in the home.

[***Lange v. California***](https://www.scotusblog.com/case-files/cases/lange-v-california/),

 Officers do not have categorical authority to make a warrantless entry based on hot pursuit of a misdemeanor suspect who is fleeing. There may be authority for warrantless entry based on exigent circumstances however.

2021 SCOTUS term

[***Wooden v. United States***](https://www.scotusblog.com/case-files/cases/wooden-v-united-states/)**, No. 20-5279**

Issue(s): Whether offenses that were committed as part of a single criminal spree, but sequentially in time, were “committed on occasions different from one another” for purposes of a sentencing enhancement under the Armed Career Criminal Act.

[**U.S. v. Tsarnaev**](https://www.scotusblog.com/case-files/cases/united-states-v-tsarnaev/)**, No. 20-443**

Issue(s): (1) Whether the U.S. Court of Appeals for the 1st Circuit erred in concluding that Dzhokhar Tsarnaev’s capital sentences must be vacated on the ground that the district court, during its 21-day voir dire, did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard or seen about Tsarnaev’s case; and (2) whether the district court committed reversible error at the penalty phase of Tsarnaev’s trial by excluding evidence that Tsarnaev’s older brother was allegedly involved in different crimes two years before the offenses for which Tsarnaev was convicted.

[**Brown v. Davenport**](https://www.scotusblog.com/case-files/cases/brown-v-davenport/)**, No. 20-826**

Issue(s): Whether a federal habeas court may grant relief based solely on its conclusion that the test from *Brecht v. Abrahamson* is satisfied, as the U.S. Court of Appeals for the 6th Circuit held, or whether the court must also find that the state court’s application of *Chapman v. California* was unreasonable under 28 U.S.C. § 2254(d)(1)**,** as the U.S. Courts of Appeals for the 2nd, 3rd, 7th, 9th and 10th Circuits have held.

[**Hemphill v. New York**](https://www.scotusblog.com/case-files/cases/hemphill-v-new-york/), No. **20-637**

Issue(s): Whether, or under what circumstances, a criminal defendant, whose argumentation or introduction of evidence at trial “opens the door” to the admission of responsive evidence that would otherwise be barred by the rules of evidence, also forfeits his right to exclude evidence otherwise barred by the confrontation clause.

[**Shinn v. Ramirez**](https://www.scotusblog.com/case-files/cases/shinn-v-ramirez/), **No.** **20-1009**

Issue(s): Whether application of the equitable rule the Supreme Court announced in *Martinez v. Ryan* renders the Antiterrorism and Effective Death Penalty Act, which precludes a federal court from considering evidence outside the state-court record when reviewing the merits of a claim for habeas relief if a prisoner or his attorney has failed to diligently develop the claim’s factual basis in state court, inapplicable to a federal court’s merits review of a claim for habeas relief.