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### Upcoming Events

ADAA Extended Business Session	April 8-11	Point Clear
ADAA Summer Conference	July 5-8	Orange Beach

**March 2011**

# THE *CRASH* C O U R S E

## HGN: Yeah, It's Admissible

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I hear “HGN evidence is not admissible” and “My judge doesn’t allow us to even mention HGN” all too often. This is a common misconception held by law enforcement, prosecutors, judges and defense attorneys and has carried on long enough. It is up to the prosecutors of this state to fix it.

Why the prosecutor? Well, if not the prosecutor, then who? The officer continues to administer the HGN test despite knowing the results most likely will not come in to evidence and despite usually believing the results are not even admissible in court. The judge certainly isn’t going to tell you how to try your case and what evidence you should or should not admit (well,

at least not all the time) and the defense attorney certainly isn’t going to encourage you to utilize this damaging evidence. Ever ask yourself why the defense attorney is so quick to object to HGN? Why they make every effort to keep the results of the HGN test out of evidence?

As certain as death and taxes is the defendant’s objection to HGN on the grounds that it is not admissible. Just as certain as the objection to testimony regarding HGN is the response by the judge sustaining the objection and the

prosecutor accepting the ruling, moving on and keeping what is arguably the most compelling evidence of guilt from being heard by the judge or jury. Keep in mind that



it is a physiological effect that alcohol has on the Central Nervous System that causes this nystagmus and is either present or it is not. This is also the one Standardized Field Sobriety Test that cannot be practiced by the drunk for the next time he or she gets pulled over and has to perform these tests roadside. Is HGN testimony

critical in a case where you have the defendant on video driving all over the road and barely able to stand up? Of course not, but then again, how many of those cases go before a jury?

**Take these facts:** The defendant is pulled over for running a stop sign in the middle of the day. The evidence of impairment is an odor of alcohol, EXACTLY two clues on the One Leg Stand (OLS), EXACTLY two clues on the Walk and Turn (WAT) and four clues on the HGN test and he refuses the evidentiary breath test. Now, given these facts, how important are the results of the HGN examination? I would say that in the instant case they are critical. Why? To answer that, let's look at two scenarios utilizing different strategies for prosecuting this case in front of a jury.



**Scenario 1:** You do not go through the effort of admitting the HGN results and simply rely on the officer's testimony which is: running the stop sign, odor of alcohol and two clues on the WAT and two clues on the OLS and the defendant's refusal to blow.

**Scenario 2:** Same facts as above except you take the extra step to bring in a witness to lay the proper foundation to have the results of the HGN test admitted. This witness would establish the foundation for HGN by answering the following questions: 1. What is nystagmus? 2. What effect does alcohol have on nystagmus? 3. Is HGN generally accepted in the scientific community? 4. Can this effect be observed? 5. How do you observe this effect? 6. What do these observations tell us?

The *Reader's Digest* version of what the witness will tell you is that nystagmus is an involuntary jerking of the eyes and the introduction of a drug (in this case alcohol) causes this involuntary jerking of the eyes to become much more noticeable. The higher the concentration of alcohol, the sooner the jerking begins and more pronounced it will be as the eyes track the stimulus. The witness will tell you that the effect can be observed if the person making the observations uses the proper technique. The witness will then describe the proper technique to be utilized to detect the presence of HGN and what clues of impairment the officer is looking for. The witness will also tell you what the clues, if any are observed, actually mean.

There are a total of six possible clues that can be observed. The first clue of impairment is lack of smooth pursuit. When the subject's eyes move back and forth, do they move smoothly or jerk noticeably? A good example of this "jerky movement" is to imagine a marble rolling across sand paper versus rolling across a smooth piece of glass. The second clue of impairment is distinct and sustained nystagmus at maximum deviation. This entails holding the stimulus outside the subject's shoulder essentially burying the outside white portion of the eyeball in the outside corner of the eye and holding it there. When in this position, does the officer observe a distinct and sustained jerking of the eye? The final clue of impairment is onset prior to 45 degrees. As the

subject's eye moves to the side, is the involuntary jerking of the eye observed before prior to a 45-degree angle? This clue is indicative of higher blood alcohol levels.

The officer checks each eye for each of the three clues of impairment thus giving a total of six possible clues. The officer must observe at least four clues before he or she can count the HGN as positive for impairment.

Now that the witness has laid the predicate, the officer then testifies to how he administered the test which will (if it was done correctly) coincide with how the prior witness said the test should be administered. Make sure you establish before trial whether or not the officer performed the HGN test properly. There is no reason to jump through the hoops of admissibility if the officer did not perform the test correctly. Then, the officer will simply testify to his or her observations. What did he or she observe? They are not rendering an opinion or conclusion of what those observations mean. That was or will be handled by your foundation witness.



Once you have the HGN results in to evidence, solicit testimony on the results of the WAT and the OLS from the officer. To backstop the officers testimony, utilize your foundation witness from before to establish that the SFST validation studies have shown that when an officer observes four or more clues on the HGN, two or more clues on the WAT and two or more clues on the OLS the proper arrest decision was made 91%-95% of the time. Meaning that when the results of all three tests are combined they are 91%-95% accurate at indicating a subject has a blood alcohol content of .08 or higher.

Which of the two scenarios do you believe will make for a more compelling case against the defendant?

**Saying it doesn't make it so:** This is all good information, but it doesn't necessarily solve your problem with the judge allowing HGN testimony to be heard. The first step is going to be to present your judge with the law that says HGN evidence is in fact admissible *so long as the proper predicate is established*. You know the defense attorney will present a laundry list of cases establishing the inadmissibility of HGN evidence. It is important, though, to actually read the cases and find out the reasons the court ruled that the admission of HGN evidence was improper and thus reversible error.

In each case, you will find that the admission of the HGN results into evidence was held improper because the State attempted to lay the foundation through the officer performing the test. The issue was first addressed in Malone v. City of Silverhill, 575 So. 2d 101 (Ala. Crim. App. 1989). The Court in *Malone* ruled that the HGN test was a scientific test and also that it satisfied the *Frye* standard of admissibility. The Court further established that while the officer may be an expert in administering

the test, the officer is not qualified to demonstrate the reliability of either the HGN test or the scientific principle on which the HGN test is based, i.e., that alcohol causes nystagmus. The Court in *Malone*, therefore, ruled that the results of the HGN test were improperly received in to evidence *due to the State's failure to lay the proper foundation*.

The defendant will almost certainly counter *Malone* with *Ex Parte Sides*, 574 So. 2d 859 (Ala. 1990), *however*, in a subsequent Court of Criminal Appeals opinion, *Blake v. State*, 581 So2d 1282 (Ala. Crim. App. 1991), the Court referenced *Sides* when the Court stated, "...our Supreme Court held, essentially, that the State's failure to lay a proper predicate establishing either the HGN test's reliability or the scientific principles upon which it is based, effectively precludes the admission of the test results into evidence, and that the admission of such results, *without first laying a proper predicate*, amounts to reversible error."

The most definitive statement came from the Court of Criminal Appeals in *Brunson v. State*, 580 So2d 62 (Ala. Crim. App. 1991) when it stated, "that *once proper foundation is laid* regarding the scientific reliability of the test *the HGN results are admissible*."

I recently used these cases to defeat a Motion in Limine to prohibit any mention of the HGN test in front of the jury. This case is in a jurisdiction where I was told HGN is not so much as uttered in the courthouse. Not being from there, I just plead ignorance before pleading my case and the judge ruled in my favor. Understand that this is only the first hurdle and the judge is just allowing me an opportunity to present evidence to establish the proper foundation to admit the results of the HGN test into evidence. While this is only the first step in a long process, the first step is often the toughest to take.

The fact is that HGN evidence is available to you; it is merely a matter of doing rather than accepting.



There is a new resource for prosecutors on the internet:

[alabamaDUIprosecution.com](http://alabamaDUIprosecution.com)

# Gavel Glinns



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## Disclaimer

This outline contains summaries of selected criminal law opinions released by the Alabama Court of Criminal Appeals, the Alabama Supreme Court and the United States Supreme Court between June 1, 2010, and November 30, 2010. It does not note whether those decisions have been appealed to higher courts or whether motions for reconsideration are pending. Before relying on one of these opinions, the reader should keycite or shepardize the case to see if it has subsequent history. These summaries are not a substitute for reading and analyzing the actual opinion. In fact, the summaries often omit secondary issues, dissenting opinions, etc. These summaries do not adhere to Bluebook rules. They borrow a significant number of phrases and a few sentences from the court opinions without attribution or quotation marks.

## Case Summaries By Subject

### **ALTERED SERIAL NUMBER**

Little v. State, CR-09-0149, 2010 WL 3377700 (Ala. Crim. App. Aug. 27, 2010)

**Facts:** Little, a police officer, confiscated a pistol during the sweep of a residence. The pistol's serial number had been altered. Little did not turn the pistol into the property room as required by department policy. It was later found in the trunk of his police car during a routine inspection. Little was charged with Possession of a Firearm with an Altered Serial Number. In its charge to the jury, the trial court instructed the jury that in order to convict it must find that Little possessed the gun with knowledge of the altered serial number and that it was possessed "with the intent to use it, conceal it, or misrepresent the identity of the firearm." Little was convicted and appealed.

**Issue:** Was the instruction to the jury an accurate statement of the law?

**Holding:** No.

**Discussion:** The Court of Criminal Appeals examined its 1986 opinion in Self v. State. In that case, the Court determined that the legislature did not intend for §13A-11-64 to be a strict liability statute. The Self Court held in that case that the specific intent requirement in (1), the provision making it illegal to alter a serial number "with intent to conceal or misrepresent the identity of the firearm," should be inferred in (2), the provision making it illegal to "possess" a firearm with an altered number. In Little's jury instruction, the trial court advised the jury that Little would be guilty of the crime of possession if he did so with the intent to use it, conceal it or misrepresent the identity of the firearm. Consequently, the Court reversed the conviction because the jury could have found him guilty if he merely intended to use or conceal the gun (not conceal the identity).

### **CUMULATIVE EVIDENCE**

Brannon v. State, CR-09-0402, 2010 WL 2546478 (Ala. Crim. App. June 25, 2010)

Facts: Brannon and several accomplices assaulted an individual believed to have stolen marijuana from one of the accomplices. The victim died, and Brannon was charged with Capital Murder during a Kidnapping and Capital Murder during a Robbery. The jury found Brannon guilty of Felony Murder during a Kidnapping and Felony Murder during a Robbery. The trial court sentenced Brannon to two concurrent 40-year terms. Brannon appealed challenging the admission and chain of custody of two jackets with the victim's blood on them.

Issue: Were the jackets cumulative to other evidence?

Holding: Yes.

Discussion: The Court of Criminal Appeals reviewed the evidence and held that the admission of the jackets was cumulative in light of the admission, without objection, of photographs and testimony from law enforcement officers about their existence and testimony from a forensic scientist that the blood on them contained the victim's DNA. The Court concluded any error was harmless because the jury would have reached the same verdict even without the admission of the jackets. Based on Brannon's argument that the multiple felony murder convictions violated double jeopardy, the Court remanded the case for the circuit court to vacate one of the convictions. Existing case law holds that one cannot be guilty of more than one felony murder where there is only a single death.

## DEATH PENALTY

Doster v. State, CR-06-0323, 2010 WL 2983206 (Ala. Crim. App. July 30, 2010)

Facts: Doster was charged with three counts of Capital Murder arising from the shooting death of the victim during a robbery, burglary and discharging of a weapon into a dwelling. The jury convicted Doster on all three counts and unanimously recommended LWOP. The circuit court overrode the recommendation and sentenced Doster to death. Doster appealed.

Discussion: The Court of Criminal Appeals affirmed the conviction and jury override. A detailed summary is omitted because the appellate opinion did not discuss any novel issues.

State v. Gamble, CR-06-2274, 2010 WL 3834280 (Ala. Crim. App. Oct. 1, 2010)

Facts: Gamble entered a pawn shop with his codefendant and robbed it. During the robbery, which was caught on video, the codefendant shot both the owner and an employee in the head, killing them. The video showed that Gamble was present and knew about the shooting as it happened. Gamble was convicted of Capital Murder and sentenced to death. In a separate trial, the codefendant also received the death sentence, but he was later resentenced to life without parole because he was 16 at the time of the crime. Gamble filed a Rule 32 petition alleging that his counsel was ineffective at the penalty phase of his trial and that his sentence of death was disproportionate given that the shooter received a sentence of life without parole. The circuit court, which had presided over the trial, ruled that counsel's investigation and decisions regarding mitigation evidence at the penalty phase violated the Strickland standard. That court also ruled that Gamble's sentence of death was disproportionate and unconstitutional given the lesser sentence that the codefendant ultimately received.

Issue: Was Gamble's death sentence unconstitutional in light of the codefendant's sentence of life without parole?

Holding: No.

Discussion: The Court of Criminal Appeals affirmed the circuit court's finding that Gamble received ineffective assistance of counsel at the penalty phase of his trial. [Defense counsels' efforts to develop mitigation evidence were so blatantly deficient that it serves no purpose to discuss the Court's findings here.] The Court next examined the circuit court's ruling that Gamble's death sentence was unconstitutionally disproportionate in light of his codefendant's sentence. The Court reviewed a Sixth Circuit opinion, a Florida Supreme Court opinion and several Alabama appellate opinions dealing with proportionality reviews. Citing the U.S. Supreme Court's Pulley opinion, the Sixth Circuit rejected a defendant's argument that his proportionality review must determine whether his sentence was disproportionate to the punishment imposed on others convicted of the same crime. In the Florida case, the codefendant's death sentence had been reduced to life because his age at the time of the crime made him ineligible for the death penalty. In rejecting that defendant's claim that his codefendant's sentence should factor into his proportionality review, the Florida Supreme Court noted that the codefendant's sentence was not relevant because the aggravation and mitigation evidence was not comparable. The Alabama opinions acknowledged the obligation to provide an individualized sentencing determination and the requirement that appellate proportionality review include consideration of codefendant sentences, though those sentences do not control the outcome of a

proportionality review. In Gamble's case, the Court first expressed concern that consideration was given to the codefendant's sentence at the trial level in light of the statutory directive for the appellate courts to consider that issue and Alabama Supreme Court precedent stating it should not be considered at the trial level. The Court next noted that any determination of the constitutionality of a death sentence must focus on the defendant, his character and the circumstances of the crime. In Gamble's case, the Court concluded that the circuit court decision was based on the codefendant's sentence. The Court quoted the Florida opinion for the proposition that a "purely legal" basis for sentence reduction (a minor's ineligibility) is "irrelevant as a mitigating circumstance." Finally, the Court pointed out that there was no constitutional right to a proportionality review in death penalty cases and cited Pulley for the proposition that a defendant cannot prove an Eighth Amendment violation "by demonstrating that other defendants who may be similarly situated did not receive the death penalty." The Court reversed the trial court's ruling that Gamble could not receive the death penalty because his codefendant received life without parole.

McMillan v. State, CR-08-1954, 2010 WL 4380259 (Ala. Crim. App. Nov. 5, 2010)

**Facts:** The victim was carjacked, shot and killed in a department store parking lot. Surveillance video captured the crime. Police located the victim's truck the next morning, but the driver fled on foot and was not captured. Defendant approached officers at the scene and told them he had personal items in the truck. Police found those personal items along with the murder weapon in the truck. They also found loan papers containing the victim's signature and McMillan's signature as a co-borrower. McMillan told police that he was not involved and that another individual recently picked him up in the truck. McMillan was charged with Capital Murder during a Robbery. At trial, the State proved that the individual identified by McMillan as driving the truck was actually in another county in jail at the time. McMillan was convicted, and the jury recommended LWOP by a vote of 8 to 4. The trial court overrode the recommendation and sentenced McMillan to death. McMillan appealed, claiming, among other things, that the trial court improperly considered his juvenile record in assigning little weight to the statutory mitigating factors of his age and lack of significant history of prior criminal activity and the nonstatutory factors arising in the case.

**Issue:** Did the circuit court err when it considered McMillan's juvenile record in determining sentence?

**Holding:** No.

**Discussion:** The Court of Criminal Appeals looked to the Alabama Supreme Court's Burgess and Carroll decisions for guidance. Burgess noted that a sentencing court must receive a presentence report and that those reports contain a juvenile history. That opinion also acknowledged that juvenile adjudications were not to be treated as "prior criminal activity" and used to *negate* the statutory mitigating circumstance of a lack of significant criminal history in death-eligible cases. However, the Burgess court held that juvenile adjudications can be used by the trial court when determining the *weight* to assign to the statutory mitigating circumstances of age and lack of significant criminal activity. Likewise, Carroll affirmed the principle that juvenile adjudications could not be used to negate those two statutory mitigating circumstances. In the case at bar, the Court recognized the principles stated above and also determined that Burgess and Carroll did not prohibit juvenile adjudications from being used to weigh nonstatutory mitigating circumstances. The Court held that there was no error in trial court's use of the juvenile record to lessen the weight of the two statutory mitigating circumstances. Moreover, the Court went on to note that even if it was error, the error was harmless in light of the trial court's sentencing order, which stated that the court used McMillan's Assault 3<sup>rd</sup> conviction to give little weight to the lack of criminal history circumstance and McMillan's emancipation, Assault 3<sup>rd</sup> conviction, employment history, possession of a weapon and purchase of ammunition to give little weight to the age circumstance. The Court of Criminal Appeals also affirmed the trial court's override and sentence of death.

Mitchell v. State, CR-06-0827, 2010 WL 3377698 (Ala. Crim. App. Aug. 27, 2010)

**Facts:** Mitchell was convicted of four counts of Capital Murder arising from the robbery and shooting deaths of three victims in a hotel lobby on Thanksgiving Day. The shootings were captured on surveillance video. The jury recommended LWOP by a vote of 10 to 2. The trial court overrode the recommendation and sentenced Mitchell to death. Mitchell appealed.

**Discussion:** The Court of Criminal Appeals affirmed the conviction and jury override. A detailed summary is omitted because the appellate opinion did not discuss any novel issues.

## **DOUBLE JEOPARDY**

Ex parte State (In re Chapman v. State), 1090277, 2010 WL 3797903 (Ala. Sept. 30, 2010)

**Facts:** Chapman broke through the firewall separating the attic space of his apartment with the attic space of the victim's apartment. He then removed ductwork in the neighboring attic space and observed the victim through the air vents.

He admitted to entering the attic space on two occasions. The victim and her husband heard noises on multiple occasions. Chapman was charged and convicted of Burglary 3<sup>rd</sup> (done with the intent to commit criminal surveillance) and Attempted Criminal Surveillance. He appealed. The Court of Criminal Appeals affirmed the burglary conviction but reversed the conviction for Attempted Criminal Surveillance ruling that the conviction for that crime violated double jeopardy protections. The State petitioned for certiorari review in the Supreme Court.

Issue: Did the conviction for Attempted Criminal Surveillance violate double jeopardy protections?

Holding: No.

Discussion: The Alabama Supreme Court disregarded the arguments of both parties and rejected the Court of Criminal Appeals ruling, which was premised on a finding that the two charged crimes failed the Blockburger same-elements test. Instead, the Supreme Court focused on the testimony in the record that established Chapman went into the attic on more than one occasion. The Supreme Court also rejected the portion of the lower court's opinion that cited §13A-4-5(b) as prohibiting a conviction for the commission of a crime and a conviction for the attempted commission of the crime. The Supreme Court pointed out that there was sufficient testimony in the record establishing that Chapman entered the attic space on multiple occasions. Thus, where the convictions were not based on the same course of conduct, but instead on multiple events, §13A-4-5(b) had no application and the constitutional double jeopardy protections did not apply.

## ESCAPE

State v. Bethel, CR-09-0881, 2010 WL 2983258 (Ala. Crim. App. July 30, 2010)

Facts: Bethel relapsed and missed at least one weekly meeting with his community corrections officer, a meeting required by the terms of his sentence in a prior case. He was charged with Escape 1<sup>st</sup>. After a hearing held for the purpose of accepting the plea, the circuit court dismissed the Escape 1<sup>st</sup> charge, saying that it did not think Bethel's failure to report for one week was an escape. The State appealed the dismissal.

Issue: Can an inmate be charged with Escape 1<sup>st</sup> for not reporting to a supervising officer in the community corrections program?

Holding: Yes.

Discussion: The Court of Criminal Appeals reviewed existing case law holding that a community corrections prisoner can commit Escape 1<sup>st</sup> if his facts satisfy the elements. The Court noted that a failure to remain within the limits set by the community corrections program could be an escape from a state penal institution if the inmate threatens or uses physical force or a deadly weapon or dangerous instrument or if he simply was in custody because of a felony conviction. The Court concluded that the circuit court's dismissal was erroneous because (1) a pretrial dismissal based on insufficient evidence is barred by existing precedent and (2) it is legally possible for a community corrections prisoner to commit the charged crime.

## EVIDENCE

Ex parte Jackson, 1090679, 2010 WL 3724910 (Ala. Sept. 24, 2010)

Facts: Jackson shot from his car into another vehicle killing two individuals and wounding two others. During her corpus testimony at trial, the mother of one of the victims expressed her unsolicited opinion that Jackson had committed the crime and then, while crying, spontaneously provided victim impact testimony about how the crime had affected her. In closing arguments, the prosecutor referenced the mother's certainty of Jackson's guilt. Jackson was convicted of three counts of Capital Murder: killing the first individual while shooting from a vehicle, killing the second individual while shooting from a vehicle, and killing two people during one act or pursuant to one scheme or course of conduct. The jury recommended death by a vote of 10 to 2. The trial court sentenced Jackson to death. The Court of Criminal Appeals affirmed the conviction without addressing the issue of lay witness opinion and victim impact evidence at the guilt phase. Jackson sought certiorari review.

Issue: Did the mother's testimony rise to the level of plain error?

Holding: Yes.

Discussion: The Supreme Court reviewed the test for plain error – an error that probably affected a defendant's substantial rights and had an unfair prejudicial impact on the jury's deliberations. The Court first concluded that the mother's

opinion of guilt was inadmissible because it was based on facts she did not observe. The Court rejected the State's argument that such testimony was harmless and pointed out the prosecutor's use of it in closing arguments. The Court found that the highly emotional victim impact testimony and the opinion testimony when coupled with the prosecutor's use of the mother's opinion of guilt in closing arguments rose to the level of plain error and required reversal of the capital convictions.

## **EXPERT TESTIMONY**

WRC v. State, CR-08-1640, 2010 WL 3834051 (Ala. Crim. App. Oct. 1, 2010)

**Facts:** WRC was charged with Sodomy 1<sup>st</sup> and Sexual Abuse 1<sup>st</sup> related to his step-grandson. During trial, over WRC's objection, the State presented testimony from a forensic interviewer qualified as an expert in child development and child and adolescent sexual abuse. That expert testified to her experience and research indicating child victims commonly delay disclosure and the reasons for that delay. The expert did not examine the victim, did not testify about the victim, and did not give her opinion as to whether the victim had been abused. WRC was convicted and appealed.

**Issue:** Was the expert's testimony about delayed disclosure admissible?

**Holding:** Yes.

**Discussion:** The Court of Criminal Appeals first looked to its case law for the proposition that Daubert, Kumho and Frye do not apply to non-scientific expert testimony. From that point, the Court went on to note that Rule 702 was the sole statement of law governing non-scientific expert testimony. As such, there are only two threshold requirements for the admissibility of non-scientific expert testimony: (1) the witness qualifies as an expert in the field; and (2) the testimony assists the jury in determining a fact in issue in the case. Accordingly, the Court rejected WRC's argument that there was a threshold question of reliability that had to be satisfied before such testimony is admitted.

## **FATAL VARIANCE**

Hayes v. State, CR-08-1280, 2010 WL 3834060 (Ala. Crim. App. Oct. 1, 2010)

**Facts:** In addition to an unrelated Robbery 1<sup>st</sup> charge, Hayes was charged with Robbery 1<sup>st</sup> in the course of committing the theft of the victim's "purse and its contents." At trial, the victim testified that Hayes stopped his bicycle next to her and demanded her purse. She gave him her cell phone and debit card from her pocket, not her purse. After the jury was charged but before they began deliberations, Hayes moved for a judgment of acquittal, and the circuit court denied the motion. Instead, the circuit court amended the indictment to read "a cell phone and a debit card" and recharged the jury. After his conviction on both charges, Hayes appealed challenging the amendment of the indictment.

**Issue:** Did the trial court err in amending the indictment?

**Holding:** Yes.

**Discussion:** Citing its case law finding variances between "currency" and "check" fatal, the Court of Criminal Appeals concluded that amending the indictment to reflect the items actually stolen was error. §15-8-90 requires the consent of a defendant before amending an indictment to fix incorrect descriptions of property. However, the Court observed that precedent supported a re-indictment with the corrected description.

## **INCONSISTENT VERDICTS**

Sheffield v. State, CR-09-0357, 2010 WL 4380239 (Ala. Crim. App. Nov. 5, 2010)

**Facts:** Sheffield was charged with two counts of reckless murder for the deaths of an adult victim and that person's child arising from the burning of their home. At trial, an officer testified to taking a theft report from Sheffield five days before the fire in which he alleged that the adult victim, his neighbor, stole eight pit bull puppies. The officer testified that while making that report, Sheffield declared that he was so mad he might seal the victim's windows and doors shut and set his house on fire. Several other witnesses testified to inculpatory statements Sheffield made after the fire, at least one of which rose to the level of an unqualified confession. The jury convicted Sheffield of reckless murder related to the adult's death and reckless manslaughter related to the child's death.

**Issue:** Were the verdicts mutually exclusive or inconsistent?

Holding: Inconsistent.

Discussion: The Court of Criminal Appeals first pointed out that mutually exclusive verdicts are a legal impossibility but inconsistent verdicts are legally permissible. Determining Sheffield's issue required an analysis of the elements of each verdict. The Court observed that each crime required proof that Sheffield recklessly caused another person's death. The reckless murder conviction required proof of an additional element – that under circumstances manifesting extreme indifference to human life, the actor engaged in conduct that created a grave risk of death to someone other than himself. The Court determined that there was no element in one charge that cancelled out or disproved an element in the other charge, as exists in mutually exclusive verdicts. Consequently, the Court held that the verdicts were merely inconsistent and would not be reversed on that ground. However, the Court went on to hold that the State's evidence as a matter of law did not prove extreme indifference to human life in general, as required for reckless murder. Instead, the evidence showed Sheffield's actions were directed at one individual and that individual's house. Having invalidated the reckless murder verdict, the Court ruled that the evidence was sufficient to sustain a reckless manslaughter charge related to the death of the adult and remanded the case for entry of that verdict. (The Court affirmed the reckless manslaughter verdict related to the death of the child.)

## JURY SELECTION

Ex parte Dixon, 1071564, 2010 WL 2629059 (Ala. June 30, 2010)

Facts: During jury selection for Dixon's Attempted Murder and Discharging cases, his attorney asked if any venire members had ever been a criminal defendant prosecuted by the district attorney in the district or circuit courts of that county. LA did not respond to the question even though in the prior two months her family members charged her with two counts of harassing communications and she had engaged in direct negotiations with the district attorney about settling those charges. Not having that information, Dixon's attorney did not move to excuse LA for cause and did not exercise a peremptory strike against her. After his conviction, Dixon discovered LA's charges and included in his motion for a new trial a challenge relating to Dixon's failure to respond to the question. The trial court denied Dixon's motion. At a hearing on the motion, Dixon's attorney testified that he would have challenged LA for cause or used a peremptory strike to exclude her if she had truthfully answered the question. LA gave conflicting testimony about why she did not respond to the question. Dixon appealed. The Court of Criminal Appeals upheld his conviction. The Supreme Court granted certiorari review.

Issue: Did the circuit court abuse its discretion in denying the motion for new trial based on LA's untruthfulness?

Holding: Yes.

Discussion: The Supreme Court rejected the Court of Criminal Appeals' finding that no prejudice resulted from LA's failure to disclose the pending criminal charges. The Court first pointed out that the standard for determining whether a new trial is required is not "actual prejudice" but whether the defendant "might" have been prejudiced by the venire member's failure to give an accurate response. The Court quoted its Dobyne opinion, which uses "might" and "probable" in the same discussion. (Though not contained in this Dixon opinion, Dobyne footnotes the civil and criminal origin of the seemingly conflicting tests and concludes that the two words have become interchangeable in the context of this issue.) The Supreme Court applied the five factors set out in Dobyne to determine whether Dixon established the requisite prejudice warranting a new trial: (1) temporal remoteness; (2) ambiguity of the question; (3) the prospective juror's inadvertence or willfulness in falsifying the answer or failing to answer the question; (4) failure of the juror to recollect; and (5) materiality of the matter inquired about. The Court concluded that the juror's criminal charges were not remote, the question was sufficiently clear to warrant a response, and the matter was material to a potential challenge for cause or the exercise of Dixon's peremptory strikes. The Court made two important observations, one of which appeared to add a factor to the Dobyne list. The Court found fault with the prosecutor's failure to disclose LA's charges to the defense given that the elected district attorney was negotiating the charges with LA and the fact that Dixon's prosecutor never denied knowledge of the charges. The Court opined that "fairness dictates the State cannot stand mute when a juror fails to respond (or responds incorrectly) to a question on voir dire and the prosecutor is aware of the true facts." Saying that the "bare assertion of impartiality" was not sufficient to rebut the presumption of prejudice, the Court rejected the State's contention that the presumption was rebutted by LA's own testimony denying that the pending charges affected her verdict in the case.

Rice v. State, CR-09-1013, 2010 WL 4380222 (Ala. Crim. App. Nov. 5, 2010)

Facts: During jury selection in Rice's capital murder trial, the State used 11 of its 12 peremptory strikes to exclude black individuals from the jury. Rice challenged those strikes based on the number of black veniremembers struck, and the circuit court, without making a finding of discrimination, required the State to give its reasons for the strikes.

The prosecutor declared that veniremember TLS was struck because she had disorderly conduct and harassment convictions. Defense counsel pointed out that the State did not strike a white veniremember who had traffic and misdemeanor assault convictions. The circuit court denied Rice's challenge. Rice was convicted, sentenced to LWOP and appealed.

Issue: Was the State's reason for striking TLS pretextual?

Holding: Yes.

Discussion: The Court of Criminal Appeals first noted its doubt that a prima facie case could have been shown with reliance solely on the number of black veniremembers struck. However, pursuant to its case law, the Court reviewed the validity of the State's strike of TLS because the trial court required the State to declare a reason for the strike without first making a prima facie finding of discrimination. The Court found that the record indicated disparate treatment of similarly situated individuals in that the white veniremember with misdemeanor convictions was not struck by the State. The Court found additional evidence of pretextual discrimination in the State's failure to ask venire members about their prior convictions or question them about the details of those convictions.

Ex parte Smith, 1080973, 2010 WL 4148528 (Ala. Oct. 22, 2010)

Facts: During jury selection in the retrial of the penalty phase of Smith's Capital Murder charges related to multiple killings at a crack house, the mother and brother of one of the victims sat among the veniremembers for a considerable amount of time. During voir dire, one of Smith's attorneys (neither of whom were involved with his first trial) realized that a victim's relatives were sitting with the venire and asked they be excluded. The State objected, saying they had a right to be present. Before the issue could be taken up outside the presence of the jurors, the mother commented that the defendant took her son's life and deserves to die. The trial court held in camera voir dire of two jurors seated near the victim's family to learn about their interaction and whether and what they heard relating to the mother's statement. Those members repeated the above comments, and the trial court decided to question as a group all the veniremembers (21) who indicated they heard a comment. The court then repeated the statement above and asked them if they heard it. Almost all confirmed they heard the first part, and five confirmed they heard the "deserves to die" comment. In subsequent questioning as a group, the court confirmed that there were no members who could not be fair. Five jurors who heard the first portion of the comment and who heard the court repeat the "deserves to die" portion served on Smith's penalty phase jury and recommended death by a vote of 10 to 2. Having preserved objections to the events of voir dire, Smith appealed. The Court of Criminal Appeals affirmed the sentence. Smith obtained certiorari review with the Alabama Supreme Court.

Issue: Was there reversible error in handling the juror contact issue?

Holding: Yes.

Discussion: The Supreme Court observed that in affirming the trial court's decision on the issue, the Court of Criminal Appeals applied the "manifest-injustice" standard applicable to mistrials. In that analysis, the lower court noted that all the prospective jurors said they could still be impartial. The Court reviewed the position of the parties regarding the applicable standard and determined that the "inherent-prejudice" standard applied, under which a defendant does not have to prove actual prejudice. The Supreme Court ruled that Smith was inherently prejudiced by the mother's comments and entitled to a new penalty hearing. In doing so, the Court focused on several points: (1) the sole purpose of the proceeding was to determine punishment; (2) testimony by the mother about the sentence Smith deserved would have been objectionable; (3) the prosecutor's facilitation of the prejudice by failing to separate the family from the venire; and (4) the trial court's effort to cure the problem "compounded the prejudice" when the court published the "deserve to die" comment to veniremembers who had not heard it.

Welch v. State, CR-09-0770, 2010 WL 4380242 (Ala. Crim. App. Nov. 5, 2010)

Facts: Welch objected to the State's use of peremptory strikes against the only two African-American veniremembers. The circuit court did not make a prima facie finding of discrimination but did ask the State for its reasons for the strikes. The prosecutor declared that both of those individuals recently served on a felony arson jury that returned a misdemeanor verdict. Welch's counsel responded that the prosecutor failed to strike a white male who was also on that arson jury and that the prosecutor's statements were factually incorrect in that one of the African-American veniremembers was not on the arson jury. The circuit court denied the challenge. Welch was convicted of Assault 2<sup>nd</sup> and appealed.

Issue: Was it error to deny the Batson motion?

Holding: No.

Discussion: The Court of Criminal Appeals first noted that Welch failed to preserve an adequate record to evaluate the factual accuracy of his objection at trial. However, the Court assumed the factual accuracy of Welch's argument and concluded that there was no Batson violation. The Court focused on the portion of the record that suggested the prosecutor may have been mistaken about which jurors served on the arson jury. The Court inferred from the trial court's ruling that the lower court determined the strike was exercised based on a mistaken belief. The Court relied on case law that held a party's mistaken belief about a juror's background is a sufficient race-neutral reason for a preemptory strike.

## **JURY VERDICT**

Lamb v. State, CR-08-1682, 2010 WL 2546424 (Ala. Crim. App. June 25, 2010)

Facts: Lamb was tried on charges of Rape 1<sup>st</sup> of JM, Sexual Abuse 1<sup>st</sup> of JM, Incest with JM, and Sexual Abuse 2<sup>nd</sup> of KM. The jury initially returned guilty verdicts on the first three charges, but the foreperson announced he had signed the wrong verdict form for the fourth charge. The circuit court sent the jury back to the jury room to correct the error. When the jury returned, the foreperson announced a "not guilty" verdict on the fourth charge of Sexual Abuse 2<sup>nd</sup>. The jury was polled as to the first three charges and each affirmed a verdict of guilt on those charges. The court then dismissed the jury and began to formally pronounce guilt. In doing so, the court realized that the verdict form for the Sexual Abuse 1<sup>st</sup> charge was marked "not guilty." The court reassembled the jury but could only find the foreperson and 6 of the other jurors. The court asked those jurors to correct the verdict form for the Sexual Abuse 2<sup>nd</sup> charge. The foreperson also confirmed that their verdicts were guilty on the first three charges and not guilty on the fourth charge of Sexual Abuse 1<sup>st</sup>. The circuit court directed the foreperson to correct the verdict form for Sexual Abuse 1<sup>st</sup> to read "guilty." Lamb appealed without challenging the amendment of the verdict form. He lost that appeal. He later filed a Rule 32 petition challenging the amendment to the verdict form. The circuit court denied that petition as procedurally barred, and Lamb appealed that denial.

Issue: Did the circuit court have authority to correct the verdict form to match the verdict verbally delivered by the jury?

Holding: Yes.

Discussion: The Court of Criminal Appeals examined the rules and case law regarding the correction of errors in the record. Specifically, it looked to Rule 29 of the Ala. R. Crim. P. and that rule's origin, Rule 60(a) of the Ala. R. Civ. P. Rule 29 allows the court to correct clerical mistakes in judgments or orders at any time. The Court determined that since the foreperson orally announced "guilty" on the second charge and each juror individually affirmed that verdict, the inconsistent verdict form was simply a clerical error to be corrected so that the record accurately reflected the truth. The Court noted that the correction was not a new judgment since there was no reweighing of the evidence or exercise of judicial discretion to reach a different result. The correction was done to accurately reflect a past decision. Because the trial court's actions were authorized by Rule 29, it had jurisdiction to enter the judgment. Thus, Lamb's Rule 32 claims properly were dismissed as nonjurisdictional and procedurally barred.

TDM v. State, CR-08-0355, 2010 WL 2546423 (Ala. Crim. App. June 25, 2010)

Facts: TDM was tried on charges of Sodomy 1<sup>st</sup> and Sexual Abuse 1<sup>st</sup>. When the jury foreperson read the verdicts in court, she indicated that the jury found him guilty of Sexual Abuse 1<sup>st</sup> and not guilty of Sodomy 1<sup>st</sup>. The Defendant waived a polling of the jurors. The Court discharged the jury to meet with the clerk in the hallway and receive their checks and work excuses. The courtroom observers remained seated. As the jury filed out, the foreperson informed the clerk that she had signed the wrong verdict form. The clerk then took all the jurors into the hallway and was told that the verdict was guilty on the Sodomy 1<sup>st</sup> charge. While that was occurring, the circuit court orally entered judgment on the verdicts as originally announced and then asked questions of the attorneys regarding a presentence report and bond. The clerk then advised the court of the error in the verdict. The court brought the jury back from the hallway, seated them, made a record of what had happened and received from the foreperson a corrected verdict of guilty of Sodomy 1<sup>st</sup>. The Defendant objected on double jeopardy grounds and appealed the convictions.

Issue: Was there a double jeopardy violation in recalling the discharged jury to amend the verdict?

Holding: No.

Discussion: The Court of Criminal Appeals examined the conflicting lines of cases from other jurisdictions. One line is absolute and holds that a verdict cannot be amended after the jury is discharged. The other line of cases says that a verdict might be amended after discharge depending on the circumstances of the jury's conduct after being discharged. In this case, the Court determined that there was no error in amending the verdict because the jury had not left the floor, was still within the control of the trial court, had not dispersed and had not conversed with observers.

## LESSER INCLUDED OFFENSES

Beemon v. State, CR-08-1889, 2010 WL 4380238 (Ala. Crim. App. Nov. 5, 2010)

Facts: Beemon was charged with Robbery 1<sup>st</sup> related to a home invasion in which several members of a family were tied up and assaulted as four masked and gloved robbers armed with pistols and stun guns searched for money within the house. Beemon gave three conflicting statements to police. In the first, he said he was home all night and so was his car. In the second, he said a friend called him and asked him to pick him up at the victim's house, from which the friend came running when Beemon arrived. In the third, Beemon said he gave the friend a ride to the victim's house but neither got out. Beemon admitted he knew a robbery was occurring when he drove to the house. At trial, a neighbor testified to seeing an unoccupied car with a Ten Commandments bumper sticker parked in an unusual location near the house. Beemon's vehicle matched the description and had that bumper sticker. A forensic analyst testified that a glove found in the driver's floorboard of Beemon's car had Beemon's DNA on the inside and the victim's blood on the outside. Beemon testified at trial and told the jury that while riding around that night he and the friend got a call from a third person who directed them to the house where Beemon knew a robbery was occurring. When they arrived, his friend got out to assist in the robbery while Beemon stayed in the car. Beemon denied being armed with any weapon and denied knowing that his friend was armed. Beemon admitted to the lies in the prior statements. Beemon denied ownership of the gloves found in his car and denied having ever seen them before. The jury convicted Beemon of Robbery 1<sup>st</sup>. Beemon appealed arguing that the trial court should have given his requested instructions on Robbery 2<sup>nd</sup> and Robbery 3<sup>rd</sup>.

Issue: Was Beemon entitled to jury charges on Robbery 2<sup>nd</sup> and Robbery 3<sup>rd</sup>?

Holding: No.

Discussion: The Court of Criminal Appeals first noted the test to evaluate a trial court's decision to give lesser-included charges to the jury: whether there is any rational basis or reasonable theory that would support a conviction on the lesser offense. The Court then examined appellate precedent where "wheel man" defendants sought Robbery 2<sup>nd</sup> and 3<sup>rd</sup> instructions in Robbery 1<sup>st</sup> trials. The Court found a two-prong analysis in Hannah that called for lesser-included charges if the defendant's reasonable theory of the case demonstrated "either (1) that his codefendant . . . did not carry out an armed robbery, or (2) that, if his codefendant . . . carried out an armed robbery, the wheel-man accomplice presented evidence tending to show that he did not have the intent to commit the armed robbery or that he did not have the knowledge that an accomplice was going to commit an armed robbery." The Court quickly rejected the idea that the evidence did not show an armed robbery occurred – it was undisputed that pistols and stun guns were used. The Court observed that the only evidence Beemon presented relevant to the second prong was his self-serving testimony that he did not participate in the robbery and did not see his friend with a weapon when the friend got out of the car. To determine whether self-serving testimony creates a "reasonable theory" warranting charging on lesser-included offenses, the Court examined several cases to arrive at two general considerations: (a) how does the defendant's theory comport with the evidence presented by the parties and (b) how would the jury reach a hypothetical guilty verdict on the lesser-included charge. To analyze whether the defendant's theory fits with the evidence, the Court looked to three factors: (1) whether other evidence substantiated the self-serving statement; (2) whether the theory is directly refuted by undisputed physical evidence; and (3) whether the theory is implausible or absurd. The Court found no other evidence to substantiate that Beemon served only as the wheel man without knowledge of weapons given the neighbor's observation that the car was unoccupied. Beemon's theory he never went inside was directly refuted by the victim's blood on the glove containing Beemon's DNA in the driver's floorboard of the car he claimed to control all night. The Court concluded that Beemon's theory was unreasonable. The Court further found that theory unreasonable because the jury would have had to unreasonably piece together Beemon's testimony and the State's evidence to convict on a lesser charge. That result would have required the jury to disregard undisputed physical evidence and accept as true the testimony from an admitted liar, a process the Court described as "wholly irrational" and "speculative."

Ex parte Mills, 1080350, 2010 WL 3463487 (Ala. Sept. 3, 2010)

Facts: Mills was charged with three counts of Capital Murder related to the robbery and killing of an elderly couple. During trial, evidence was introduced that the female victim suffered from COPD and died several months after the

crime. A State medical examiner testified that she died from complications related to the injuries she suffered during the robbery. During a charge conference, the court and the attorneys discussed jury charges on Felony Murder, Manslaughter, Robbery 1<sup>st</sup>, Assault 1<sup>st</sup>, and voluntary intoxication (which might result in a Felony Murder or Manslaughter conviction). After extensive conversations with Mills, the defense attorneys advised the trial court that Mills did not want any lesser included charges submitted to the jury, and, with the exception of the intoxication charge, Mill's desires ran counter to their advice. On the issue of an intoxication charge, Mills and his attorneys were in agreement – they did not want a jury charge on that subject. The circuit court held a colloquy with Mills confirming that. Mills was convicted of all three counts and sentenced to death, as recommended by the jury. Mills appealed, claiming, among other things, the circuit court erred in letting him decide whether the jury would be charged on lesser included offenses. The Court of Criminal Appeals affirmed the conviction and sentence. Mills obtained certiorari review in the Supreme Court.

Issue: Was it plain error to allow Mills to decide whether the circuit court would charge on lesser included offenses?

Holding: No.

Discussion: The Alabama Supreme Court reviewed two Court of Criminal Appeals decisions, ABA guidelines, a Colorado state court opinion and the U.S. Supreme Court's opinions in Nixon and Taylor. The Court of Criminal Appeals opinions found there was no interference with the attorney-client relationship where trial courts called witnesses at defendants' requests but over defense counsels' objections. The Court distinguished factually the Colorado opinion, which cited ABA guidelines identifying tactical decisions as the responsibility of defense counsel. The Court concluded that although Nixon and Taylor generally stand for the proposition that defense counsel controls tactical trial decisions, those two cases do not stand for the proposition that a trial court always is required to honor trial counsel's tactical decisions over the objection of the defendant. The Court concluded that there was no plain error in allowing Mills to make the final decision as to the jury instructions in light of the fact that he had an extensive amount of time to discuss the matter with counsel and his counsel did not clearly object to Mills' decision not to seek charges on lesser included offenses.

## MANDAMUS

Ex parte Denson, 1090952, 2010 WL 3196494 (Ala. Aug. 13, 2010)

Facts: Neal was charged with murder. The jury rejected her claim of self defense and found her guilty. The circuit court then granted her motion for judgment of acquittal. The State filed a petition for writ of mandamus with the Court of Criminal Appeals. That court granted the petition. Arguing that its own jurisdiction had expired when the Court of Criminal Appeals issued its writ, the circuit court filed its own petition with the Supreme Court seeking an order to the lower appellate court to vacate its writ.

Issue: Did the circuit court retain jurisdiction to vacate its judgment of acquittal?

Holding: No.

Discussion: Citing long established precedent, the Supreme Court pointed out that a mandamus petition does not stay the final judgment of a lower court. Accordingly, the complaining party also must seek a stay of the judgment in question when seeking mandamus review with an appellate court. In this case, the State did not file a motion to stay with the circuit court or the Court of Criminal Appeals. Without a stay of the judgment, the circuit court's 30-day jurisdictional window closed while the Court of Criminal Appeals was awaiting Neel's and the circuit court's responses to the State's mandamus petition. The Supreme Court was compelled to hold that the circuit court no longer had jurisdiction over the case when the Court of Criminal Appeals entered its writ of mandamus directed to the circuit court. Without circuit court jurisdiction to vacate its judgment, the Court of Criminal Appeals also lacked jurisdiction to order the circuit court to do so.

## MIRANDA RIGHTS

Ex parte Landrum, 1090119, 2010 WL 3377668 (Ala. Aug. 27, 2010)

Facts: Landrum turned himself in to police at 3 AM on June 4, 2007. A detective read Landrum his juvenile Miranda rights, and Landrum requested his father be present before giving a statement. After his father arrived, Landrum denied involvement in a homicide. Landrum was arrested for that homicide and transported to jail. The detective got a call from Landrum's girlfriend on June 6 saying that Landrum wanted to talk. The detective went to see Landrum at 4 PM on June 6, reminded him of the Miranda rights previously covered and took Landrum's

confession. Landrum was charged with murder and later moved to suppress the statement. The trial court denied the motion. Landrum was convicted and appealed.

Issue: Was Landrum's confession taken in violation of his Miranda rights?

Holding: No.

Discussion: The Alabama Supreme Court examined whether, considering the totality of the circumstances, Landrum's original Miranda warning was too stale to permit use of the confession. The Court determined that Landrum understood the rights read to him on June 4 given that he delayed making a statement until his father arrived. The Court focused on the length of time and intervening events to see if they affected Landrum's ability to voluntarily waive his rights and give a second statement. In this case, approximately 60 hours passed from the reading of Miranda to the second statement. The only intervening events were the transfer of Landrum to the jail where he gave the second statement and Landrum's girlfriend re-initiating contact on his behalf. Also, the Court pointed out cases in which a reminder of Miranda rights was determined to be a factor favoring admissibility of subsequent statements. In this case, although the detective's testimony was uncertain as to whether his reminder of Miranda occurred before or after the second statement, the Court reasoned that the reminder must have come before the tape recorder was turned on since it would have appeared in the recorded statement if the reminder had been given at the end. The Court also found it significant that Landrum re-initiated contact with the detective who did the initial interview. The Court concluded that the circumstances of the second statement did not make the original warnings "so stale as to fail to protect Landrum from the coerciveness inherent in a custodial interrogation."

### **PRETRIAL DISMISSAL**

Ex parte Worley (In re State v. Worley), 1090631, 2010 WL 3518740 (Ala. Sept. 10, 2010)

Facts: Worley was charged with felonies and misdemeanors related to letters mailed to her state employees seeking their political support for her re-election. She filed a motion to dismiss arguing that the State could not establish the elements necessary to convict her of the felony charges. In opposing the motion, the State made a proffer of its evidence. The circuit court granted the motion and dismissed the felony counts. The State appealed, and the Court of Criminal Appeals reversed the dismissal stating that the trial court's dismissal amounted to a pretrial determination of the sufficiency of the evidence. Worley sought certiorari review in the Supreme Court.

Issue: Did the State invite the error by proffering its evidence?

Holding: Yes.

Discussion: The Supreme Court implicitly acknowledged it was error for the trial court to consider the sufficiency of the evidence in ruling on the pretrial motion to dismiss. However, the Court pointed out that the State presented its proffer of evidence without ever arguing to the circuit court that its proffer was premature and it would be error to rely in it when ruling on the motion to dismiss. The Court invoked the doctrine of "invited error" and remanded the case to the Court of Criminal Appeals for it to consider the substance of the motion and the State's proffer.

### **PROBATION REVOCATION**

Ex parte State (Dean v. State), 1090754, 2010 WL 2546418 (Ala. June 25, 2010)

Facts: While Dean was on probation after serving a split sentence for Robbery 1<sup>st</sup>, his probation officer filed a delinquency report alleging that he failed to report. When Dean came before the circuit court, the court asked him if the allegation was true or false. Dean admitted it was true. The court revoked his probation but then allowed him to explain why he did not report. Dean told the court that he lost his home, was living on the street and not making enough money to pay the supervision fee. Dean appealed claiming error in the circuit court's failure to appoint counsel to represent Dean at the revocation proceeding. The Court of Criminal Appeals reversed the revocation order on that ground. The State petitioned the Alabama Supreme Court for certiorari review.

Issue: Was the circuit court required to appoint counsel under these facts?

Holding: No.

Discussion: The Supreme Court first reviewed the issue of whether Dean's objection to the court's failure to appoint counsel had to be preserved for appeal. The Court concluded that an objection to not appointing counsel did not require preservation at the trial level because to require otherwise would run afoul of the "fundamental fairness" imposed by the due process clause as discussed in the U.S. Supreme Court's Gagnon opinion. Moving to the primary issue,

the Court examined the law regarding appointment of counsel for revocation proceedings. The Court noted that a probationer does not have an automatic right to counsel at a revocation hearing but a trial court must determine if counsel is required before conducting such a hearing. Per Ala. R. Crim. P. Rule 27.6(b), appointment of counsel is required if the probationer denies the alleged violation or there are substantial reasons that justify or mitigate the violation and those reasons are complex or difficult to develop or present. A court's refusal to appoint counsel is not reversible unless the absence of counsel materially harmed the probationer. In this case, the Supreme Court found that Dean's reasons for the violation were not complex or difficult to develop. The Court also noted that the record clearly indicated Dean could and did present those reasons to the circuit court. The Court also pointed out that Dean filed a motion to reconsider the revocation demonstrating his ability to communicate his situation and advocate for his interests.

Ex parte Jones, CR-09-1576, 2010 WL 3834016 (Ala. Crim. App. Oct. 1, 2010)

**Facts:** Jones was convicted of rape and had his probation revoked in 2004. In 2010, he filed a motion seeking status as a technical probation violator under recently amended §15-22-54.1. The circuit court denied the motion, and Jones filed a mandamus petition seeking review of that denial.

**Issue:** Is the denial of technical violator status reviewable by mandamus or direct appeal?

**Holding:** Direct appeal is the appropriate avenue for review.

**Discussion:** The Court of Criminal Appeals looked to Alabama's Kirby case law for guidance. That case law holds that reviews of Kirby decisions are by appeal because those decisions related to prison sentences, which generally are challenged by appeal and not by mandamus.

## **RESTITUTION**

Dawson v. State, CR-09-0266, 2010 WL 2546451 (Ala. Crim. App. June 25, 2010)

**Facts:** Dawson was indicted for Criminal Trespass 2<sup>nd</sup>. That charge arose when Dawson was caught on the victim's property. The victim found damage to a window when he came to the scene where police had Dawson in custody. After Dawson pled guilty, the State asked for \$644.70 in restitution to cover the damage to the window. The trial court held a hearing on the issue and then ordered Dawson to pay that amount. Dawson appealed.

**Issue:** Did the plea to Criminal Trespass 2<sup>nd</sup> give the court authority to order restitution for the damage to the window?

**Holding:** No.

**Discussion:** The Court of Criminal Appeals reviewed its precedent examining the prerequisites for restitution orders. To order restitution, the criminal conduct for which a defendant is convicted must have resulted in the damage or the defendant must have admitted to causing the damage in the court proceedings. In this case, the Court held that Criminal Trespass 2<sup>nd</sup> did not contain an element contemplating damage to property and there was no admission by Dawson in the record that he caused the damage. Therefore, the Court reversed the trial court's restitution order.

Ex parte Theodorou, 1090393, 2010 WL 2629083 (Ala. June 30, 2010)

**Facts:** Theodorou pled guilty to Receiving Stolen Property 3<sup>rd</sup> related to a backhoe and hammer attachment. At a restitution hearing, the owner of the backhoe and hammer attachment testified to a loss of business resulting from the theft of those items. He also testified that the hammer attachment was extensively damaged because it was stored improperly on Theodorou's property. The trial court entered a restitution order requiring Theodorou to pay \$33,417.94. The restitution order was based on (1) the difference between the backhoe's insurance proceeds and its actual cost at purchase, (2) loss of business at the site from which the items were stolen, and (3) the value of the hammer attachment. Theodorou appealed claiming the order was based on a crime – theft - for which he was not convicted. The Court of Criminal Appeals affirmed the order. The Supreme Court issued a writ of certiorari to review that holding.

**Issue:** Could Theodorou have reasonably foreseen that his conduct in receiving the stolen property would result in the damages covered by the order?

**Holding:** Yes.

**Discussion:** The Alabama Supreme Court first noted the wide discretion granted trial courts for restitution orders. It affirmed the portion of the order requiring restitution for the value of the hammer attachment, noting that Theodorou testified

that the attachment worked properly when he bought it and the owner testified that it was damaged by the way it was found stored on Theodorou's property. Thus, Theodorou's conduct proximately caused the damage to the attachment. As for the loss of business at the site where the items were stolen, the Supreme Court cited the restitution statutes that define victim as one who suffers direct or indirect pecuniary damages and that define pecuniary damages as special damages of the type recoverable in a civil action including losses such as travel, medical, burial and wages. The Supreme Court accepted the State's argument that Theodorou's conduct in buying the stolen goods created the market for those goods, without which the theft might not have occurred. The Court held that his conduct was an indirect cause of the damage, compensation for which could be ordered under the restitution statutes.

## **RULE 32**

Ex parte Coleman, 1090975, 2010 WL 3377655 (Ala. Aug. 27, 2010)

**Facts:** Coleman pled guilty to Rape 1<sup>st</sup>, Sodomy 1<sup>st</sup>, and Sexual Abuse 1<sup>st</sup> (x2). He was sentenced to 20 years on each of the rape and sodomy charges and 10 years on each of the sexual abuse charges with all sentences to run concurrent. Almost one year later, he filed a Rule 32 petition claiming that his counsel was ineffective because the attorney gave him erroneous information about his eligibility for parole and work release. Coleman claimed that he would not have pled guilty if his attorney had not made those representations. Specifically, Coleman claimed that he would not have accepted a 20-year sentence without parole eligibility because at age 65, such a sentence would in effect be a life sentence. The circuit court dismissed the petition. Coleman appealed. The Court of Criminal Appeals affirmed the dismissal, holding that Coleman failed to meet the second prong of Strickland - he failed to plead facts showing a reasonable probability the outcome would have been different. Coleman sought certiorari review in the Supreme Court.

**Issue:** Did Coleman sufficiently plead facts that, if true, would show a reasonable probability the outcome would have been different?

**Holding:** Yes.

**Discussion:** Relying on a Court of Criminal Appeals decision relating to representations about parole in the context of a Rule 32 petition challenging a guilty plea, the Supreme Court held that Coleman pleaded sufficient facts to support Strickland's second prong. In finding that the summary dismissal was in error, the Court noted that Coleman set out "special circumstances" (his age) showing he placed a particular emphasis on his attorney's statements about parole eligibility. Justice Stuart wrote specially to note that Coleman's claim was meritorious on its face because he alleged misrepresentations about eligibility for parole or work release and that a misrepresentation about when a defendant would get parole or work release was too speculative to meet the requirements of Strickland.

Ivory v. State, CR-09-1767, 2010 WL 4723389 (Ala. Crim. App. Nov. 5, 2010)

**Facts:** Ivory's sixth Rule 32 petition was dismissed by the circuit court. The Court of Criminal Appeals affirmed that ruling by unpublished memorandum. Judge Kellum concurred specially in that vote and wrote to "encourage the circuit court to adopt sanctions . . . to prevent future frivolous litigation on the part of Ivory." She cited Peoples v. State, 531 So.2d 323 (Ala. Crim. App. 1988), and Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986) and Ex parte Thompson, 38 So.3d 119 (Ala. Crim. App. 2009).

**Discussion:** In Peoples, the defendant previously filed 16 post-judgment motions that were denied. The circuit court issued an order barring him from filing additional motions. He filed four additional motions and, after a contempt hearing, the circuit court denied the motions but declined to hold him in contempt. The Court of Criminal Appeals affirmed the denial of the motions but reversed as overbroad the blanket order barring future motions. The Court did note a number of potential options a trial court has to curtail abusive litigants. In Procup, the Eleventh Circuit Court of Appeals reviewed remedies used by courts to curb the filing of frivolous litigation by prisoners. In Thompson, the circuit court entered an order barring the circuit clerk from accepting any of Thompson's future Rule 32 petitions unless Thompson (1) paid past due court costs, (2) prepaid the civil docketing fee for the future petition, and (3) set out a cognizable jurisdictional claim in the petition. Thompson then filed a mandamus petition asking that the circuit court be directed to set aside its order. The Court of Criminal Appeals rejected Thompson's mandamus petition because he could not show a "clear legal right" to the relief sought. Under the U.S. Supreme Court's Lewis v. Casey and Christopher v. Harbury opinions, a petitioner with an access-to-court claim arising from a backward-looking challenge to an existing judgment must show "actual injury" resulting from being barred from litigating a "non-frivolous" claim. The Court of Criminal Appeals found that Thompson's underlying claim focused on the facts of his case and did not present a true jurisdictional challenge or discovery of new evidence claim that fell

outside the time-bar. As such, the Court concluded that it was without merit and prevented him from establishing the actual injury necessary for standing – his clear legal right to the mandamus relief.

Ex parte Martin, 1090035, 2010 WL 3196461 (Ala. Aug. 13, 2010)

**Facts:** Martin was convicted of capital murder and sentenced to death. Defendant's sentence was reversed on appeal and the case was remanded for a new sentencing. He again received the death penalty. He appealed again, and the Court of Criminal Appeals affirmed his conviction. His appellate counsel did not seek rehearing and did not file a petition for certiorari with the Alabama Supreme Court. Defendant later filed a Rule 32 petition alleging ineffective assistance on the part of his appellate counsel and seeking permission to file an out of time application for rehearing with the Court of Criminal Appeals and an out of time petition for certiorari with the Supreme Court. The circuit court granted Martin permission to file an out time application for rehearing and, if needed, an out of time petition for certiorari. The Court of Criminal Appeals reversed, holding that Rule 32 did not allow for those remedies. Martin then sought certiorari review of that decision.

**Issue:** Is a Rule 32 petition the proper method of obtaining permission to file an out of time application for rehearing and petition for certiorari review?

**Holding:** No.

**Discussion:** The Alabama Supreme Court looked to its precedent and Rule 2(b) of the Rules of Appellate Procedure. It determined that Rule 2(b) allows the appellate courts to suspend the appellate rules except for a Rule 4(a)(1) appeal and non-death penalty petitions for certiorari. Since Martin was sentenced to death, the Supreme Court concluded that his request for an out of time certiorari petition should have been directed to the Supreme Court and that his request for an out of time application for rehearing should have been submitted to the Court of Criminal Appeals.

Vines v. State, CR-09-0759, 2010 WL 4380241 (Ala. Crim. App. Nov. 5, 2010)

**Facts:** Vines was convicted of three counts of Rape 1<sup>st</sup> and sentenced to concurrent 15-year terms. His appeal was dismissed because his notice of appeal was untimely filed. He filed a Rule 32 petition alleging newly discovered information and claiming he was entitled to an out-of-time appeal due to no fault of his own. In support of his first issue, Vines attached an affidavit from an adult friend of the victim in which the friend claimed the victim recanted the allegation supporting the rape convictions. The State countered with an affidavit from that victim affirming her testimony at trial. The trial court ruled that evidence of a recantation was not newly discovered evidence warranting consideration by the trial court. Vines' appealed the denial of his petition.

**Issue:** Does a recantation qualify as newly discovered evidence?

**Holding:** No.

**Discussion:** The Court of Criminal Appeals agreed with the trial court's determination that the recantation was impeachment evidence and not newly discovered evidence as contemplated by Rule 32.1(e).

## **SEARCH AND SEIZURE**

CDM v. State, CR-09-1337, 2010 WL 4380245 (Ala. Crim. App. Nov. 5, 2010)

**Facts:** Police received an anonymous call about an individual that matched CDM's description entering an abandoned house from which gunfire was later heard. Officers stopped CDM walking down the road within two blocks of the house. They asked him if he had any weapons on him to which he replied "no." The officers then patted CDM down and found a pistol and marijuana. After losing a suppression hearing, CDM pled to being delinquent based on underlying charges of carrying a pistol without a license and possession of marijuana. He appealed the suppression ruling.

**Issue:** Did the anonymous tip contain enough indicia of reliability to allow the officers to do a Terry pat-down?

**Holding:** No.

**Discussion:** The Court of Criminal Appeals reviewed the law regarding anonymous tips and the requirement that such tips contain information beyond a description of a suspect in order to allow officers to conduct stops and pat-downs. In particular, such tips must contain information such as predictions of future behavior that allow officers to verify the reliability of the tipster. In this case, there was no such information in the tip.

State v. Henry, CR-09-0667, 2010 WL 2546480 (Ala. Crim. App. June 25, 2010)

**Facts:** A police officer pulled Henry over for failing to signal a turn. Henry stopped in the parking lot of a convenience store. He got out of his car and began to walk away from the officer and toward the store. The officer instructed him to walk back to his vehicle and as he did so the officer saw him fumbling with his front pants pocket. The officer began a Terry pat down. Henry continued to move his left hand during the pat down. The officer asked Henry if there was anything he needed to know about. Henry admitted that he had “dope in his pocket.” The officer reached into the pocket, retrieved cocaine and ended the pat down. Henry was charged with UPOCS and moved to suppress the evidence. The circuit court granted the motion to suppress.

**Issue:** Was the search constitutional?

**Holding:** Yes.

**Discussion:** The Court of Criminal Appeals first noted that the circuit court’s ruling carried no presumption of correctness because that court’s ruling was not premised on a resolution of disputed facts. The State’s appeal challenged the court’s application of the law to those facts, so the review was de novo. The Court reviewed the testimony and concluded that the officer had reasonable suspicion to justify a Terry pat down. The Court then found that Henry’s admission during the pat down that he had drugs in his pocket created probable cause for the officer to reach into the pocket and retrieve the contraband. That instant creation of probable cause led the Court to dismiss the circuit court’s apparent conclusion that the officer’s failure to continue the pat down indicated he did not truly fear for his safety.

McIntosh v. State, CR-09-0579, 2010 WL 3834028 (Ala. Crim. App. Oct. 1, 2010)

**Facts:** A deputy received information from a reliable confidential informant that McIntosh was cooking methamphetamine on his property and had it in his residence. The deputy relayed that information to a drug task force detective. The detective drafted a search warrant affidavit setting out the information and stating that “[t]he information is fresh within the last 24 hours.” A magistrate signed the search warrant, and officers found a meth lab and meth when it was executed. McIntosh moved to suppress the evidence seized in the search, arguing that the affidavit did not establish probable cause. The trial court denied the motion. McIntosh pled guilty and reserved the right to appeal the suppression ruling.

**Issue:** Did the affidavit establish probable cause justifying the issuance of the search warrant?

**Holding:** No.

**Discussion:** The Court of Criminal Appeals reviewed the text of the affidavit and found that it did not contain a reference to when the informant observed the contraband and overheard McIntosh’s statement about having what was needed to cook meth. The Court noted that the affidavit’s reference to the information being “fresh within the last 24 hours” was ambiguous in that it was unclear whether that statement referred to when the informant saw the contraband or when the informant passed along the information to the deputy. The Court went on to examine the record to see if there was additional information provided to the magistrate when the warrant was issued that would support probable cause. The Court found no such additional information. Without a basis for believing the drugs were probably on the premises to be searched when the warrant was issued, the Court reversed the trial court’s ruling denying the motion to suppress.

Melton v. State, CR-08-1767, 2010 WL 3834048 (Ala. Crim. App. Oct. 1, 2010)

**Facts:** Melton gave his computer to Best Buy technicians to repair his internet connection and remove a virus. While making those repairs, the technicians saw file names suggestive of child pornography but did not open the files. Following company policy, they contacted police. Vice officers came to the scene, saw the same filenames that they surmised were indicative of child pornography and asked the technicians to open the files to confirm. The technicians did so, and their suspicions were confirmed. The officers took possession of the computer and later obtained a search warrant for a forensic examination of the computer. Melton was charged with Possession of Obscene Matter. He filed a motion to suppress based on the initial search of the computer at Best Buy. The trial court denied that motion. Melton was convicted and appealed on that issue.

**Issue:** Did Melton have a reasonable expectation of privacy in his computer files after turning them over to the computer technicians?

Holding: No.

Discussion: The Court of Criminal Appeals examined the facts and concluded Melton did not have a reasonable expectation of privacy in the computer files because he voluntarily turned them over to Best Buy knowing of their existence without deleting them, agreed to let the technicians make repairs without placing limitations on what they could access, and failed to put a password lock on the files. In addition to finding that Melton gave up any reasonable expectation of privacy when he turned over the computer, the Court also reviewed analogous cases and held that whatever expectation of privacy he might have retained was not one that society was prepared to recognize as “reasonable” given the grave interest society has in protecting children from sexual exploitation. The Court quoted a U.S. Supreme Court opinion dealing with field tests of drugs in which that court said a field test that discloses whether a substance is an illegal drug does not violate a legitimate interest in privacy.

State v. ORJ, CR-09-0275, 2010 WL 2546477 (Ala. Crim. App. June 25, 2010)

Facts: Police officers pulled over ORJ for playing his music too loud. Once stopped, ORJ got out of his vehicle and began to walk away despite commands from the officers to return to his vehicle. He eventually returned to his vehicle and gave officers a false name. Officers described him as sweating and acting nervous. While ORJ was standing nearby, Officers went into his vehicle to check for weapons and look for ID. They eventually found documents identifying ORJ but in the process smelled marijuana. A more complete search of the vehicle turned up marijuana and a controlled substance. ORJ moved to suppress the evidence. The trial court granted the motion. The State appealed.

Issue: Was there probable cause for the warrantless search of the vehicle?

Holding: Yes.

Discussion: The Court of Criminal Appeals first examined the appropriate standard of review. It determined that since there were no disputed facts then the alleged trial court error must be in its application of the law to the facts. As such, the ore tenus rule was inapplicable, and the Court conducted a de novo review without any presumptions of correctness. The Court found that under a totality of the circumstances the officers were justified in conducting a wingspan search and looking for identification in the vehicle. Once permissibly inside, the smell of marijuana established probable cause for a full search of the vehicle.

TAP v. State, CR-09-0727, 2010 WL 3834022 (Ala. Crim. App. Oct. 1, 2010)

Facts: Officers were called to a domestic disturbance by Smith who said her boyfriend was armed and had threatened to shoot her. Smith advised them that her boyfriend was inside a nearby apartment. They entered the apartment and found the boyfriend, three other males (including juvenile TAP) and a female. They took all five outside, patted them down for weapons and handcuffed them. They then searched the apartment and found four assault rifles, four pistols and a large amount of cash in a purse. They questioned the female who admitted the purse was hers, but she said the males put the money in there. She also told police that one of the males had drugs in his shoe. Officers made all four remove their shoes – heroin was found in TAP’s shoes. He was charged with UPOCS. At a suppression hearing, the arresting officer testified that he did not know the female’s name and had no prior experience with her or knowledge about her dealings with other officers. The trial court denied the suppression motion. TAP pled true to his delinquency and appealed the suppression ruling.

Issue: Was the female a police informant to whom the proof-of-veracity rules applied or an eyewitness to whom those rules did not apply?

Holding: She was an eyewitness.

Discussion: The Court of Criminal Appeals analyzed the issue in terms of whether the female was an informant or an eyewitness. Sometimes called “ordinary citizens” or “citizen informers,” eyewitnesses who report the events of a crime, the location of evidence or statements of suspects are presumed to be reliable and need no further validation other than their own claim of personal knowledge of the matter. The Court noted that officers are allowed to presume their truthfulness and act on their statements without further verification. For police informants, the risk of false information arising from the informant’s self interest requires additional validation. Specifically, officers must have knowledge of the informant’s historical veracity or reliability or independently corroborated predictions of behavior before acting on informant information or relying on it to obtain a search warrant. In this case the Court determined that the female was merely a witness to the crime of drug possession. The Court held that the officers had probable cause to search TAP based on the witness’s tip and the commonly known association of narcotics with large sums of currency and guns such as those found.

## SENTENCING

Ex parte State (In re Lane v. State), 1091117, 2010 WL 3724912 (Ala. Sept. 24, 2010)

**Facts:** Lane was convicted of murder and, because of his two prior felony convictions, sentenced as a habitual offender to 120 years. The Court of Criminal Appeals affirmed the conviction but reversed and remanded for resentencing, holding that the maximum sentence was 99 years. The trial court resentedenced him to 99 years. The appellate affirmed the new sentence. The State sought the Supreme Court's review of the Court of Criminal Appeals' ruling regarding the sentence.

**Issue:** Does §13A-5-9(b)(3) authorize sentences greater than 99 years?

**Holding:** Yes.

**Discussion:** The Supreme Court looked to the plain language of the statute, which prescribes a sentence of "life or ... any term of not less than 99 years" for a Class A felony conviction where the offender has two prior felony convictions. The Supreme Court found that the statute unambiguously raised the minimum punishment without fixing a maximum punishment in terms of years. The Court concluded that the Court of Criminal Appeals relied in error on existing case law regarding firearms enhancements, which make the minimum and maximum sentences equal for certain crimes.

McGowan v. State, CR-09-0411, 2010 WL 4380240 (Ala. Crim. App. Nov. 5, 2010)

**Facts:** McGowan was convicted of murder. At his sentencing hearing, the State presented certified copies of five prior convictions, which included one for receiving a stolen vehicle in Illinois and two "no contest" convictions for battery as a habitual offender in Wisconsin. The circuit court sentenced McGowan to LWOP. He appealed challenging the use of those three convictions to enhance his sentence.

**Issue:** Were the Illinois and Wisconsin convictions usable to enhance McGowan's sentence?

**Holding:** No.

**Discussion:** The Court of Criminal Appeals examined the record, the certified copies and the existing statutory law at the time of the Illinois conviction to see if the State proved that McGowan's Illinois conduct was a felony violation in Alabama at the time it occurred. The Court determined that the State was required to prove the vehicle's value was greater than \$100 (per the RSP 2<sup>nd</sup> statute at the time), but there was no information in the record supporting that point other than mere speculation that the particular vehicle would have had such a value. The Court also noted that under existing case law "no contest" pleas from other states could not be used to enhance a sentence pursuant to the habitual felony offender law.

Stevenson v. State, CR-09-1307, 2010 WL 4380243 (Ala. Crim. App. Nov. 5, 2010)

**Facts:** Pursuant to a plea agreement, Stevenson pled guilty to Receiving Stolen Property 2<sup>nd</sup> and Attempted Production of Obscene Matter on Sept. 17, 2001. He received a 15-year sentence for RSP 2<sup>nd</sup> and a 30-year sentence for the Attempted Production of Obscene Matter charge. The circuit court ordered those sentences to run concurrent and released him on bond to attend to personal affairs prior to his turn-in date. Stevenson fled to Oklahoma where he was arrested in 2008 and returned to Alabama. He was brought back before the circuit court, which entered an order in December 2008 that Stevenson's sentences were to be run consecutive. Stevenson later filed a Rule 32 petition challenging, among other things, the order for consecutive sentences. The circuit court denied that petition, and Stevenson appealed.

**Issue:** Did the circuit court have jurisdiction to order Stevenson's sentences to be run consecutive?

**Holding:** No.

**Discussion:** Pointing out that a court retains jurisdiction to modify a sentence for 30 days after entry of that sentence, the Court of Criminal Appeals remanded the case for the circuit court to reinstate the concurrent sentences imposed in 2001.

## SEX OFFENDERS

State v. Adams, CR-08-1728, 2010 WL 4380236 (Ala. Crim. App. Nov. 5, 2010)

**Facts:** Adams completed his sentences for Rape 1<sup>st</sup> and Sodomy 1<sup>st</sup>, convictions which qualify him as an “adult criminal sex offender” for purposes of applying the Community Notification Act (CNA). On the date of his release, he was arrested for failing to provide DOC with a residential address where he could legally reside under the restrictions of the CNA. After his indictment, his appointed counsel filed a motion to dismiss in the circuit court alleging that the portion of former §15-20-22(a)(1) requiring him to provide a valid address was unconstitutional alleging: (1) it was void for vagueness on its face and as applied, (2) it was cruel and unusual punishment, (3) it violated due process and (4) it violated equal protection. At a hearing on the motion, Adams testified that he was indigent, had no address to give to DOC, had no friends or family with whom to live in compliance with the CNA, had no access to resources at his prison that would assist him in finding an acceptable address, and at the time of filling out the required address form he had not received responses to letters written to halfway houses asking about availability of a bed. He also testified that prior to his release date he did get confirmation from one halfway house that he could live there. However, when he advised his classification officer of that fact, he was told it was too late. A paralegal with the Southern Poverty Law Center testified to the impediments to finding housing for sex offenders and to the erroneous and limited resources provided by the prison for such efforts. Adams also introduced evidence regarding the procedure and forms used to process sex offenders out of DOC. The circuit court declared unconstitutional the portion of §15-20-22(a)(1) requiring indigent sex offenders in DOC custody to provide an actual address 45 days prior to release.

**Issue:** Is the portion of former §15-20-22(a)(1) dealing with post-release residence of sex offenders unconstitutional?

**Holding:** Yes. As applied to Adams, the former provision requiring a valid and acceptable address prior to release violates equal protection and is cruel and unusual punishment.

**Discussion:** The Court of Criminal Appeals first reviewed the language of former §15-20-22(a)(1), which required that forty-five days prior to release an adult sex offender had to provide an “actual address at which he or she will reside or live upon release.” The Court then rejected the State’s contention that the phrase “actual address” merely meant a “physical place,” such as a park bench, where the sex offender could be found after release. The Court concluded that the specific terms (“address,” “reside,” and “live”) used in that portion of the statute had plain, ordinary and commonly understood meanings that when read in the context of the purpose of the CNA could only mean “a fixed place where one lives continuously for a period and where mail can be received.” The Court then moved to its analysis of constitutionality. The Court concluded that an equal protection violation existed in the statute because it resulted in the continued incarceration of indigent homeless sex offenders, with no funds to secure a valid address, while nonindigent homeless sex offenders, with such funds, were released. The Court held that the disparity of treatment based solely on wealth violated the Equal Protection Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution and §§ 1, 6 and 22 of Article I of the Alabama Constitution. The Court relied on U.S. Supreme Court cases finding equal protection violations in cases where incarceration resulted from an inability to pay fines or costs. The Court noted that Adams was not really punished for his failure to comply with the CNA but instead was punished for his indigency and homelessness, which were beyond his control. The Court noted that other states had enacted provisions for monitoring transient sex offenders. The Court went on to conclude that the statute also resulted in an 8<sup>th</sup> Amendment violation by imposing cruel and unusual punishment on Adams because it resulted in his incarceration based on his status – that of indigency. The Court focused on the impossibility of compliance that resulted from Adams’ status of indigency and the unavailability of housing for individuals in Adams’ circumstances making his failure to provide a valid address “involuntary conduct that was inseparable from his status of homelessness.” The Court pointed out that its finding of constitutional violations was “as applied” and confined to the facts of this case. It acknowledged there may be other homeless indigent sex offenders who under different sets of facts may be able to provide valid addresses.

# The Prosecutors' Encyclopedia

Our prosecutor friends at the [New York Prosecutor Training Institute \(NYPTI\)](#) have been working on technology to support their prosecutor community through the Web. As their project developed in the last couple years, they realized that their vision of a Web-based home for prosecutor resources was bigger than just one state.

This fall NYPTI has launched the [Prosecutors' Encyclopedia](#), which you will find at [www.MyProsecutor.com](http://www.MyProsecutor.com). The PE is a free resource to prosecutors in the "wiki" format, with two major differences: It is open only to prosecutors, and it cannot be edited anonymously. (To date, the PE contains thousands of expert witness transcripts, commentaries from fellow prosecutors, cases summaries, discussion forums, and briefs. The key, of course, is that any prosecutor can add additional information to be shared across the country.

The Web platform is powerful. The Prosecutors' Encyclopedia contains every federal and state criminal case since 1970 in a searchable format powered and updated by VersusLaw; features a database of expert witnesses with videos of actual testimony; auto-detects case citations in any articles, memos, or briefs uploaded to the site; and serves as a nationwide directory of prosecutors and expert witnesses.

To join the PE, go to the website and click on "request an account." You will need to complete the user information as instructed. Once you have logged in and given it a spin, let us know what you think!