Tuscaloosa County Bar CLE - Federal and State Case Law Update

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This is not a complete list of all cases from 2019. This is a list of major and/or noteworthy cases. For the most part cases that aren't included are fairly routine cases, federal ACCA cases, procedural Rule 32 cases, procedural federal habeas cases under §§ 2254; 2255, and 1983 cases regarding executions.

THE STRANGEST CASE OF 2019

***Ex parte Smith*, MS. 1171025 (Ala. January 11, 2019)**

Smith, a Montgomery Police Department officer, shot and killed a man after he attempted a *Terry* stop. Smith moved for a pre-trial immunity hearing, arguing that he acted in self-defense. Prior to trial, Smith moved for the Judge Griffith to recuse "after Judge Griffin posted on his Facebook page his aggravation with being detained by an officer with the Montgomery Police Department while he was walking in his neighborhood." The court denied that motion and the Court of Criminal Appeals and Alabama Supreme Court denied his mandamus petitions seeking recusal.

Judge Griffin ultimately denied the immunity request. Of particular note, Judge Griffin stated that he did not find Smith credible. A lot of media was present for this hearing. Smith renewed his motions for recusal and for a change of venue on account of the media attention given to the case in the community, but these motions were denied. Smith again sought mandamus review on denials of his request for (1) immunity, (2) recusal, and (3) change of venue. The Court of Criminal Appeals denied the requests.

WRIT GRANTED FOR RECUSAL AND CHANGE OF VENUE; DENIED AS TO IMMUNITY

In what can only be described as an astounding ruling, the Alabama Supreme Court granted Smith's request for Judge Griffin to recuse and for a change of venue. With respect to recusal, the majority concluded that Judge Griffin's comment on Smith's credibility ran afoul of Canon 3C(1) -- when facts are shown that could "make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge." The Court took into consider the totality of the circumstances surrounding this case, including the media coverage.

The Court also granted the writ with respect to the change of venue. The Court again relied on Judge Griffin's comments regarding Smith's credibility; however, the Court paid little attention the factors it previously relied upon in *Luong v. State*, 199 So. 3d 139 (Ala. 2014) in rejecting a change-of-venue claim to a widely-covered capital murder in Mobile. *Luong* all but killed change-of-venue claims and motions in Alabama – if Luong couldn't get one, it's hard to imagine how anyone else could. Here, the Court spent little more than a page writing with vague statements about "widely reported" coverage of the case.

FOURTH AMENDMENT

***United States v. Taylor*, 935 F.3d 1279 (11th Cir. 2019)**

Child porn/NIT warrant case. Court held that although the warrant violates the 4th amendment, but good faith saves the warrant. The exclusionary rule is intended to deter police conduct, not the conduct of a magistrate, therefore, the good faith exception applies to void warrants.

Dissent argues that the FBI knew or should have known that warrant was void because higher ups at the FBI and DOJ knew that the warrant would be too broad.

***Berry v. State*, CR-18-0233 (Ala. Crim. App. September 20, 2019)**

Crim. App. reversed and remanded Berry's conviction. Berry was arrested without a warrant after the officer learned that Berry had two outstanding arrest warrants, but the warrants were capias warrants, not felony or misdemeanor arrest warrants. Therefore, the arrest was illegal under § 15-10-3(a)(6). Capis warrants are not felony or misdemeanor warrants. The illegal arrest rendered the drugs found in the search pursuant to arrest inadmissible and the arrest/search was not saved by good faith because of the officer's failures.

***Gardner v. State*, CR-18-0368 (Ala. Crim. App. September 20, 2019)**

Terry patdown that found drugs was within the scope of the search because the officer could know the small bulge was methamphetamine based the "crunchy texture" bulge and "[y]ou know it when you grab hold of it."

***United States v. Babcock*, 924 F.3d 1180 (11th Cir. 2019)**

The Court upheld the warrantless seizure of a cell phone because the Government demonstrated both probable cause that the phone would contain evidence of a crime and because there was a fear that the evidence would be destroyed. The Court agreed that the seizure of the cell phone could not be justified under *Terry*. The opinion's discussion to that point is very informative.

***Amerson v. State*, CR-17-0673 (Ala. Crim. App. 2019)**

The Court rejected Amerson's claim that the warrantless entry into his apartment wasn't warranted under the "emergency aid" exception to the warrant requirement.

***United States v. Johnson*, 921 F.3d 991 (11th Cir. 2019)**

Terry allowed an officer to remove a bullet from a suspect's pocket as reasonably necessary for officer safety.

***United States v. Cooks*, 920 F.3d 735 (11th Cir. 2019)**

The Court held that after a hostage stand-off, officers were justified under the "emergency aide" exception to the warrant requirement in prying-open paneling leading to a crawlspace when the officers believed other hostages could be in the crawlspace.

***United States v. Campbell*, 912 F.3d 1340 (11th Cir. 2019)**

Here, the Court engages in a thorough discussion of *Rodriguez v. United States*, 135 S.Ct. 1609 (2015) and ultimately concluded that law enforcement impermissibly prolonged a traffic stop. However, the Court did not apply the exclusionary rule because the officer's actions would have been permissible under binding precedent at the time.

***State v. Martin*, CR-17-0745 (Ala. Crim. App. January 11, 2019)**

The Court reversed a motion to suppress a urine and meconium test where the circuit court had preemptively ruled that the test could not be authenticated or was not reliable. The Court concluded that these were premature determinations under Rule 15, Ala. R. Crim. P.

SIXTH AMENDMENT

***Jarmon v. State*, CR-17-0360 (Ala. Crim. App. April 12, 2019)**

In failing to hold case in recess where trial counsel collapsed during closing arguments, the circuit court violated the defendant's Sixth Amendment right to the assistance of counsel in presenting a closing argument under *Herring v. New York*, 422 U.S. 853 (1975).

***Connell v. Daphne*, CR-17-0943 (Ala. Crim. App. (July 12, 2019)**

Conviction reversed because there was no unequivocal waiver of the defendant's right to counsel.

***Mitchell v. State*, CR-17-1144 (Ala. Crim. App. July 12, 2019)**

The Court rejected arguments about DUI sufficiency and held that speeding in an area where construction workers are present is not a separate offense from speeding. It is a sentencing aggravator. But for that enhancement to apply, the State must prove it beyond a reasonable doubt under *Apprendi*.

***United States v. Smith*, 928 F.3d 1215 (11th Cir. 2019)**

Confrontation clause case. The Court held that government could use the deposition testimony of an unavailable witness. The main issue was whether the government exercised good faith in locating the witness when they had ideas of where she was and stopped looking because they had the video deposition. Cert has been filed.

***United States v. Feldman*, No. 16-12978 (11th Cir. August 30, 2019)**

Review of *Burrage* but-for causation in multi drug usage scenarios for § 841 and what *Alleyne* requires the jury to determine for sentencing enhancements under § 841 involving *Burrage*. Court reversed Feldman's sentences based on *Alleyne* violations.

GUILTY PLEAS

***J.F.C. v. State*, CR-17-1120 (Ala. Crim. App. August 16, 2019)**

The Court granted an application for rehearing and reversed and remanded J.F.C.'s case with instructions for the circuit court to grant Rule 32 relief and allow J.F.C. to withdraw his guilty plea. J.F.C. argued that his guilty plea was involuntary because neither the trial court, the State, nor defense counsel informed him regarding the specific range of punishments available and his

eligibility for parole if he pleaded guilty. On rehearing, the Court of Criminal Appeals agreed with J.F.C. after previously affirming the denial of his Rule 32 in a memorandum opinion.

JURY ISSUES

***Brewster v. Hetzel*, 913 F.3d 1042 (11th Cir. 2019)**

A great discussion on *Allen* charges and how trial counsel was ineffective for failing to move for a mistrial when the trial court's *Allen* charge was improper.

JUVENILE CASES

***D.A.H. v. State*, CR-17-1049 (Ala. Crim. App., January 11, 2019)**

Court vacated a restitution order requiring a juvenile to pay nearly $80,000 in restitution because the order didn't take into account the juvenile's ability to pay.

***State v. B.T.D.; B.T.D. v. State*, CR-17-1171 (Ala. Crim. App. May 24, 2019) --**

The Court reversed and remanded the order of the circuit court holding Alabama's automatic transfer statute unconstitutional on due process and equal protection grounds. The Court examined the issue as both a matter of procedural and substantive due process before rejecting the reasoning of the circuit court. (This case provides a very thorough discussion on constitutional challenges and is worth reading for that alone.)

SENTENCING

***Laakkonen v. State*, CR-17-1146 (Ala. Crim. App. April 12, 2019)**

Trial court illegally sentenced and misinformed Laakkonen about the potential sentence for a Class D felony guilty plea.

***Jackson v. State*, CR-17-1059 (Ala Crim. App. April 12, 2019)**

The Court specifically adopted Judge McCool's concurrence from *Jackson v. State*, CR-17-1059 (Ala. Crim. App. April 12, 2019) (memo. op.), explaining why the use of juvenile convictions does not render the HFOA unconstitutional.

***Collier v. State*, CR-17-0799 (Ala. Crim. App. April 12, 2019)**

Section 15-18-8 doesn't authorize courts to split misdemeanor sentences.

***McGowan v. State*, CR-18-0173 (Ala. Crim. App. July 12, 2019)**

The Court overruled its decision in *Enfinger v. State*, 123 So. 3d 535 (Ala. Crim. App. 2012), and its progeny. When a defendant has received an illegally split since and is revoked to serve the remainder of the sentence, any legality issues stemming from the split are rendered moot. The manner of serving the sentence was illegal, not the sentence itself.

PROBATION

***Ex parte Wayne*, Ms. 1171213 (Ala. April 12, 2019)**

Court vacated the revocation of probation for absconding because the probationer had not received written notice of the allegation of absconding.

***Jacobs v. State*, CR-18-0554 (Ala. Crim. App. July 12, 2019)**

Under § 15-22-54(e)(1), a circuit court cannot fully revoke probation for a technical violation of the probation terms. Here, the circuit court held that the State had failed to prove that Jacobs had committed a new criminal offense, but fully revoked his probation for failing to complete the ACES program, which the State did prove. The Court reversed and remanded the case because 54(e)(1) only allows 45 day dunks for technical violations.

***Allen v. State*, CR-17-0634 (Ala. Crim. App. March 8, 2019)**

Reversal of probation revocation where probationer's Due Process rights were violated. The record didn't clearly establish he admitted the violations nor did the record demonstrate the Court's decision was supported by non-hearsay evidence.

EXPUNGEMENT

***Ex parte Steingberg*, CR-17-1157 (Ala. Crim. App. September 20, 2019)**

One of a series of consolidated expungement cases. The circuit court denied the petitions because it believed that expungements should only be granted for acquittals, not dismissals. The State conceded error and asked the Court to address expungement issues.

"Thus, in this particular situation -- when no objection is filed and no hearing is held -- the circuit court is required to grant the petition in the first case "if it is reasonably satisfied from the evidence that the petitioner has complied with and satisfied the requirements of this chapter,"

EVIDENTIARY ISSUES

***United States v. Hawkins*, 934 F.3d 1251 (11th Cir. 2019)**

Court reversed for plain error where lead agent overstepped in his testimony and began interpreting unambiguous language and fact testimony as well as synthesized the trial evidence to spoon fed the jury his interpretation of events. The Court emphasized the dangers of case agents testifying as experts because of these issues.

***United States v. Stahlman*, 934 F.3d 1199 (11th Cir. 2019)**

Court affirmed after Stahlman raised claims about the exclusion of expert testimony about his mental state, specifically that he believed he was going to take part in a fantasy with an adult not an actual child; that the FBI agent could not give lay opinion testimony regarding Stahlman's craigslist ad and the agent's communications with the Stahlman; that the Gov. failed to present sufficient evidence; and challenging his sentence based in part of judicial determination of Stahlman honesty at trial.

The court held that the district court misapplied the standards for opinion testimony, which is per se abuse of discretion, when it allowed the FBI agent to provide lay opinion testimony. But that error was harmless in this case. The Court also rejected Stahlman's sufficiency and sentencing arguments.

MILLER V. ALABAMA

***Thrasher v. State*, CR-17-0393 (Ala. Crim. App. April 12, 2019)**

The Court rejected arguments about the broader constitutional requirements of Miller hearings based on its previous decision in Wilkerson. The Court rejected arguments that the circuit court abused its discretion in sentencing Thrasher to LWOP despite expert testimony about his mental development as a juvenile and testimony by the key witness who was a surviving victim that contrasted sharply with her original trial testimony as to Thrasher's involvement in the murders. The Court also rejected on Thrasher's Brady claim on the merits in spite of the circuit court's refusal to consider the claim on the merits.

***Bracewell v. State*, CR- 17-0014 (Ala. Crim. App. March 8, 2019)**

Miller matter remanded for the circuit court to prepare an order that complies with *Ex parte Henderson* because the circuit court's sentencing order reflected a decision-making process based on sentencing adult capital defendants.

RESTITUTION

***United States v. Rothenberg*, 923 F.3d 1309 (11th Cir. 2019), cert petition filed**

This is a long discussion of restitution in the context of a federal child-pornography prosecution.

INDICTMENT ISSUES

***Moore v. State*, CR-16-1078 (Ala. Crim. App. May 24, 2019)**

In a DV-menacing case, the circuit court impermissibly amended Moore's indictment when it failed to instruct the jury of the "physical action" alleged in the indictment and required to prove menacing.

***Thomas v. State*, CR-17-0873 (Ala. Crim. App. January 11, 2019)**

Thomas was convicted of theft after receiving excessive payments that she did not earn. The Court held that statute of limitations was not an issue because depending on the circumstances, theft can be an ongoing offense.

MIRANDA ISSUES

***Peterson v. State*, CR-16-0652 (Ala. Crim. App. January 11, 2019)**

The Court of Criminal Appeals had no problem with the circuit court not suppressing statements made by Peterson after he said he should probably talk to his mom and a lawyer and guessed he

should talk to my lawyer. And saying "need a lawyer" does not indicate an absolute present desire to consult with an attorney.

DOUBLE JEOPARDY

***Hopson v. State*, CR-17-1155 (Ala. Crim. App. April 12, 2019)**

In a case stemming from a police chase that ended in some injuries, the defendant's convictions for reckless endangerment and reckless driving violated Double Jeopardy, and, defendant's multiple convictions for attempting to elude, which all stemmed from the same chase, violated Double Jeopardy.

***United States v. Feldman*, 931 F.3d 1245 (11th Cir. 2019)** –Double Jeopardy

The Court rejected as an issue of first impression an argument that double jeopardy barred retrial on an offense that the jury was instructed on but did not decide. Feldman was charged with 2 different types of money laundering conspiracy and the jury was instructed that it could find him guilty of both, either type, or not guilty. The jury convicted Feldman of one type, but did not decide on the other type. After a reversal, Feldman was again tried on both types of money laundering. The 11th Circuit joined other jurisdictions in holding that there is no inference of acquittal when a Δ is convicted of one of multiple alternative means of committing a single crime.

COMPETENCY

***Lindsay v. State*, CR-15-1061 (Ala. Crim. App. March 8, 2019)**

Even though Lindsay was diagnosed as a paranoid schizophrenic, the circuit court didn't abuse its discretion in denying him a competency hearing because the court had ample evidence, including expert reports, indicating that he was competent.

***Weeks v. State*, CR-16-0881 (Ala. Crim. App. Feb. 9, 2018)**

A defendant cannot waive a competency hearing when the circuit court had concluded the defendant met the threshold of showing he may be incompetent.

DEATH PENALTY

***Ex parte Gissendanner*, Ms. 1160762 (Ala. January 4, 2019)** (Rule 32)

This case is an interesting discussion regarding how the appellate courts are to review Rule 32 determinations.

***Peterson v. State*, CR-16-0652 (Ala. Crim. App. January 11, 2019)**

***White v. State*, CR-16-0741 (Ala. Crim. App. April 12, 2019)** (Rule 32)

***Ex Parte Carroll*, Ms. 1170575 (Ala. April 5, 2019)** (Rule 32) (*Atkins*)

George v. State, CR-15-0257 (Ala. Crim. App. January 11, 2019) (Rule 32)

***Smith v. Commissioner, Alabama Department of Corrections*, 924 F.3d 1330 (11th Cir. 2019)**

Because the ruling of *Moore v. Texas* is one of procedure, not substance, that decision is not to be applied retroactively.

***Graham v. State*, CR-15-0201 (Ala. Crim. App. July 12, 2019)**

***Hicks v. State*, CR-15-0747 (Ala. Crim. App. July 12, 2019)**

***Jackson v. State*, CR-16-0139 (Ala. Crim. App. September 20, 2019)**

***Knight v. Florida, DOC*, 936 F.3d 1322 (11th Cir. 2019)—Hurst/IATC**

As a matter of first impression, *Hurst v. Florida* established a procedural rule, rather than a substantive rule, and therefore does not apply retroactively.

***Raulerson v. Warden*, 928 F.3d 987 (11th Cir. 2019)**

SCOTUS UPDATE

***United States v. Stitt*, 139 S. Ct. 399 (2018)**

Generic burglary for ACCA purposes includes non-permanent dwellings and structures such as tents and motorhomes.

***Stokeling v. United States*, 139 S. Ct. 544 (2019)**

A robbery offense that involves the use of force to overcome resistance categorically qualifies as violent felony for ACCA purposes.

***Madison v. Alabama*, 139 S. Ct. 718 (2019)**

An Eighth Amendment case about immunity from the death penalty. During his time on death row, Madison's mental state has become severely impaired. The core issue of the case concerned whether a prisoner with dementia can be executed. The Court answered that it depends on the circumstances. A death row inmate whose lacks memory of the crime but can understand why he is being executed can be executed. A death row inmate whose dementia prevents him from rationally understanding why he is to be executed cannot be executed. The key determination is whether the inmate can rationally understand the sentence, regardless of whether the case is psychotic delusions, dementia, or another mental issue. The effect of the mental issue is what is important, not the mental issue itself.

***Garza v. Idaho*, 139 S. Ct. 738 (2019)**

Counsel was constitutionally ineffective for failing to vile notice of appeal when the defendant made clear requests that counsel do so even when there has been an appeal waiver. Counsel's failure to do so was presumptively prejudicial because doing so deprives the defendant of assistance of counsel on appeal and deprives the defendant of an appeal that could have been taken.

***Timbs v. Indiana*, 139 S. Ct. 682 (2019)**

The Eighth Amendment prohibition on excessive fines is incorporated upon the states under the Fourteenth Amendment.

***United States v. Haymond*, 139 S. Ct. 2369 (2019)**

Haymond was convicted of possessing child pornography and sentenced to 38 months followed by 10 years of supervised release. Haymond's supervised released was revoked after the District Court determined that under a preponderance standard that Haymond had violated the terms of his supervised released. The Gorsuch plurality opinion held that this violated Haymond's Sixth Amendment right to trial by jury. Under the statutes involved, 18 U.S.C. §§ 2252(b)(2); 3583(k), a finding of fact is required to revoke the supervised release.

This decision is likely to be limited to the specific statutes involved due to the nature of the proceedings. A defendant could face little or no jail time but have a period of supervised release. In that case, a revocation could force him to spend time in prison that exceeds the total amount of his original sentence. That is where the *Apprendi* violation comes in.

***Gamble v. United States*, 139 S. Ct. 1960 (2019)**

The Court upheld the dual sovereigns interpretation of the Double Jeopardy Clause.

***Flowers v. Mississippi*, 139 S. Ct. 2228 (2019)**

In one of the most messed up and long running death penalty cases you will ever see, the Court is deciding another *Batson* case out of Mississippi. A key issue in this case is whether the courts can look at the history of racial discrimination in jury selection in determining if the current trial has *Batson* issues. Flowers has been tried six times for murder: 3 death sentences that were later reversed and 2 hung juries before the trial at issue now. The same DA was the lead prosecutor in all 6 trials and was the reason why the first 3 trials were reversed. Flowers argued that in considering

the current *Batson* issues, the courts had to look at the DA's history of prior discrimination and misconduct.

In reversing Flowers's conviction, the Court looked at the history of the case across the various trials and the repeated violations of Batson and other issues of prosecutorial misconduct. What this means is that when convictions are vacated on *Batson* grounds, the prosecutor's prior *Batson* violations in the case can be used to revaluate future *Batson* issues.

***Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019)**

Implied consent allows for a warrantless blood draw of an unconscious person when there is a probable cause.

SCOTUS OCTOBER 2019 TERM

This term has some major criminal cases lined up already with big arguments in early October.

***Kahler v. Kansas*, No. 18-6135**

Question presented: Whether the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense.

***Ramos v. Louisiana*, No. 18-5924**

Question presented: Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict.

This one will be big for Alabama to challenge *Ex parte Waldrop* and *Ex parte Bohannon*'s rulings that non-unanimous jury verdicts are fine for sentencing.

***Mathena v. Malvo*, No. 18-217**

Question presented: Whether the U.S. Court of Appeals for the 4th Circuit erred in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of the Supreme Court, *Montgomery v. Louisiana*, addressing whether a new constitutional rule announced in an earlier decision, *Miller v. Alabama*, applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question.

This direct impact of this decision on Alabama will probably be minimal, but the wider effects will be huge for juvenile resentencing under *Miller*.

***Kansas v. Glover*, No. 18-556**

Question presented: Whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.

The yearly Fourth Amendment case

***Holguin-Hernandez v. United States*, No. 18-7739**

Question presented: Whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence.

This will be a federal issue.

***McKinney v. Arizona*, No. 18-1109**

Questions presented: (1) Whether the Arizona Supreme Court was required to apply current law when weighing mitigating and aggravating evidence to determine whether a death sentence is warranted; and (2) whether the correction of error under *Eddings v. Oklahoma* requires resentencing.

***Shular v. United States*, No. 18-6662**

Question presented: Whether the determination of a "serious drug offense" under the Armed Career Criminal Act requires the same categorical approach used in the determination of a "violent felony" under the act.