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ALABAMA LAWYER

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The Alabama Lawyer (USPS 743-090) is published six times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama and additional mailing offices. POSTMASTER: Send address changes to *The Alabama Lawyer*, P.O. Box 671, Montgomery, AL 36103-671.

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On The Cover

A Yellowhammer, the state bird of Alabama, on a tree branch in winter

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Lawyers and Legacies

One of the more somber responsibilities of being president of the Alabama State Bar – and one that receives little attention when considering the job – is expressing sympathies to family members who have lost lawyer loved ones. Members of our bar pass away every week. We attempt to reach out to the families to let them know that their lawyer family grieves with them.

A particularly poignant occasion in the bar year is the Opening of Court ceremony held at the Alabama Supreme Court at the beginning of October. The families of the lawyers who have passed over the prior year are invited, and the president of the state bar gives an address intended to memorialize the contributions of those deceased members of our bar.

It's a daunting challenge – eulogizing over 100 lawyers, all at the same time. And it makes you think about what's important, about why you chose the profession, and about what kind of legacy most of us hope (at some point in time) to leave.

I found the experience to be a sharp reminder to focus on matters of more eternal significance. So often, the truly meaningful stuff loses our attention amidst never-ending deadlines and distractions that seem important yet lose their significance with just a bit of hindsight. Were it not for this occasion, I would not have been prompted to engage in the mental exercise of contemplating how lawyers might well like to be remembered. I am grateful to have had the opportunity.

And so, what follows are my remarks to those family members at the Opening of Court Ceremony. I print them here in hopes that they might remind us, even if just for

a fleeting moment, to reflect on our priorities, our relationships, and our lasting impact:

"It is appropriate that we open our courts by remembering and celebrating those lawyers who we lost in the last year. Before carrying on with the business of the judicial system, we pause to honor our fellow members of the bar who blessed us, our profession, and our communities in so many ways.

Undoubtedly, you all remember your lawyer family member as a parent, sibling, child, aunt, uncle, or cousin. And those family memories are paramount. But today we reflect on their contributions as lawyers who rendered service to others.

We come into this world as nothing more than a son or a daughter and maybe, if we are lucky, as a sibling. What we become beyond that is a function of God's grace, the nurturing of our parents and others who mentor us, our own choices, and the work we put in. Your loved ones that we celebrate today became lawyers. And if that were all they did, it would be quite a legacy to leave to your family. To become a lawyer, they had to excel academically, obtain an undergraduate degree, gain admission to law school, study law for three years, and pass the bar exam. That alone would be enough to inspire future generations. But for virtually all of your loved ones, becoming a member of this bar was just the beginning of their legacies.

Most individuals choose the legal profession, at least in part, because they have a servant's heart. They find dignity and honor in helping people with difficult problems. Your family member leaves that legacy. Whether he or she talked about it or not, every working day your loved one spent time helping someone in a time of crisis. I can promise each of you that there are countless people who you probably never met and will likely never know that are in a better place today because of the work of your family member. These people are quietly grateful for what your loved one did for them.

But the legacies of those who have passed, almost uniformly, extend far beyond the assistance they provided to their paying clients. They were volunteers – whether they were providing free legal services to those who could not pay or donating countless hours of valuable time to their communities and their profession. They served churches, schools, and charities. They chaired boards, and they led meetings. They provided wise counsel, and people relied on them for their guidance. In each of their own unique ways, your loved ones left their communities better than they found them.


I was blessed to know some of the lawyers we celebrate today. I know these things to be true of them, and I am certain these things are true of every person we honor here.

So, I encourage you – take a few moments to record your lawyer's legacy. Whatever was on his or her resume is just a fraction of the story.

Write it down – all the contributions they made, all the ways they served, and all the people they impacted in a positive way. Share it with your children and your children's children. Let their legacies of service be an inspiration to your family. Because now more than ever, we need servant leaders in this world.

On behalf of the Alabama State Bar, I thank you for sharing your loved ones with us. We were blessed to have them as members of our profession. And those of us who continue in their footsteps will honor their legacies with a commitment to professionalism and service."

Please help me in fulfilling the promise I made to those families – to honor those who preceded us "with a commitment to professionalism and service." And let us not forget to spend some time each day on building the legacy we wish to leave behind. ▲



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EXECUTIVE DIRECTOR'S REPORT

Terri Lovell
terri.lovell@alabar.org



Each January, it's my tradition to pause and reflect. I believe many of you share this practice – a moment to assess the successes of the past year and pinpoint areas where improvement is needed, in both our personal lives and professional endeavors.

As I delve into the progress of our state bar in the last year, the accomplishments that come to the forefront are those that will steer our efforts and enhance the experiences of our members for years to come.

These include a commitment to financial stewardship that benefits our members and the public. We also implemented our new strategic plan and updated our by-laws, laying the groundwork for a more robust and responsive state bar. Additionally, the engagement initiatives we rolled out last year, like the OutREACH Tour and the #ChooseCivility campaign, are poised to leave a lasting, positive impact on our members and the overall direction of the bar.

Even with the positive momentum, there are still areas that require our continued focus.

The pursuit of excellence in all regulatory functions, fostering meaningful connections with our members and the public, ensuring the well-being of the legal community, and increasing partnerships to address access to justice issues in Alabama remain steadfast priorities.



Alabama
State
Bar

This month, we will host a Bar Leadership Summit in Montgomery. It will bring together local bar leaders, affinity and practice area bar leaders, and Alabama State Bar section chairs and co-chairs. In addition to professional development, we hope this furthers collaborative learning opportunities. I think we all can benefit from sharing experiences, insights, and best practices with our peers. Our hope is that by working together outside of our immediate circles, we will strengthen the profession in Alabama.

This summit coincides with the 25th anniversary celebration of the Alabama State Bar Women’s Section as well as the Mid-Winter Conference for District and Circuit Judges, and we look forward to supporting and attending those events, too.

As we get to work on our goals for 2024, I find myself reflecting on the essence of what truly matters. What do we value, both in our personal lives and within our organization? It’s a question that has guided my thoughts and actions.

You are what we value most, and I want each of you to recognize the immense impact you have on shaping the identity and future of the legal profession.

We are blessed with many leaders in our bar who have a steadfast commitment to service and integrity, and they consistently strive to uphold these values in their actions and decision-making. The commitment of volunteer leaders and a staff who understands these principles is vital to our organization.

This past year, our staff rallied around a powerful vision statement: “Help lawyers be their best so they can best serve others.” It’s a sentiment that summarizes our shared commitment to growth and service. As we step into 2024, our bar staff remains resolute in seeking ways to support and assist you on your unique journeys.

May this new year bring you fulfillment, success, and good health. The strength of our legal community lies not only in our shared values but in our collective commitment to excellence.

Together, we lay the groundwork for a future where leadership and collaboration are the bedrock of a stronger, united profession. ▲

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IMPORTANT NOTICES

- ▲ **Notice of Election and Electronic Balloting**
- ▲ **Notice of and Opportunity for Comment on Amendments to The Rules of the United States Court of Appeals for the Eleventh Circuit**
- ▲ **Alabama Lawyers Hall of Fame**
- ▲ **Judicial Award of Merit**
- ▲ **J. Anthony “Tony” McLain Professionalism Award**
- ▲ **William D. “Bill” Scruggs, Jr. Service to the Bar Award**
- ▲ **Women’s Section Awards**

Notice of Election and Electronic Balloting

Notice is given here pursuant to the Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners that the election of these officers will be held beginning Monday, May 20, 2024, and ending Friday, May 24, 2024.

On the third Monday in May (May 20, 2024), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 3, 2024) requesting a paper ballot. A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 24, 2024) immediately following the opening of the election.

Nomination and Election of President-Elect

Candidates for the office of president-elect shall be members in good standing of the Alabama State Bar as of February 1, 2024 and shall possess a current privilege license or special membership. Candidates must be nominated by petition of at least 25 Alabama State Bar members in good standing. Such petitions must be filed with the secretary of the Alabama State Bar no later than 5:00 p.m. on February 1, 2024.

Nomination and Election of Board of Bar Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits:

2nd Judicial Circuit

4th Judicial Circuit

6th Judicial Circuit, Place 2

9th Judicial Circuit

10th Judicial Circuit, Place 1

10th Judicial Circuit, Place 2

10th Judicial Circuit, Place 8

10th Judicial Circuit, Place 9

12th Judicial Circuit

13th Judicial Circuit, Place 2

15th Judicial Circuit, Place 2

15th Judicial Circuit, Place 6

16th Judicial Circuit

18th Judicial Circuit, Place 2

20th Judicial Circuit

23rd Judicial Circuit, Place 2

23rd Judicial Circuit, Place 4

24th Judicial Circuit

27th Judicial Circuit

29th Judicial Circuit

38th Judicial Circuit

39th Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2024, and vacancies certified by the secretary no later than March 15, 2024. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 26, 2024).

Submission of Nominations

Nominating petitions or declarations of candidacy form, a high-resolution color photograph, and biographical and professional data of no more than one 8 ½ x 11 page and no smaller than 12-point type must be submitted by the appropriate deadline and addressed to Secretary, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101-0671.

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: **1, 3, 4, and 7**. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2024. All terms will be for three years.

Submission of At-Large Nominations

Nominee's application outlining, among other things, the nominee's bar service and other related activities must be submitted by the appropriate deadline and addressed to Executive Council, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101-0671.

All submissions may also be sent by email to elections@alabar.org.

It is the candidate's responsibility to ensure the executive council or secretary receives the nomination form by the deadline.

Election rules and petitions for all positions are available at <https://www.alabar.org/board-of-bar-commissioners/election-information/>.

Notice of and Opportunity for Comment on Amendments to The Rules of the United States Court of Appeals for the Eleventh Circuit

Pursuant to 28 U.S.C. § 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the United States Court of Appeals for the Eleventh



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Circuit. The public comment period is from Monday, December 4, 2023, to Wednesday, January 3, 2024.

A copy of the proposed amendments may be obtained on and after Monday, December 4, 2023, from the court's website at <http://www.ca11.uscourts.gov/rules/proposed-revisions>. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., N.W., Atlanta, Georgia 30303 [phone: 404-335-6100].

Comments on the proposed amendments may be submitted in writing to the Clerk at the above address, or electronically at <http://www.ca11.uscourts.gov/rules/proposed-revisions>, by 5:00 PM Eastern Time on Wednesday, January 3, 2024.

Alabama Lawyers Hall of Fame

May is traditionally the month when new members are inducted into the Alabama Lawyers Hall of Fame, which is located at the state Judicial Building. The idea for a hall of fame first appeared in 2000 when Montgomery attorney Terry Brown wrote state bar President Sam Rumore with a proposal that the former supreme court building, adjacent to the state bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of Alabama.

The implementation of the idea of an Alabama Lawyers Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines, and then provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004.

A 12-member selection committee consisting of the immediate past-president of the Alabama State Bar, a member appointed by the chief justice, one member appointed by each of the three presiding federal district court judges of Alabama, four members appointed by the Board of Bar Commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society, and the executive secretary of the Alabama State Bar meets annually to consider the nominees and to make selections for induction.

Inductees to the Alabama Lawyers Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement – leadership, service, mentorship, political courage, or professional success. Each inductee must have been deceased at least

two years at the time of their selection. Also, for each year, at least one of the inductees must have been deceased a minimum of 100 years to give due recognition to historic figures as well as the more recent lawyers of the state.

The selection committee actively solicits suggestions from members of the bar and the general public for the nomination of inductees. We need nominations of historic figures as well as present-day lawyers for consideration. Great lawyers cannot be chosen if they have not been nominated. Nominations can be made throughout the year by downloading the nomination form from the bar's website and submitting the requested information. Plaques commemorating the inductees are located in the lower rotunda of the Judicial Building and profiles of all inductees are found at www.alabar.org.

Download an application form at <https://www.alabar.org/assets/2023/10/2024-HOF-Nomination.pdf> and mail the completed form to:

Sam Rumore
Alabama Lawyers Hall of Fame
P.O. Box 671
Montgomery, AL 36101-0671

The deadline for submission is March 1.

Judicial Award of Merit

The Alabama State Bar Board of Bar Commissioners will receive nominations for the state bar's Judicial Award of Merit through **March 15**. Nominations should be mailed to:

Terri B. Lovell
Secretary
P.O. Box 671
Montgomery, AL 36101-0671

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation. The award will be presented during the Alabama State Bar's Annual Meeting.

Nominations are considered by a three-member committee appointed by the president of the state bar, which then makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.

J. Anthony “Tony” McLain Professionalism Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the J. Anthony “Tony” McLain Professionalism Award through **March 15**. Nominations should be prepared on the appropriate nomination form available at www.alabar.org and mailed to:

Terri B. Lovell
Secretary
P.O. Box 671
Montgomery, AL 36101-0671

The purpose of the J. Anthony “Tony” McLain Professionalism Award is to honor the leadership of Tony McLain and to encourage the emulation of his deep devotion to professionalism and service to the Alabama State Bar by recognizing outstanding, long-term, and distinguished service in the advancement of professionalism by living members of the Alabama State Bar.

Nominations are considered by a five-member committee which makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

William D. “Bill” Scruggs, Jr. Service to the Bar Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the William D. “Bill” Scruggs, Jr. Service to the Bar Award through **March 15**. Nominations should be prepared on the appropriate nomination form available at www.alabar.org and mailed to:

Terri B. Lovell
Secretary
P.O. Box 671
Montgomery, AL 36101-0671

The Bill Scruggs Service to the Bar Award was established in 2002 to honor the memory of and accomplishments on behalf of the bar of former state bar President

Bill Scruggs. The award is not necessarily an annual award. It must be presented in recognition of outstanding and long-term service by living members of the bar of this state to the Alabama State Bar as an organization.

Nominations are considered by a five-member committee which makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Women’s Section Awards

The Women’s Section of the Alabama State Bar is accepting nominations for the following awards:

Maud McLure Kelly Award

This award is named for the first woman admitted to practice law in Alabama and is presented each year to a female attorney who has made a lasting impact on the legal profession and who has been a great pioneer and leader in Alabama. The Women’s Section is honored to present an award named after a woman whose commitment to women’s rights was and continues to be an inspiration for all women in the state. The award will be presented at the Maud McLure Kelly Luncheon at the Alabama State Bar Annual Meeting.

Susan Bevell Livingston Leadership Award

This Women’s Section award is in memory of Susan Bevell Livingston, who practiced at Balch & Bingham. The recipient of this award must demonstrate a continual commitment to those around her as a mentor, a sustained level of leadership throughout her career, and a commitment to her community in which she practices, such as, but not limited to, bar-related activities, community service and/or activities which benefit women in the legal field and/or in her community. The candidate must be or have been in good standing with the Alabama State Bar and have at least 10 years of cumulative practice in the field of law. This award may be given posthumously. This award will be presented at a special reception.

Submission deadline for both awards is **March 15**.

Please submit your nominations to jbuettner@birminghambar.org. Your submission should include the candidate’s name and contact information, the candidate’s current CV, and any letters of recommendations. If a nomination intends to use letters of recommendation previously submitted, please note your intentions. ▲



The Prosecutor's Duty to Help the Defense Make Its Case

By Gregory M. Varner

Most prosecutors likely agree with Judge Learned Hand that “a criminal defendant already ha[s] too many advantages over the state. . . .”¹

While the American criminal system does provide those accused of crimes with certain cherished privileges, in one important area, prosecutors have an inordinate advantage: the production of discovery to the accused. And prosecutors jealously guard the contours of that privileged position, often seeking expansion of it.²

That Learned Hand quote, perhaps aptly, is found in the official commentary to the Alabama Rules of Criminal Procedure on discovery. The discovery rules in Alabama generally restrict the ability of a criminal defendant to learn about the government's case against them. Unlike the civil defendant, the criminal defendant is somewhat at the mercy of the prudence, good faith, and diligence of the opposing counsel.

A comparison of the two systems reveals the extent of this disparity. Even in a district civil case, the rules provide the civil defendant

with tools such as interrogatories, requests for production, and requests for admission. A civil defendant can demand the plaintiff's witness list and, in most civil cases, take depositions of any and all parties and witnesses.

Not so for the person accused of a crime, even a serious one like murder³ or rape. Alabama is one of 13 states that provides criminal defendants with the least discovery in the nation.⁴ The criminal defendant is only entitled to items specifically delineated in Rule 16 of the ARCP: a narrow set of statements by the defendant or co-defendants, a narrow set of physical things and documents, and a narrow set of results from tests and experts.⁵ As slim as that list is, Rules 16.1(c)(1) and 16.1(e) further limit the prosecutor's obligation to produce by excluding a broad range of materials: amongst other things, witness lists and witness statements. No comparative tools of civil discovery exist: no interrogatories and certainly no depositions in the ordinary case.⁶ If a prosecutor can ambush the defense at trial with a surprise witness or a defendant's inculpatory statement to a private citizen, the current rules fully allow that tactic.⁷

Nevertheless, those same Rules include this provision in Rule 16.1(f):

Nothing in this Rule 16.1 shall be construed to limit the discovery of exculpatory material or other material to which a defendant is entitled under constitutional provisions or other provisions of law.

One such constitutional provision is the Due Process Clause of the United States Constitution. It

provides the criminal defendant with a wedge of powerful authority to pry from prosecutors something more about their case.⁸ The seminal case interpreting the clause is *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, because prosecutors withheld evidence that an accomplice confessed to the actual killing, the Supreme Court held that the defendant did not receive a fair trial. "Under *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment."⁹ Such evidence is known colloquially as "*Brady* material."

But there is great ignorance of (1) what actually constitutes *Brady* material and (2) what duties of prosecutors arise from *Brady*. A study by the Innocence Project of Santa Clara University School of Law found *Brady* violations to be "among the most pervasive forms of prosecutorial misconduct."¹⁰ Research also reveals that *Brady* violations are a principal cause of wrongful convictions of innocent persons.¹¹

Ignorance of The Definition Of *Brady* Material

Many jurists, prosecutors, and even criminal defense attorneys underappreciate that *Brady* material includes more than exonerating evidence. Rather, *Brady* holds that the prosecution must disclose

any information or material that is: (1) material; (2) relevant to guilt or punishment; (3) favorable to the accused; and (4) within the actual or constructive knowledge or possession of anyone acting on behalf of the State.¹²

Several implications from this definition are often disregarded by prosecutors.

First, *Brady* material extends to information outside the prosecutor's case file.¹³ If "anyone acting on behalf of the State" has "information or material" that is "favorable and material," the Constitution requires timely production to the defense. So even if the information has not found its way into the prosecutor's actual

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possession but is only in an investigator's notebook (or even just in their mind), *Brady* requires disclosure.¹⁴

Second, *Brady* obligations apply to favorable information that the defense could use either during the “guilt or punishment” phase of a case.¹⁵ If law enforcement learns of information during an investigation that may not affect guilt of the defendant but could impact the defendant's sentencing, that information should be produced. For instance, the fact that a criminal defendant was impaired at the time of the offense might not impact his criminal guilt, but certainly could affect his culpability for sentencing arguments.¹⁶

Third, when viewed retrospectively, “material information” is anything that could “in any reasonable likelihood . . . affect the judgment of the jury” or judge at any phase of the criminal process.¹⁷ Evidentiary “trustworthiness or admissibility” is irrelevant.¹⁸ And *Brady* material encompasses any evidence that is “‘favorable to the defense’ even if the jury might not afford it significant weight.”¹⁹ The prosecutor should not be in the business of weighing the importance of the favorable information or making evidentiary decisions on its admissibility.²⁰

Fourth, any information relevant to the credibility of a prosecutor's witness falls under *Brady*.²¹ The Supreme Court expressly included impeachment material in *Giglio v. United States*. Therefore, any inconsistent statements made by a witness during the course of the investigation should be made known to the defense. Similarly,

changes in a witness's statements (even if not reduced to writing) made pretrial when compared to the witness's testimony at trial are under the *Brady* rule.²² This *Brady/Giglio* principle further extends to any information of a witness's prior dishonesty or bias or physical/mental impairment, or anything else that can be used for impeachment.²³

Fifth, *Brady* mandates an ongoing obligation that begins at the initiation of the criminal proceedings. Accordingly, *Brady* applies to every phase of the criminal process: from bond hearings to preliminary hearings, from pretrial suppression hearings to sentencing. Due Process demands disclosure of any and all *Brady*-type information that could be used by the defense at that particular point of the process. “Timing is critical to proper *Brady* disclosure.”²⁴ From early in the process: Prosecutors might need to divulge information that could provide arguments for a reduction in bond. Or until late in the proceedings: New *Brady* obligations may arise during trial. For instance, the 11th Circuit Court of Appeals found that a prosecutor had violated *Brady* by failing to correct representations he made to a jury that were damaging to the defendant's duress argument, despite learning before the finish of the trial that they were false.²⁵

Sixth, prosecutors must produce any information that tends to cast doubt on the admissibility of their evidence. Accordingly, information that might assist (or even just make the defense aware of issues regarding) the pretrial suppression of evidence must be disclosed.²⁶

Seventh, any information that might suggest the defendant may be only guilty of a lesser included crime is also required to be produced.²⁷ Or evidence (even if from an anonymous phone call)²⁸ that might support an affirmative defense like insanity²⁹ or self-defense³⁰ or provide the identity of any alternative suspects³¹ falls under the *Brady* doctrine.

Finally, *Brady* even applies to ambiguously favorable information. For instance, *Brady* extends to evidence of mistaken, negligent, or even incomplete police work. The Supreme Court opined that such evidence can raise “opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. . . . Indications of conscientious police work will enhance probative force [of the prosecution's evidence] and slovenly work will diminish it.”³²

Ignorance of Duties of Prosecutor Concerning *Brady* Material

More significant though is the ignorance of the actual duties of prosecutors resulting from *Brady*. Few prosecutors see themselves having any duty to help the defense; they see themselves as zealous advocates for their case only, seeking justice against the criminal.

However, the Supreme Court of the United States disagrees.

“By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model.”³³

Most prosecutors probably chaff at this doctrine of constitutional law and the implications flowing from it. The Court sees, perhaps naively yet idealistically, that the prosecutor’s role is beyond that of an adversary: they are “the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”³⁴

How does the prosecutor assist the defense in making its case? It begins with a non-delegable duty to investigate and seek out material and information that is favorable to the defense’s case in all its various aspects.

In *Kyles v Whitley*, 514 US 419, 437 (1995), the Supreme Court held that “[a] prosecutor’s *Brady* disclosure obligation is not limited to information of which a prosecutor has actual knowledge. **Rather, a prosecutor has a non-delegable duty to learn of *Brady* information in the case.**”³⁵ The prosecutor has “a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”³⁶

The prosecutor, diligent for the dictates of *Brady*, will ferret out potential *Brady* material from everyone involved in the investigation. The prosecutor, faithful to Due Process, does not rely upon what has made it into their case file. In fact, that prosecutor will

not even be content to know what has made it into the investigator’s case file. If there is favorable information, even if only in the mind of anyone on the prosecutorial team, they will seek it out.³⁷

The prudent prosecutor will not expect law enforcement officers or investigators to know or understand what *Brady* material actually is. The prosecutor cannot delegate that screening responsibility to anyone; it is “non-delegable.” And the prosecutor will not merely limit his or her investigation to the lead investigator or arresting officer. The prosecutor will seek potential *Brady* material from everyone in the prosecutor’s “entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture.”³⁸ This might include DHR or federal agents or drug task force officers or even jailors.

The current system countenances an implicit conflict of interest for prosecutors. As Justice Blackmon, in dissent, identified in *Bagley*:

At best, this standard places on the prosecutor a responsibility to speculate, at times without foundation, since the

prosecutor will not normally know what strategy the defense will pursue or what evidence the defense will find useful. At worst, the standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive.

While this assessment probably describes the reality, current doctrine still relies upon the prudence of the prosecutor:

When it is uncertain whether information is favorable or useful to a defendant, “the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.”³⁹

There is no good faith exception for prosecutors either. If the suppression of evidence by prosecutors results in constitutional error, “it is because of the character of the evidence, not the character of the prosecutor.”⁴⁰ To the extent a prosecutor fails to adequately and diligently seek out *Brady* material in each and every case, justice is not done. “[T]he aim of due process


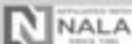

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‘is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.’”⁴¹

The obligations imposed on the prosecutors by the Constitution are, indeed, substantial. And these duties apply the same for every single misdemeanor case as they do for a capital murder case. By way of exemplar for minimal standards, the U.S. Department of Justice maintains a memorandum for its prosecutors entitled *Guidance for Prosecutors Regarding Criminal Discovery* in meeting the demands of *Brady and Whitley* including sections on “Where to Look” and “What to Review.”⁴² How powerful would it be to ask in open court or in a motion filed in the case whether the prosecution has complied with what the Department of Justice thinks of as its minimal standards?

Defense Lawyer’s Responses to The Broken System

Because of this system’s reliance on the good-will of prosecutors, despite their conflicting interests, the criminal defense attorney must zealously guard the right of their clients to a fair process. This requires continual diligence throughout the course of the case and use of the tools that the rules and Constitution provides.

First, make specific, as well as, broad *Brady* requests. Do not rely

upon a basic motion for discovery. Tailor your *Brady* requests to the specific facts of the case. But also make broader requests for common locations of *Brady* material. Do this even though a prosecutor has *Brady* obligations when faced with “merely a general request” or when “there has been no [defense] request at all.”⁴³

Second, ask early and continuously throughout the process. Under *Pennsylvania v. Ritchie*, the obligations of the prosecutors to pursue *Brady* material and their duty to disclose are ongoing.⁴⁴

Third, ask the court to compel a formal response from the prosecutor. “When the prosecutor receives a specific and relevant [*Brady*] request, the failure to make any response is seldom, if ever, excusable.”⁴⁵

Fourth, don’t let the prosecutors hide *Brady* disclosures. In the words of one federal court, “[t]he Government cannot meet its *Brady* obligations by providing . . . 600,000 documents and then claiming that [the defendant] should have been able to find the exculpatory information”)

Fifth, seek a special *Brady* order from the state trial court under its powers of Rule 16.5⁴⁶ and modeled after the federal rules. Those federal rules were amended in 2020 by legislation⁴⁷ to require federal trial courts to establish specific orders, at the outset of the case, specifying *Brady/Whitley* obligations within their courtrooms. Congress developed the amendment following the unjust prosecution of Senator Ted Stevens. After the ultimate dismissal of the charges, a specially-appointed

prosecutor, targeting the trial prosecutors ultimately:

did not recommend bringing criminal contempt charges against any of the prosecutors due to what he concluded was *a deficiency in the judge’s orders*. One might say that the prosecutors got lucky. Significantly, [the special prosecutor] found that the investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systematic concealment of exculpatory evidence which would have independently corroborated Senator Stevens’ defense and his testimony, and seriously damaged the testimony and credibility of the government’s key witness.⁴⁸

Include in the request that the court order prosecutors to produce *Brady* material within 14 days of the request, consistent to basic discovery obligations in Rule 16.

Finally seek an order from the trial court requiring the prosecutor to certify his or her compliance with *Brady* and *Whitley* at each phase.

Conclusion

These substantial constitutional burdens exist because, in criminal law, actual life, liberty, and property are at stake for those targeted by the incredible power and apparatus of the government. In *Brady*, the Supreme Court reminded prosecutors that:

An inscription on the walls of the Department of Justice states the proposition candidly . . . :

‘The United States wins its point whenever justice is done its citizens in the courts.’


The same is true for the State of Alabama. ▲

Endnotes

1. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923), cited in the commentary to Ala. R. Crim. P. 16.1.
2. E.g. *Ex parte State*, 259 So. 3d 683 (Ala. Crim. App. 2017) (prosecutors sought to disable district court judges from ordering basic discovery to a criminal defendant).
3. In capital murder cases, per *Ex Parte Monk*, 557 So. 2d 832 (Ala. 1989), judges can order “open file” discovery from prosecutors.
4. Legal Aid Society of New York City, Criminal Discovery Reform in New York: A Proposal to Repeal CPL Article 240 and to Enact a New CPL Article 245 (2009); Wayne R. LaFave et al., Criminal Procedure §20.2(b), n.31 (3d ed. updated Dec. 2012).
5. Rule 16.1 of the Ala. R. Crim. P.
6. Rule 16.6 of Ala. R. Crim. P. does authorize depositions “whenever, due to the exceptional circumstances of the case, it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at trial . . .” However, Rule 16.6 depositions are extremely rare and are not a tool for discovery.
7. *Pilley v. State*, 930 So. 2d 550 (Ala. Crim. App. 2005).
8. *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996); *U.S. Const. amend XIV*.
9. *Smith v. Cain*, 556 U.S. 73 (2012); *Brady v. Maryland*, 373 U.S. 83 (1963).
10. Ridolfi, Kathleen M.; Possley, Maurice; and Northern California Innocence Project, Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009 (2010). Northern California Innocence Project Publications. Book 2.
11. Bennett L. Gershman, Bad Faith Exception to Prosecutorial Immunity for Brady Violations, Amicus, Aug. 10, 2010.
12. *Wilson v. State*, 874 So. 2d 1155 (Ala. Crim. App. 2003).
13. *Ibid*.
14. *Duncan v. State*, 575 So. 2d 1198 (Ala. Crim. App. 1990).
15. *Spivey v. Head*, 207 F.3d 1263 (11th Cir. 2000); *United States v. Newton*, 44 F.3d 913 (11th Cir. 1994).
16. *Cone v. Bell*, 129 S.Ct. 1769, 1783–86 (2009); *Cone v. Bell* (No. 07-1114) 492 F.3d 743, vacated and remanded.
17. *Giglio v. United States*, 405 U.S. 150, 154 (1972).
18. *US v Triumph Capital Group, Inc.*, 544 F3d 149, 162; *Ex Parte Brown*, 548 So.2d 993, 994 (Ala. 1989).
19. *Lambert v. Beard*, 537 Fed. Appx. 78, 86 (3d Cir. 2013).
20. *Ex Parte Dickerson*, 517 So. 2d 628 (Ala. 1987).
21. *West Virginia v. Youngblood*, 547 U.S. 867 (2006).
22. *Brown v. State*, 545 So. 2d 106 (Ala. 1988).
23. *Banks v. Dretke*, 540 U.S. 668, 702-03 (2004); *Wilson v Beard*, 589 F3d 651, 660–62 (CA 3, 2009); *Bennett v. United States*, 797 A.2d 1251, 1255-58 (D.C. 2002).
24. See *United States v. Peters*, 732 F.2d 1004, 1008-09 (1st Cir. 1984).
25. *US v Alzate*, 47 F3d 1103, 1110 (11th Cir. 1995).
26. *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990); *Nuckols v. Gibson*, 233 F.3d 1261, 1266-67 (10th Cir. 2000); *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000).
27. *Cone*, 129 S.Ct. at 1783-86.
28. *Patton vs. State*, 530 So.2d 886 (1988).
29. *US v Spagnuolo*, 960 F2d 990, 993–95 (11th Cir. 1992).
30. *Savage v. State*, 600 So.2d 405 (1992).
31. *Bradley v. State*, 494 So.2d 772 (1985); *Patton vs. State*, 530 So.2d 886 (1988).
32. *Kyles v. Whitley*, 514 U.S. 419 (1995).
33. *United States v. Bagley*, 473 U.S. 667 (1985).
34. *Id.* at 676 n.6 (1985) quoting *Berger v. United States*, 295 U.S. 78, 88 (1935).
35. *Kyles* at 437.
36. *Id.* at 437.
37. *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007).
38. *Smith v. Secretary of N.M. Dep’t of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995); *States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995).
39. *Cone* 129 S.Ct at 470 n.15.
40. *United States v. Agurs*, 427 U.S. 97, 103 (1976).
- 4q. *Smith v. Phillips*, 455 U.S. 209, 219 (1982).
42. Memorandum to Department Prosecutors. <https://www.justice.gov/archives/jm/criminal-resource-manual-165-guidance-prosecutors-regarding-criminal-discovery>.
43. *Agurs* 427 U.S. at 106-07.
44. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987); Ala. R. Crim. P. Rule 16.3.
45. *Agurs*, 427 U.S. at 106; *Ex Parte Womack*, 541 So. 2d 47 (Ala. 1988).
46. The court may specify the time, place, and manner of making the discovery and inspection and may prescribe such terms and conditions as are just. Ala. R. Crim. P. Rule 16.5.
47. Due Process Protections Act, Pub. Law 116-182, 134 Stat. 894 (Oct. 21, 2020).
48. Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary House of Representatives, 112th Congress, Second Session, April 19, 2012, Serial No: 11-106. <https://www.govinfo.gov/content/pkg/CHRG-112hhrg73861/html/CHRG-112hhrg73861.htm>.

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Preserving the Record for Appeal: Tips and Pitfalls

By J.D. Lloyd, Robert H. Matthews, III, and Alisha L. McKay

An appellate practitioner is tied to the trial record.

If something does not appear in the record, it did not happen for purposes of appeal. So, make sure everything appears on the record.

That seems simple enough. But even when an objection appears in the record, a motion in limine is filed, or an argument is made, the intended issue is not necessarily preserved for appeal. Instead, the rules governing issue preservation

dictate that objections must be properly timed, grounds must be stated, and an adverse decision must be memorialized, among other nuanced rules that are not always intuitive. And our appellate courts do not shy away from refusing to address an arguably unpreserved issue on appeal.¹

Issue preservation has been and always will be the key to success on appeal. Today, the need to preserve the record is greater than ever even in our most serious cases with the now discretionary application of plain error review to death

cases.² Certainly, issue preservation is easier said than done considering the pressures of trial practice. But we hope the following tips and pitfalls can assist the trial practitioner in preserving the record for appeal.

The Nuts and Bolts Of Issue Preservation

The general principle of issue preservation is that our appellate courts will only address issues timely and properly raised in the trial court.³ As the Alabama Court of Criminal Appeals often puts it: “[T]o preserve an issue for appellate review, it must be presented to the trial court by a timely and specific motion setting out the specific grounds in support thereof. . . . An issue raised for the first time on appeal is not correctly before this court.”⁴

The ground or grounds stated for the objection at the trial level binds the appellate practitioner to the same previously raised ground as “[t]he statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial.”⁵

And the purpose of this specifically timed objection? It is to allow the lower court notice of the issue and an opportunity to correct it.⁶

But what do these timing and specificity requirements mean in the context of cases resolved by a guilty plea, at trial, and in the probation revocation context? Each of these scenarios offer different considerations for purposes of issue preservation.

Considerations in Plea Cases: Issue Preservation Versus Issue Reservation

There are limited ways to avoid the guilty plea waiver on direct appeal.⁷ “An issue raised on an appeal from a guilty plea must be preserved by an objection, a motion to withdraw the plea, or a motion for a new trial.”⁸ As with all properly preserved issues, they must first be brought to the trial court’s attention.⁹

One area of possible confusion deals with reserving and preserving issues for appeal in plea cases. In the case of a guilty plea, the defendant can avoid the normal guilty plea waiver rule by “expressly reserv[ing] the right to appeal with respect to a particular issue or issues.”¹⁰

Simply put, reserving an issue for appeal means placing the trial court on notice that the defendant intends to appeal a particular issue *before* the defendant enters their guilty plea.¹¹

Practically speaking, the trial practitioner makes a record during the plea hearing that a specific issue will be appealed prior to the defendant’s guilty plea. In addition to making the appropriate record at the plea hearing, however, a diligent trial attorney can also memorialize the reserved issue on any plea agreement filed with the trial court. If applicable, they can also ensure that the standard form felony sentencing order appropriately reflects that an issue has been preserved for appeal.¹²

While making a specific record of the reserved issue is by far the preferred method to ensure that the guilty plea waiver rule does not prevent an appeal, our caselaw recognizes a limited exception. That is when the record, taken as a whole, demonstrates the trial court understood that the defendant had reserved an issue for appeal.¹³ As an example, in *Mullins v. State*, the Alabama Supreme Court held that the record overall indicated a reserved issue based on the trial court’s comments at the conclusion of the plea hearing, sentencing, and at a plea withdrawal hearing.¹⁴ Thus, based on all of the court’s comments on issue reservation, the record demonstrated that the court understood that the defendant intended to appeal a suppression issue.¹⁵ But this search of the record for a “pre-plea reservation of the right to appeal” as *Ex parte Mullins* put it, is the exception not the rule.¹⁶

Properly reserving the issue is just one of the two necessary steps to overcome the guilty plea waiver rule for appeal. Take, for example, *Mitchell v. State*.¹⁷ There, at the plea hearing, trial counsel made a record that the defendant intended to appeal the interpretation of a drug manufacturing statute.¹⁸ Counsel also memorialized the reserved issue on the plea agreement.¹⁹ All good, right? Not the case. Instead, the Alabama Court of Criminal Appeals refused to address the reserved issue indicating that “Mitchell never presented [the] issue . . . to the trial court before reserving it for appeal.”²⁰ As the court of criminal appeals succinctly put

it, “[r]eserving the right to appeal an issue is not the equivalent of *preserving* an issue for appellate review. To *preserve* an issue for appellate review, the issue must be timely raised and specifically presented to the trial court and an adverse ruling obtained.”²¹

Thus, both steps must be taken to properly pursue an issue on appeal following a guilty plea: (1) raise the issue to the trial court and obtain an adverse ruling and (2) place the trial court on notice of the intent to appeal the issue before the defendant enters their guilty plea.²² For example, in the context of a Fourth Amendment issue, this means that counsel needs to do three things: (1) file a motion to suppress; (2) get a ruling on the motion; and (3) properly reserve the issue before the client pleads guilty.

Preserving the Record at Trial

There are four basic considerations in preserving the record at trial: (1) object on the record;²³ (2) make the objection timely, preferably before the objectionable evidence is introduced;²⁴ (3) state specific grounds;²⁵ and (4) obtain an adverse ruling.²⁶

In addition to these four basic considerations, the circumstances of trial and the issue in play often dictate additional considerations for preserving the record.

Objecting on the record would seem to be a simple task during trial. But as any experienced practitioner knows, this is not always the case. Sidebars are often a necessary occurrence during a trial to flesh out objections without engaging in the type of speaking objections that judges despise. During these sidebars, defense counsel often asserts their grounds to an objection and the trial court may make findings or a ruling outside the earshot of the court reporter.

Remember, if it does not appear in the record, it did not occur for the purposes of appeal.²⁷ This means that unless the court reporter was party to the sidebar, your carefully crafted argument is unknown for purposes of appeal.²⁸ Sidebars must be recounted on the record as soon as possible – typically the next time that the jury is not in the courtroom.

The timeliness of objections is also key to issue preservation. In general, an objection must be made as soon as the grounds are apparent.²⁹ This means that when, for example, an objection comes after a witness

has already responded to an objectionable question, nothing has been preserved for appeal.³⁰ The only way to remedy this is both to object and to move to strike the witness’s response to the objectionable question.³¹

Take, for example, a not so uncommon exchange from *Gross v. State*, between the prosecution and the defendant’s alibi witness:

[State:] How long have you known this defendant, Tommy Gross? How long have you known him?

A. Well, I have known him ever since he has got [sic] out of jail.

(Defense Counsel): I object.

THE COURT: Well, it was responsive.³²

In the above example, the State’s question was not objectionable. However, the witness’s response drew an objection. But as the Alabama Court of Criminal Appeals stated: “Since defense counsel did not move to exclude the witness’s response, it was properly before the jury.”³³

The *Gross v. State* exchange also suffers from two additional problems that demonstrate the third and fourth general considerations for issue preservation at trial: no specific grounds were stated, and the circuit court avoided ruling on the objection. Saying, “I object” at trial preserves nothing for appeal.³⁴ Instead, specific grounds for the objection must be stated.³⁵ And recall that the specifically stated grounds for the objection waive all possible other grounds.³⁶

This is particularly important for objections to Rule 404(b) evidence. Objections to Rule 404(b) evidence need to be as comprehensive as possible and based on both the text of Rule 404(b) and caselaw interpreting the Rule and its requirements.³⁷ Because the specific objection waives all other arguments and “the appellant is bound by the specific objections made at trial and cannot raise new grounds on appeal, an objection that proffered evidence is inadmissible because it does not meet an acceptable purpose under Rule 404(b) does not preserve arguments that the evidence is necessary to the government’s case; unduly and unfairly prejudicial; plain, clear, and conclusive; and answers a real and open issue for an acceptable purpose.”³⁸

Thus, when multiple grounds for an objection exist, stating all possible grounds opens possibilities on appeal that otherwise do not exist when just one ground is stated. Finally, the appellate courts will not review

any issue unless an adverse decision from the trial court appears in the record.³⁹ So, the response in *Gross* of “Well, it was responsive[.]” fails to meet the adverse ruling requirement as well.

In addition to these four general principles of issue preservation at trial, there are several other pitfalls to avoid in the trial court:

Insufficient proffers of excluded evidence:

The substance of any excluded evidence must appear in the record on appeal.⁴⁰ Ideally, trial counsel would not only submit the excluded evidence, but would also specifically argue the significance of the excluded evidence to the defense case. Trial counsel can ensure that excluded evidence makes it into the appellate record usually by presenting a witness’s testimony outside the presence of the jury, proffering the substance of a witness’s testimony, or submitting the excluded exhibit (think pictures, audio, and video evidence) as a court’s exhibit to be included in the record.

Failure to renew objections at trial:

A pretrial ruling on a motion in limine will generally not preserve anything for appellate review.⁴¹ As the Alabama Supreme Court put it, “unless the trial court’s ruling on the motion *in limine* is absolute or unconditional, the ruling does not preserve the issue for appeal.”⁴² As an example, consider a trial court’s pretrial ruling on the State’s motion to introduce Rule 404(b) evidence over defense objection. The safest route to ensure issue preservation is to object at trial to the Rule 404(b) evidence at the time the State starts to admit it. Only if trial counsel has “obtained express acquiescence of the trial judge that such subsequent objection to evidence proffered at trial and assignment of grounds are not necessary[.]” should an objection at trial be foregone.⁴³

Insufficient and late objections to jury instructions:

Often, specifically requested jury instructions are not filed in the case and thus do not appear in the record.

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This can pose a problem if the specific language of a denied instruction is not read into the record during the charging conference. Thus, the best practice is to file all requested instructions in the circuit court to ensure a complete record on appeal. In addition, an argument in favor of a requested charge on grounds that the charge is merely a correct statement of the law does not preserve anything for appeal.⁴⁴ Instead, trial counsel's argument in favor of a requested charge must be specific to the facts of the case.⁴⁵ Finally, all objections to jury instructions must be made before the jury retires to deliberate.⁴⁶

Insufficient record on *Batson*⁴⁷ claims:

At the outset, the timing of a *Batson* objection is specifically addressed in the caselaw and requires trial counsel to object "after the peremptory strikes have been made, *but prior to the jury's being sworn.*"⁴⁸ In addition to this timing consideration, the strength of any *Batson* claim depends on a carefully supported claim and a record that contains clear information on characteristics of the panel and the struck jurors whether they relate to race, gender, religion, or national origin. Remember that the juror seating chart and jury list with biographical information won't appear in the appellate record unless specifically entered as a court's exhibit. This means that trial counsel must make special efforts to include this information, make sure that the juror numbers and corresponding identifying information is in the record, and make a highly detailed record considering all circumstances relevant to the challenged strike pattern or disparity.

Preserving the Record at Probation Revocation Hearings

The rules of issue preservation all generally apply to probation revocation hearings.⁴⁹ There are, in fact, just three issues in the probation revocation context that can be raised on appeal even without an objection in the trial court.⁵⁰ These include: (1) an adequate written order on revocation, (2) that a revocation hearing actually be held, and (3) failure to advise a defendant of his right to request an attorney for the revocation proceedings.⁵¹ Constitutional issues such as lack of procedural due process must be properly preserved to be raised on appeal.⁵²

As for some issues to watch for and preserve in probation revocation cases, consider that the Alabama Court of Criminal Appeals frequently reverses revocation determinations based on the State's presentation of hearsay alone.⁵³ Thus, while hearsay is admissible in probation revocation proceedings,⁵⁴ the State must submit non-hearsay evidence to specially connect the defendant to an alleged new offense.⁵⁵ At the close of the evidence and in argument in support of continuing probation, trial counsel must specifically make this argument when applicable to allow appellate review.

If an argument is not made at the close of evidence, consider filing a motion to reconsider probation revocation to raise the issue to the trial court. However, as a practical pointer, a motion to reconsider probation revocation does *not* stay the 42-day deadline to file the notice of appeal, which starts running from the court's oral ruling on revocation.⁵⁶

Post-Trial Motions And Other Considerations

After trial and sentencing, the defendant has 30 days to file a motion for new trial.⁵⁷ But generally, issues raised for the first time in a motion for new trial are insufficient to preserve the claim for appeal. The Alabama Court of Criminal Appeals explains it this way:

[A] new trial will not be granted for matters pertaining to rulings, evidence, or occurrences at a trial, including erroneous conduct on the part of the court, counsel, or jury, unless timely and sufficient objections, requests, motions, or exceptions have been made and taken. Any grounds which might have been afforded by such matters are presumed to have been waived, except where such matters were unknown to applicant until after verdict and could not have been discovered by the exercise of reasonable diligence, and except in instances of fundamental errors which of themselves invalidate the trial.⁵⁸

Take note, however, that claims of insufficient evidence or weight of the evidence can be raised in a motion for new trial to preserve these issues for appeal.⁵⁹

Moreover, issues of ineffective assistance of trial counsel (IATC) can be raised in a motion for new trial to preserve these issues for direct appeal. However, counsel should be extremely wary in raising IATC at this early and almost certainly premature phase. Because the 30-day deadline to file a motion for new trial cannot be extended, the transcripts are almost never available before the motion for new trial is due. And a 30-day period is too limited to properly investigate IATC claims. Clients should almost always be advised that IATC claims are improper, perhaps even detrimental, at this stage and must be raised only in a timely Rule 32 Petition.⁶⁰

Finally, on a procedural sticking point, the Alabama Rules of Criminal Procedure dictate that a timely motion for new trial is denied by operation of law if not decided within 60 days from the oral pronouncement of sentence.⁶¹ If a hearing is necessary on the claims raised in the motion for new trial and the denial by operation

of law deadline is approaching, this decision deadline can be extended only by “express consent of the prosecutor and the defendant’s attorney” on the record to a “date certain.”⁶² The denial by operation of law date needs to be carefully monitored by counsel as the 42-day deadline to file a notice of appeal starts running as soon as the motion for new trial is denied.⁶³

Conclusion

Preserving the record on appeal is something of an art form. It requires deep knowledge of the rules of issue preservation, attention to detail, and quick and specific objections. We hope this piece provides a refresher for the seasoned practitioner and a jumping off point for the newer attorney. An appeal is only as strong as the trial record and that depends largely on defense counsel’s tenacity in the trial court. ▲

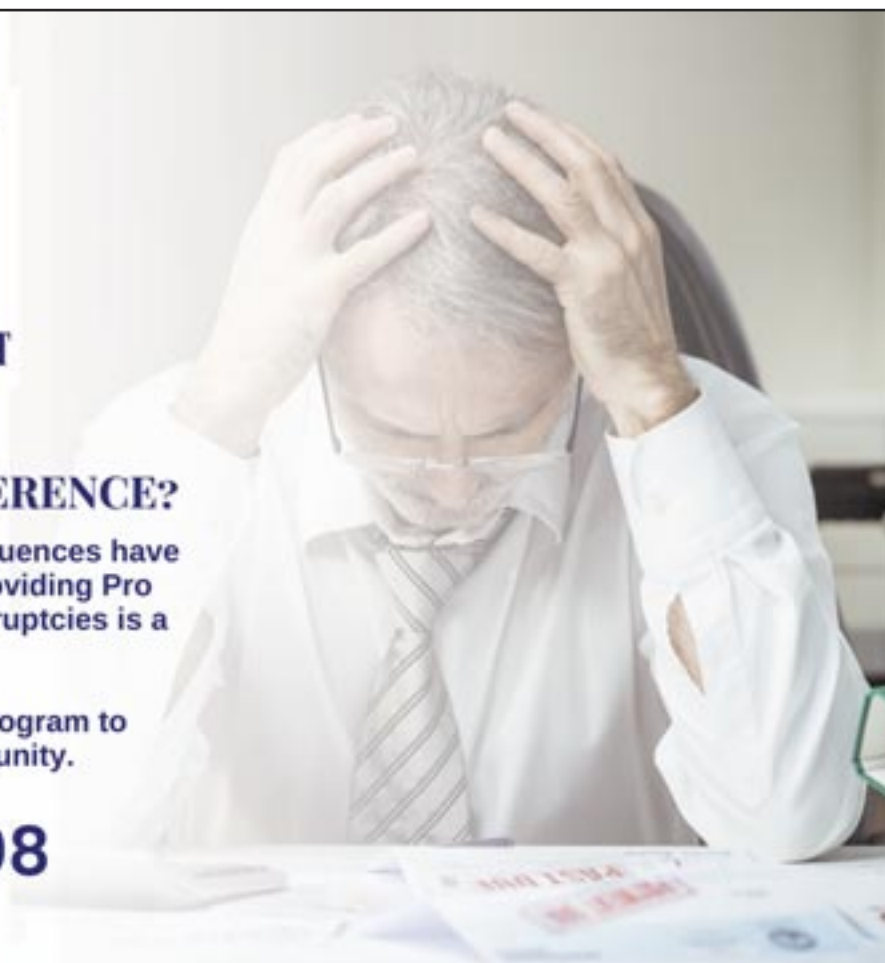


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Endnotes

1. A Westlaw search using the terms and connectors “not /s preserved” reveals more than 2,000 cases (over 1,400 of those from the Alabama Court of Criminal Appeals) involving unpreserved issues.
2. Rule 45, Ala. R. App. P. (effective January 12, 2023); *see also Iervolino v. State*, __ So. 3d __, 2023 WL 5316682 at *5 (Ala. Crim. App. Aug. 18, 2023) (addressing changes to Rule 45 and the Alabama Court of Criminal Appeals’ approach to plain error review).
3. *Ex parte Coulliette*, 857 So. 2d 793, 794 (Ala. 2003) (“Review on appeal is restricted to questions and issues properly and timely raised at trial.”).
4. *McKinney v. State*, 654 So. 2d 95, 99 (Ala. Crim. App. 1995) (quoting *Buice v. State*, 574 So. 2d 55, 57 (Ala. Crim. App. 1990)).
5. *Ex parte Frith*, 526 So. 2d 880, 882 (Ala. 1987) (citing *State v. Holloway*, 307 So. 2d 13 (1975)); *Murray v. State*, 494 So. 2d 891 (Ala. Crim. App. 1986)).
6. *Ex parte Works*, 640 So. 2d 1056, 1058 (Ala. 1998) (citing *Jennings v. State*, 558 So. 2d 540, 541 (Ala. Crim. App. 1991)).
7. *Watkins v. State*, 659 So. 2d 688, 689 (Ala. Crim. App. 1994) (“[W]e have held that a defendant may waive his right to appeal as part of a negotiated plea agreement so long as he is fully advised of its implications and he voluntarily agrees to enter into the agreement.”). For a discussion of how the guilty plea waiver does not bar review of the voluntariness of the waiver, the voluntariness of the plea, or issues of ineffective assistance of counsel *see Love v. State*, 365 So. 3d 344, 346-48 (Ala. Crim. App. 2022).
8. *Cochran v. State*, 808 So. 2d 1226, 1227 (Ala. Crim. App. 2000) (citing *Willis v. State*, 500 So. 2d 1324, 1324 (Ala. Crim. App. 1986)).
9. *See id.* (quoting *Anderson v. State*, 668 So. 2d 159, 162 (Ala. Crim. App. 1995)).
10. Rule 14.4(a)(1)(viii), Ala. R. Crim. P.
11. Rule 26.9(b)(4), Ala. R. Crim. P.
12. *See* State of Alabama, Unified Judicial System Felony Sentencing Order, Section VIII, available at <https://eforms.alacourt.gov/media/mmjfxnac/felony-sentencing-order.pdf>.
13. *Ex parte Mullins*, 920 So. 2d 589 (Ala. 2005).
14. *Id.* at 590.
15. *Id.*
16. *See id.*
17. *Mitchell v. State*, 913 So. 2d 501 (Ala. Crim. App. 2005).
18. *Id.* at 504.

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19. *Id.* at 503-04.
20. *Id.* at 504.
21. *Id.* at 505.
22. *Id.*
23. Rule 103, Ala. R. Evid.
24. *Id.*
25. *Id.*
26. *Click v. State*, 695 So.2d 209, 227 (Ala. Crim. App. 1996).
27. *Jefferson v. State*, 449 So.2d 1280, 1282 (Ala. Crim. App. 1984) (“If counsel makes objections and secures rulings ‘off the record,’ this court cannot consider those rulings. If the trial court hears objections and makes rulings in side-bar conferences only, then the court reporter must be a party to the side-bar conference if the actions of counsel and the court are to be recorded. Our review is limited to matters of record.”).
28. *See Russell v. State*, 272 So.3d 1134, 1165 (Ala. Crim. App. 2017) (quoting *Jefferson*, 449, So. 2d at 1282).
29. *Hinson v. King*, 603 So.2d 1104, 1105 (Ala. Civ. App. 1992) (citing *Macon Cnty. Comm. v. Sanders*, 555 So.2d 1054 (Ala. 1990)).
30. *Cassady v. State*, 563 So.2d 53, 53 (Ala. Crim. App. 1990) (quoting *Davis v. Southland Corp.*, 465 So.2d 397, 402 (Ala. 1985)).
31. *Gross v. State*, 395 So.2d 485, 487-88 (Ala. Crim. App. 1981) (quoting *Willingham v. State*, 74 So.2d 241 (Ala. 1954)).
32. *Id.*
33. *Id.* at 488.
34. *See Langford v. State*, 312 So.2d 65, 69-70 (Ala. Crim. App. 1975).
35. *Id.*
36. *See supra* note 5.
37. *See Floyd v. State*, 289 So.3d 337, 395-404 (Ala. Crim. App. 2017) (discussing the requirements for 404(b) evidence to be admissible in general and as applied to *Floyd*).
38. *Id.* at 396-98; *Chapman v. State*, 196 So.3d 322, 329 (Ala. Crim. App. 2015).
39. *Click*, 695 So.2d at 227 (quoting *Hudgins v. State*, 65 So.2d 1297, 1299 (Ala. Crim. App. 1993)).
40. Rule 103(a)(1), Ala. R. Evid.
41. *Perry v. Brakefield*, 534 So.2d 602, 606 (Ala. 1988) (quoting *Robinson v. Kierce*, 513 So.2d 1005, 1009 (Ala. 1987)).
42. *Id.*
43. *Id.* (quoting *Robinson*, 513 So.2d at 1009).
44. *Knight v. State*, 710 So.2d 511, 513 (Ala. Crim. App. 1997) (“The ground that a jury instruction is a correct statement of the law is insufficient to preserve an objection to the trial court’s refusal to give the instruction.”).
45. *Id.*
46. *Johnson v. State*, 168 So.3d 163, 167 (Ala. Crim. App. 2014).
47. *Batson v. Kentucky*, 476 U.S. 79 (1986).
48. *Williams v. State*, 530 So.2d 881, 884 (Ala. Crim. App. 1988) (emphasis in original).
49. *Puckett v. State*, 680 So.2d 980, 983 (Ala. Crim. App. 1996) (*Taylor v. State*, 600 So.2d 1080, 1081 (Ala. Crim. App. 1992)).
50. *Evans v. State*, 794 So.2d 1234, 1236-37 (Ala. Crim. App. 2000).
51. *Id.* at 1236-37.
52. *Id.* at 1236.
53. *See Glasscock v. State*, ___ So.3d ___, 2023 WL 1935341 (Ala. Crim. App. Feb. 10, 2023).
54. *Beckham v. State*, 872 So.3d 208, 211 (Ala. Crim. App. 2003); *see also* Rule 1101(b)(3), Ala. R. Evid.
55. *Glasscock*, 2023 WL 1935341 at *2.
56. *Wank v. State*, 18 So.3d 972, 973 (Ala. Crim. App. 2009).
57. Rule 24.1(b), Ala. R. Crim. P.
58. *Fuller v. State*, 365 So.2d 1010, 1012 (Ala. Crim. App. 1978).
59. *Zumbado v. State*, 615 So.2d 1223, 1241 (Ala. Crim. App. 1993) (also addressing other proper methods to preserve a sufficiency of the evidence claim).
60. *See Ex parte Ingram*, 675 So.2d 863, 866 (Ala. 1996) (doing away with extensions of time for newly appointed counsel to investigate IATC for the motion for new trial).
61. Rule 24.4, Ala. R. Crim. P.
62. *Id.*
63. *Ex parte Holderfield*, 255 So.3d 743, 744 (Ala. 2016).

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Cross-Examination of the Forensic Gold Standard for DNA Testing

By Samantha C. Spencer

DNA (deoxyribonucleic acid) analysis has long been labeled the gold standard of forensic testing by the court.

While I acknowledge the scientific process of DNA testing as the pinnacle of scientific rigor when employed correctly by qualified scientists, certain aspects of the process can be shown to fall short of the objectivity necessary to be considered a scientific standard. To be considered a scientific standard, a method or technique must survive scrutiny and peer

reviews. DNA analysis fits into the section of a crime laboratory called forensic biology. This unit is typically separated into two parts: serology and DNA analysis.

Serology is the study of body fluids, and most forensic labs focus on identifying blood, semen, and saliva through screening, color change, and immunological tests. Body fluids are known to contain higher quantities of DNA making the downstream steps of DNA analysis much easier. Once a body fluid has been identified, the item is subjected to DNA analysis which is composed of five steps: extraction, quantitation, amplification, separation, and interpretation. The

first four parts of this process are where the science happens. Scientists use chemicals and instruments to produce DNA profiles from evidentiary samples and potentially known samples. These techniques are used throughout the scientific community in research and diagnostic labs.

The final step, interpretation, is unique to the field of forensics, and where the process loses the gold standard label. Developing a mixture profile, or a DNA profile with more than one individual, is extremely common for most evidence submitted to forensic labs. Mixtures are the crux of sexual assault matters, so much so that an extraction technique was developed to attempt to separate the male and female portion of a sample, sometimes referred to as the sperm fraction and the non-sperm fraction. Due to the increased sensitivity of chemistries and instruments and increased requests to sample for trace DNA (not touch DNA – a topic for a whole other conversation), labs see mixtures of two to five individuals in routine casework. Trace DNA refers to the amount of DNA present and does not imply an action that causes DNA to be present on that item of evidence.

For scientists, sensitivity is a double-edged sword. On one side, we have more data, which means we can potentially use this data to identify more perpetrators or provide more information to investigators and the court. More data also equates to better statistical calculations that can provide more weight to our conclusions. This data helps analysts assist in revealing more of the truth using science. On the

other side, it leads to many questions about how well we can confidently and accurately identify an individual.

Mixture interpretation – especially of four or more individuals – has always been a subjective aspect of the forensic biology process and fails to survive adequate scrutiny by peers. As the chemistries and

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instrumentation sensitivities continue to become more sensitive, the subjectivity of interpreting the results increases. This subjectivity is well-documented. One such study was completed by the National Institute of Standards and Technology (NIST) which issued a report on the findings in 2018. In this study, they compared two interlaboratory studies named MIX05 and MIX13.¹ These studies reflect the years in which

they were performed, 2005 and 2013, respectively, and compare the protocols and procedures of labs across the United States on how they interpreted mixture profiles. The labs were given multiple DNA mixture profiles of two, three, or more persons (meaning it could be 3 or 4 or 5, or more) and known standards to compare with these profiles. Then each lab provided conclusions based on their standard operating procedures.

If you are still determining whether subjectivity is a part of DNA analysis, here is your answer. For a single lab included in this study, when the responses were reviewed for one scenario in MIX13, 50 percent of the analysis effectively said, “I don’t know” [inconclusive], 30 percent of the analysts said, “He’s not there” [excluded], and 20 percent of the analysts said, “He’s not only in the mixture, but I can exclude greater than 99.9 percent of the population” [match]. This implies that presenting favorable or unfavorable DNA results to a person of interest may depend on which analyst in the lab processes the evidence. Should this be considered a gold standard? This study expresses that this study does not provide a full view of the day-to-day activities within a lab and the results may not have undergone normal casework requirements (such as undergoing a technical review, or multiple analysts working together).

How can we move toward solving this issue if there is no way to establish a set protocol for each and every forensic lab using different chemistries and instrumentation? The best answer

we have right now is probabilistic genotyping (PG) software. The MIX05 and MIX13 study states “We are encouraged by the developments of probabilistic software systems...”¹ PG software uses biological modeling, statistical theory, computer algorithms, and probability distributions to infer genotypes (DNA profiles) and likelihood ratios. The software uses the files generated by the separation step of DNA analysis, or all the data that is used to produce a picture of a DNA profile (called an electropherogram), and deconvolutes the profile. This deconvolution, or process of determining the possible contributors in the profile, occurs using a statistical method called Markov chain Monte Carlo (MCMC) that relies on random sampling to find the genotypes that best explain the composition of the mixture DNA profile. This software removes some of the subjectivity of interpretation by employing validated biological modeling that can include specific data from the lab. However, if this software processes a sample twice, it will not provide the exact same answer but will be clustered around that best-fit answer.

Currently, two well-known companies have produced software that forensic labs are taking advantage of in casework. They both work on the same mathematical principles described above and can deconvolute mixtures of more than five individuals. Both have been presented at trials in multiple states in the U.S. and accepted in admissibility hearings. PG

software allows analysts to harness all the data produced in the scientific process and apply well-studied and mathematical sound calculations to provide a more objective, unbiased, and accurate view of mixture profiles. Although this software is a move in the right direction, it is a *tool* that must be used aptly and after proper training and validation have been completed.

As an attorney, why should you care about this study, PG, and the subjectivity in forensic biology? It comes down to two essential things: voir dire and cross-examination. The findings from this study specifically highlight the need for improved training and striving for consistency.

When preparing for a trial, you must obtain as much information about the analyst as possible, including their training record, proficiency test results, and personnel files, along with the entire case file. If they have issues with their casework, it will be present in these documents. If their training record states nothing about mixture interpretation in the past two to three years, you need to press them on what they are doing to prevent this subjectivity. Ask them if they have participated in any training in PG and if the lab is moving forward to validate and bring on this software for casework. Don’t be afraid to get them to dig deep into their conclusions during cross-examination. Simply reading the report to the jury provides just the tip of the iceberg of the data they collected. Remember, that report is the result of five steps. All forensic scientists should be able

to answer questions about their entire process. Furthermore, they should be up to the task of relaying this information in a manner that can be understood by you, the court, and the jury. Even if the lab does not employ PG, they should have a basic knowledge of what this software is capable of and what information it could provide. That is their duty when they climb onto the stand and are deemed expert witnesses. As the attorney, you must ensure they are held to this standard and reveal this subjectivity so that a jury is fully aware of the standards in forensic biology. Although subjectivity will never be fully removed from the forensics field, all criminal law system participants must strive to ensure we decrease it as much as humanly possible. ▲

Endnote

1. Butler, J. M., Kline, M. C., & Coble, M. D. (2018). NIST interlaboratory studies involving DNA mixtures (MIX05 and MIX13): Variation observed and lessons learned. *Forensic Science International: Genetics*, 37, 81–94. <https://doi.org/10.1016/j.fsigen.2018.07.024>.

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Leggett, Triston William	Nour, Zina	Sik, Joshua Shane *	Trigg, Marshal
Loftin, Jordan Elizabeth	O'Grady, Eireann	Sikes, John Mitchell	Tucker, Melissa Elise
Love, Tanner Austin	Oehl, Nathaniel Fisk *	Simpson, Sandy C	Tucker, Andrew Bascom
Lovell, Jeffrey Dwaine *	Oliver, Matthew Gregory	Sims, Angel Maria	Turner, Madeline
Lyn, Julianne Bethany	Overing, Robert M. *	Sims, Hunter Layne	Turney, Miles
Magda, Teodora Alexandra *	Pack, Laura Kathryn	Sims, Rachel Marie	Underwood, Leonard Elmo III
Mann, Trenton Harrell	Parker, Hannah Trece	Sims, Emily Glass	Walker, William *
Mansfield, Trent Alexander	Patterson, Grantham	Sinclair, Kaitlyn Ann	Walters, Macy Margaret
Martinson, Douglas Claude III	Peacock, Ashley Jana'e *	Smith, Clytisha Gena'	Washington, Jaleel Da'Marcus
Mathews, Caroline Price *	Pease, Jack Flournoy	Smith, Dean Reagan	Waters, Victoria Talbot
Mauldin, Dylan Lynn	Perkins, Kyra	Smith, Harrison Franklin	Watkins, John Jacob *
Mayz, Constanza	Pfizer, Sarah Anne *	Smitherman, Phillip Jackson	Watts, James Whitt
McBride, Elizabeth Newman	Pickens, Daniel Shawn	Snellgrove, Diana Joan	Weinacker, Robert M IV
McCrary, Walker Harrison	Pilkington, Cherri Talese *	Spidle, Anna Marie	Weiss, Louisa Davenport Chafee
McDonald, Baylee Meadows	Plowman, Olivia Rheann	Spooner, Stuart George *	White, Abigail Willis
McGee, Alyssa	Pollock, Benjamin H	Spoor, Brennan Austin	White, Hayley
McGill, Sharon Kaye	Pope, Caroline Elizabeth	Stanley, Benjamin Allen	White, Joanna Renita
McKendry, Robert	Pope, Christopher Lee *	Steele, James Robert Mitchell	Whitney, Janey Lauren
McLeroy, Meghan	Prestwood, Richard R	Steen, Rebecca Taylor	Williams, Kayla Rose
McNab, Megan Nicole *	Purdue, Jillian Miller	Stephens, Heather Lee	Williams, Joshua Graham
Meldrum, McKenna Jo	Quick, Alexander Parker	Stepp, Amber Lynn	Williams, Freddie Lee II
Menefee, Andrew *	Ramaswamy, Rebecca Rose	Stone, Clayton Blackner	Woelke, Adam Kristopher
Meter, Arjen James	Ramos, Roxana Lopez *	Strickland, Belinda May*	Wood, Brett *
Mitchell, James Sidney Lanier	Reiersen, Samantha Elisa	Szymanski, Michael Dylan	Yarbrough, Tyler Elaine
Mitchell, Sidney Erin	Resnick, Gabrielle Victoria *	Talley, Hunter	Young, Lindsey Rene
Monzon, Claire Alise-Culp *	Richardson, Ford Edwin	Tapley, Philip Anthony Jr. *	Zeller, J Elliott
Moore, Meredith Raye	Rock, Madeline Alexandria	Taylor, William Edwin III	Zickafoose, Danielle Jordan
Mordecai, Palmer Austin	Roush, Jackson Van Wellington	Terry, William Bennett Davis *	Zotaj, Courtney R.

* Deficient in one or more category (MPRE, AL Course, Character & Fitness Certification)
 Deficiency notations current as of Thursday, September 28, 2023

LAWYERS IN THE FAMILY



Melissa Elise Tucker (2023) and
Laura Hays Pearson (1997)
Admittee and mother



Meghan Ruth McLeroy (2023) and
Darren Todd McLeroy (1992)
Admittee and father



Taylor Steen (2023) and
Ronn Steen (1996)
Admittee and father



Chloe Dasinger (2023), Michael Dasinger (1991),
Sharon Hoiles (1984), and Thomas Dasinger (1995)
Admittee, father, grandmother, and uncle



William Powell Burgess, III (2023), C. Gregory Burgess (1995),
W. Graham Burgess (2004), and William Powell Burgess, Jr. (1973)
Admittee, father, uncle, and grandfather



John Mitchell Sikes (2023) and
John Douglas Cates (1965)
Admittee and grandfather



James E. Cory (2023) and
Ernie Cory (1981)
Admittee and father



Jordan E. Loftin (2023) and
G. Bartley Loftin (1991)
Admittee and father

LAWYERS IN THE FAMILY



Caroline Price Mathews (2023), William G. Mathews (1989),
and William G. Mathews, Jr. (2022)
Admittee, father, and brother



Alex Gressett (2023), Cindy Fuhrmeister (1981),
Jim Fuhrmeister (1978), and Susan Smith (1990)
Admittee, grandmother, grandfather, and mother-in-law



Matthew C. Shumate (2023) and
Amy M. Shumate (1992)
Admittee and mother



Daniel Shawn Pickens (2023) and
Martin Joseph Humble (2003)
Admittee and uncle



Ragan Tolar (2023) and
Gregory E. Tolar (1994)
Admittee and father

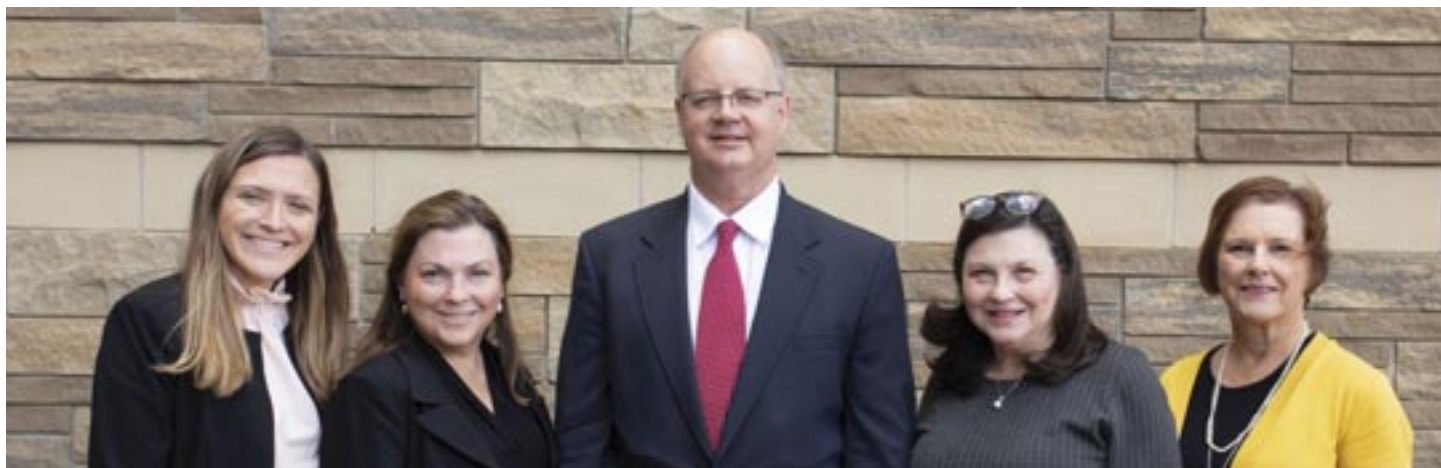


Clay Martinson (2023), Doug Martinson, II (1989), and
Mac Martinson (1991)
Admittee, father, and uncle



Anna Katherine Sherman (2023), Kathy Sherman (1996), and
Judge Michael Sherman (1995)
Admittee, mother, and father

LAWYERS IN THE FAMILY



Victoria Waters (2023), Judge Shelly Slate Waters (1989), Judge Bill Cook (ret.) (1987), Beth Slate Poe (1983), and Cindy Slate Cook (1987)
Admittee, mother, uncle, aunt, and aunt



Kaitlyn Ann Sinclair (2023) and
Tom Sinclair (1999)
Admittee and father



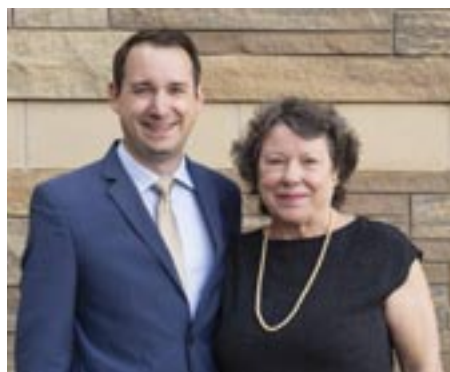
Caleb T. Chancey (2023) and
Richard L. Chancey (1994)
Admittee and father



Callie Moss Shearer (2023) and
Buzzy Riis (1985)
Admittee and stepfather



Kyra Devan Perkins (2023) and
Byron R. Perkins (1989)
Admittee and father



Seton William Parsons (2023) and
Elizabeth Skinner Parsons (1981)
Admittee and mother



Ford Edwin Richardson (2023) and
Robert Ford Richardson (1991)
Admittee and father

LAWYERS IN THE FAMILY



Harrison Smith (2023) and
Buddy Smith (1986)
Admittee and father



Meredith Hall (2023) and
Bruce Hall (1978)
Admittee and father



Carol Graffeo (2023) and
Tony Graffeo (1995)
Admittee and father



Margaret Garrett Canary (2023) and
Leura Garrett Canary (1981)
Admittee and mother



Murphy McCullen Barze (2023) and
R. Bruce Barze, Jr. (1992)
Admittee and father



Robert Yeilding Ezell (2023) and
Mark Edward Ezell (1980)
Admittee and father



Hunter Ashton Hanks (2023) and
Judge Jeff T. Brock (ret.) (1991)
Admittee and father-in-law



Jeffery Kyle Kelley (2023) and
Judge Jeff W. Kelley (1990)
Admittee and father



Griffith Hawk (2023) and
Judge Howard Griffith Hawk (1983)
Admittee and father

LAWYERS IN THE FAMILY



Robert Duncan Johnston, III (2023), Robert Duncan Johnston, Jr. (1982), and Mollie Penick Johnston (1982)
Admittee, father, and mother



Sarah Hammitte (2023) and Judge Mark Hammitte (1997)
Admittee and uncle



Marjorie Milham Head (2023), J. Frank Head (1983), Judge Oliver P. Head (ret.) (1956), and G. Dan Head (2003)
Admittee, father, grandfather, and uncle



Robert M. Weinacker, IV (2023) and Robert M. Weinacker, III (1986)
Admittee and father



Harold Wayne Morris (2002), Alexandria Faye Jackson (2023), and Keith Jackson (1999)
Uncle, admittee, and uncle



Sidney Mitchell (2023), Judge Shannon Mitchell (1991), and Joe Wiley Mitchell (2021)
Admittee, father, and brother



YOUNG LAWYERS' SECTION UPDATE

Christopher B. Driver
cdriver@badhambuck.com



The Young Lawyers' Section (YLS) is gearing up for its annual Orange Beach CLE on May 16-19 at the Perdido Beach Resort. If you are a young lawyer, I urge you to attend. The Orange Beach CLE is a great event focused on the professional development of young lawyers. Typically, we offer around six hours of CLE credit, including an ethics hour.

The most valuable benefit that we offer, however, is the ability to connect with other young lawyers from around the state. Developing a network and socializing with colleagues is more important now than ever. Many of today's young lawyers have spent significant portions of their careers working, earning CLE credit, and networking remotely. The flexibility of working from home or marketing yourself online is great, but connecting on LinkedIn is no substitute for really getting to know someone over drinks on the beach. We have social events every night that will help you build those connections, while also having fun in the process. I hope that you will consider attending the Orange Beach CLE, and if you are not a young lawyer but work with one, I hope that you will encourage your firm to send your younger colleagues.

If you have any questions, please reach out to me or Wesley Smithart (wsmithart@lightfootlaw.com), and be on the lookout for details on Instagram ([@asbyounglawyers](https://www.instagram.com/asbyounglawyers)), on the Alabama State Bar website (<https://www.alabar.org/about/sections/young-lawyers/>), or in an email from me.

Since the last YLS Update in September, the section has been busy. Together with the admissions office and the Alabama Supreme Court, we hosted the Admissions Ceremony and welcomed many new young lawyers into our profession. The YLS also participated in a virtual clinic with our friends at the Volunteer Lawyers Program where we answered questions on Alabama's Free Legal Answers website. If you are interested in participating in these or any programs with the YLS, please reach out to me anytime. ▲



▲ Henry Herold Self, Jr.

Henry Herold Self, Jr.

Hank Self of Florence, a proud member of our state bar for 48 years and a Fellow of the American College of Trial Lawyers, died at home surrounded by his loving family, on his 73rd birthday, July 19, 2023, after a brave battle with cancer. Hank was a brilliant attorney, gifted athlete, loving husband and son, and great father and brother.

Hank was born in Florence on July 19, 1950. He was a graduate of Coffee High School, where he was captain of the 1967 football team. He was named to the Alabama High School Football 4A All-State Team as well as the Super All-State Team. He earned a football scholarship to Auburn University. At Auburn, Hank was a member of Pi Kappa Alpha fraternity and served as vice president. He was also a member of Alpha Epsilon Delta, Auburn's pre-medical honor society. He received a Bachelor of Arts degree from Auburn University in 1972.

Hank continued his studies at the University of Alabama School of Law, where he earned his Juris Doctorate in 1975. After graduation, he practiced with Rosser & Munsey and John D. Clement Law Firm in Tuscumbia before founding Self & Self Law Firm with his brother Gil in 1988, which was selected into the 2000 Martindale-Hubbell's Bar Registry of Preeminent Lawyers. Hank had a distinguished career as a trial lawyer representing plaintiffs in products liability, personal injury, and medical malpractice cases. He was a fierce advocate for his clients. He was admitted to practice before the Alabama Supreme Court as well as the U.S. Court of Appeals, Fifth and Eleventh circuits.

Hank was certified as a Civil Trial Advocate by the National Board of Trial Advocacy, was a member of the Association of Trial Lawyers of America as well as the Colbert and Lauderdale County Bar associations, served as the president of the Colbert County Bar Association, and was a member of the Executive Committee of the Alabama Trial Lawyers Association for well over a decade. Hank earned the honor of being named a Fellow of the American College of Trial Lawyers, composed of preeminent members of the trial bar from the United States and Canada. Less than one percent of the total lawyer population is eligible for membership.

*Self*

Hank met his wife, Laura Jane, while they were in junior high school. They married on March 25, 1972. After graduate school, they returned to Florence and raised their three children at historic Woodlawn, a horse and cattle farm. He was a proud member of the Lauderdale County Cattlemen's Association.

Hank retired from the practice of law in 2000. In retirement, he travelled the world with his family. He never missed an opportunity to spend time with his children and grandsons.

Hank was in awe of the beauty and wonder of the natural world. He spent most days rowing and watching wildlife on his beloved Tennessee River and most nights on his deck looking up at the stars. He had a lifelong obsession with the

pursuit of knowledge, continually studying history, science, philosophy, and literature. He never quit learning.

Above all else, Hank's greatest joy and purpose was being a father.

Hank is survived by his beloved wife of 51 years, Laura Jane; a daughter, Caroline; two sons, Wesley (Shea) and Neil; two grandsons, Henry Wakefield and Doran; a brother, Gil; a sister, Sue Raines (Bill); and a number of nieces and nephews. Hank was preceded in death by his parents, Coach Hal and Shirley Self, and grandparents Iva Mae and Auburn Porterfield Williams and Lottie Belle and John Gilbert Self. ▲

—Bob Rogers, Russellville, and Kitty Rogers Brown, Birmingham

John Dabney Clement, Jr.

Muscle Shoals
Died: October 25, 2023
Admitted: 1961

Annette Brashier Crain

Tuscaloosa
Died: October 16, 2023
Admitted: 1988

Clayton Keith Davis

Ozark
Died: October 14, 2023
Admitted: 1978

Emily Dawn Geary

Athens
Died: December 22, 2023
Admitted: 2019

Hon. John David Jolly (ret.)

Russellville
Died: November 21, 2023
Admitted: 1963

Stephen Gary Jordan

Rockland, ME
Died: June 17, 2023
Admitted: 1988

Frederick Moore McCormic, III

Selma
Died: December 14, 2023
Admitted: 1971

Hon. Randel Hood Mullican (ret.)

Moulton
Died: November 26, 2023
Admitted: 1979

Faith Ann Pate Nixon

Daphne
Died: October 20, 2023
Admitted: 2004

Tara Lynn Rose

Prattville
Died: November 28, 2023
Admitted: 2020

Kimberly Ann Ryberg

Huntsville
Died: December 26, 2023
Admitted: 1995

Robert Earl Sasser

Montgomery
Died: December 13, 2023
Admitted: 1970

Joel Lee Sullivan, III

Decatur
Died: November 25, 2023
Admitted: 1998

Albert Craig Swain

Huntsville
Died: September 18, 2023
Admitted: 1977

Thomas Jackson Tate, Jr.

Birmingham
Died: October 9, 2023
Admitted: 2021

Matthew Stephen Wisda

Huntsville
Died: November 7, 2023
Admitted: 2012



Marc A. Starrett

Marc A. Starrett is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.



J. Thomas Richie

J. Thomas Richie is a partner at Bradley Arant Boulton Cummings LLP, where he co-chairs the class action team. He litigates procedurally-complex and high-stakes matters in Alabama and across the country. Richie is a 2007 summa cum laude graduate of the Cumberland School of Law and former law clerk to the Hon. R. David Proctor of the United States District Court for the Northern District of Alabama.

RECENT CRIMINAL DECISIONS From the 11th Circuit Court Of Appeals

Untimely Notice of Appeal

***United States v. Phillips*, No. 22-13572 (11th Cir. Nov. 22, 2023)**

A defendant's notice of appeal must be filed within 14 days after the entry of judgment, and the government's motion to dismiss the appeal was not untimely. The government may object to the timeliness of an appeal for the first time in a responsive brief, and here the government objected before filing its brief.

AEDPA; State Court Factual Findings

***Washington v. Att'y Gen.*, No. 21-13756 (11th Cir. Nov. 8, 2023)**

After initially reversing the district court's denial of relief in this capital murder case, the Eleventh Circuit Court of Appeals granted rehearing and affirmed the district court's judgment. Citing *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025 (11th Cir. 2022), it found that under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, the Alabama state courts could have reasonably rejected the defendant's claim that his attorney failed to present the state's mid-trial plea offer to him.

Deprivation of Rights Under Color of Law

***United States v. Burks*, No. 22-10566 (11th Cir. Sept. 29, 2023)**

The court affirmed the defendant's conviction under 18 U.S.C. § 242 arising from his employment as a correctional officer and failure to intervene to protect an inmate against another officer's excessive force. Rejecting the defendant's challenge to the sufficiency of the evidence, the court found that "he had the duty and opportunity to intervene and...the video evidence and corroborating witness testimony supported the government's contention that he knew he had an obligation to intervene and chose not to."

From the Alabama Supreme Court

Speedy Trial

***Ex parte State (v. Dennis)*, No. SC-2023-0146 (Ala. Nov. 17, 2023)**

The Alabama Supreme Court reversed the dismissal of the defendant's capital murder indictment for lack of a speedy trial. It first held that for purposes of presumed prejudice under the factors set forth by *Barker v. Wingo*, 407 U.S. 514 (1972), only four

and one-half years of the delay was attributable to the state's negligence, rather than the entire eight-year period between indictment and trial. Because this was less than five years, there was no presumed prejudice. In the absence of presumed prejudice or proof of actual prejudice, the defendant failed to show that his right to a speedy trial was violated.

From the Alabama Court of Criminal Appeals

Assault; Split Sentence Act

Walker v. State, No. CR-2022-1377 (Ala. Crim. App. Nov. 3, 2023)

The court of criminal appeals affirmed the defendant's second-degree assault conviction under Ala. Code § 13A-6-21, finding that she failed to preserve her argument on appeal – that the state failed to prove that she intended to cause physical injury to the victim – because her motion for a judgment of acquittal referenced only a failure to prove causation. However, it remanded for resentencing because the split portions of the defendant's sentence failed to comply with the Split Sentence Act, Ala. Code § 15-8-8, as it was written at the time of the offense.

Right to Counsel; Motion to Withdraw Guilty Plea

Barksdale v. State, No. CR-2022-1273 (Ala. Crim. App. Nov. 3, 2023)

A motion to withdraw a guilty plea is a critical stage of the criminal proceeding that requires either representation by counsel or a valid waiver of counsel. For that reason, the court of criminal appeals remanded for the trial court to determine whether the defendant was either represented by counsel or voluntarily waived his right to counsel at the time he moved to withdraw his guilty pleas to sodomy and sexual abuse.

Municipal Pretrial Appeal of Dismissal

Town of Brookside v. Rowser, No. CR-2022-0505 (Ala. Crim. App. Nov. 3, 2023)

The court of criminal appeals first held that a municipality is authorized to seek appellate review of a pretrial dismissal of its charges under Ala. R. Crim. P. 15.7. It then reversed the municipal court's judgments that, before trial, dismissed charges against several defendants based on a "lack of credibility and public trust of the Brookside Police Department under previous police leadership[.]" The Alabama Rules of Criminal Procedure provide no pretrial means to dismiss a defendant's charges based on the insufficiency of the evidence.



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Hon. R.A. "Sonny" Ferguson <i>raferguson@csattorneys.com</i> (205) 250-6631	Hon. James M. Russell <i>mack@mackrussell.com</i> (334) 399-2558
Hon. J. Langford Floyd <i>floydmediation@gmail.com</i> (251) 610-1001	Hon. James H. Sandlin <i>judge@jimmysandlin.com</i> (256) 319-2798
Hon. Dave Jordan <i>dave@schreiberadr.com</i> (251) 867-7724	Hon. Ron Storey <i>ron@storeyfirm.com</i> (334) 793-7635
Hon. John Lockett <i>johnlockett2020@gmail.com</i> (251) 656-6629	Hon. Edward B. Vines <i>evinesattorney@yahoo.com</i> (205) 586-0222
Hon. Charles "Chuck" R. Malone <i>chuck@malonenelson.com</i> (205) 349-3449	Hon. J. Scott Vowell <i>jsv@scottvowell.com</i> (205) 214-7320

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THE ALABAMA LAWYER

(Continued from page 43)

Ala. R. Evid. 404 (b)

Webb v. State, No. CR-21-0143 (Ala. Crim. App. Nov. 3, 2023)

The trial court did not abuse its discretion in admitting evidence that the defendant was charged as a “peeping Tom” after he was caught looking into the victim’s window while masturbating; this was relevant to show his motive in the instant prosecution for burglary, assault, and witness intimidation. The court acknowledged the longstanding proposition that “[e]vidence tending to establish motive is always admissible.”

Probation Revocation

Wright v. State, No. CR-2022-1057 (Ala. Crim. App. Oct. 27, 2023)

The trial court did not err in revoking probation; the evidence was sufficient to show, to the trial court’s reasonable satisfaction, that the probationer committed first-degree burglary in violation of Ala. Code § 13A-7-5. The probationer’s appellate argument against the sufficiency of the state’s delinquency report was not first presented to the trial court, and because it does not fall within the few exceptions to the preservation rule applicable to probation revocation proceedings, it was not subject to appellate review.

Sexual Abuse; Forcible Compulsion

Zink v. State, No. CR-2022-0919 (Ala. Crim. App. Sept. 22, 2023)

The evidence was sufficient to support the jury’s determination of forcible compulsion in finding the defendant guilty of first-degree sexual abuse in violation of Ala. Code § 13A-6-66. Regardless of his claim that he did not threaten his female victim, at the time of the offense the defendant – the 12-year-old victim’s babysitter – was 19 years old, and he was physically much larger than the victim. He touched the inside of her thighs and her “private area” and attempted to kiss her, but she moved away from him. These actions, combined with the defendant’s authority over the victim, differences in age and size, and other circumstances supported a finding of forcible compulsion.

Voluntary Absence from Trial; Use of Child Victim’s Out-Of-Court Statement

C.B.R. v. State, No. CR-2022-0738 (Ala. Crim. App. Sept. 22, 2023)

The trial court did not abuse its discretion in conducting the trial on the defendant’s sodomy and sexual abuse charges in his absence, because defense counsel acknowledged that he had “ample notice that today was the day and to be here this morning,” and when he appeared at sentencing, he provided no explanation for his absence. The trial court also did not abuse its discretion in admitting the victim’s out-of-court statement despite the defendant’s claim

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that he was not provided notice that it would be used at trial. The Child and Protected Person Physical and Sexual Abuse, and Violent Offense Victim Protection Act, Ala. Code § 15-25-30 et seq., allows the admission of out-of-court statements of children less than 12 years of age if timely notice is given and the defendant has an opportunity to prepare a response. The state provided the statement to the defendant before trial, and that act alone was sufficient to put him on notice that it intended to use the statement at trial; this satisfied the Act's notice requirement.

Rejection of Plea Agreement; Recusal

Ex parte State (v. Ridgeway), No. CR-2022-0966 (Ala. Crim. App. Sept. 22, 2023)

After granting the defendant a new trial on his capital murder charge, the trial court did not abuse its discretion in rejecting a felony murder plea agreement after he proclaimed his innocence at the plea hearing. It also did not abuse its discretion in denying the State's motion to recuse, because "frustration with a judge – even '[u]nderstandable frustration' – does 'not form a basis for granting a recusal,'" and there was no showing of bias. ▲



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ASSOCIATE LICENSED COUNSELOR UNDER THE SUPERVISION OF CAROL J. WHITE, LPC-S, SUPERVISING COUNSELOR



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NOTICE

DISCIPLINARY NOTICES

▲ Disbarment

▲ Suspension

Notice

- **Allen Charles Jones**, who practiced in Phenix City and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of this publication, or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 2023-434, 2023-687, and 2023-843 before the Disciplinary Board of the Alabama State Bar. [ASB Nos. 2023-434, 2023-687, and 2023-843]

—Alabama State Bar Disciplinary Board

Reinstatement

- Montgomery attorney **William Clay Teague** was reinstated to the practice of law in Alabama on October 20, 2023, per notation of the Alabama Supreme Court. Teague petitioned to be transferred to inactive status and the petition was granted, effective March 15, 2023. On September 11, 2023, Teague petitioned for reinstatement to the practice of law in Alabama and was subsequently reinstated by notation of the Supreme Court of Alabama, effective October 20, 2023. [Rule 28, Pet. No. 2023-1303]

Suspensions

- Mobile attorney **Patrick Mattox Hyndman** was suspended from the practice of law in Alabama for 91 days, pursuant to Rule 8(b), Alabama Rules of Disciplinary Procedure, by the Disciplinary Board of the Alabama State Bar. The Disciplinary Board ordered the suspension to be held in abeyance and that Hyndman be placed on probation for two years, effective October 12, 2023. While on probation, Hyndman is ordered to enroll in and complete the Practice Management Assistance Program within 30 days.

In ASB No. 2021-1123, the Disciplinary Board found Hyndman guilty of violating Rules 1.4 [Communication] and 8.4(c) and (g) [Misconduct], Alabama Rules of Professional Conduct. Hyndman was ordered to make restitution to the client. The Disciplinary Board determined that Hyndman undertook to represent a client on an estate matter in December 2020. While representing the client, Hyndman informed the client on multiple occasions that he was going to file the petition to open the estate but then failed to do so.

In ASB No. 2022-467 and ASB No. 2022-891, Hyndman admitted the factual allegations of the formal charges previously filed by the bar. In ASB No. 2022-467, Hyndman pled guilty to violating Rules 1.3 [Diligence], 1.4 [Communication], 1.5(b) [Fees], 1.15 [Safekeeping Property], 5.1 [Responsibilities of a Partner or Supervisory Lawyer], 8.1(b) [Bar Admission and Disciplinary Matters], and 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. In ASB No. 2022-891, Hyndman pled guilty to violating Rules 1.15 [Safekeeping Property], 8.1(a) [Bar Admission and Disciplinary Matters], and 8.4(c) and (g) [Misconduct], Alabama Rules of Professional Conduct. [ASB Nos. 2021-1123, 2022-467, and 2022-891]

- Birmingham attorney **Ashley Rose Rhea** was summarily suspended from the practice of law in Alabama by the Disciplinary Commission of the Alabama State Bar, effective

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LEFT TO RIGHT

Judge David Jordan*, Steve Ford, Richard Lord, Charlie Peppler, Allen Schreiber, Gaynor St. John, Phillip McCallum, Judge Bob Vance*, Judge Jake Walker*, Jonathan Lowe

*RETIRED

We welcome former litigator **Charles V. Peppler** (Pensacola) and retired Circuit Judge **Jacob A. Walker III** (Opelika).



Charlie Peppler's value as a mediator and arbitrator stems from his more than 45 years in private litigation and local government advocacy, in cases involving personal injury, construction, employment, and breach of contract.



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(Continued from page 47)

August 9, 2023, for failing to respond to formal requests for a written response concerning a disciplinary matter. Rhea subsequently submitted a written response and petitioned for dissolution of the summary suspension. The Disciplinary Commission granted the petition and ordered that the summary suspension be dissolved on August 14, 2023. [Rule 20, Pet. No. 2023-1105]

- Mobile attorney **Timothy Marion Shepard, Jr.** was suspended from the practice of law in Alabama for 91 days with the suspension to be held in abeyance. Shepard was placed on probation for two years, effective October 12, 2023. While on probation, Shepard must complete the Practice Management Assistance Program within 30 days. Shepard was also ordered to refund the client the legal fee. The suspension was based upon the Disciplinary Commission's acceptance of Shepard's conditional guilty plea, wherein Shepard pled guilty in ASB No. 2023-332 to violating Rules 1.3 [Diligence], 1.4 [Communication], and 8.4 (c), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. Shepard was hired to represent a client in May 2018 to quiet title to property adjoining his land which the client had purchased at a tax sale. Shepard filed suit on behalf of the client on June 4, 2018 and an amended complaint on July 8, 2019. Shepard subsequently moved for the appointment of a GAL to protect the interests of potential unknown parties. Shepard filed a second amended complaint on May 3, 2021, naming the parties identified by the GAL. Shepard and his client, as well as the defendants, failed to appear at the hearing on June 3, 2021. As such, the court issued another order setting the final hearing of the matter for June 17, 2021. In the order, the court warned that failure to attend would result in the dismissal of the case. On June 17, 2021, the defendants appeared in court, but neither Shepard nor his client appeared. As such, the case was dismissed without prejudice. After the case was dismissed, the GAL filed a motion seeking payment of his GAL fee in the amount of \$1,575. On July 2, 2021, the court issued a show cause order directing Shepard and his client to appear on August 10, 2021 to show cause as to why the fee was not previously paid. Shepard and his client failed to appear. The court then issued a judgment against the client. In September 2022, Shepard exchanged text


messages with his client in which Shepard informed the client that his case was ongoing. Shepard's text messages gave the impression that he had been in contact with the court to check on the status of the case. In fact, Shepard had not contacted the court or checked on the status of the case. [ASB No. 2023-332]

Public Reprimands

- Enterprise attorney **Spencer Wade Jones** received a public reprimand without general publication on September 8, 2023 for violating Rules 7.3 [Direct Contact with Prospective Clients] and 8.4(c) and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. Jones sent an improper direct solicitation letter to a prospective client, offering to represent the prospective client in bankruptcy and debt consolidation matters. Specifically, the solicitation letter was mailed to the prospective client prior to his being served with notice of the lawsuit filed against him and prior to the passage of seven days from the date of service. Jones admits that he obtained the prospective client's information from Alacourt, wherein the prospective client was sued for collection of a debt. However, the letter is void of where the prospective client's information was obtained other than "publicly available information." With this conduct, Jones violated Rules 7.3 [Direct Contact with Prospective Clients] and 8.4(c), and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct, by sending a direct solicitation letter to a prospective client concerning a civil proceeding where the prospective client had yet to be served notice of the suit, for failing to accurately identify where Jones obtained the prospective client's information, and for engaging in conduct that adversely reflects on his fitness to practice law. Jones is also required to pay any costs taxed against him pursuant to Rule 33, Alabama Rules of Disciplinary Procedure, including but not limited to a \$1,000 administrative fee. [ASB No. 2022-803]
- Dothan attorney **Arthur Ross Medley**, upon completion of a two-year probationary period, was issued a public reprimand with general publication, as ordered by the Disciplinary Commission on January 5, 2021 for violating Rule

Rules 1.3 [Diligence] and 8.4(a) and (g) [Misconduct], Alabama Rules of Professional Conduct. The Disciplinary Commission's order was based on a complaint filed with the Office of General Counsel wherein, after investigation, it was determined that Medley failed to timely file a brief in representing a client before the Alabama Court of Criminal Appeals. Also, Medley previously failed to timely file briefs with the Alabama Court of Criminal Appeals on multiple occasions and had been disciplined for doing so within the two years preceding 2021. [ASB No. 2020-227]

- Florence attorney **Andrew Jay Spry** was issued a public reprimand without general publication by the Disciplinary Commission of the Alabama State Bar on September 8, 2023 for violating Rules 8.4(c), (d), and (g), Alabama Rules of Professional Conduct. An attorney formerly employed by Spry's office filed a complaint after Spry signed her name to final title insurance policies, without her permission, after she was terminated. At the time of her termination, the attorney had reviewed several dozen title searches in preparation for the issuance of the title policy/opinion. During this time, the firm was several months behind on issuing final title insurance policies on closings already conducted by the firm. Spry's firm utilizes a real estate software program called Qualia to prepare the title policies/opinions. The software automatically populates the responsible attorney's name into the policy or opinion. In addition, the software allowed a "signature stamp" of the attorney's name to be added to the policy. After the attorney's termination, Spry continued to use the attorney's "signature stamp" in the software to sign the attorney's name to final title insurance policies because the attorney conducted the closing and acted as title agent. After the attorney revoked permission to use her name on any further policies, Spry continued to add her signature to approximately 20-75 other policies issued by the firm. [ASB No. 2022-615]
- On September 8, 2023, a Birmingham attorney received a public reprimand without general publication for violating Rules 1.1 [Competence], 1.3 [Diligence], 1.4 [Communication], and 8.1 [Bar Admission and Disciplinary Matters], Alabama Rules of Disciplinary Procedure. The pertinent facts are that the attorney was retained by a client to assist in being refunded a tax payment overage. The attorney failed to return multiple phone calls from the client and failed to return the client's documents or properly conclude the representation. [ASB No. 2018-262] ▲



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THE ALABAMA LAWYER



ABOUT MEMBERS, AMONG FIRMS

Please email announcements to
margaret.murphy@alabar.org.

About Members

Danyel Peters announces the opening of **The Peters Law Firm**, at 704 Ave. D, Ste. 701, Opelika 36801. Phone (334) 758-8436.

Donnie Riggins announces the opening of **Donnie Riggins, Attorney at Law LLC**, at 1772 Platt Pl., Montgomery 36117. Phone (334) 782-4724.

Artie Vaughn announces the opening of **Vaughn Defense LLC** in Auburn. Phone (334) 232-9392.

Among Firms

Bradley Arant Boult Cummings LLP announces that **Sarah Atkinson, Samuel E. Bartz, Nicolas E. Briscoe, William P. Burgess, III, C. Reed Cowart, Caroline Kerr, Danner Kline, Marianna Nichols, Jack Pease, Benjamin H. Pollock, Rachel M. Sims, Clytisha G. Smith, DeMario Thornton, and Jack Tucker** joined as associates in the Birmingham office and that **Schylar B. Burney** and **Emma F. Duke** joined as associates in the Huntsville office.

Cunningham Bounds of Mobile announces that **Chris Estes** joined of counsel.

Hall, Booth & Smith PC announces that **Gage C. Smythe** joined as an associate in the Nashville office.

Hankey Law Firm LLC of Cullman announces that **Nicholas J. Shabel** joined as an associate.

Scott Hughes and **Leslee Hughes** announce the opening of **The Cahaba Law Group LLC** and that **Sharon Davis** and **David Moore** joined the firm. Offices are at 6647 Green Dr., Ste. 107, Trussville 35173. Phone (205) 383-1875.

Huie, Fernambucq & Stewart LLP announces that **Meredith Maitrejean** joined as an associate in the Birmingham office.

Leitman Siegal & Payne PC of Birmingham announces that **Meredith Hall** joined as an associate.

Marsh, Rickard & Bryan LLC of Birmingham announces the firm is moving to 2222 Arlington Ave. S., that **J. Ben Ford** is the managing partner, and that **Joseph Callaway** joined as an associate.

Jasmine M. Matlock and **Joshua J. Holcomb** announce the opening of **Matlock & Holcomb Legal Services LLC** at 456 Old Town St., Guntersville 35976. Phone (256) 279-7190.

Phelps Dunbar LLP announces that **Jennifer Powers** joined as a partner in the Birmingham office.

Swift, Currie, McGhee & Hiers LLP announces that **Brandon Clapp** and **Murray Flint** are partners in the Birmingham office and that **Jonathan Wilson** is a partner in the Atlanta office. ▲

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