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Calendar of Events

2014

ADAA Winter Conference	Jan. 22-24	Ross Bridge
You can register and view the agenda HERE .		
ADAA Summer Conference	June 24-27	Orange Beach

THE **CRASH** C O U R S E

The Truth About Checkpoints

Brandon Hughes

Traffic Safety Resource Prosecutor

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“No one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it...the balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state [checkpoint] program.”

- Chief Justice Rehnquist¹

A traffic safety checkpoint—also referred to as a roadblock—is the stopping of the motoring public at a predetermined time and location on a public roadway for the limited purposes of checking driver license, registration, insurance, equipment, and signs of impairment. The purpose of a checkpoint is two-fold. First, it serves as a *specific* deterrent by arresting drivers who operate vehicles while under the influence of alcohol and/or drugs and, secondly, it serves as a *general* deterrent to persons who have knowledge of a checkpoint. The utilization of

checkpoints should be part of a continuing, systematic, and aggressive overall program to reduce the number of traffic crashes and their resulting deaths, injuries, and property damage within the community.

Neither the idea nor the implementation of a checkpoint is new or novel and their use has evolved over time. Among the first manifestations involved the search for illegal aliens. The Supreme Court of the United States addressed this issue in United States v. Martinez-Fuerte, 428 U.S. 543 (1976) when the United States Border Patrol established a permanent checkpoint on a major highway near the Mexican border in an effort to ferret out illegal aliens entering the country. The Court held:

The Border Patrol's routine stopping of a vehicle at a permanent checkpoint located on a major highway away from the Mexican border for brief questioning of the vehicle's occupants is consistent with the Fourth Amendment, and the stops and questioning may be made at reasonably located checkpoints in the absence of any individualized suspicion that the particular vehicle contains illegal aliens. 428 U.S. 556-564.

To require that such stops always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car necessary to identify it as a possible carrier of illegal aliens. Such a requirement also would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly. 428 U.S. 556-557.

While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited, the interference with

legitimate traffic being minimal and checkpoint operations involving less discretionary enforcement activity than roving patrol stops. 428 U.S. 557-560.

Under the circumstances of these checkpoint stops, which do not involve searches, the Government or public interest in making such stops outweighs the constitutionally protected interest of the private citizen. 428 U.S. 560-562.

The Court in *Martinez-Fuerte* summed up the utilization of checkpoints as a tool for law enforcement in the detection of illegal activity nicely: A brief stop of a motor vehicle without individualized suspicion of illegal activity, the inherent impracticality to disallowing this method of investigation, and the great public need tempered against minimal intrusion.

Although *Martinez-Fuerte* was a checkpoint case, it did not deal with checkpoints from the standpoint of impaired driving, which is why the *Sitz* decision is so important. In Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990) the Court held sobriety checkpoints constitutional; therefore, it is necessary to understand the Court's rationale so as to form a blueprint from which to work.

In *Sitz* the Michigan Department of State Police established a sobriety checkpoint pilot program in 1986. Guidelines for the checkpoints were set and the first checkpoint was conducted in Saginaw County. The checkpoint lasted one hour and fifteen minutes and came in contact with 126 vehicles with an average driver delay of 25 seconds. Two drivers were detained for the purpose of submitting to Standardized Field Sobriety Tests with one of those being arrested for DUI. A third driver drove through the checkpoint without stopping and was subsequently pulled over and arrested for DUI. 496 U.S. at 447.

Prior to this initial checkpoint, several licensed Michigan drivers filed a complaint with the Circuit Court to prohibit the use of checkpoints by law enforcement. The trial court ruled that the

checkpoint program violated the Fourth Amendment of the Constitution of the United States and the Michigan Court of Appeals upheld the decision. The Michigan Supreme Court denied petitioner's request to hear the case and the Supreme Court of the United States granted certiorari. 496 U.S. at 448.

The trial court, and subsequently the state appellate court, found that although the state of Michigan has "a grave and legitimate interest in curbing drunken driving," sobriety checkpoint programs are "generally 'ineffective' and, therefore, do not significantly further that interest; and that the checkpoints' 'subjective intrusion' on individual liberties is substantial." 496 U.S. at 449.

As a result, the trial court ruled that sobriety checkpoints violate the Fourth Amendment, which is generally the core argument against checkpoints and was the core issue in *Sitz*.

It is not in dispute that checkpoints are seizures within the purview of the Fourth Amendment as a "Fourth Amendment seizure occurs 'when there is a governmental termination of freedom of movement *through means intentionally applied*' (emphasis in original). The question thus becomes whether such seizures are 'reasonable' under the Fourth Amendment." 496 U.S. at 450.

The Court turned to the three-pronged test established in *Brown v Texas*, 443 U.S. 47 (1979), which was to weigh the public concerns served by the seizure (is the issue important?), the degree to which the seizure advances the public interest (is the checkpoint an effective method to address the issue?), and the severity of the interference with individual liberty (is the method minimally intrusive?). As to the first prong of the *Brown* test, whether the issue of impaired driving is a valid public concern, the Court stated: "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the

statistical.” The Court then addressed the issue of reasonableness of the checkpoint by finding that the State’s interest in eradicating drunk driving is great while the intrusion on the motorist by a brief stop is “slight” (the third prong of the *Brown* test). The Court also downplayed the “fear and surprise” a checkpoint has on a driver, which was an element the trial court seized upon. The Court stated: “At traffic checkpoints, the motorist can see the other vehicles are being stopped, he can see visible signs of the officers’ authority, and he is much less likely to be frightened or annoyed by the intrusion.” 496 U.S. at 451-453.

The Court also examined how the trial court addressed the issue of the “effectiveness” of checkpoints (the second prong of the *Brown* test: the degree to which the seizure advances the public interest) by stating that the trial court misinterpreted that aspect of the evaluation. The Court stated that the issue of effectiveness was not one to be determined by the courts but shall remain with “governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.” 496 U.S. at 454.

In ruling in favor of the State and sobriety checkpoints, the Court found this situation constitutionally indistinguishable from the stops upheld in *Martinez-Fuerte*. In closing, the Court stated “...the balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state [checkpoint] program.” 496 U.S. at 455.

Following the *Sitz* decision, Alabama appellate courts soon weighed in on the issue. The Court of Criminal Appeals upheld the constitutionality of sobriety checkpoints in *Cains v State*, 555 So. 2d 290 (Ala. Crim. App. 1989). On March 13, 1988 three State Troopers set up a roadblock to

check for "drivers' licenses, equipment violations, persons who were driving under the influence... based on problems that we were having in the area." 555 So. 2d at 291.

The troopers conducting the roadblock stopped every car in both the northbound and southbound lanes of traffic, asked the drivers for their licenses, and then waved them on if there were no problems. The duration of each stop was for "five, ten seconds or so, just long enough to pull out their license." When the defendant stopped at the roadblock and was asked to produce his license, a trooper observed signs of possible impairment and directed the defendant to pull over to the side of the road and the defendant complied. After further investigation, including the performance of Standardized Field Sobriety Tests, the defendant was arrested for DUI and taken to jail where he blew a 0.20 on the evidentiary breath-testing instrument. 555 So. 2d at 291-292.

The *Cains* opinion echoed the sentiment of the United States Supreme Court with regard to the devastation of impaired driving and the need to arrest and prosecute the offenders:

There is at least one factor of the balancing test on which all courts agree: the public interest in promoting highway safety by detecting, removing, and prosecuting drunk drivers is extremely great. As the Supreme Court has observed, "The slaughter on the highways of our Nation exceeds the death toll of all our wars." *Perez v. Campbell*, 402 U.S. 637, 657, 29 L. Ed. 2d 233, 91 S. Ct. 1704 (1971) (Blackmun, J., concurring). "The carnage caused by drunk drivers is well documented and needs no detailed recital here," *South Dakota v. Neville*, 459 U.S. 553, 558, 74 L. Ed. 2d 748, 103 S. Ct. 916 (1983). "Certainly, the need to identify and apprehend drunken drivers is just as clear and pervasive as the need to discover illegal aliens, which was determined to be a sufficient public concern to justify the checkpoint stops in *United States v. Martinez-Fuerte*" *State v. Deskins*, 673 P.2d at 1186-87 (Prager, J.,

dissenting). We do not believe this first factor is open to argument or dispute. The only debatable questions in the sobriety checkpoint cases are whether roadblocks sufficiently advance the legitimate public interest, and whether the interference with individual liberty occasioned by a roadblock stop outweighs the public interest. 555 So. 2d at 294.

On the issues of advancing the public interests and weighing the interference with the motorist, the court followed the same rationale as *Sitz*. The *Cains* opinion also touched on the need for checkpoint to be "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." 555 So. 2d at 292. In other words, have a plan that limits the officers' discretion, e.g., stopping every car, every fifth car, etc...

Avoiding a checkpoint gives a law enforcement officer reasonable suspicion to make contact with the driver and engage in investigational questioning. See Smith v State, 515 So. 2d 149 (Ala. Crim. App. 1987). In *Smith*, the driver was within view of the roadblock when he abruptly turned into the driveway of a private residence, stopped his car approximately fifty feet from the house, and turned off the car's headlights but did not turn off the car. The trooper believed the driver was avoiding the roadblock so he drove to the defendant's location to investigate and subsequently arrested the driver for DUI. The Court ruled the initial investigatory contact and questioning was justified. 515 So. 2d at 150-151.

Just as the Alabama Court of Criminal Appeals has shown us what passes constitutional muster, it has also shown us what types of checkpoints will *not* be accepted. In Hagood v Town of Town Creek, 628 So. 2d 1057 (Ala. Crim. App. 1993) the Town Creek Police Department conducted a roadblock at the intersection of two roads which was, by operation, the entrance to Town Creek

Apartments. Any resident of or visitor to the apartment complex had to proceed through the roadblock to enter the property of the apartment complex.

This roadblock was ruled unconstitutional by the Court because of its stated purpose:

When asked what had been his "*particular purpose* for setting up a roadblock at the intersection of Auburn and Mauldin," [Town Creek Police] Chief Holland replied, "*Trying to stop so much trouble in the [Town Creek] Apartments over there.*" R. 9 (emphasis added). Chief Holland testified that he and his officers "made numerous arrests on individuals . . . at those apartments." *Id.* On cross-examination, the following occurred:

"Q. [By defense counsel:] And this [roadblock] was set up as -- *for the sole purpose of stopping and observing the automobiles that were going into the Town Creek Apartments*

"A. Yes, sir, more or less *to cut down on trouble over there.*" R. 16 (emphasis added).

It was not until trial that Chief Holland explained the "trouble" the roadblock was intended to prevent:

"Q. [By town prosecutor:] Tell me about this road- block; why you put it there and what y'all were doing.

"A. We had so much going on at the Town of Town Creek Apartments over there, *fighting, drunk and disorderly* over there. The town wanted us to tighten up a little bit there and *we could catch a lot of it there on the street before it got in there.* We could save a lot of the old people misery over there, you know." R. 67 (emphasis added).

628 So 2d at 1059

In sum, the roadblock in the present case "was addressed to problems of general law enforcement, . . . *not to problems associated with persons who are stopped at the roadblock*. Such a justification is antithetical to the Fourth Amendment." Galbreth v United States, 590 A 2d 990, 999 (D.C. App. 1991) (emphasis added). Furthermore, the purpose of or the governmental interest to be served by the roadblock must be one that can reasonably be advanced by a roadblock. See *Sitz*, 496 U.S. at 453-55; *Cains*, 555 So. 2d at 298. The problems sought to be addressed by the roadblock must be "predictably associated with persons who are stopped at the roadblock." *Galberth*, 590 A.2d at 998-99. There is no indication in the present case that the roadblock would advance the stated purpose, i.e., that it would prevent "trouble" at the Town Creek Apartments. 628 So. 2d at 1061.

The Court decided that, based on the police chief's stated purpose of the roadblock, the seizures violated the Fourth Amendment.

A similar ruling can be found in City of Indianapolis v Edmond, 531 U.S. 32 (2000). In *Edmond*, the City of Indianapolis set up checkpoints throughout the city with the stated primary purpose of interdicting unlawful drugs. Justice O'Connor delivered the opinion of the United States Supreme Court holding that "general interest in crime control" was not a justifiable purpose for conducting a checkpoint. In rendering its decision, the Court looked back at its previous holding in Delaware v Prouse, 440 U.S. 648, 659, n. 18 (1979) in which it addressed the issue of a seizure without individualized suspicion of illegal activity. Another important finding by the Court in *Edmond* is the fact that the Court charged itself with looking only at the "primary purpose" of the checkpoint based on all of the available evidence. The Court did not and would not concern itself with any secondary or tangential purpose of the checkpoint. 531 U.S. at 46.

This issue of a “secondary purpose” arose as the City of Indianapolis attempted to justify the checkpoints on the grounds that the checkpoints were also dealing with a highway safety concern as had been previously held to be a valid reason to conduct a checkpoint. The city’s argument was that since they were checking drivers’ licenses and looking for impairment, the checkpoints should come under previous ruling by the United States Supreme Court. The Court rejected the argument saying that would give rise to checkpoints being conducted for “impermissible purposes” using a valid secondary purpose as subterfuge. 531 U.S. at 46-47.

The United States Supreme Court has also found checkpoints to be valid for other law enforcement purposes. See Illinois v Lidster, 540 U.S. 419 (2004).

In *Lidster*, a bicyclist was hit and killed by a hit-and-run driver just after midnight. The police were unable to identify the vehicle or the driver. About a week later and at approximately the same time and place the crime occurred, the police set up a checkpoint to “obtain more information about the accident from the motoring public.” Each vehicle at the checkpoint was stopped just long enough to ask what they had seen the previous weekend and to give the vehicle occupants a flyer requesting information on identifying the vehicle and driver involved in the cyclist’s death. Robert Lidster approached the checkpoint, swerved and nearly struck on officer, and was subsequently arrested and charged with DUI. 540 U.S. at 422.

The Illinois Supreme Court upheld the state appellate court’s holding that the checkpoint was invalid citing *Edmond* supra. The United States Supreme Court overturned that decision saying the checkpoint in Lidster’s case “differ[ed] significantly from that in *Edmond*.” The Court held that the “stop’s primary law enforcement purpose was *not* to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help... about a crime in all likelihood committed by others.” 540 U.S. at 423.

The Court likened this type of stop to that of questioning a pedestrian: “[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen.” Florida v. Royer, 460 U.S. 491, 497 (1983). The fact that a motorist is involved in the crime and not a pedestrian necessitates the need to stop and question motorists as opposed to stopping and questioning pedestrians. Consequently, if it is acceptable to approach a pedestrian for this information, then why should it be any different for a motorist? 540 U.S. at 425-426.

In addressing the legality of a checkpoint, I believe that the most important issue is its purpose; why is the checkpoint being conducted? Whereas the mechanics of a checkpoint (third prong) are fairly uniform, the answer to the question of purpose (first prong) will generally determine whether or not the seizure violated the protection afforded under the Fourth Amendment because an affirmative answer to the second prong of the *Brown* test—whether or not a checkpoint effectively achieves the goal of the stated purpose—is entirely predicated on the answer to the question of purpose. After all, if you are conducting a checkpoint for an improper reason, the rest of the equation is moot.

When prosecuting an offense arising from contact made at a checkpoint, there is a predicate to be laid in order to “validate” the checkpoint before you can proceed with the testimony of the actual offense. First, the prosecutor must establish the purpose of the checkpoint and the reason behind selecting the chosen location. Neither is a difficult burden to meet, but the burden still exists. Examples of valid reasons for conducting traffic safety checkpoints in specific areas include impaired driving related crashes, DUI arrests, proximity to bars and clubs along the route, citizen complaints of speeding or reckless driving, and an officers first hand knowledge of the traffic

patterns of the area being targeted. This is not an exhaustive list, but should give you an idea of what to consider when planning a checkpoint detail or prosecuting a checkpoint related case. This information should be elicited from the supervisor who approved the checkpoint and the predicate questions for their testimony can be found [HERE](#). There will also most likely be a written record kept of the checkpoint documenting location, start/end time, officers present, number of contacts, number of arrests, etc...and the official who authorized the checkpoint should bring that document when called to testify.

Time and again courts have upheld the utilization of traffic safety checkpoints as legal, purposeful, and effective. When conducted properly, it is a valuable tool available to law enforcement for reducing the instances of impaired driving and removing impaired drivers from the roadway.



Endnotes

¹ Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990)

Carol Kendrick, Office of Prosecution Services Fiscal Officer, has announced her retirement after more than 35 years of service to the State of Alabama. She has dedicated more than 33 of those years to faithfully serving Alabama's District Attorneys and their employees.

She will definitely be missed and almost certainly can't be replaced.

From OPS, ADAA, and the hundreds of employees you serve everyday:

Thank you!

Some Juvenile Killers Deserve Adult Justice

Peter A. Weir

District Attorney

[Jefferson & Gilpin Counties, Colorado](#)

"He is only a child. He doesn't understand."

"His brain is not fully developed. He can't make good decisions or be held fully accountable for his actions."

"Our juvenile system is criminalizing our children. We are incarcerating kids and they don't understand why."

These are the arguments we have been hearing. These are the arguments that have driven well-intended but misguided and naive policies.

This week, the juvenile who murdered Jessica Ridgeway faced justice and was sentenced to life plus 86 years in prison. At the same time, advocates for juveniles are preparing yet another series of unnecessary and reckless proposals for the legislature.

It is time to set the record straight about juvenile justice.

Our juvenile justice system is not our criminal justice system. Its design and goals are different, and it is staffed by dedicated and committed professionals who breathe life into its explicit goals of balancing the best interests of the community and the best interests of the child.

Many young offenders are diverted from the juvenile system before they enter it. Others are brought into the juvenile system because they need enhanced supervision by the courts and increased services. All young people in the juvenile justice system are protected by strict standards of confidentiality that prevent juvenile mistakes from carrying lifelong consequences.

Despite what critics say, the juvenile system works very well for the vast majority of offenders, but there are some juveniles who need to be prosecuted and sentenced as adults. Ironically, these same advocates who vehemently criticize the juvenile system will plead for the perpetrators of heinous crimes to remain in the juvenile justice system because of the services that the juvenile system can provide, and because we don't want to "label" the most egregious offenders as felons.

Some juveniles commit crimes so serious, so heinous, that public safety mandates — and justice demands — full accountability in our criminal justice system. There are those who argue this is unfair and unjust. They say the juvenile brain is not fully developed until well into the 20s. Therefore, they tell us, a juvenile should not be held to the same standards as an adult offender.

Advocates for reform retain experts who state that three-quarters of adolescents lack the decision-making abilities of an adult. However, this means that one-quarter of juveniles can function in a manner very similar to adults. The experts also acknowledge that they cannot apply the general concepts of the developing juvenile brain to the activities of any specific individual.

It is clear that a developing adolescent brain does not prevent deliberate, thoughtful actions. It cannot be an excuse for unspeakable behavior. It cannot be used as a basis for sweeping reform of the juvenile system or to challenge the propriety of addressing the most serious crimes in our criminal justice system.

Jessica Ridgeway was hunted, kidnapped and killed by a predator. Her murder was thoughtful, deliberate and cunning in its planning and execution.

By legal definition, the predator was a juvenile, months shy of his 18th birthday. Because of the heinous nature of his crime, only the criminal justice system could ensure justice for Jessica.

We need to acknowledge that individuals under the age of 18 can (and do) commit crimes that are beyond the pale of a civilized society; they destroy lives and shake communities to their core. Those "juveniles" forfeit the rights and opportunities available in the juvenile justice system. The victims of their crimes do not care if the perpetrator is 16 or 66; the consequences of the crimes are the same.

After all, Jessica Ridgeway was 10 years old. She was only a child. She didn't understand.



Peter A. Weir is district attorney for Colorado's 1st Judicial District (Jefferson and Gilpin Counties), a former district court judge, and has served as the executive director of the Colorado Department of Public Safety.

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Judge Carnes Becomes Chief Judge Carnes

Emily J. Tidmore

Attorney

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Note from Barry Matson: The following article appeared in the most recent issue of The Alabama Lawyer, and it details the long and distinguished career of Chief Judge Carnes from his days as an Assistant Attorney General in the Capital Litigation Division through his tenure on the bench.

My introduction to Judge Carnes was much different. As a young prosecutor over twenty years ago, I met Ed Carnes in a much different way. Though I have only met Chief Judge Carnes a few times, and I am sure he would not recall the encounters, I feel I know Ed Carnes through the respect and many stories told by prosecutorial giants such as Robert Rumsey, Joe Hubbard, David Barber, Ken Davis, and Tom Sorrells, as well Presiding Judge Bill Sullivan and Judge Jerry Fielding.

The article details two encounters where Ed Carnes was opposed to Alabama prosecutors. Those encounters are significant and add to the respect I share with the Alabama District Attorneys Association for Chief Judge Carnes. However, it is the years of brilliant and brutally honest counsel he provided Alabama prosecutors in Capital Litigation and his work as prosecutor for the Judicial Inquiry Commission that I remember and reflect upon. The phrase “go call Ed and see what he thinks,” was uttered many many times throughout the halls of Alabama courthouses. His ability to distinguish facts and discern truth in complex and emotional legal matters is unquestionable. But seeing truth and having the courage to stand next to it are two different things. I learned early in my career that Ed Carnes was not afraid to do either.

In a day when Nancy Grace is the national face of prosecution, we need champions of truth not self. So as a career prosecutor and one that believes our obligation is not to pursue convictions but to seek out justice, it is my honor to pass on the Ed Carnes that I know, to a new generation of Alabama Prosecutors. The following is reprinted with permission:

The Scottish author Sir Walter Scott observed that “[a] lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.”² If Scott’s observation is true, we can say with certainty that as he takes on new job responsibilities Judge Ed Carnes will not merely be stacking bricks; instead, he will continue to do his architectural work constructing opinions with a flair for style as well as content.

On August 1, 2013, Judge Carnes, who has served on the Court of Appeals for the Eleventh Circuit for twenty-one years, became the Chief Judge of it. To the task of leadership, he brings a treasure trove of knowledge not just of the law but also of history, literature, and popular culture, and drawing from that cache, he has scattered little gems in the engaging opinions he is renowned for writing. Veteran legal reporter Alyson M. Palmer has described Judge Carnes's opinions as "crackl[ing] with personality" and as characterized by some "biting zingers" along with a tone that is "[c]onversational, and often blunt."³

To take just one example, in an appeal about whether a magazine and one of its writers could be compelled to reveal a confidential source, Judge Carnes addressed some events that were likely familiar to many Alabamians, beginning his opinion with this jewel of an introduction:

In the Spring of 2003 Mike Price was head coach of the University of Alabama's Crimson Tide football team. Given the near-fanatical following that college football has in the South, the head coach at a major university is a powerful figure. However, as Archbishop Tillotson observed three centuries ago, "they, who are in highest places, and have the most power . . . have the least liberty, because they are most observed." If Price was unaware of that paradox when he became the Crimson Tide's coach, he learned it the hard way a few months later in the aftermath of a trip he took to Pensacola, Florida.⁴

That passage is probably the only time Archbishop Tillotson has shared a page with a football coach, and the points that passage makes are all the richer for the unexpected but apt connection. This kind of writing calls to mind what Justice Holmes once described as his own "chief interest" in showing "the universal in the particular."⁵ A Carnesian judicial opinion often contains engagingly written particulars that offer a glimpse of the universal.

Irony and wit are no strangers to his opinions either. For example, the next paragraph of that same opinion, continues:

While in Pensacola to participate in a pro-am golf tournament Price, a married man, visited an establishment known as “Artey’s Angels.” The name is more than a little ironic because the women who dance there are not angels in the religious sense and, when he went, Price was not following the better angels of his nature in any sense. Scandal ensued, and as often happens in our society, litigation followed closely on the heels of scandal.⁶

In the first two of those three sentences about the coach’s trip to the strip club, Judge Carnes crafted a fitting allusion to a line from one of Shakespeare’s sonnets (“The better angel is a man right fair”),⁷ and to a line from Lincoln’s First Inaugural Address (“The mystic chords of memory . . . will yet swell the chorus of the union, when again touched, as surely they will be, by the better angels of our nature.”).⁸ In the third sentence, he linked the facts to another broader truth: in our society, litigation often “follow[s] closely on the *heels* of a scandal” (emphasis added).

As for the particulars, Ed Carnes’s Alabama roots run deep. He was born in Albertville, Alabama, and graduated at the top of his class from the School of Commerce and Business at the University of Alabama before heading north for his legal education at Harvard Law School, where he graduated with honors in 1975. He went to work in the Alabama Attorney General’s Office and his duties there included prosecuting cases across the state, ranging from bootlegging to burglary and manslaughter to murder. Early in his career as an Assistant Attorney General for the State, he worked to ban the importation into Alabama of South African coal, which at that time was mined by indentured black laborers under penal sanction. In the famous Sixteenth Street Baptist Church bombing case prosecuted by Attorney General Bill Baxley in 1977, Carnes was chief appellate and habeas counsel for the State in the case involving the first of the Ku Klux Klansmen killers to be prosecuted.⁹ He convinced the Alabama appellate courts to affirm the conviction of the Klansman for murdering the four little girls and persuaded the federal courts to deny habeas relief. As a prosecutor and appellate lawyer he considered his clients to be the State of Alabama and those of

its people who were the victims of crime. He received an award from the Victims of Crime and Leniency organization for his efforts on behalf of crime victims, which included authoring and helping lobby into law eighteen statutes involving criminal law and victims' rights.

One of his other duties was to prosecute in the Alabama Court of the Judiciary ethical complaints filed against state court judges by the Alabama Judicial Inquiry Commission. In all eighteen of those cases that he prosecuted, he succeeded in having the judge convicted of violating the Canons of Judicial Ethics and disciplined by the Court of the Judiciary. Two of the cases were brought against state court judges who had separately engaged in racist conduct or made racist comments. He advocated that both of those judges should be removed from the bench, and they were.

Years before the Supreme Court's Batson decision prohibiting the racially discriminatory use of peremptory strikes, he urged district attorneys not to strike a black juror unless they would strike a white one in the same circumstances.¹⁰ In a case involving a Ku Klux Klansman charged with lynching a young black man in Mobile, he fought all the way to the United States Supreme Court in an effort to prevent the Klansman defendant from striking all of the blacks from the jury. After the Batson decision, he drafted and lobbied for legislation that would have extended its ban on racially discriminatory strikes to both sides. And in a case involving the retrial of a black defendant who had been convicted twice before by all-white juries for murdering a white victim, he persuaded the Attorney General to agree to a change of venue to a county with a higher black population to ensure a multi-racial jury.¹¹

As a lawyer, he was a skilled and tenacious advocate but a fair and ethical one. In an open letter to the Alabama Bar in 1989, attorney David Bagwell sought lawyers to handle capital cases at the post-conviction stage including federal habeas corpus proceedings. He cautioned those who

would step forward to volunteer that Carnes, the attorney who represented the State, was “very, very bright,” knew that area of the law cold, and “could beat anybody in the country on this subject.”¹² Bagwell warned them that in the battle “you will not meet a German farmhand, you will meet the Red Baron. Good luck.” He added parenthetically that Carnes “is also, in my experience, entirely fair and ethical.”¹³

In 1992, President George H. W. Bush nominated Carnes to the United States Court of Appeals for the Eleventh Circuit. Bagwell, who had personally litigated against him in two capital cases, was one of many opposing counsel who openly supported the nomination, attesting to Carnes’ fairness. Bagwell testified before the Senate Judiciary Committee about the man who had been his opposing counsel: “Nobody could have been more fair, nobody could have been more helpful, nobody could have been more cooperative than Ed Carnes was. He was straight. He did not overreach. . . . He has immense credibility with the judges in Alabama, and the reason is he has earned it by speaking straight when he speaks.”¹⁴

Two other attorneys who had represented death row inmates told the Senate Judiciary Committee about how Carnes in two different cases, while representing the State in the post-conviction stage, had uncovered and immediately brought to their attention and to the attention of the court exculpatory evidence that led to the murder convictions and death sentences being overturned.¹⁵ In one of those cases, he discovered exculpatory evidence in another prosecutor’s file, notified defense counsel that same day, drafted an order granting the death row inmate a new trial, and the next morning in the presence of defense counsel presented that order to a federal judge and persuaded him to sign it.¹⁶ Defense counsel stated that if Carnes had not taken the action that he did, his client would have been executed.¹⁷

Another testament to his fairness is that Carnes has been the only Alabama Assistant Attorney General in the history of the State known to have litigated on the defendant's side of a criminal case against the position of district attorneys, and he did it twice. In one of those cases the district attorney had convinced the judge to sentence to death a teenager convicted of brutally murdering a young woman.¹⁸ Carnes urged the DA to ask the trial judge to change the sentence to life imprisonment because of the defendant's age at the time of the murder and, when that did not happen,¹⁹ he weighed in on the defendant's side and argued to the Alabama Court of Criminal Appeals that the death sentence should be set aside as unconstitutional.²⁰ It was.²¹ In another case, he filed a brief and argued in the Alabama Supreme Court that trial judges should be given the authority to order district attorneys to open their entire file to defense counsel in capital cases even though the Constitution, state law, and the rules of criminal procedure did not require an open file policy.²² The District Attorneys Association filed a brief and argued against his position.²³ The Court agreed with Carnes and made his position the law of the state.²⁴

Carnes was also one of those rare attorneys who worked to increase the amount of funding for those who represent the other side in court. Along with an attorney from the Southern Poverty Law Center, he co-authored and lobbied for legislation that would have increased the compensation of attorneys representing capital defendants at trial, on appeal, and in state collateral proceedings.²⁵ When that legislation failed to pass, he wrote and signed an Attorney General's advisory opinion, which was issued, that doubled the maximum payment for out-of-court work by appointed counsel at the trial stage of capital cases.²⁶

During his time as an Assistant Attorney General, Carnes became an expert in criminal law and procedure. As an attorney he served as a member of the Alabama Supreme Court's Criminal Procedure Rules Committee, and as a judge he served as a member and Chair of the Criminal Rules

Advisory Committee of the Judicial Conference of the United States. As one lawyer who has appeared before him as a judge remarked, “He’s a master at criminal law. He knows it far better than anyone else I know.”²⁷

Judge Carnes has spent twenty-one years establishing a judicial record notable for legal brilliance and stubborn insistence on following the rule of law. The only party line he appears to follow is the one leading to hors d’oeuvres at courthouse socials. Lawyers who have cases before him have made observations like these: “He’s at the top; he’s extremely bright. . . . He’s very interested in the law and where the 11th Circuit is in the whole nation with the other circuits. He’s a national legal mind.”²⁸ Though not lauded as the most genteel judge on the bench during oral argument (“He’s generally courteous, but he lacks patience with unprepared lawyers or advocates”), he is described as being “very prepared” and is known for asking “probing questions.”²⁹ Lawyers who have appeared before him at oral argument have also described him as an active questioner: “He’s really an aggressive questioner and you’d better be prepared” and “He asks a lot of questions; he didn’t give me a chance to say hello.”³⁰ He is praised by lawyers for his well-written opinions, which are described as “scholarly” and “really fun to read,” an unusual combination.³¹ Lawyers know him as having “a very distinctive style” and for being “a fanatic about excellent writing.”³² One lawyer stated, “He takes real pride in his writing and he’s good at it. I think he secretly would have loved to have been a famous novelist.”³³ Judge Carnes as a novelist would be surprising because he has expressed a preference for non-fiction by stating on many occasions that the only fiction he reads is in briefs.

Last spring a group of judges studied his writing style in an advanced course that he taught in Duke Law School’s Masters of Judicial Studies Program. (The other half of that writing course

was taught by Justice Antonin Scalia.) He has also given many talks on effective writing and editing to bar associations, judges' conferences, and to students at law schools around the country.

Chief Judge Carnes will have a host of new responsibilities in his leadership role. While the administrative responsibilities that come with being Chief Judge of a federal appellate court are demanding, most readers will likely share the hope his new duties do not take too much time away from the architectural art of drafting legally astute opinions that are also a pleasure to read.



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Endnotes

¹ Sir Walter Scott, Guy Mannering, Complete Works of Sir Walter Scott 77 (Conner & Cooke, Franklin Buildings 1833).

² Alyson M. Palmer, Smarts and Zingers, Daily Report, Feb. 12, 2009, available at <http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202551783683&slreturn=20130726185449>, last visited Aug. 26, 2013.

³ Price v. Time, Inc., 416 F.3d 1327, 1329 (11th Cir. 2005) (footnote omitted).

⁴ Oliver Wendell Holmes, Jr., "Aug. 31, 1920 letter to Morris Cohen," in The Collected Works of Justice Holmes: Vol. I 19-20 (Sheldon M. Novick, ed., 1995).

⁵ Price, 416 F.3d at 1329-30.

⁶ William Shakespeare, "Sonnet 144," The Oxford Shakespeare Complete Sonnets and Poems 669 (Oxford Univ. Press 2008).

⁷ Abraham Lincoln, "First Inaugural Address," The Declaration of Independence and Other Great Documents of American History 1775-1865 88 (John Grafton, ed., Dover Thrift Editions 2000) (1861).

⁸ See Chambliss v. State, 373 So. 2d 1185 (Ala. Crim. App. 1979).

⁹ Letter of District Attorney Robert L. Rumsey to Senator Joseph R. Biden, Chair, S. Comm. on the Judiciary (May 7, 1992).

¹⁰ Letter of Don Siegelman, Esq., to Senator Joseph R. Biden, Chair, S. Comm. on the Judiciary (May 11, 1992).

¹¹ David A. Bagwell, "Letter to the Editor," Alabama Lawyer, Nov. 1989, at 292.

¹² Id.

¹³ Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary, 102d Cong. 170 (1992) (Statement of David A. Bagwell) (hereinafter Confirmation Hearings).

¹⁴ Letter of Joseph A. Fawal, Esq. to Senator Joseph R. Biden, Chair, S. Comm. on the Judiciary (March 12, 1992); Confirmation Hearings, 102d Cong. 163-69 (Statement of Rick Harris).

¹⁵ Confirmation Hearings, 102d Cong. 167.

¹⁶ Id. at 168.

¹⁷ See Flowers v. State, 586 So. 2d 978 (Ala. Crim. App. 1991).

¹⁸ Letter from Assistant Attorney General Ed Carnes to Baldwin County District Attorney David Whetstone, Feb. 26, 1990; see also Letter from Whetstone to Carnes, March 6, 1990; Letter from Carnes to Whetstone, March 9, 1990; Letter from Whetstone to Carnes, March 16, 1990; Letter from Whetstone to Attorney General Don Siegelman, Sept. 17, 1990 (asking the Attorney General to defend the judgment of death by electrocution that the state trial court had imposed); Letter from Siegelman to Whetstone, Oct. 17, 1990 (informing Whetstone that Carnes would do all he could

to facilitate Whetstone's filing an amicus brief with the state appellate court setting out his arguments in support of the judgment).

¹⁹ Flowers, 586 So. 2d 978.

²⁰ Id. at 990-91.

²¹ See Ex parte Monk, 557 So. 2d 832, 836-37 (Ala. 1989)

²² See id. at 833.

²³ See id. at 836-37.

²⁴ Letter from Assistant Attorney General Ed Carnes to Dennis Balske, Jan. 29, 1988 (enclosing a copy of the Bill proposing to amend Ala. Code §§ 15-12-21 and 15-12-23).

²⁵ Ed Carnes, Advisory Opinion Letter to the Honorable John B. Bush, Circuit Judge, April 26, 1990.

²⁶ Almanac of the Federal Judiciary, 2013 WL 4482372 (2013) (last visited Aug. 28, 2013) (hereinafter Almanac).

²⁷ Almanac, 2013 WL 4482372.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

Gavel Glinns



Tom Sorrells
Supernumerary District Attorney

Yahudah Israel v State, (CR-11-1281, 02/15/13) Marengo County, Evidence, Jeopardy, Affirmed as to convictions, Remanded with instructions as to Sentencing, Kellum, Judge

HOLDING:

The defendant was indicted for one count of Rape first degree and one count of Rape second degree. At trial the jury found him guilty of both counts. The trial court sentenced Israel to 12 years imprisonment for his first-degree Rape conviction, but did not, however, impose a sentence for the defendant's conviction of second-degree Rape.

The evidence revealed that the defendant was having a relationship with the mother of L.W. the victim in the case, although he was married to another woman at the time. L.W. was 12 years old at the time of the offense. L.W. lived in Demopolis with her mother and often took care of her siblings while her mother worked. L.W. first met the defendant when she was 3 years old and attended the church where he was pastor. Israel often spent the night in L.W.'s home. On the night in question, after L.W.'s siblings went to sleep, the defendant grabbed L.W. by the neck and shoulders as she started to the bathroom. She attempted to push him away but failed. Israel kicked the victim in the stomach with his knee, causing her to fall and hit her head on a bunk bed with the defendant on top of her. She tried to poke the defendant's eyes and he choked her and told her it would be worse if she resisted. The defendant then forced intercourse on her. She did not inform her mother of the rape because she was afraid she would not be believed. Even after finding blood on her sheets the next morning she washed the sheets and kept quiet. Much later she informed a counselor in neighboring Sumter County.

The defendant objected to the granting of a motion in limine, barring the admission of evidence and questions concerning the victim's prior sexual history pursuant to the rape-shield statute, section 12-21-203 Ala. Code 1975. He contended he should be able to question the victim as to her prior history on the theory that she made the allegations against him to explain the fact that she was not a virgin. The appeals court pointed out that there were several exceptions to the rape-shield act and that it was not absolute. However, they found that Israel had no reasonable

basis for his contention and wanted to conduct a fishing expedition and thus his argument was without merit.

The defense argued to the trial court that the defendant could not be convicted and sentenced on the Rape second degree charge since it constituted nothing more than a lesser-included offense under the Rape first degree charge of which he was convicted. The trial court seems to have adopted this view. The State contended that the second-degree conviction was not barred by the doctrine of former jeopardy and moved that the case be remanded to the trial court for sentencing. The well known case of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) provides the classic test as to what constitutes a separate offense not subject to jeopardy. The test is as follows: Does each crime contain an element not contained in the other. A lesser-included offense merely contains fewer elements than the higher but none that are not present in the higher offense. In this case Rape in the second degree contains elements such as age, lack of ability to consent, not present in Rape first. Therefore, the case was remanded for sentencing.

Steven Petric v. State, (CR-09-0386, 02/19/13) Jefferson County, Evidence (Rule 404), Affirmed, Burke, Judge

HOLDING:

Steven Petric was convicted of Murder made capital because it was committed during a Rape in the first degree. The jury, by a vote of 10 to 2, recommended that Petric be sentenced to death. The trial court followed the jury's recommendation.

The State's evidence tended to show that on March 9, 1990 the victim, Tony Lim, was found dead on her bed in the apartment she shared with another woman in Homewood, a suburb of Birmingham. The roommate discovered Lim's body after returning from work around 8:00 p.m. Lim was alone in the apartment when the roommate left for work earlier in the day. Lim had previously told the roommate that a man named "Steven" was going to help Lim fix the brakes on her car. The roommate also stated a man named "Steven" sometimes gave Lim a ride home from school, but the roommate had never met "Steven." Barbara Short testified she married Petric after a short courtship in January 1990 in the Birmingham area. The victim's mother testified she recovered some of her daughter's jewelry but wedding rings were missing and never recovered. Several other details of the crime scene—position of the body, t-shirt around her neck, hand bound behind the body, appearance of the wound—were admitted in to evidence. Semen was found in the vagina but DNA technology was not available at that time. Later DNA tests revealed that the DNA of the semen matched DNA found on cigarette butts in the victim's bedroom.

In 2008, the administrator of the national Combined DNA Index System (CODIS) notified Debra Kay Dodd of the Alabama Department of Forensic Sciences that the DNA found on the victim matched the profile of Petric, who was in prison in Illinois at the time. She traveled to Illinois, took samples, and confirmed the match. At trial, the testimony of an expert hired by the defense was entered into evidence by stipulation. This expert did not dispute the match but testified that he also found Petric's DNA on the blanket on the victim's bed. He said a DNA sample taken from the

victim's fingernail clippings was a "mixture" which contained Petric's DNA. Petric's defense was that while he had a physical relationship with the victim, he was gone when the murder occurred.

The state was allowed to offer evidence of other bad acts of the defendant. Testimony of an officer that he had given the defendant a ticket for domestic violence in the past was immediately thrown out by the trial court who strongly instructed the jury to disregard the testimony. Evidence was also admitted as to a murder and assault committed by the defendant, which were strikingly similar to the instant case including the fact Petric in those cases stole wedding rings while ignoring other jewelry. In one case the defendant was identified by his DNA and eyewitness testimony in the other. Much of the evidence was not challenged at trial, bringing into play the plain-error rule, Rule 45A, Ala. R. App. P.

The appeals court ruled that most of the evidence was properly admitted under the common scheme and design exception to the prohibition of evidence of other bad acts found in Rule 404, Ala. R. Evid. The Court noted that the common scheme exception was based on the requirement that the issue of identity was before the court. By contending that he had consensual sex with the victim but did not kill her, the defendant made his identity as the killer the main issue. The facts of the other bad act had enough similar and unique circumstances that shed light on the instant crime to qualify it as an exception to the general Rule 404 prohibition. Even if one of the witness' testimonies was improperly admitted, that ruling did not rise to the level of "plain-error." As to the testimony of the ticket charging domestic violence, the court found the prompt action of the trial court cured any error. Therefore, the case was affirmed.

Riggs v. State, (CR-09-1349, 5/03/13) Jefferson County, Jury Charge, Reversed and Remanded, Windom, Judge

HOLDING:

Jeffery Tyrone Riggs appeals his conviction of Murder made capital because it was committed during a burglary. This is a case of note and should be read in its entirety. It is also troubling in some of its aspects.

The evidence tended to show that the defendant and the victim, Norber Payne, had been involved in a relationship for years prior to her death. In 2005, Riggs bought a house and asked Payne and her daughters to move in with him. Two years later, Payne and her daughters moved out and into an apartment in Center Point in Payne's name only. Later, Riggs moved in with them. According to Payne's daughters their mother ended her relationship with Riggs after they saw Riggs choking their mother. After the victim told her daughter to call 911, Riggs threatened to shoot them and stated they "were going to die tonight." Later that night the victim and her daughters packed up Riggs' belongings and left them at his mother's house. After that Riggs no longer slept at the apartment, no longer lived there, nor did he contribute to the rent and other expenses.

On the night in question, the victim was leaving the Burger King in Roebuck, where she was manager, when Riggs pulled up with her granddaughter, who he had been keeping while she worked. As the victim was getting into the vehicle, Riggs asked Payne to step out of the car so they

could talk. On the ride home the victim told her daughter she did not want Riggs back in her house. The victim arrived home around 1:30 a.m. Her daughter Tiffany was already there. Her daughter Natasha heard her mother on the phone telling Riggs she was getting ready for bed. Natasha later heard her mother call from her room. Moments later Tiffany heard a loud boom as if someone kicked in the back door. Shortly thereafter, Natasha saw Riggs running down the hall with a gun in his hand and go into her mother's room. She heard approximately four gunshots. She then saw Riggs run back down the hall and out the back door.

At 2:18 a.m. Natasha dialed 911. At 2:24 a.m. Riggs telephoned the sheriff's office from his mother's house. Riggs' mother admitted he lived there with her. After warning Riggs of his rights, authorities found the weapon. Riggs admitted following Payne back to her apartment, to kicking down the door after she slammed it in his face, to following Payne into her bedroom, and shooting her with a gun. Terrence Battle testified that after learning that Payne and Riggs had broken up, he started dating the victim. He started getting threatening voice mails from "Jeff." One call said that if the victim came back to Battle's house something would happen to her. Payne related to Battle that Riggs was following her. He later got calls from Riggs and stopped speaking to him. The gunshot wounds showed stippling indicating the shots were fired from very close range. The medical examiner concluded the victim was in bed or falling off the bed when shot.

The defendant took the stand. He admitted making threatening phone calls to Battle but was just trying to scare him. He admitted he called the victim and said they needed to talk and that he was still on the phone with the victim when he arrived at her house. He said he told her he was at the back door. He said Payne came to the back door, in nothing but her underwear, and cracked it a little so they could talk. He said when he asked her about Battle, she slammed the door in his face striking him in the eye and causing him to fall back and hit his head. He admitted he kicked the door open and that he followed her down to her bedroom. He said the argument continued and the room was dark, with the television being the only source of light. He said he thought she retrieved something he thought could be a knife from the bed and refused to put it down. He said she then left the bed and approached him and he pulled out his gun and shot her.

The judge charged the jury on heat of passion. The exact charge does not seem to be quoted in this opinion; however, the Court said there should be a charge with the words that explicitly instructed the jury that the state must prove the defendant did not act in "heat of passion." The defense did not object to the charge, nor did it request a charge on heat of passion. Therefore, the court of appeals could only consider the question if it qualified as "plain-error" under Rule 45 Ala. R. App. P.

The Appellate Court admitted that to rise to the level of plain-error, the claimed error must not only seriously affect a defendant's substantial rights but it must also have an unfair prejudicial impact on the jury's deliberations. They quote the U.S. Supreme Court's description of the federal plain-error rule, which stated that the appeals courts are only authorized to correct particularly egregious errors; the plain-error exception to the contemporaneous objection rule is to be used sparingly, solely in those cases in which a miscarriage of justice would otherwise result. The Court of Criminal Appeals pointed out that the standard of review under the plain-error rule is stricter than the standard used in reviewing an issue properly raised in the trial court and that while Riggs' failure to object did not bar the court from reviewing the issue, it weighed against any claim

of prejudice.

The Court found that the fact that the trial court did not charge the jury specifically that the State had to prove beyond a reasonable doubt that the defendant did not act in the heat of passion before they could find him guilty of Capital Murder met the plain-error standard. They basically stated that the defendant had his choice of self defense (a complete defense to all charges) or heat of passion (which reduces the offense to manslaughter). One difficulty in evaluating the court’s ruling as to the plain-error doctrine is the apparent absence of the trial court’s charge on heat of passion in the opinion. In the past, some have contended that these two defenses were mutually exclusive. To be safe, it might be wise for judges to charge on any potential defense in a capital case even if not requested or, in the judge’s view, unwarranted. This is a very cautious approach but it has been difficult in the past to anticipate what an appeals court would do.

Though they made no ruling on he issue, the court indicated that since the defendant admitted that he continued to live in the apartment until the day of the incident, the jury should have been charged that if they believed the defendant continued to live in the apartment, helped with the rent, etc...he could not be convicted of Burglary. They based this on the fact that possession is the critical element not ownership. The trial court charged the jury that if a person is licensed to be in the home, that license could be revoked at any time. The court reversed and remanded the case.

DISCOVERY

I had the occasion to read a motion to set aside and brief filed in the case of State v. Andre Lamon Ellis by Assistant District Attorney Chris Kaminski of the 12th Judicial Circuit. The issue is discovery, under Rule 16 Ala. R. Crim. P. and Brady v. Maryland and its progeny. I found it to be well written and a helpful look at the issue. As ADA Kaminski points out, statements are not discoverable under Rule 16, which only leaves an analysis of the ruling in *Brady*, and subsequent cases that require a pretty high standard of evidence to rise to a *Brady* violation. I thought it would be helpful to reproduce here the entire brief and motion and recommend you read it and the cases cited as this kind of problem comes up frequently.

IN THE CIRCUIT COURT OF PIKE COUNTY, ALABAMA

STATE OF ALABAMA,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO: CC 2012-238
)	
ANDRE LAMON ELLIS,)	
)	
Defendant.)	

MOTION TO SET ASIDE ORDER

COMES NOW the State of Alabama, by and through the undersigned Assistant District Attorney and moves this Court to set aside the order entered on the 17th day of May, 2013 and as grounds for said motion states:

A properly struck and empanelled jury heard the facts of this case during the week of January 14, 2013. After four and a half days of testimony and argument and approximately two and a half hours of deliberation the jury returned verdicts of Guilty against the Defendant for two separate counts of Rape in the First Degree and one verdict of Guilty against the Defendant for Burglary in the Second Degree. Upon receipt of the verdicts, the Court polled the jury inquiring as to whether the verdicts rendered were the verdicts of each individual member and, as such, unanimous. Each individual member of the jury indicated by raising his or her hand that the verdicts rendered were in fact each of their verdicts and as such were unanimous. Subsequent to the Court finding that the verdicts in each Count were unanimous, the jury was thanked for their service and discharged. The Court then, pursuant to the verdicts of the jury, pronounced the Defendant Guilty of two counts of Rape in the First Degree and one count of Burglary in the Second Degree. The Defendant requested a pre-sentence investigation and report. This Court granted that request and set sentencing for March 27, 2013.

On March 25, 2013 the Defendant, through counsel, filed a Motion for New Trial alleging the State failed to provide certain material impeachable and exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

On March 27, 2013, this Court pronounced sentence upon the Defendant and the Defendant was ordered to serve eighty-five (85) years in prison on each Rape in the 1st Degree offense and twenty (20) years in prison on the Burglary in the 2nd Degree offense. The sentences were ordered to run concurrent with each other.

The Court then held a hearing on April 24, 2013 on Defendant's Motion for New Trial. The Court, at the conclusion of the hearing, took the matter under advisement and issued a written order on May 17, 2013 granting Defendant's motion for new trial.

At the hearing on April 24, 2013, the State objected to the timeliness of the Defendant's motion for new trial and this Court overruled the State's objection. Specifically, the State alleges that the Defendant filed his motion for new trial outside of the time frame as established in Rule 24.1 of the Alabama Rules of Criminal Procedure. Rule 24.1(a) states "**when the defendant has been sentenced** (emphasis added), the court, on motion of the defendant or on its own motion, may order a new trial. This subsection is titled "Power of the Court." Rule 24.1(b) states in pertinent part that "a motion for new trial must be filed no later than thirty (30) days **after sentence is pronounced**" (emphasis added). The Defendant's motion for new trial was filed approximately two (2) days prior to sentence being pronounced and therefore its filing did not conform to the requirements of Rule 24.1. Clearly, the jurisdiction of the Court, pursuant to Rule 24.1, is not properly invoked until (1) after the Defendant has been sentenced and (2) upon the Court's own

motion or on motion of the Defendant having been filed within thirty (30) days of sentencing. Therefore, the State contends that the jurisdiction of this Court to entertain said motion was not properly invoked and this Court is without jurisdiction to enter the order dated May 17, 2013.

The Court, in its Order, makes a lengthy analysis of statements made by various individuals. Those statements were provided in camera and reviewed by the Court prior to the hearing on Defendant's Motion for New Trial.

Prior to the State addressing the substance of these statements, the Court has improperly applied the pertinent case law as it pertains to a prosecuting agency being required to produce and/or disclose any statement of any witness under Rule 16 of the Alabama Rules of Criminal Procedure or pursuant to case law. Rule 16 of the Alabama Rules of Criminal Procedure states **twice** (emphasis added) that a defendant shall not be permitted to discover or to inspect statements made by state/municipality witnesses or prospective state/municipality witnesses. Since the prosecuting authority has no duty to disclose witness statements pursuant to Rule 16 of the Alabama Rules of Criminal Procedure, one is left to look to the case law regarding the disclosure of said statements. Under the mandates of Brady the State is only required to disclose to the Defendant information that is exculpatory in nature. Giglio v. U.S., 405 U.S. 150 (1972) expanded the mandates of Brady to include disclosure of impeachment evidence. However, the impeachment evidence considered in the cases that this Court cites in its order were offers or inducements to testify made by the prosecuting agency. These issues of impeachment are therefore known to the prosecutor before trial and able to be disclosed because the prosecution creates them. There is a minor but significant difference between impeachment evidence and a mere inconsistent statement. Minor inconsistencies in statements previously made to law enforcement are not considered by the cases this Court cites in its order. Thankfully, this issue is not one of first impression in the State of Alabama and the Supreme Court of Alabama has established procedures for the disclosure of a prior inconsistent statement made by a State's witness to law enforcement. In Pate v. State, 415 So.2d 1140 (Ala. 1981), the Defendant was granted certiorari to review the question whether or when the defendant in a criminal case is entitled to inspection of a statement of a prosecution witness for the purpose of cross-examining or impeaching the witness. This case specifically involved the statements of rape victims to law enforcement. In this case, defense counsel, on cross-examination, inquired of the prosecutrixes if they had made a statement to the police about the facts of the case. Both had. Defense counsel then moved the court to require the prosecution to disclose the previous statements to the defense for use in the cross-examination and potential impeachment of the witnesses. The court in Pate lays out the factors the court should consider concerning the production of a prior statement made by a state's witness and says the court should first consider "the nature of the document, that is, whether it is the witnesses own words, and [second] the time when production is sought, that is, before trial, or during the trial after the witness has testified." Id. at 1143. The Pate court used a prior ruling in Gillogly v. State, 314 So.2d 304 (Ala. App. 1975) where this very issue was addressed. The Gillogly court held that the State was obligated to produce a witness's prior statement to law enforcement only upon the laying of a proper predicate and a request being made **after said witness's testimony** (emphasis added). The Pate court declined to hold that the State had a duty to produce a witness's prior statement before that witness testified. The Pate court cites Thigpen v. State, 355 So.2d 392 (Ala. Cr. App.), aff'd, 355 So.2d 400 (Ala. 1977) where the Thigpen court held that the State did not err in not producing the prior statements of the two

prosecution witnesses where the defendant made a motion prior to trial asking for the statements of any and all witnesses taken by the investigative authorities. The Pate court states “the rule stated in Thigpen is consistent with the general rule that an accused is not entitled to discover statements of government witnesses before trial.” Pate, 415 So.2d at 1144. The reasoning of the Pate court was affirmed in Key v. State, 890 So.2d 1056 (Ala. 2003) when the court again held that the State had no duty to disclose a prosecution witness’s prior statement until after the witness testified on direct examination and the defendant laid a proper predicate compelling disclosure of the prior statement. In the case before this Court, the State argues the Defendant never laid the proper predicate to compel the State to disclose the statements of M.B., K.H., or J.H. Additionally, the State argues the Defendant never once made the specific request that is required **at trial** for said statements to be disclosed and therefore, the State had no duty to disclose the statements of M.B., K.H., or J.H. Without the proper predicate being laid and the defendant’s request for a witness’s prior statements being made after a witness testifies, the State would have the impossible burden of predicting what a witness’s testimony is going to be and producing those prior statements which would conflict with that predicted testimony. As such, the facts before the Court in this case are clearly distinguished from the reasoning applied in Brady and its progeny, because the State did not create the issue of impeachability pretrial and therefore have knowledge of impeachable information before trial. The information in the State’s possession only potentially became impeachable upon the testimony of the witnesses and there was never a request made during trial to have any prior statements disclosed. The State would note that it would be impossible for the statement of J.H. to be used for impeachment purposes, as J.H. **never testified**.

This Court also states in its order that “a jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is upon subtle factors that a defendant’s life or liberty may be deprived.” This Court goes on further to say “when the reliability of a witness may well determine guilt or innocence non-disclosure of evidence affecting credibility falls within the “Brady Rule.” This Court relies upon the holdings in United States v. Bagley, 473 U.S. 667 (1985) and Giglio. However, these cases can be distinguished from the facts before this Court in the present case. In both the Bagley and Giglio case, there was an offer or inducement, made by the prosecution, to a witness in exchange for his or her testimony. This clearly is something that is due to be disclosed pre-trial because the prosecution created the issue relating to credibility of the witness by effectively bargaining for a witness’s testimony. The bargain made by the prosecution could certainly be reason for a witness’s credibility to be called into question. However, in the present case, there was no “bargain” for M.B.’s testimony. She was the victim in the case and received no offer or inducement to testify. The State, therefore, did not create any questions as to M.B.’s credibility as was done in the Bagley and Giglio cases and had no duty to disclose these witness’s pretrial statements. Much to the contrary, the pretrial statements of M.B. were precisely those kinds protected under Rule 16 of the Alabama Rules of Criminal Procedure. The Defendant did not follow the procedures as established by Pate and Key and made no request for any pretrial statements made by any witnesses during the course of the trial. Therefore, the Defendant effectively waived any right to review or otherwise cause the statement of M.B. to be disclosed.

This Court, in its analysis of the statements that were provided in camera, makes numerous findings and comparisons with which the State takes contention. This Court begins its analysis by discussing the time M.B.’s roommates were gone before the rape occurred. The Court found that in

one statement, M.B. indicates that her roommate was gone for about twenty minutes and in another statement M.B. indicates that her roommate was gone for about an hour and thirty minutes. These statements are taken approximately two months apart. In the second statement, M.B. is not as definitive about the elapsed time as the Court makes it appear and even says that her roommate had been gone for as little as an hour. These statements about the time her roommate was gone are not exculpatory in nature as they do not tend to show the innocence of the Defendant. The Court also critiques the placement of M.B.'s telephone in her home at the time of the rape saying that in one statement M.B. indicates her phone to be in the kitchen and in the other indicates her phone to be in the bathroom. These items are in no way exculpatory, as they do not tend to show the Defendant's innocence. The Court states in its order that M.B. provided inconsistent testimony about the type of clothes the Defendant was wearing but does not elaborate on the inconsistency. M.B. indicates in her statement that the Defendant was wearing dark colored pants and a dark colored shirt. M.B. provided the same description during her testimony at trial. The State contends that M.B. was absolutely consistent in her description of the Defendant at the time of the attack. The Court then points out that M.B. says in her March 27, 2012 statement that the rape lasted four or five minutes. However, what the Court fails to point out is that M.B. indicated that the rape *probably* lasted about four to five minutes. M.B. also said that the Defendant only entered her three or four times. This does not conflict with the timeline in this trial. M.B.'s statements indicate that this was an attack that both began and ended in a very quick manner and is not inconsistent with the timeline established at trial. The Court then speaks about M.B.'s testimony regarding her and J.H.'s sexual activity the day of the rape finding that "M.B. did not tell about her and J.H. (boyfriend) having sex shortly prior to the alleged rape." This Court further states "M.B. did not testify on direct about having sex with J.H. a couple hours prior to the alleged rape" but that she "did testify that she and J.H. had sex when called as an adverse witness by the defense." The Court fails to mention a conference held outside the hearing and presence of the jury where the Defendant requested that he be allowed to ask M.B. about her sexual history with J.H. It was in that hearing that the State objected to M.B. being examined about her sexual history with J.H. as §12-21-203, Code of Alabama and Rule 412 of the Alabama Rules of Evidence (otherwise known as the "Rape Shield") both expressly prohibit questioning a complaining witness about their sexual history unless it involves the sexual history of the complainant and that of the accused. The complaining witness and Defendant had no prior sexual history. Therefore, the State maintains that this Court improperly allowed testimony about the sexual history between M.B. and J.H. It was because M.B. believed she was protected by the "Rape Shield" that she did not provide testimony about her sexual history with J.H. However, when the Court overruled the State's objection to said testimony, M.B. was both forthcoming and truthful in answering questions about her sexual history with J.H. This testimony was put before the jury and the fact that this Court is now using testimony that was put before the jury as a basis for the granting of a motion for new trial is improper as it seriously invades the exclusive fact finding province of the trial jury. The Court then made a finding that M.B. stated in her March 27, 2012 statement that she did not see the penis of the Defendant because she closed her eyes but that at trial she testified that she could see the Defendant had on a condom and could see the erect penis. In M.B.'s statement, she did state that she closed her eyes however it was while the act of penetration was occurring. M.B. also says in her March 27, 2012 statement that the Defendant put on a condom "right in the beginning, like whenever he was just like holding me down and I, I wasn't resisting cause I just figured that was the best thing was for me not to, not to try to resist and *I just kind of closed my eyes...*(emphasis added). M.B. also says in the March 27, 2012

statement that she specifically paid attention to whether the Defendant used a condom for her own benefit. The March 27, 2012 statement is consistent with the trial testimony in that M.B. didn't close her eyes until after she saw the Defendant put a condom on. The Court then takes issue with a portion of the March 27, 2012 statement where M.B. says "I was really scared to look [the Defendant] in the face." This Court goes on further to say that "at trial M.B. testified she would not forget the eyes of the rapist." What the Court fails to mention is that M.B. has, at this point in her statement, given a description about the clothing the Defendant was wearing at the time of the rape, the Defendant's complexion, the Defendant's type of haircut, the pitch of the Defendant's voice, that the Defendant was not wearing any jewelry, and that she didn't think he had any facial hair. M.B. also said in her statement that she answered the door and the Defendant forced his way into her home. M.B. and the Defendant would have been face to face when he forced his way into her home because M.B. answered the door. This Court has taken eleven words from a twenty-two page statement and used them out of the context they were given. The Court then states that "at trial M.B. testified she was bent out with her legs straight at the time of the rape, however in one of the non-disclosed statement (sic) she said her knees were bent the whole time of the rape." The State contends that the trial testimony and the both statements are consistent in that in all instances M.B. stated that she was bent over at the waist and the force that the Defendant used to rape her caused her to be knocked down. As such, the testimony and statements of M.B. are consistent.

The Court then addresses the testimony of K.H. The undersigned cannot recall the specific testimony the Court references regarding when K.H. and M.B.'s mother left to return to the trailer and therefore has response other than the responses set forth above. The State would note, however, that M.B.'s mother and K.H. went back to the trailer hours after the criminal offense occurred and therefore whether they returned at 8:00 or 10:00 is irrelevant to criminal offense.

The Court then addresses the statement of J.H. The Court specifically recognizes that J.H. was not called as a witness at trial and defense counsel was not aware that J.H. was the boyfriend of M.B. until M.B. was called as an adverse witness. The State is unaware of any requirement imposed upon the prosecution to disclose any relationship status of any witnesses prior to commencing or during prosecution of a case where that relationship status is not a specific element of a charged offense. Here, the relationship status of M.B. and J.H. is immaterial and irrelevant. Although defense counsel may not have known about the relationship between J.H. and M.B., J.H.'s name was disclosed to defense counsel by way of an evidence submission form where a DNA swab was submitted to the Alabama Department of Forensic Sciences for analysis. Additionally, due to the contents of the text conversation being intimate in nature, one could easily infer that M.B. and J.H. were involved in relationship that was more than platonic. The State determined that J.H.'s testimony was not needed at trial and the Defendant did not subpoena J.H. to testify. Because J.H. never testified at trial, his statement could not have been used for any potential impeachment purpose.

The Court next refers to the "text messages and call log of M.B. which was produced "in camera..." What the Court is referring to is a document that was created by the prosecution during the preparation of the trial in this matter and, as such, is work product of the State. Specifically, the Court is referring to a document that was created by the prosecution that compiled all of the various types of evidence and condensed it into one document to be used for

quick reference both during preparations for trial and during the course of the trial. The State's work product is specifically protected from production to the Defendant under Rule 16(e) of the Alabama Rules of Criminal Procedure. The State did, however, produce all the materials that were used in the creation of the text message and call log to the Defendant. Notice of the availability of the materials was provided through a "Discovery Response" filed by the State on or about September 4, 2012 and an individual by the name of Kate Taylor signed for and received the items on September 7, 2012. Since the Defendant was provided all of the information used by the State in the creation of the text message and call log of M.B. and since the State created that document in anticipation of trial, the State contends that it has met its burden with regard to production of said material and that the Defendant could have used that material in the very same manner as the State to either create his own timeline of events and/or impeach the State's witnesses. The State would note that the Court makes reference to two different sources of evidence in this portion of its analysis. One being the text logs and another being the video where the Defendant's truck is seen passing in view of the camera. There is no evidence that the time source of the video and the time source of the phone are perfectly in synchronization and therefore able to be directly used for comparison. The Court, in its comparison of each assumes that the times are synchronized and then draws the conclusion that the rape of M.B. had to occur between 4:45 p.m. and 4:46 p.m. Without evidence of how far apart the times are in the video and on the phone, the Court is making an improper and unsupported conclusion.

The Court then discusses an affidavit and search warrant utilized to obtain cellular telephone records of S.L.F. The State concedes that this document should have been disclosed in discovery. Through inadvertent and unintentional error this document was not disclosed to the Defendant prior to trial. However, the affidavit for the search warrant, search warrant, and return were all filed in with the Pike County Circuit Clerk's Office and therefore available from another source. In U.S. v. Lawson, 368 Fed. Appx. 1 (2010) the court recognizes an additional prong to be established in order for a Brady claim to be asserted. That court held that in addition to the three requirements set forth in Brady that the Defendant must show that he does not possess the evidence, nor could he obtain it himself with any reasonable diligence. The affidavit for the search warrant, search warrant, and return were all being maintained in the Pike County Circuit Clerk's Office. The Defendant could have obtained this material by simply asking for it from the Circuit Clerk's Office. Additionally, the tentative identification referred to in the search warrant was actually addressed at trial. S.L.F.'s photograph was included one of the State's Exhibits that was introduced at trial. The photo lineup dated 4/3/2012 was a trial exhibit that was introduced into evidence. It is in this photo lineup that S.L.F.'s photograph appears and M.B. places a question mark next to his number within that photo lineup. There was ample testimony at trial about what the meaning of the question marks next to individuals refers to. S.L.F. is not the only individual with a question mark beside his number. M.B. testified on direct and on cross-examination that the question mark next to somebody's name indicated that there were certain **characteristics** about that particular person that matched those of her attacker but that **she was certain none of those individuals had committed these offenses**. This issue was asked about, argued before the jury, and the jury had this and every other photographic lineup utilized during the investigation of this case. There was ample testimony at trial from both M.B. and Investigator McClendon that the individuals with question marks next to their number had similar characteristics as her attacker but were not a positive identification of who her attacker was. There was only one positive identification ever made by M.B. in this case and it was when she was

presented a photographic lineup that contained the photograph of the Defendant. M.B. **positively identified** Andre Ellis as the individual that raped her.

The Court then proceeds to a section of its order titled "Findings." The State takes contention with Paragraph 1 of the Court's findings and argues, based on the foregoing, that the State was under no duty to disclose the statements of M.B., J.H., and K.H. as the statements did not contain exculpatory information and could not potentially be used for impeachment until after the witnesses testified. Even then, the Defendant should have laid the proper predicate as established in Pate and Key and requested the production of said statements at trial. Defendant failed to do so and therefore waived his right to inspect the statements of M.B., J.H., and K.H. Additionally, the State contends the Defendant never could have met its burden to have the State produce the statement of J.H. because it could not have been used for impeachment purposes as J.H. never testified. The State further argues that the Defendant was provided, through discovery, all of the phone records of M.B., including those showing her text messages sent at 4:45 p.m., and the Defendant either failed or refused to use them during the course of the trial. The negligence of the Defendant to properly utilize discovery that has been provided does not give rise to the granting of a motion for new trial as there is no Brady violation.

As to paragraph 2 of the Court's findings, the State would argue that the determination of the Court that there was any suppressed evidence is incorrect as the Defendant failed to follow the proper procedure to obtain the prior statements of M.B., J.H., or K.H. and the affidavit for a search warrant was readily available from another source and not held in the exclusive possession of the State or any other person from which the State is imputed knowledge.

As to paragraph 3 of the Court's findings, the State would argue that the statement contained within the affidavit for a search warrant of S.L.F.'s phone records were available from another source, that J.H.'s prior statement could never have been used for impeachment as J.H. was not called as a witness, and that all of M.B.'s phone records were provided to the Defendant and the Defendant either failed or refused to utilize said records.

As to paragraph 4 of the Court's findings, the State would argue that the foregoing would negate the finding of the court in paragraph 4.

As to paragraph 5 of the Court's findings, the State would argue that the fact that the mother of M.B. cleaned up blood at the scene was not suppressed and was testified about and argued at trial and therefore has no bearing on the motion for new trial. That the fact that the text conversation between M.B. and J.H. was disclosed to the Defendant and that the Defendant failed or refused to utilize said evidence has no bearing on the motion for new trial. The State was forthcoming about the deletion of messages between M.B. and J.H. Although the messages were deleted from the cellular phones of M.B. and J.H., the State obtained and disclosed to the Defendant, through the course of its investigation, phone records that contained the messages between M.B. and J.H. pertaining to the deletion of same. That the fact that M.B. told the doctor that she fell on something and that caused the injuries for which she was being treated was testified to and argued at trial and therefore has no bearing on the motion for new trial. That M.B. was incredibly candid about her actions prior to the rape and that once she was ordered (over objection of the State) to testify about her prior sexual history between her and J.H. that she did so and therefore

that testimony was put before the jury and argued at trial and has no bearing on the motion for new trial.

The Court then moves to the “Conclusion” section of its order where the Court orders a new trial in both the cases where M.B. is a victim and where Q.C. is a victim. The State contends that the order of this Court as it pertains to the cases where M.B. is the victim is in error for the above reasons. The State also objects to the granting of Defendant’s motion for new trial as it pertains to the case where Q.C. is the named victim. Although the trial for each victim was held at the same time, the cases are still mutually exclusive of the other. The Court makes no findings as to any alleged violations pertaining to the case where Q.C. is the named victim and therefore is without jurisdiction to enter an order for new trial in the case where Q.C. is the victim. Additionally, the Defendant made no allegations of **any Brady** violations or **any other** specific violation having occurred in the case where Q.C. is the victim.

WHEREFORE, the State of Alabama prays that this court will set aside its Order dated May 17, 2013.

Done this the 24th day of May, 2013.

/s/ Chris M. Kaminski
Chris M. Kaminski
Assistant District Attorney

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