2018 SOUTH CAROLINA STATE & FEDERAL CRIMINAL LAW YEAR-IN-REVIEW

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ABOUT THIS PUBLICATION

This edition summarizes published 2018 criminal appellate cases before the Supreme Court of the United States, the Fourth Circuit Court of Appeals, and the state appellate courts of South Carolina. It focuses on cases that are helpful to defense attorneys, while also including a selection of noteworthy cases in which the prosecution ultimately prevailed.

GEEL LAW FIRM

Post-Conviction Attorneys, Serving South Carolina, Georgia, and Federal Appellate Courts

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SUPREME COURT CASES

FOURTH AMENDMENT, SEARCH & SEIZURE

Carpenter v. United States, 138 S. Ct. 2206 – Government's acquisition of defendant's cell-site location data from his wireless carrier was a "search" for 4th Amendment purposes, requiring a warrant prior to accessing the records.

Collins v. Virginia, 138 S. Ct. 1663 - The 4th Amendment automobile exception does not permit warrantless entry of a home or its curtilage in order to search a vehicle therein.

Dahda v. United States, 138 S. Ct. 1491 – Wiretap orders were not facially insufficient because, while there was language authorizing interception outside of the court's territorial jurisdiction, the orders clearly stated the court's jurisdiction.

Byrd v. United States, 138 S. Ct. 1518 – Driver in lawful possession of a rental car who is not listed on the rental agreement still has reasonable expectation of privacy with respect to the vehicle.

District of Columbia v. Wesby, 138 S. Ct. 577 – D.C. police officers had probable cause to arrest partygoers for holding raucous, late-night party in a house they did not have permission to enter. (42 U.S.C. §1983 case).

DOUBLE JEOPARDY

Currier v. Virginia, 138 S. Ct. 2144 – Defendant consented to a severance of the multiple charges against him. His second trial and resulting conviction, following an acquittal at his first trial, did not violate the Double Jeopardy clause.

GUIDELINES AND SENTENCING ISSUES

Koons v. United States, 138 S. Ct. 1783 – Petitioners in this case did not qualify for sentence reductions pursuant to 18 U.S.C. §3582(c)(2) because their sentences were not "based on" their lowered Federal Guidelines ranges, but instead were "based on" their mandatory minimums and their substantial assistance to the Government.

Hughes v. United States, 138 S. Ct. 1765 – An 11(c)(1)(C) plea agreement is "based on" the defendant's Federal Guidelines range so long as that range was part of the framework that the district court relied upon in imposing the sentence or accepting the agreement. Consequently, defendants sentenced pursuant to these agreements may prevail in 18 U.S.C. §3582(c)(2) motions.

APPEALS AND POST-CONVICTION PROCEEDINGS >> HABEAS CORPUS

Sexton v. Beaudreaux, 138 S. Ct. 2555 - The Ninth Circuit erred in reversing a denial of federal habeas relief because it "did not consider reasonable grounds that could have supported the state court's summary decision."

Wilson v. Sellers, 138 S. Ct. 1188 – A federal habeas court reviewing an unexplained state-court decision on the merits should "look through" that decision to the last related state-court decision that provides a rationale, and presume that the unexplained decision adopts the same reasoning.

APPEALS AND POST-CONVICTION PROCEEDINGS >> DIRECT APPEAL

Rosales-Mireles v. United States, 138 S. Ct. 1897 – Miscalculation of the Federal Guidelines range (which went unnoticed in the district court) that is "plain" and "affect[s] a defendant's substantial rights" requires appellate court to exercise discretion under FRCP 52(b) to vacate defendant's sentence.

Class v. United States, 138 S. Ct. 798 – A guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of statute of conviction on direct appeal.

APPEALS AND POST-CONVICTION PROCEEDINGS >> INEFFECTIVE ASSISTANCE OF COUNSEL

McCoy v. Louisiana, 138 S. Ct. 1500 – The 6th Amendment guarantees a defendant the right to choose the objective of defense and to insist that counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt provides the best chance to avoid the death penalty.

MISCELLANEOUS

Sessions v. Dimaya, 138 S. Ct. 1204 - SCOTUS affirms Ninth Circuit holding that 18 U.S.C. §16(b), which defines a "violent felony" for the purposes of immigration removal proceedings, is unconstitutionally vague.

FOURTH CIRCUIT COURT OF APPEALS CASES

CONFESSIONS >> *MIRANDA* WAIVER

United States v. Nader Abdallah, 2018 U.S. App. LEXIS 35404 – The district court reversibly erred by refusing to suppress the Defendant's inculpatory custodial statement. During the recitation of the *Miranda* warnings, Defendant said he "wasn't going to say anything at all." This was an unambiguous invocation of his right to remain silent, which investigators ignored. The district court also erred by declining to conduct an in-camera review of the interrogating agents' notes and email communications, to determine whether they contained *Brady* material.

> *Under Miranda, the onus is not on the suspect to be persistent in his demand to remain silent. Rather, the responsibility falls to the law enforcement officers to scrupulously respect his demand.*
> ***U.S. v. Abdallah***

FOURTH AMENDMENT >> WARRANTLESS SEARCHES

United States v. Brian Terry, 2018 U.S. App. LEXIS 33617, 2018 WL 6253385 – Investigators placed a GPS tracker on defendant's car without a warrant. Two days later, officers used the GPS tracker to locate defendant's car, and they pulled it over. Officers claimed that the fact that defendant was driving 50 mph in a 45 mph zone purged the taint of the warrantless search (placing the GPS tracker). The Fourth Circuit rejected this argument.

United States v. Hamza Kolsuz, 890 F.3d 133 – Border agents may conduct "routine" searches and seizures of people and property without a warrant or individualized suspicion, however individualized suspicion is required for forensic (advanced) searches of cell phones.

United States v. Brian Bowman, 884 F.3d 200 – Evidence should have been suppressed where police officer lacked consent and reasonable suspicion to extend traffic stop.

FOURTH AMENDMENT >> SEARCH WARRANTS

United States v. Robert McLamb, 880 F.3d 685 – This case involves the child pornography distribution site "Playpen." After the FBI seized the site's servers, they received a warrant that authorized them to deploy software from the server that would identify and locate the site's users. Defendant was one of several thousand users identified in this manner, and he moved to suppress the evidence that was later found on his computer after he'd been identified as a Playpen user. Due to the fact that this was a nationwide investigation, several other circuits have already weighed in on the validity of this search warrant. The Fourth Circuit joins other circuits in concluding that even if the warrant was invalid, the *Leon* exception applies.

United States v. Tyrone Lyles, 2018 U.S. App. LEXIS 35190 – Police conducted a trash pull at defendant's house and recovered three marijuana stems and rolling papers. They then sought and received a search warrant for defendant's home, which revealed firearms, ammunition, and marijuana. Defendant moved to suppress the evidence, and that motion was granted – the district court declined to apply the *Leon* exception. On appeal, the Fourth Circuit affirms, holding that "the trash pull evidence did not adequately support the warrant to search defendant's home for marijuana possession." Review this opinion for very defense-friendly language about courts needing to exercise "circumspection" regarding items discovered in trash pulls.

> *Leon's standard is ultimately an "objective" one. And objectively speaking, what transpired here is not acceptable. What we have before us is a flimsy trash pull that produced scant evidence of a marginal offense but that nonetheless served to justify the indiscriminate rummaging through a household. Law enforcement can do better.*
>
> ***U.S. v. Lyles***

SENTENCING >> APPLICABILITY OF ENHANCEMENTS

United States v. Corey Townsend, 886 F.3d 441 – Defendant's prior North Carolina conviction for assault with a deadly weapon with intent to kill inflicting serious injury is categorically a violent felony under the force clause of the Armed Career Criminal Act (ACCA).

United States v. Donald Covington, 880 F.3d 129 - West Virginia's Unlawful Wounding statute categorically qualifies as a crime of violence for the purposes of career offender enhancement.

United States v. Jarnaro Middleton, 883 F.3d 485 - South Carolina's Involuntary Manslaughter statute is not a "violent felony" for the purposes of the ACCA.

United States v. Antoine Smith, 882 F.3d 460 – North Carolina's Voluntary Manslaughter statute is a "violent felony" for the purposes of the ACCA.

United States v. Andreatti Brown, 2018 U.S. App. LEXIS 33461, 2018 WL 6220038 – Defendant considered "under a criminal justice sentence" during 10-year suspended sentence for purposes of sentence enhancement. Court likened defendant's suspended sentence to unsupervised probation.

United States v. Bradford Allen, 2018 U.S. App. LEXIS 33367, 2018 WL 6187567 – Defendant was convicted for felon in possession of a firearm, and received a two-level enhancement under 2K2.1(a)(2) due to his prior "controlled substance offense," his prior offense being "using a communication facility to facilitate the crime of possession with intent to distribute cocaine base." The Fourth Circuit affirmed, holding that this enhancement is proper in circumstances where the offense that was facilitated during the prior conduct was a controlled substance offense.

United States v. Garnett Hodge, 902 F.3d 420 – At sentencing, the Government identified three ACCA-predicate convictions, and defendant was sentenced accordingly. Defendant later filed a post-*Johnson* 2255 arguing that one of his ACCA predicates was no longer a crime of violence. The Government argued that nevertheless, defendant had another ACCA predicate conviction (one not identified as such during his initial sentencing), and the district court denied defendant's 2255 on that basis. The Fourth Circuit reversed, noting that defendant had a due process right to have all ACCA-triggering offenses identified during his actual sentencing proceeding.

United States v. Taison McCollum, 885 F.3d 300 – Conspiracy to commit murder in aid of racketeering is not

categorically a crime of violence for purposes of §2K2.1 sentencing enhancement.

SENTENCING >> REASONABLENESS OF SENTENCE

United States v. Shelton Ketter, 908 F.3d 61 – After receiving a 192-month sentence for felon in possession under the Armed Career Criminal Act, defendant had his sentence vacated in a post-*Johnson* 2255. At his subsequent sentencing, the court imposed a sentence of time-served (which was 53 months over the new guideline range) and imposed a term of supervised release. Defendant appealed, arguing that the court's unexplained variance was error. The Fourth Circuit agreed, but held that the error was harmless, since it did not prolong his sentence.

SENTENCING >> SUBSTANTIAL ASSISTANCE

United States v. Under Seal, 902 F.3d 412 – Defendant entered a plea agreement that required him to testify "fully and truthfully" against others, and in return the Government agreed to make a substantial assistance motion. After not being impressed with defendant's testimony, the Government declined to make a substantial assistance motion. Defendant demanded a hearing on this issue, and was denied. The Fourth Circuit affirmed, holding that the language of the plea agreement gave the Government discretion to file a substantial assistance motion (or to decline to do so).

SENTENCING >> RESTITUTION, FORFEITURE

United States v. Dominic Steele, 897 F.3d 606 – Abuse of discretion to order restitution based on replacement cost because proper measure is fair market value when items are fungible. Replacement cost measure only appropriate for (1) non-fungible items, (2) when fair market value is difficult to determine, or (3) when fair market value would not adequately capture actual losses.

United States v. Lorene Chittenden, 896 F.3d 633 - Defendant and others were convicted for a fraudulent mortgage scheme. Although defendant only received $231,000 from the scheme, the district court entered a forfeiture order for over $1.5 million, "representing the foreseeable proceeds of the offenses of which the defendant has been found guilty." The Government went on to seize defendant's non-tainted assets to satisfy the order. The Fourth Circuit holds: "forfeiture under 18 U.S.C. § 982(a)(2) is limited to property the defendant acquired as a result of the crime. The statute does not permit courts to hold a defendant liable for proceeds that only her co-conspirator acquired."

APPEALS AND POST-CONVICTION PROCEEDINGS >> TIMELINESS, WAIVERS, MOOTNESS, DEFAULT, ETC.

United States v. Alex McCoy, 895 F.3d 358 - An appeal waiver does not prohibit a defendant from challenging the validity of the factual basis for guilty plea.

United States v. Eddie Fluker, 891 F.3d 541 – Defendant was convicted under the ACCA in 1992, and later filed a post-*Johnson* 2255, and was re-sentenced. In his second sentencing, defendant was designated as a career offender, and received a time-served sentence. However, while in custody defendant had committed other offenses which resulted in a consecutive 120-month sentence, which he started serving after he received his time-served sentence. Defendant appealed, challenging the career offender designation, and the Government argued that the appeal was moot, because he had received a time-served sentence. The Fourth Circuit rejected this argument, noting that the commencement of defendant's consecutive sentence relied upon the date that he completed his prior sentence. Thus, defendant had a "legally cognizable interest in the outcome of the appeal," since winning the appeal could alter his ultimate release date.

United States v. Daniel Sanchez, 891 F.3d 535 – District court has no jurisdiction to examine validity of underlying sentence issues (such as post-*Johnson* ACCA issues) in a subsequent revocation proceeding. Defendant must challenge these issues on direct appeal or in a 2255 motion.

United States v. Adrian Hyman, 880 F.3d 161 – Fourth Circuit Local Rule 27(f) permits a party to move to dismiss on procedural grounds, such as timeliness, at any time.

United States v. Gerald Wheeler, 886 F.3d 415 – Defendant entitled to have sentencing issue heard on the merits where retroactive change in the law arguably affected applicable mandatory minimum. NOTE: This opinion contains a thorough and informative stroll

through the garden of habeas cases touching on retroactivity, jurisdiction, and 2255's savings clause.

APPEALS AND POST-CONVICTION PROCEEDINGS >> INEFFECTIVE ASSISTANCE OF COUNSEL

United States v. Christian Allmendinger, 894 F.3d 121 – Ineffective assistance of counsel to fail to raise improper merger of offenses on direct appeal. District court erred in 2255 proceeding by considering likely result of resentencing, instead of whether issue would have resulted in reversal of the defendant's conviction.

TRIALS >> EXPERT WITNESSES

Mark Lawlor v. David Zook, Warden, 2018 U.S. App. LEXIS 33240 – Constitutional error for the trial court in death penalty case to exclude expert testimony of qualified witness about defendant's very low risk of future violence in prison.

SOUTH CAROLINA APPELLATE CASES

CONFESSIONS >> *MIRANDA* WAIVER

State v. Marshell Hill, 2018 S.C. App. LEXIS 82 (S.C. Ct. App.) – Court finds *Miranda* and *Seibert* violations in connection with two custodial statements by the Defendant. The first statement was inadmissible because it was the product of a custodial interrogation conducted without the required *Miranda* warnings. The second confession, although made after he was given *Miranda* warnings, was excludable because it was procured in violation of *Miranda* by the investigators' use of the "question first" method forbidden by *Missouri v. Seibert*, 542 U.S. 600 (2004).

FOURTH AMENDMENT ISSUES

State v. Stepheno Jemain Alston, 422 S.C. 270 (S.C.) – The offense of failure to maintain a lane is not a strict liability offense. As a result, an officer must consider all relevant circumstances in deciding whether to stop a vehicle for a violation of this statute.

State v. Lamar Sequan Brown, 423 S.C. 519 (S.C.) – Defendant "abandoned" phone for 4th Amendment purposes by leaving it at scene of crime and canceling service, paving the way for inspection of the phone's contents.

State v. David Wilkins Ross, 423 S.C. 504 (S.C.) – Automatic lifetime electronic monitoring of sex offender constituted an unreasonable search because the court failed to consider totality of the circumstances presented.

State v. James Clyde Dill, Jr., 423 S.C. 534 (S.C.) – In this meth-lab case, the search warrant affidavit and supplemental oral testimony were insufficient to establish probable cause; consequently, the search of the defendant's residence was not authorized. "The affidavit, as written, conveys only that the informant informed law enforcement he saw numerous items that are used in the manufacture of methamphetamine. The affidavit does not relate what those items were, nor does the affidavit relate what was being done with the items . . . there was nothing presented to the magistrate to support a finding of probable cause that there was an active lab in operation."

TRIALS >> EVIDENTIARY ISSUES

State v. Johnnie Lee Lawson, 424 S.C. 51 (S.C. Ct. App.) – Abuse of discretion to admit testimony indicating defendant had prior criminal record where such testimony was unnecessary to authenticate evidence.

State v. David Alan White, 2018 S.C. App. LEXIS 79, 2018 WL 5020073 (S.C. Ct. App.) – Defendant was convicted of ABHAN for cutting the throat of the victim in the midst of a physical altercation. Defendant claimed he acted in self-defense. The trial court abused its discretion by excluding the defendant's testimony regarding the victim's statements moments before the fight – defendant claimed that the victim stated he had a gun and a knife nearby. The court further erred by refusing to charge the jury on self-defense.

State v. Venancio Diaz Perez, 423 S.C. 491 (S.C.) – Violation of Confrontation Clause to prevent defendant from cross-examining mothers of alleged victims regarding U-visa (visas provided to victims of certain crimes who are helpful to government/prosecution) to show bias/self-interest.

State v. Timothy Artez Pulley, 423 S.C. 371 (S.C.) – Trial court erred in concluding proper establishment of complete chain of custody where officer who seized drugs left it at the scene with another officer, evidence custodian testified he did not receive the drugs personally as indicated on form, and no testimony indicating how drugs traveled from the scene to the evidence lockbox.

State v. James Simmons, Jr., 423 S.C. 552 (S.C.) – In this CSC case, the admission of a pediatrician's statements pursuant to SCRE 803(4) was "blatantly improper," and "nothing more than hearsay shrouded in a doctor's white coat."

State v. Tyrone J. King, 424 S.C. 188 (S.C.) – The trial court erred in admitting evidence of the unrelated murder charge. "The admission into evidence of the unrelated murder charge is highly prejudicial to a defendant currently on trial for murder. . . Since King was on trial for murder, it is entirely reasonable to conclude the jury considered the evidence of his unrelated murder charge in reaching its guilty verdict."

State v. Donte Samar Brown, 424 S.C. 479 (S.C.) – GPS records that incriminated Defendant were not properly authenticated, and therefore were inadmissible. To establish the accuracy of the GPS records, the testifying officer simply observed the GPS records are accurate because "[w]e use it in court all the time." Such a response provides no assistance in assessing the accuracy of the GPS records. Without this component of authentication satisfied, it was error to admit this evidence. However, the error was harmless.

TRIALS >> EVIDENTIARY ISSUES >> EXPERT WITNESSES

State v. Jeffrey Dana Andrews, 424 S.C. 304 (S.C. Ct. App.) – Reversible error to allow paramedic opinion testimony that exceeded paramedic's expertise. See *State v. Ellis*, 345 S.C. 175, 177–78, 547 S.E.2d 490, 491 (2001).

Whether the subject matter of a proposed expert's testimony is outside the realm of lay knowledge is a determination left solely to the trial judge and his or her sense of what knowledge is commonly held by the average juror.
State v. Roy Lee Jones

State v. Roy Lee Jones, 423 S.C. 631 (S.C.) – Improper use of juror voir dire responses to determine if expert witness testimony is relevant. "Whether the subject matter of a proposed expert's testimony is outside the realm of lay knowledge is a determination left solely to the trial judge and his or her sense of what knowledge is commonly held by the average juror. The purpose of voir dire is to assess a juror's individual biases and overall fitness to serve on the jury––not to probe the need for expert testimony." Nevertheless, defendant's conviction was affirmed.

TRIALS >> JURY INSTRUCTIONS

State v. Preston Shands, Jr., 424 S.C. 106 (S.C. Ct. App.) – Attempted murder conviction reversed; the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon. "[A]ttempted murder requires the specific intent to commit murder, which is a higher level of mens rea than is required for murder. . . . [A]ttempt crimes require the highest level of mens rea because it is logically impossible to attempt an unintended result."

State v. Steven Otts, 424 S.C. 150 (S.C. Ct. App.) – Error to instruct jury with "defense of others" language where State used language to justify victim's behavior and argue in favor of defendant's guilt. Court held that, when used appropriately, this jury instruction presents a possible defense to a criminal charge; it is not an instruction for the State to use offensively.

TRIALS >> *FARETTA*, *PRO SE* DEFENDANT

State v. Lamont Antonio Samuel, 422 S.C. 596 (S.C.) – Error to prevent defendant from representing himself in murder trial where lower court found defendant was lying about whether he had or would have access to legal coaching in preparation for trial. Defendant "made a knowing, intelligent, and voluntary request to proceed pro se as required by *Faretta*, and he should have been given the opportunity to represent himself."

TRIALS >> DOUBLE JEOPARDY

State v. Stephanie Irene Greene, 423 S.C. 263 (S.C.) – Appellant could not be found guilty of both homicide by child abuse and involuntary manslaughter. In this situation, the jury should have been instructed that, depending on their view of the evidence, they could find Appellant not guilty of both homicide offenses, guilty of homicide by child abuse, or guilty of involuntary manslaughter—but may not find Appellant guilty of both homicide charges.

TRIALS >> JURISDICTION

State v. Jennifer Lynn Alexander, 424 S.C. 270 (S.C.) – Where a law enforcement officer receives a call through his dispatch center from 911 communications regarding

an incident believed to be within or immediately adjacent to his jurisdiction, the officer has the authority to respond, assess the situation, and (if necessary) detain the subject even if the incident location lies outside of the responding officer's jurisdiction.

APPEALS AND POST-CONVICTION PROCEEDINGS >> GUILTY PLEAS

State v. Bobby Randolph Sims, 423 S.C. 397 (S.C. Ct. App.) – Immunity from prosecution pursuant to the Protection of Persons and Property Act, S.C. Code §§ 16-11-410, *et seq*., is not a jurisdictional challenge, and as such, defendant may not raise the issue on appeal following guilty plea.

APPEALS AND POST-CONVICTION PROCEEDINGS >> PCR'S

Samuel Brown Jr. v. State, 423 S.C. 56 (S.C.) – The Post-Conviction Procedure Act contains no "in custody" requirement. PCR cases brought under subsection 17-27-20(A)(1) require only what the subsection clearly states: "Any person who has been convicted of, or sentenced for, a crime and who claims: (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State . . . may institute . . . a proceeding under this chapter to secure relief."

Darrell L. Goss v. State, 2018 S.C. LEXIS 120, 2018 WL 5023465 (S.C.) – Error for court to take judicial notice of present witnesses' proposed testimony during PCR hearing and conclude they would not be credible to a jury because of their relationship with defendant. Witnesses' proposed testimony was pertinent to defendant's ineffective assistance of counsel claims for failure to interview/call them at trial.

APPEALS AND POST-CONVICTION PROCEEDINGS >> INTERLOCUTORY APPEALS

State v. David Zackary Ledford, 422 S.C. 244 (S.C.) – Interlocutory appeal improper avenue for objection to court's decision re: jury charge mid-trial.

APPEALS AND POST-CONVICTION PROCEEDINGS >> INEFFECTIVE ASSISTANCE OF COUNSEL

Michael Robinson v. State, 422 S.C. 78 (S.C.) – Defendant pled guilty based on plea counsel's advice to accept the plea offer because, according to his attorney, defendant would be subject to an increased sentence based on an amendment to the applicable statute that took place after the offense date. Of course, defendant was not subject to the increased sentence, for that would have violated the *ex post facto* clauses of the United States Constitution and South Carolina Constitution. Denial of defendant's PCR was reversed.

Stephen Smalls v. State, 422 S.C. 174 (S.C.) – Trial counsel was ineffective by (1) failing to impeach a key witness when it was revealed that the State had dismissed a pending carjacking charge against him on the morning of trial, and (2) failing to object when another witness implied that the defendant had obtained the shotgun used in the incident by committing a burglary a year before.

Gregg Taylor v. State, 422 S.C. 222 (S.C.) – Court finds denial of PCR improper where defendant's trial counsel failed to properly advise him regarding the risk of deportation, defendant was deported following guilty plea, and defendant "demonstrated a reasonable probability that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

Darryl Frierson v. State, 423 S.C. 257 (S.C.) – In order to establish prejudice when challenging a guilty plea at the PCR stage, a defendant must prove only that "there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have gone to trial." The crux of the inquiry is whether counsel's ineffective performance affected the outcome of the plea process, not whether the defendant would have been successful had he gone to trial.

Jerome Curtis Buckson v. State, 423 S.C. 313 (S.C.) – PCR correctly granted where trial counsel failed to present evidence defendant lived in the apartment where the incident took place, which would have undermined the allegation that defendant committed burglary when he entered the apartment.

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In his free time, Chris enjoys listening to podcasts, reading case law, and writing things down so that he will not forget them. His wife, Tekesha, is also an attorney, and they are blessed with a 2-year-old daughter and a mortgage.