GREATER BIRMINGHAM CRIMINAL DEFENSE LAWYERS

CASELAW UPDATE

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This handout covers major and/or noteworthy published Court of Criminal Appeals, Alabama Supreme Court, Eleventh Circuit, United States Supreme Court, and criminal decisions from the last twelve months. It will also have some interesting cases from other jurisdictions. This handout does not contain every criminal case from the Alabama appellate courts or the Eleventh Circuit. For the most part, cases that aren't included involve fairly routine issues that are cumulative, federal ACCA cases that don't deal with Alabama law, procedural Rule 32 cases, procedural federal habeas cases under §§ 2254 and 2255, and § 1983 civil rights cases.

STIMULUS MONEY

Ex parte Reno, CR-20-0512 **(Ala. Crim. App. February 11, 2022)**

This is a mandamus challenging the motions to get ahold of stimulus money. This one is out of Baldwin county. It was originally called garnishment, but then the DA's office filed a motion to correct a clerical error saying that it wasn't seeking to "garnish" the account, but to enforce the previous restitution order. On appeal, that distinction pretty much ended all the arguments Reno made against the state taking his stimulus money. Basically, because it is "enforcing a previous order" the Court easily rejected all the legitimate due process concerns he raised.

PRESERVATION

***United States v. Williams*, 29 F.4th 1306 (11th Cir. March 30, 2022)**

The Eleventh Circuit held that Williams forfeited his claims because counsel didn't raise them the right way after being told to do so.

***Love v. State*, CR-20-0423 (Ala. Crim. App. March 11, 2022)**

Love pleaded guilty to two counts of theft and did not reserve any issues for appeal. His plea included the standard appeal waiver. After he was ordered to pay over $10,000 in restitution, however, Love sought to appeal the restitution. But because he did not reserve any issues and did not move to withdraw his guilty plea, the appeal waiver remained valid. As a result, the Court dismissed Love's appeal.

***P.B. v. State*, CR-20-0795 (Ala. Crim. App. May 6, 2022)**

The Court dismissed the appeal because the notice of appeal was not timely. P.B.'s post-trial motion was functionally a Rule 29 motion, not a Rule 24 motion. Therefore, the time for filing the notice of appeal did not toll. The Court also took the opportunity to expressly say that reservation issues do not have to be included in the guilty plea order so long as the record demonstrates that issues for appeal were reserved.

FOURTH AMENDMENT

***United States v. Lewis*, 40 F.4th 1229 (11th Cir. July 14, 2022)**

The Court affirmed Lewis's drug convictions. The Court reaffirmed that there is no privity between state and federal governments that requires the federal government to suppress evidence previously suppressed by state courts as issue preclusion. The Court also held that there was no abuse of discretion in the challenged juror strikes.

***United States v. Cohen*, 38 F.4th 1364 (11th Cir. July 6, 2022)**

Cohen was stopped driving a rental car. His license was suspended and his name was not listed on the rental agreement. He was arrested for resisting and during the inventory search a gun was located. Cohen challenged the search. The district court found that he lacked standing because he was not on the rental agreement **and** did not have a valid license. In *Byrd* the Supreme Court held that not being on a rental

agreement did not deprive a defendant of a right to privacy in a rental car. Here the government argued that the combination of not being on a rental agreement and a suspended license deprived Cohen of standing. The Court disagreed finding that Cohen did have standing to challenge the search, but that the search was permissible.

This may set up a circuit split.

***United States v. Campbell*, 26 F.4th 860 (11th Cir. February 16, 2022) (en banc)**

The Eleventh Circuit returns with yet another opinion in *Campbell* fighting over whether the government can waive/abandon issues on appeal. But the important part for most of us is that this is the major case dealing with *Rodriguez v. United States*, 575 U.S. 348 (2015), the case on unlawfully prolonged stops. Alabama, so far, does not have a published *Rodriguez* decision, so this is one to read; and it is fairly pro-defendant.

The officer only added 25 seconds to the stop and the Eleventh Circuit said this violated *Rodriguez*. And it doesn't matter if the time is added during or after the purpose of the stop if the officer strays from the purpose of the stop. So, if you have a case where your client was pulled over for a traffic violation and the cop suddenly decides to run his dog, question passengers, or asks things "CDS or DVDs … illegal alcohol? Any marijuana? Any cocaine? Methamphetamine? Any heroin? Any ecstasy? Nothing like that? You don't have any dead bodies in your car?"

Read it people. We don't have an Alabama opinion on this. Don't freak out over the length. It is an en banc with multiple opinions.

***United States v. Braddy*, 11 F.4th 1298 (11th Cir. August 31, 2021)**

Officer pulled Braddy over on I65 because Braddy's tag was obscured by 2 bicycles. Dog sniff turned them on to cocaine in the vehicle. Braddy appealed arguing that the reason for the stop—that Ala Code § 32-6-51 which requires licenses to be plainly visible—did not establish probable cause because the statute did not apply to Braddy as a nonresident of Alabama. The government conceded this view of the statute was correct, but the Eleventh Circuit held that the officer's interpretation of the statute

was objectively reasonable. Braddy also challenged the stop as being unlawfully prolonged under *Rodriguez* by the officer's questions and the dog sniffs. The court rejected those arguments because the officer's questions were routine and the dog sniffs occurred while the purpose of the stop was ongoing, not after. The court also rejected arguments about whether the dog's alert was sufficient in this case to establish probable cause.

***United States v. Chatrie*, 2020 WL 628905 (E.D. Va. March 3, 2022)**

Geofence

***United States v. Sanchez*, 30 F.4th 1063 (11th Cir. April 5, 2022)**

Sanchez was convicted of 7 counts involving sex crimes against minors. He challenged the warrantless search of his house, but the Eleventh Circuit rejected that argument because the entry was consented-to as to retrieve evidence for which officers had a search warrant. The court also rejected arguments related to a sentencing based on a prior conviction under the UMCJ involving and minor various enhancements, double jeopardy, and that the life sentence was substantively unreasonable.

***Watkins v. State*, CR-20-0670 (Ala. Crim. App. March 11, 2022)**

Watkins appealed the denial of his motion to suppress and his HFOA LWOP sentences. The suppression dealt mainly with a one-man show up identification on the scene. The Court acknowledged that these identifications are highly suggestive and pose multiple problems, but after going through the requirements of them find that this was just Grade A police work. This is a case worth looking at when dealing with one-man show up identifications. The case was reversed and remanded in part, however, to fix the double jeopardy issues related to the two robbery convictions.

***Picogna v. State*, CR-20-0668 (Ala. Crim. App. February 11, 2022)**

Police went to hotel room to investigate a threat supposedly made by Picogna. Picogna declined to speak with the officers and went to shut the door. Officer reached in and grabbed his arm while putting his boot in the doorway. Picogna ended up pulling the officer into the room and got into a tussle with the two officers resulting in 2nd degree assault and resisting arrest charges. He challenged the whole thing on Fourth

Amendment grounds, but the Court held that the exclusionary rule does not bar admission of evidence related to crimes committed after the violation occurred. So even though the violation caused the tussle, it doesn't matter.

***United States v. Nicholson*, 24 F.4th 1341 (11th Cir. January 23, 2022)**

The Court rejected arguments that there was insufficient evidence to show that Nicholson took the children across stateliness with the intent to engage in criminal sexual activities. The government is not required to show that illegal sexual activity occurred to show intent. The Court also rejected arguments regarding the suppression of evidence. Nicholson argued that the evidence was due to be suppressed because the government did not seize the evidence until after the 60-day time frame outlined in the warrant. The Court held that this time violation was more like a Rule 41 violation than a constitutional violation, requiring a showing of prejudice. Nicholson also argued that evidence should have been suppressed because law enforcement told the tow company to hold the evidence and did not obtain a warrant to seize the evidence for months. The Court held that while the violation may have occurred it was not subject to the exclusionary rule and any error was harmless.

***Ex parte Powers*, No. 1200764 (Ala. January. 21, 2022)**

Alabama Supreme Court granted certiorari after the Court of Criminal Appeals affirmed the denial of Power's motion to suppress in ***Powers v. State*,** CR-18-1196 (Ala. Crim. App. February 5, 2021). Powers was sleeping on the couch of a house when police arrived to execute a search warrant of the house. Powers didn't live at or own the house. During the search, police searched her purse, which she challenged as outside the scope of the warrant. The Court of Criminal Appeals followed the 11th Circuit and applied a relationship test, which balanced the person's relationship the premises and the officer's knowledge of that relationship. The Alabama Supreme Court affirmed the Court of Criminal Appeals' decision but rejected the specific test to be used to considering the question raised in the case. Instead, the Court held that "each case must be evaluated based on the unique facts and circumstances relevant to a defendant's reasonable expectation of privacy and whether police reasonably can

conclude that a particular personal effect comes within the scope of a premises search."

***Byrd v. State*, CR-20-0609 (Ala. Crim. App. October 8, 2021)**

Court affirmed the denial of Byrd's motion to suppress. The emergency assistance exception to the Fourth Amendment applied because the officer found the pill bottle containing synthetic marijuana when checking Byrd's jacket for weapons after being asked to grab the jacket while medics attended to Byrd. Officer checked the bottle to see if it contained something that would be needed and smelled something a little like marijuana.

***United States v. Watkins*, 10 F.4th 1179 (11th Cir. August 20, 2021)**

Sitting en banc, the court reversed the panel decision and held that when the government seeks to use inevitable discovery exception to the exclusionary rule, the government must demonstrate probable cause that the discovery was inevitable. This reversed the former standard of "reasonable probability" that had been applied by the Eleventh Circuit.

FIFTH AMENDMENT

***United States v. Woodson*, 30 F.4th 1295 (11th Cir. April 13, 2022)**

Woodson was interviewed by police as they conducted a search warrant at his house in relation to child porn. Woodson later appealed the denial of his motion to suppress statements made during that interview because he had not been Mirandized. The Eleventh Circuit held that there was no error in denying the motion because under the circumstances of the case, the interview did not meet the threshold where *Miranda* warnings are required. Woodson also challenged his sentences for procedural and substantive reasonableness.

***United States v. Lee*, No. 20-13505 (11th Cir. March 21, 2022)**

Lee was convicted of solicitation and advertisement for child porn under 18 U.S.C. § 2251(d), but later had that conviction overturned following the Eleventh Circuit's decision in *Caniff*, 955 F.3d 1183 (11th Cir. 2020). When the motion for judgment of

acquittal was granted on those charges, the government charged Lee with violating § 2251(a). Lee appealed the denial of his motion to dismiss based on Double Jeopardy because the same conduct was the basis of both charges. The Eleventh Circuit affirmed the denial of the motion to dismiss after determining that although both 2251(a) and 2251(d) involve child porn, the two offenses are not the same type of offense because a person can violate 2251(a) in multiple ways which do not violate 2251(d) in light of *Carniff II*.

***Doster v. State*, CR-20-0300 (Ala. Crim. App. December 17, 2021)**

The Court affirmed Doster's convictions and held that the State is allowed to present a defendant's testimony from a stand-your-ground immunity hearing as substantive evidence. The Court agreed with a Florida appellate court that unlike a suppression hearing, there is no constitutional right involved in a stand-your-ground hearing and, and therefore, the Fifth Amendment protection against self-incrimination does not prevent the State from using testimony in a stand-your-ground hearing.

***Ex parte Collins*, 1200443 (Ala. November 5, 2021)**

The Alabama Supreme Court reversed Sherman's conviction for criminal conspiracy because under the facts of the case, the conviction and Sherman's capital murder violated double jeopardy.

Justice Mitchell felt the need to remind us all the raise claims under the Alabama Constitution, so they to can be denied 99.9% of the time.

SIXTH AMENDMENT

***United States v. Moon*, 33 F.4th 1284 (11th Cir. May 10, 2022)**

During a DEA search of his office related to illegal distribution of opioids, the DEA found VHS tapes with child porn. Moon was later convicted of offenses related to production of and possession of child porn. On appeal, the Court held that as a matter of first impression, a defendant can waive his right to a public trial when he knows the public has been excluded from the courtroom and does not object. Moon agreed to close the courtroom for various aspects of the testimony and evidence but did not

object when the courtroom remained closed at times following that testimony and evidence. The Court also rejected Moon's arguments that the VHS tapes were outside the scope of the warrant, that a *Franks* hearing was warranted, that the judge should have recused, and that additional instructions of lasciviousness should have been given to the jury.

***Horton v. State*, CR-20-0502 (Ala. Crim. App. March 11, 2022)**

Speedy trial appeal where Horton was arrested for domestic violence in 2016 and filed a speedy trial motion in 2020. The Court went through the 4 *Barker* factors and determined that although the delay was presumptively prejudicial and part of the delay was due to the State's fault, Horton's delayed assertion of the right was problematic. Most of the opinion deals with the fourth aspect of *Barker*: prejudice. Horton argued that prejudice should be presumed due to the length of the delay, but because he delayed in asserting the right, the Court held that did not apply. Horton also could not show actual prejudice due to the facts of his case. This is one worth reading for any upcoming speedy trial issues that aren't centered around COVID. COVID delays are something that haven't really gotten through the Court of Criminal Appeals in standard criminal cases.

***State v. Crandle*, CR-20-0148 (Ala. Crim. App. October 8, 2021)**

Court reversed the dismissal on speedy trial grounds because the circuit court's order did not contain specific, written findings of fact on each *Barker* factor. Remanded with instructions to fix the order or hold a hearing for additional evidence on the factors if necessary.

***State v. Crandle*, CR-20-0148 (Ala. Crim. App. May 6, 2022) (Number 2)**

On return from remand, the Court again reverse the circuit court's order dismissing Crandle's assault charge on speedy trial grounds. Notably, the Court explained that Crandle's competency issues in another case justified delay in this case. The Court also noted that when considering the assertion of the right aspect, the State's actions do not figure into the analysis. Nor was the delay so long as to be presumptively prejudicial.

***Brown v. State*, CR-20-0223 (Ala. Crim. App. October 8, 2021)**

The Court affirmed the denial of Brown's motion to dismiss the indictment for failure to comply with the Uniform Mandatory Disposition of Detainer's Act because the 180 day timeframe is not absolute. Jury trial were suspended due to COVID; and, therefore, he could not be brought to trial within 180 days. The Court also affirmed the restitution order because there was no support for Brown's claim that the insurance company must show how the replacement costs were calculated.

AUTHORITY OF THE CIRCUIT COURT

***State v. Starks*, CR-21-0048 (Ala. Crim. App. May 6, 2022)**

The State appealed the circuit court's order granting Starks' motion to dismiss. The State argued before the circuit court and on appeal that the circuit court lacked the authority under Rule 13.5 to grant the motion. The Court agreed based on precedent that there is no pre-trial authority to dismiss based on insufficient evidence. (Take a look at *Ankrom v. State*, 152 So.3d 373 (Ala. Crim. App. 2011) where the Court of Criminal Appeals considered a question of whether agreed-upon facts constituted a violation of a criminal statute and that question could be preserved and reserved for appeal.)

WAIVER OF COUNSEL/FARETTA ISSUES

***United States v. Hakim*, 30 F.4th 1310 (11th Cir. April 14, 2022)**

Hakim was charged with failing to file a federal income tax return. At arraignment, Hakim said he wanted to represent himself. The district court said okay and let him. But, the district court messed up by telling Hakim the maximum sentence was 12 months of imprisonment and then sentenced Hakim to 21 months after he was convicted. The Eleventh Circuit held that Hakim's counsel waiver was not knowing and proper because he was given "materially incorrect information" about the potential punishment. Although Hakim had counsel at trial, he did not have counsel for almost the entirety of pre-trial. The Court reviewed the issue de novo, rather than

for plain error, and found that structural error had occurred when the waiver was not knowing and Hakim was deprived of counsel during pre-trial.

INEFFECTIVE ASSISTANCE OF COUNSEL

***State v. Lewis*, CR-20-0372 (Ala. Crim. App. May 6, 2022)**

This is an appeal by the State of the circuit court's order granting Lewis Rule 32 relief from his death sentence and a cross-appeal by Lewis attacking the part of the order denying his guilt phase issues. The Court affirmed the denial of Lewis's various claims of ineffective assistance of counsel in the guilt phase, but also affirmed the circuit court's granting relief based on ineffective assistance in the penalty phase. Counsel failed to investigate and prepare for trial in a number of ways that violated *Strickland*.

EVIDENTIARY ISSUES

***Anderson v. State*, CR-20-0568 (Ala. Crim. App. February 11, 2022)**

This a 404(b) case that demonstrates why each aspect of 404(b) needs to be challenged in every case. Court held that the evidence was reasonably necessary and crucial to reinforce the credibility of the main witnesses.

***Ex parte State*, SC-2022-0417 (Ala. September 2, 2022)**

No surprise, the Alabama Supreme Court sided with the State to say that the Court of Criminal Appeals' decision in favor of the defendant was wrong. Crim. App. overturned Yeiter's death sentence based on Rule 404(b) evidence it said should have never been allowed in. The Supreme Court reversed because in its view, the evidence was harmless. I can all but guarantee this would never happen if the show was on the other foot because as Shaw pointed out in a dissent, this case does not meet the criteria established for granting cert by Rule 39(a).

***Yeiter v. State*, CR-18-0599 (Ala. Crim. App. December 17, 2021)**

A death penalty guilt phase win involving 404(b) evidence. In his statement to law enforcement, Yeiter made several comments about his prior bad acts, convictions, and imprisonment. Prior to trial, Yeiter filed a motion to redact these aspects of the

statements, but the circuit court denied the motion. On appeal, the Court held that these aspects should have been redacted and that not redacting them not only violated Rule 404(b), but required reversing Yeiter's conviction. The Court went through the various ways in which Yeiter's case was distinguishable from other 404(b) cases. This is one that is worth reading in depth for anyone dealing with 404(b) issues.

***Bowden v. State*, CR-19-0157 (Ala. Crim. App. August 14, 2020)**

Major murder win on irreversible hearsay evidence. Bowden was convicted of killing his girlfriend but argued that it had been self-defense. At trial, the state presented hearsay through the victim's mother that she had previously stabbed the defendant in self-defense. On appeal, the court held that this was inadmissible hearsay and not admissible under Rule 404(b). The court also agreed with Bowden that this error was compounded by the circuit court's exclusion of medical records from when the victim took Bowden to the hospital after she stabbed him. The victim told medical personal that Bowden had been stabbed in a drug deal gone bad. Because this would have impeached the claim that the victim stabbed Bowden in self-defense, it should have been admissible once the hearsay had been admitted. Moreover, because Bowden claimed self-defense and both the hearsay and impeachment went to self-defense, the circuit court's errors were harmful.

SELF DEFENSE/JURY ISSUES

***Williams v. State*, CR-20-0294 (Ala. Crim. App. October 8, 2021)**

The Court affirmed Williams's convictions after determining that the circuit court properly denied his request for a heat-of-passion manslaughter defense because Williams did not walk in on his wife in bed with someone else.

SENTENCING

***King v. United States*, 41 F.4th 1363 (11th Cir. July 28, 2022)**

As an issue of first impression, a plea agreement that contains a valid waiver of post-conviction sentencing challenges bars a motion for resentence based on new constitutional rules. The reasoning is a little suspect:

> Nor would it benefit defendants in the long run if we were to do so. Forcing constitutional claims into the statutory-maximum exception would render the promise of waiver virtually meaningless, robbing defendants of a powerful bargaining tool. Defendants who agree to waive their appeals receive the immediate benefit of reduced penalties in return—as King's case shows. But if that waiver becomes contingent, whether the defendant wishes it to be or not, a bargain will be much harder to strike.

***United States v. Stines*, 34 F.4th 1315 (11th Cir. 2022)**

As a matter of first impression, a defendant convicted of illegally exporting firearms does not qualify for the lower base offense level under USSG § 2M5.2(a)(2) if it involved parts sufficient for more than 2 operable firearms.

***United States v. Gardner*, 34 F.4th 1283 (11th Cir. 2022)**

The Court ruled that Alabama's first-degree UPOM Class C felony counts as a serious drug crime for the ACCA regardless of the actual sentence imposed. The categorical approach requires looking at the maximum allowed sentence, not the actual sentence.

***L.M.L. v. State*, CR-20-0157 (Ala. Crim. App. May 27, 2022)**

The Court affirmed in part and remanded with instructions. The Court rejected arguments that multiple counts of sex crimes alleging different ways of committing the same offense violated double jeopardy because there was evidence supporting separate acts for each of the counts. The Court also rejected sufficiency arguments. The Court did remand for post-release supervision to be removed from certain counts because they were not legal.

***Ex parte McGowan*, 1190090 (Ala. April 30, 2021)**

The Alabama Supreme Court overruled the Court of Criminal Appeals' decision that overruled *Enfinger*. Basically, the Alabama Supreme Court held that when there is an illegal split, the circuit court lacks jurisdiction to revoke. There has to be a new sentencing hearing and a legal sentence imposed.

***Bishop v. State*, CR-19-0726 (Ala. Crim. App. July 9, 2021)**

On his 7th Rule 32 petition since 2010, Bishop finally won one. His sentence is illegal under *McGowan* because at the time of his offense § 13A-5-6(c) mandated a minimum 10 year period of supervised release following prison. Because the circuit court's sentencing order did not include that mandatory language, the sentence is illegal and Bishop is entitled to have his Rule 32 petition granted followed by a re-sentencing hearing with counsel.

***McGuire v. State*, CR-19-0714 (Ala. Crim. App. July 9, 2021)**

McGuire appealed the summary dismissal of his Rule 32 petition seeking to set aside his convictions. Most of the claims, however, were non-jurisdictional and long since time barred. The jurisdictional claims lacked merit. The weird part of this decision is that on appeal of the Rule 32 dismissal, the State suddenly decides it needs to ask the Court of Criminal Appeals to remand the case to the circuit court for the circuit court to enhance McGuire's sentence—15 years after he pleaded guilty—because the circuit court—15 years ago—did not properly sentence McGuire under the HFOA. The State tried to claim that this rendered the sentence illegal under *McGowan*. The Court of Criminal Appeals rejected this argument on multiple grounds. Namely (1) that the circuit court always had jurisdiction to sentence McGuire even if it didn't invoke its authority to apply a sentencing enhancement that should have been mandatory and (2) what the State asks for would violate the United States Constitution.

***Sartain v. State*, CR-20-0391 (Ala. Crim. App. July 9, 2021) (per curium)**

Sartain's appeal was dismissed pursuant to *Ex parte McGowan* because his 10-year split with 2 years in community corrections followed by 5 years of probation was an illegal sentence. Specifically, the 5 years of probation exceeds the statutory authority of § 15-18-8(b). Therefore, the circuit court lacked jurisdiction to revoke because the entire sentence was illegal. And because there was no indication of whether Sartain's sentence followed a jury trial, plea agreement, or blind plea, if it was from a plea agreement Sartain must be allowed to withdraw the plea.

More *McGowan* cases

***Bloodgood v. State*, CR-20-0990 (Ala. Crim. App. February 11, 2022)**

***Self v. State*, CR-19-0978 (Ala. Crim. App. February 11, 2022)**

***Couch v. State*, CR-20-0322 (Ala. Crim. App. February 11, 2022)**

***United States v. Smith*, 30 F.4th 1334 (11th Cir. April 19, 2022)**

In 2007, Smith was convicted of 5 grams or more of crack under § 841 and brandishing firearm in commission of a trafficking crime under § 924(c). Following the First Step Act, Smith moved for a sentencing reduction. The district court determined that he was ineligible, but the Eleventh Circuit reversed. Smith's § 851 enhancement brought him within the Fair Sentencing Act which was made retroactive by the First Step Act, making him eligible for a reduction. Furthermore, the district court violated due process by interpreting Smith's pro-se motion for counsel for a sentencing reduction as a motion for a sentencing motion and subsequently denying that motion without allowing him to be heard on a sentencing reduction.

***United States v. Howard*, 28 F.4th 180 (11th Cir. March 7, 2022)**

This is a medical fraud case. The Eleventh Circuit held that the evidence was sufficient to convict all three consolidated appellants. The Eleventh Circuit, however, reversed the doctor's sentences that the government appealed. The district court's justifications for downward variances in sentencing were insufficient on multiple grounds.

***United States v. Williams*, 25 F.4th 1307 (11th Cir. February 15, 2022)**

Williams was convicted of distributing crack within 1,000 feet of a public housing facility or school in 2007. He filed for a reduction under the First Step Act and was denied. The Eleventh Circuit held that this offense was not covered by the First Step Act based on how the Supreme Court explained the First Step Act in *Terry v. United States*, 141 S. Ct. 975 (2021). Essentially any offense that falls under 841(b)(1)(C) is not covered by the First Step Act.

***United States v. Maurya*, 25 F.4th 829 (11th Cir. February 1, 2022)**

This is a consolidated appeal involving conspiracy, false statements, and wire fraud. Maurya pleaded guilty but appealed the restitution order and part of her sentence. Regarding the sentencing order, the district court committed plain error that violated the Ex Post Facto clause by applying sentencing enhancements that did not exist at the time of the offense but existed at the time of sentencing. The Eleventh Circuit also reversed the restitution order for both appellants because the district court did not make specific factual findings to support the $40 million restitution order.

Hardwick went to trial and challenged his convictions on multiple grounds. The Eleventh Circuit held that the district court did not abuse its discretion in denying Hardwick's motion for a bill of particulars because the indictment was sufficient to put him on notice. The Eleventh circuit also rejected various evidentiary claims under Rule 404(b), 1006, lack of foundation for the governments questioning of a witness. Hardwick also challenged his convictions for insufficient evidence and his sentence as substantively unreasonable.

***United States v. Gonzalez*, 9 F.4th 1327 (11th Cir. August 19, 2021)**

As a matter of first impression, a sentence imposed following revocation of supervised release is eligible for reduction under the First Step Act when the underlying crime is covered by the FSA. But the district court can still deny the reduction.

FEDERAL SUPERVISED RELEASE

***United States v. Dennis*, 26 F.4th 922 (11th Cir. February 16, 2022)**

Dennis appealed her probation revocation on the grounds that she was denied due process by insufficient notice. The Eleventh Circuit disagreed and held that, because Dennis had notice that the basis of her revocation was felony obstruction, Dennis was given sufficient notice of the lesser offense of misdemeanor obstruction.

***United States v. Moore*, 22 F.4th 1258 (11th Cir. January 13, 2022)**

Moore's supervised release was revoked for a third time. He was sentenced to 18 months followed by 18 months of supervised released plus 6 months imprisonment

for contempt of court. On appeal, the Court held that the 18th months of supervised release constituted plain error because the district court did not take into account § 3583(h) which limits the term of supervised released following revocation by the length of any supervised release following prior revocations. The Court also rejected claims that § 3583 violated *Apprendi*, that the 18 months imprisonment was unreasonable, and challenges to the contempt.

PROBATION/COMMUNITY CORRECTIONS

***Bailey v. State*, CR-21-0245 (Ala. Crim. App. May 27, 2022)**

The Court reversed Bailey's probation revocation because the circuit court did not hold a full revocation hearing. This is a big no no and does not have to be preserved. That said, please preserve it.

***Wilkerson v. State*, CR-20-0660 (Ala. Crim. App. May 27, 2022)**

The Court reversed Wilkerson's community corrections revocation because the circuit court didn't hold an adequate hearing. Community corrections and probation revocation have the same rules. Here, no hearing and he didn't admit to anything means it is reversed. Once again, not preserved. Please preserve it for your friendly appellate attorney's sanity.

JUVENILE TRANSFERS

***M.L.W. v. State*, CR-21-0468 (Ala. Crim. App. September 2, 2022)**

The Court reversed the transfer order because the only evidence supporting transfer was hearsay and hearsay cannot be the only basis for finding probable cause.

EXPUNGEMENT

***Ex parte Curran*, CR-19-1082 (Ala. Crim. App. May 27, 2022)**

The Court reversed the denial of Curran's expungement petitions. Curran filed for expungement under the former expungement law in 5 different case numbers based

on one traffic stop. There was no objection. The circuit court granted 1 expungement but denied the rest. The Court held that case under the old version of § 15-27-5 means all charges arising from one arrest or incident, not individual charges.

The Court went out of its way to say that under the current expungement law, "**if no objection is filed**, the trial court must rule on the merits of the petition without setting the matter for a hearing, and because the last sentence of § 15-27-5(d) was removed, the trial court no longer has discretion over the number of cases that may be expunged after the first case is expunged."

Rule 32

***Jefferson v. State*, CR-20-0801 (Ala. Crim. App. May 27, 2022)**

The Court reversed the summary dismissal of Jefferson's Rule 32 petition because the circuit court granted him 10 days to file an amendment and then dismissed the petition before the 10 days were up. This is a weird technical decision because the circuit court gratned a motion to reconsider and proceeded with the Rule 32 but the circuit court had already lost jurisdiction rendering everything null.

BOND

***Ex parte Smith*, CR-22-0530 (Ala. Crim. App. April 15, 2022)**

In this opinion, the court held that, under the statute authorizing appeal bonds, there is no statutory right to enjoy an appeal bond starting 15 days after the appellant's conviction is affirmed by Crim. App. Previously appeal bond was generally considered—or so J.D. has always told me, so blame him if I am wrong—to go through the denial of a cert. petition with the Alabama Supreme Court. Not anymore. The State can now move to revoke that bond without any sort of violation 15 days after Crim. App. issues its opinion affirming the conviction. The time for rehearing and petition for cert. is no longer included.

SPECIFIC OFFENSES

***Ex parte State*, 121098 (Ala. September 9, 2022)**

The Court overturned the old year and a day rule for reasons.

***J.S. v. State*, CR-20-0674 (Ala. Crim. App. May 6, 2022)—Old Sodomy**

The Court affirmed J.S.'s convictions for first-degree rape and first-degree sodomy. J.S. challenged numerous aspects of his convictions. Notably J.S. argued that the statute of limitations barred his sodomy conviction because at the time of the offense in 1990-92, the statute of limitations was 3 years and J.S. was not charged until 2019. But, the Court held that sodomy will also qualify as a violent offense even when it is done when the victim is incapable of consent.

COMPETENCY

***State v. Glass*, CR-20-0989 (Ala. Crim. App. May 6, 2022)**

The State applied the circuit court's order granting Glass Rule 32 relief on the basis that he was not competent at the time he pleaded guilty. The Court reversed that order because the evidence presented and relied upon by the circuit court did not demonstrate that Glass was incompetent at the time he pleaded guilty. Evidence about his mental state at other times did not suffice to meet the burden of showing he was incompetent at the time of trial.

DEATH PENALTY

***Smith v. State*, CR-17-1014 (Ala. Crim. App. September 2, 2022)**

Smith's death sentence was affirmed after a SIXTH penalty phase hearing. This one has dragged out for 25 years and he is still on direct appeal. This is your standard death penalty case, so lots of issues are raised and dealt with. The notable one is that Smith's Atkins relief was overturned more than a decade ago by the Alabama Supreme Court in a decision that focused on his adaptive strengths, which under more recent SCOTUS opinions isn't allowed. Crim. App. held that it could not do anything

about Smith's challenge based on new Atkins standards, which should apply to his case since it is on direct appeal, because it is bound by the Alabama Supreme Court's previous decision.

***Keaton v. State*, CR-14-1570 (Ala. Crim. App. December 17, 2021)**

***Cowan v. State*, CR-20-0145 (Ala. Crim. App. December 17, 2021)**

Two big death penalty opinion with every issue under the sun.

2021 SCOTUS TERM

***Wooden v. United States*, 142 S. Ct. 1063 (2022)**

The Supreme Court reversed Wooden's enhanced sentence under the ACCA because Wooden's prior convictions were not committed on separate occasions and, therefore, only counted as a single prior conviction. Wooden's prior convictions were based on when he burglarized 10 storage units in one facility on a single night. He was later charged for each unit individually. Years later, a federal district court treated those individual units as separate prior convictions. The Sixth Circuit affirmed that interpretation. The Supreme Court granted certiorari and held that the question is not whether the individual crimes occurred simultaneously but rather they occurred as part of a larger single criminal act.

U.S. v. Tsarnaev, 142 S. Ct 1024 (2022)

The Supreme Court—in Thomas opinion so you know, dripping with hatred—reversed the First Circuit and held that the district court did not err in its jury selection decisions and the sentencing issues were all perfectly okay.

Brown v. Davenport, 142 S. Ct 1510 (2022)

Holding: When a state court has ruled on the merits of a state prisoner's claim, a federal court cannot grant habeas relief without applying both the test the Supreme Court outlined in *Brecht v. Abrahamson* and the one Congress prescribed in the Antiterrorism and Effective Death Penalty Act of 1996; the U.S. Court of Appeals for the

6th Circuit erred in granting habeas relief to Ervine Davenport based solely on its assessment that he could satisfy the *Brecht* standard.

This is a complicated and bad—shocking, I know—decision that is just going to further hinder federal habeas relief—which was already mostly a joke.

Hemphill v. New York, 142 S. Ct. 681 (2022)

Holding: The trial court's admission—over Hemphill's objection—of the plea allocution transcript of an unavailable witness violated Hemphill's Sixth Amendment right to confront the witnesses against him.

Basically, New York had a procedure that allowed them to use a co-defendant's plea hearing transcript to rebut Hemphill's arguments at trial—because who cares about the Confrontation Clause. The Supreme Court reversed saying that the trial court does not get to judge the merits of a defendant's theory and allow the state to bypass the United States Constitution.

Shinn v. Ramirez, 142 S. Ct. 1718 (2022)

Holding: Under 28 U.S.C. § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record based on the ineffective assistance of state postconviction counsel.

The mother of all bad, god awful, who gives a damn about guilt or innocence or justice decisions. Federal habeas is rendered even more of a joke than it already was and the *Martinez* decision a few years ago that allowed a federal habeas petitioner to get around procedural bars when his state post-conviction counsel was ineffective is rendered all but moot.

***United States v. Taylor*, 142 S. Ct. 2015 (2022)**

Attempted Hobbes Act robbery does not qualify as a crime of violence.

***Concepcion v. United States*, 142 S. Ct. 2389 (2022)**

Section 404(b) of the **First Step Act of 2018** allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence.

***Ruan v. United States*, 142 S. Ct. 2370 (2022)**

Holding: For the crime of prescribing controlled substances outside the usual course of professional practice in violation of 21 U.S.C. § 841, the mens rea "knowingly or intentionally" applies to the statute's "except as authorized" clause.

2022 TERM

***Reed v. Goertz*, No. 21-442**

Issue(s): Whether the statute of limitations for a 42 U.S.C. § 1983 claim seeking DNA testing of crime-scene evidence begins to run at the end of state-court litigation denying DNA testing, including any appeals (as the U.S. Court of Appeals for the 11th Circuit has held), or whether it begins to run at the moment the state trial court denies DNA testing, despite any subsequent appeal (as the U.S. Court of Appeals for the 5th Circuit, joining the U.S. Court of Appeals for the 7th Circuit, held below).