GBCDLA

FOURTH AMENDMENT UPDATE

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This handout covers various Fourth Amendment issues in from across the country. It is not comprehensive, but contains anything noteworthy from Alabama and the Eleventh Circuit. It is divided up by type of issue.

PUSHING THEIR LUCK

***People v. Smith*, 511 P.3d 647 (Co. June 27, 2022)**

***People v. Deaner*, 517 P.3d 66 (Co. September 26, 2022)**

As the Court explained in *Smith* case about searching a vehicle: "Colorado State Patrol ("CSP") Trooper Christian Bollen had a hunch, and then another hunch, and then another hunch. And he acted on those hunches, despite a circumstance directly undermining them." Traffic stop based on a hunch turns into a drug investigation based on a hunch turns into a dog that doesn't alert turns into searching the car anyway, at which point the search became illegal.

These are 2 cases of police just pushing their luck with hunches too far without justification for the Courts to accept.

STANDING

***United States v. Lindsey*, 43 F.4th 843 (8th Cir. August 5, 2022)**

This case is just a gentle reminder that although a passenger lacks standing to challenge the search of a car he or she doesn't own, the passenger may still challenge

the evidence as fruit of the poisonous tree if the initial stop/seizure was problematic. This passenger was, not surprisingly, unsuccessful

EXPECTATION OF PRIVACY

***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.

EXTENDED STOPS

***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.

***Baxter v. Roberts*, No. 21-11428 (11th Cir. November 30, 2022)**

This is a civil rights case dealing with unlawfully qualified immunity for an unlawfully prolonged stop. Like *Campbell*, this is one to read because here the Court went through each of the justifications offered by the officer and rejected them as insufficient because the justifications occurred after the stop had already been unlawfully delayed.

***Idaho v. Vivian*, 518 P.3d 378 (Idaho October 4, 2022)**

This is a *Rodriguez* case dealing with post-*Miranda* statements. Stop occurred due to brake lights that weren't working. Vivian had a suspended license and officers began preparing that citation but believed that Vivian might have drugs, so they called for a drug dog. Officers delayed finishing the stop to give the dog time to get there and sniff the car, which lead to methamphetamine and post-*Miranda* statements about the meth. That the stop was unlawfully delayed wasn't really in doubt, the question was whether the statements should have been suppressed as fruit of the poisonous tree. While the drugs may have been an "inevitable discovery" based on the facts, inevitable discovery does not apply to verbal statements.

***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.

***Idaho v. Huntley*, 513 P.3d 1141 (Idaho June 29, 2022)**

This is a *Rodriguez* case. Here, Huntley was stopped for officers to investigate drug activity based on information from a CI. The Court determined that the initial stop was lawfully. On the *Rodriguez* aspect of the case, the key part is what was the purpose of the stop. Because the stop was intended as a drug investigation, there was no unlawful delay in waiting 15 minutes for a drug dog. Ultimately, this is going to be the type of thing that kills a lot of drug related *Rodriguez* arguments when they wait for a traffic related reason but really just want to investigate drugs based on other information.

***United States v. Kennedy*, No. 21-2377 (8th Cir. June 3, 2022)**

The Court held that the stop was not unlawfully prolonged in this case due to safety issues. Kennedy was a passenger, not the driver, and argued that the stop lawfully ended when the purpose of the stop was resolved and the driver was arrested for an outstanding warrant. The Court disagreed, holding that safety concerns involving the vehicle justified further interactions with the passengers.

***United States v. Hurtt*, No. 20-2494 (3d Cir. April 13, 2022)**

The Third Circuit reversed the denial of Hurtt's motion to suppress. While one officer was conducting a field sobriety test on the driver, the other officer got inside the vehicle to question the passengers for reasons that weren't really explained and did so in an odd way. The problem was that first officer paused in the middle of the field sobriety test and placed the driver in the police car to assist the second officer remove the passengers from the vehicle. This diverged from the intended purpose of the stop—a DUI investigation—and lacked reasonable suspicion to justify prolonging the stop.

***State v. Zeimer*, No. 20-0107 (Mont. May 25, 2022)**

The Montana Supreme Court reversed the denial of a motion to suppress because officers unlawfully prolonged the stop when, instead of proceeding with DUI/field sobriety aspects of a lawful stop, the officers extensively questioned Zeimer on various topics, searched him, and began investigating things unrelated to the basis of the stop without any reasonable suspicion to justify doing so.

***United States v. Gonzalez-Carmona*, No. 21-1241 (8th Cir. May 24, 2022)**

Stop was not unlawfully extended based on the facts including the smell of candles, the overdue rental agreement, and discrepancies between the stories give by Gonzalez-Carmona and the passenger.

***United States v. Frazier*, 30 F.4th 1165 (10th Cir. April 13, 2022)**

The Tenth Circuit reversed the denial of Fraizer's motion to suppress because the officer who stopped him repeatedly veered away from the purpose of the stop in attempts to prolong the search for a dog to arrive. Fraizer was pulled over speeding and a lane change violation, but did not contest the initial stop. Instead Fraizer contested the extension of the stop when the officer did not work towards the purpose of the stop—for traffic violations—and instead worked to arrange for a dog to come sniff the car and then further prolonging the stop by searching a DEA database. This is a good one to read to see how they addressed each aspect of the supposed reasonable suspicion and when it to be formed in regards to activities that extended the stop.

***United States v. Perez*, 29 F.4th 975 (8th Cir. April 1, 2022)**

Here extending the stop was not problematic under *Rodriguez* because of the lack of proof of registration, insurance, and ownership in addition to conflicting accounts between the driver and the passengers.

***State v. Harning*, 607 P.3d 145 (Mont. 2022)**

Harning was initially stopped for speeding before the stop transitioned into a suspected DUI and then a drug investigation involving a dog sniff. Harning argued that the drug investigation unlawfully extended the stop. The motion to suppress was denied because particularized suspicion existed based on:

> Harning's out-of-state license plates[3] and speeding, Harning's evasive answers, Harning's failure to roll down his window more than a few inches, the odor of marijuana, Harning's admission to smoking marijuana in Big Timber, and Harning's denial of having marijuana on his "person" when asked if there was marijuana in the vehicle.

On appeal, the Montana Supreme Court disagreed and held that there was not sufficient evidence to show particularized suspicion to extend the stop into a drug investigation. The DUI investigation showed that Harning was not impaired and the admission about previously smoking marijuana was not enough considering that the admission was that he smoked 80 miles away. The Court also rejected the reliance on the officer's interpretation of Harning's nervousness. In short, while the traffic stop and DUI aspects were lawful, when the officer called for a drug dog to shift into a drug investigation the stop became unlawfully prolonged in violation of the 4th Amendment and the Montana Constitution.

EXTENDED DETENTION

***United States v. Segoviano*, 30 F.4th 613 (7th Cir. April 1, 2022)**

Federal agents had an arrest warrant for a suspect in the shooting of an ATF agent and used cellphone location data to trace the suspect to the apartment building wher Sevogiano lived. When agents entered the building, they went through a door and up steps to what they believed would be a common area on the second floor but was actually a second floor apartment where they encountered Segoviano. There they detained Segoviano and swept the apartment looking for the suspect with Segoviano's consent. This was permissible because the initial entry was a mistake and then consented to. The problem was that after they swept the apartment and didn't find their suspect, federal agents continued to detain Segoviano and questioned him for 20-30 minutes. During this questioning, Segoviano admitted to having drugs and guns in the apartment and that the suspect had been there earlier in the day. The district court denied the motion to suppress finding that the continued detention was permissible based on reasonable suspicion.

On appeal, the Seventh Circuit reversed the denial of the motion to suppress. While the initial entry and limited search was permissible, the continued detention of Segoviano lacked any evidence supporting reasonable suspicion. The Court went through the flaws in the district court's findings on reasonable suspicion.

MARIJUANA

***Comm. v. Barr*, 266 A.3d 25 (Penn. 2021)**

After Pennsylvania legalized marijuana in "limited circumstances," the Pennsylvania Supreme Court held that the smell of marijuana alone does not provide probable cause for a warrantless search of a vehicle. While the smell can be factor supporting probable cause under the totality of the circumstances, smell alone isn't sufficient.

***Juliano v. State*, 260 A.3d 619 (Del. 2021)**

The smell of marijuana alone did not create probable cause to justify a custodial arrest. The smell of marijuana can be a factor in support of probable cause, but not the sole factor.

***State v. Dixon*, 963 N.W.2d 724 (Ct. App. Minn. 2021)—hemp v. pot**

The Minnesota Court of Appeals held that chemical testing to determine whether the substance was marijuana or hemp was not required for probable cause in this case because other factors supported probable cause. Dixon moved to dismiss the possession charge due to lack of probable cause because "chemical testing is required to distinguish between legal hemp and illegal marijuana, the field test used in this case merely detected the presence of THC without quantifying its concentration, and no other testing had been performed to establish that THC concentration." The trial court granted the motion but the court of appeals overturned that decision. While this seems like a bad comparison for Alabama, there are other reasons for probable cause in this case.

The good part is what the court said about hemp v marijuana. Minnesota law on hemp is pretty much identical to Alabama's. In both states, the definition of marijuana specifically excludes hemp. In Minnesota, hemp is defined as material with a

THC concentration of .3% of less on a dry weight basis. Alabama defines it as not more than .3% THC based on dry weight. "Accordingly, the only thing differentiating legal 'hemp' from illegal 'marijuana' in Minnesota is the THC concentration present in the plant material."

The downside is that Minnesota has also rejected the idea that chemical testing is required if a substance can be identified by other means—like if the defendant says it is marijuana. This is basically something to keep in mind for dealing with hemp v. marijuana issues in Alabama.

Powell v. State, 804 So. 2d 1167 (Ala. Crim. App. 2001), and *J.M.A. v. State*, 74 So. 3d 487 (Ala. Crim. App. 2011), are two cases that show why this approach doesn't work in the age of legal hemp with a defendant who has raw marijuana and keeps his or her mouth shut.

GEOFENCE

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

Geofence

https://www.wired.com/story/geofence-warrants-google/

GUNS

***United States v. Willy*, 40 F.4th 1074 (9th Cir. July 26, 2022)**

This case deals with an issue that is going to come up more and more often in light of *Bruen*. Washington is an open carry state and a "shall issue" state for concealed carry. Therefore, probable cause and reasonable suspicion for crimes related to fire-arms such as Washington's misdemeanor for possessing a firearm at a time and place that manifests and intent to intimidate or warrants alarm for the safety of other per-sons" requires something more than just having a gun.

DELAYED WARRANTS

***State v. Thompson*, S068639 (Oregon October 13, 2022)**

This is an exigent circumstances case dealing with prolonged delay between seizure of a cellphone and obtaining a warrant followed by evidence derived from that delayed warrant. Thompson committed a robbery and was shot by the victim. At the hospital, officers seized his phone out of fear that Thompson might destroy the phone or its data. There was no warrant for the phone and no search of the phone at that time. Over the night 5 days, officers investigated the robbery and the shooting before finally obtaining a search warrant for the phone. While the initial seizure may or may not have been lawful, holding the phone for 5 days before obtaining a warrant was definitely unlawful because whatever exigent circumstances that justified taking the phone had long since expired. The court then held that evidence obtained following the search of the phone, including statements made by Thompson in interviews, was fruit of the poisonous tree. But, harmless error strikes again.

***Comm. v. Jones-Williams*, 279 A.3d 508 (Pa. July 20, 2022)**

This is a case about exigent circumstances for a warrantless blood draw in a DUI case. Under *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), exigent circumstances can exist when BAC evidence is dissipating and there is a pressing health, safety, or law enforcement need that takes precedent over a warrant application. In other words, if the person is unconscious and suspected of DUI. Here, officers arrived at the hospital and Jones-Williams was in and out of consciousness, preventing the officer from obtaining consent. The officer learned, however, that the hospital had already taken a blood sample and had it turned over to police. Because the blood draw had already occurred and there was no risk of evidence being lost in the blood draw, exigent circumstances did not exist here. Officers had all the time in the world to obtain a warrant and didn't.

***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.

EMERGENCY-AID EXCEPTIONS

***Ex parte Byrd*, 1210155 (Ala. November 10, 2022)**

The Court granted certiorari to consider whether the emergency-aid exception to the Fourth Amendment. Byrd contacted 911 due to chest pains. For unexplained reasons, a safety alert was attached to the address which required police to arrive first and determine that it was safe for medical personnel to enter. While there, officers retrieved Byrd's jacket and searched it for weapons before finding a pill bottle that contained what looked like a bit of marijuana. The Court of Criminal Appeals affirmed the denial of the Byrd's motion to suppress. The Alabama Supreme Court considered the case in light of the United States Supreme Court's decision regarding the community-caretaking exception in *Caniglia v. Strom*.

The Court upheld the denial of the motion to suppress both because the medical nature of the call allowed for the emergency aid exception to allow officers to enter the house without a warrant and because the safety alert created authorization to search for weapons.

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

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.

STATE V. FEDERAL

***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.

CONSENT

***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.

INEVITABLE DISCOVERY

***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.

OTHER ISSUES

***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.

***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."

***Hall v. State*, CR-20-0394 (Ala. Crim. App. September 3, 2021)**

The easiest version of the facts is that officers had received word that Hall was dealing meth out of his house and surveilled the house for a few days. They stopped people who had visited and made drug arrests. Then,

> We went to the residence. Agent Jackson knocked on the door. You could hear Hall ask who it is. We announced it was the police department, come to the door. And you could hear him moving around in the house a lot. We detected the odor of marijuana coming from the residence. Hall wouldn't come to the door. You could hear him moving. We forcibly entered the residence and detained him."

On appeal, Hall argued that officers lacked exigent circumstances to enter his house without a warrant. The Court of Criminal Appeals disagreed. No basis to say he was destroying evidence, no real basis to show he was cooking meth or evidence to show he was when they made entry, and nothing to suggest he was dangerous; but exigent circumstances existed according to the court.

SELF-INCRIMINATION

***Ammons v. Georgia*, S22A0542 (Ga. November 2, 2022)**

***Awad v. State*, 868 S.E.2d 219 (Ga. 2022)**

These are two cases dealing with self-incrimination under the Georgia Constitution. In *Ammons*, the Court held that a defendant's refusal to submit to field sobriety cannot be used against him or her. In *Awad*, it was refusal to submit to urine testing. Under Georgia caselaw, if the act requires some sort of compelled cooperation by the defendant, refusal to do so cannot be used against the defendant.

Ammons did, however, say this doesn't apply to refusal to do a blood draw.