



GBCDLA
2023 CRIMINAL LAW UPDATE
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AGENDA

- Select SCOTUS Cases
- Select CCA decisions – 2023
- SCOTUS preview
- Doom & Gloom

FIRST AMENDMENT

Counterman v. Colorado, No. 22-138 (SCOTUS June 27, 2023)

- Counterman sent hundreds of Facebook messages to a local singer for over two years. Eventually, the State charged him under a stalking statute for repeated communication causing emotional distress.
- He argued his conduct was protected by the First Amendment – no “true threats” and that he had to be aware of the threatening character of the messages.
- “The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another.”



FOURTH AMENDMENT

McCoy v. State, CR-20-0821 (CCA Feb. 10, 2023)

- Does a person have a reasonable expectation of privacy in blood drawn for medical purposes, discarded by hospital staff, and recovered by the police?
- The CCA doesn't say – but trial counsel cannot be ineffective for failing to raise an issue of first-impression.



FIFTH AMENDMENT

- *Smith v. United States*, (SCOTUS June 15, 2023)
 - Mobile, Ala. Resident convicted of stealing trade secrets – but convicted in the wrong venue
 - Held that conviction in an improper venue by a jury drawn from the wrong community does not bar retrial.
 - No double jeopardy violation (fifth amendment) no vicinage violation (sixth amendment)
- *State v. Burton*, CR-20-0844 (CCA May 5, 2023)
 - Reversal of circuit court's dismissal of capital murder indictment on double jeopardy grounds.
 - Can't have double jeopardy because was never placed in jeopardy in the first place.

SIXTH AMENDMENT

- *Samia v. United States*, (SCOTUS June 23, 2023)

Bruton rule case – Samia’s non-testifying co-defendant confession admitted and Samia’s name was removed, replaced with “other person” and “the other person he was with.”

- *Bragg v. State*, CR-21-0361 (CCA 2023)

Two-way video testimony from victim and witness in France did not violate the Confrontation Clause.

Under *Maryland v. Craig*, the witnesses were necessary to the State’s case, were active duty with the French military, testified under oath, full view of jury, no issues with the video.

Judge Minor dissents.



CAPITAL LITIGATION – PLAIN ERROR

Iervolino v. State, CR-21-0283 (CCA Aug. 18, 2023)

- Rejects 15 issues raised on direct appeal of capital conviction and death sentence
- Rule 45A insight after rule change makes plain error review discretionary.
- CCA notes it will still review the entire record for plain error, but may exercise discretion in addressing plain error claims in the future
- Also, changes to 13A-5-47 after the end of judicial override remove the requirement that the trial court make specific findings of fact on aggravating and mitigating circumstances when jury sentencing has not been waived. And there is no special verdict form required on aggravators and mitigators. So – this means – the CCA will not be able to review whether the evidence supported the aggravators v. mitigators in most cases.

RULE 404(B)

Williams v. Alabama, CR-2022-0543 (CCA Feb. 10, 2023)

- Dealing with 404(b) motive evidence in child sex case. Williams tried to keep out a 13-year-old prior rape allegation of a 12-year-old. It came in. There is no time limit on 404(b) evidence.
- State put on the 404(b) evidence through DHR worker and JeffCo. Sheriff's Dept. Captain. Isn't that all hearsay?
- The CCA says the testimony is based on the "firsthand knowledge of the investigation of the 2002 charges . . .". And the DHR worker's testimony was based "on official records . . .".
- Cert. denied Aug. 11, 2023



A BRIGHT SPOT: PROBATION REVOCATION CASES

McCary v. State, CR-2022-1128 (Ala. Crim. App. May 5, 2023)

- Reversed probation revocation because it was based solely on hearsay.

Glasscock v. State, CR-2022-1106 (Ala. Crim. App. February 10, 2023)

- Another gentle reminder from the Court of Criminal Appeals that hearsay cannot be the sole basis for revoking probation.

Lawrence v. State, CR-21-0061 (Ala. Crim. App. February 10, 2023)

- Another probation revocation reversal because it was a technical violation and Lawrence lacked notice or explanation of the conditions he had to comply with.

ISSUE PRESERVATION

- ***Johnson v. State, CR-21-0291 (CCA May 5, 2023)***

Child sex assault case rejecting five issues, but remanding to the circuit court to impose the mandatory 10-years of post-supervised released required under 13A-5-6(c)

- On Issue Preservation – the defendant argued that the circuit court erroneously excluded evidence that the child was previously sexually assaulted. BUT – the CCA doesn't review this issue noting that there was an inadequate offer of proof in the record on the excluded evidence.

SELF-DEFENSE

Darby v. State, 0919 (CCA March 24, 2023)

- Defense win! Trial court's refusal to give JI on a reasonable officer's actions in using deadly force required a new trial. Correct statement of the law under 13A-3-27(b)(2).

Crayton v. State, CR-20-1006 (CCA May 5, 2023)

- No mutually exclusive verdicts when the jury returned provocation manslaughter as a lesser to murder (rejecting self-defense) as to one individual but attempted murder as to the other person. Both offenses involve a specific intent to kill.
- It is perfectly fine for the provocation to be applied to just one person. It is an open question as to whether Alabama recognizes attempted provocation manslaughter too.

Peterson v. State, CR-2022-0642 (CCA March 24, 2023)

- On the discussion of multiple victims and self-defense – the CCA rejects the idea that the defense of self-defense transfers to unintended victims. Instead, self-defense applies only to the person that the defendant reasonably feared.
- Discussion of accident in the context of self-defense against one individual resulting in injury to others and whether the defendant could have acted intentionally toward one person while acting negligently or recklessly toward others.

PROPER SERVICE

Grandquest v. State, CR-2022-1067 (CCA Mar. 24, 2023)

- Defense win!
- Mobile County Sheriff's Deputy held in criminal contempt for failing to appear as a witness.
- The State had emailed him the subpoena and he said "email received."
- CCA reverses holding email is not and never has been a proper mode of service.

SUFFICIENCY OF THE EVIDENCE

- *Moore v. State*, CR-2022-0914 (CCA Feb. 10, 2023)
 - Sufficiency of the evidence case dealing with first-degree elder abuse
 - Brenda Hunt sees a suspicious vehicle parked outside her house – decides to go outside and write down the plate number. Here comes Mr. Moore . . .
 - Hunt sustains “tears” to her forearms that profusely bleed. No broken bones. No hospital treatment. Photos taken in the days that follow show bruising. Deposition testimony is a scar on the left arm remains.
 - What constitutes “serious and protracted disfigurement?”
 - “[T]he disfigurement should, however, be significant and of such a character that it substantially detracts from the appearance of the person bearing the disfigurement. Some factors to consider in determining the seriousness of a disfigurement in the form of a scar include its permanence, location, size, and general appearance or nature.”

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SOCIAL MEDIA & AUTHENTICATION

Harrison v. State, CR-21-0423 (CCA Aug. 18, 2023)

- Issue of first-impression – does the silent witness theory apply to social media video evidence?
- “Instead, in accordance with Rule 901 and its low threshold for authentication, the State need only present evidence ‘sufficient to support a finding that the matter in question is what its proponent claims.’ Rule 901(a). Generally, if the pictorial-communication theory is not applicable, this requirement can be satisfied through the testimony of a witness who viewed the video on the social-media platform and can testify that the video proffered at trial is the same video. Issues such as the ownership of the social-media account, the reliability of the recording device, the competency of the operator of that device, and any editing that occurred before the video was posted on the social-media platform are issues that go to the weight to be afforded the video, not its admissibility.”

HFOA CASES

Thomas v. State, CR-2022-0789 (CCA Aug. 18, 2023)

- HFOA notice objection rejected when priors all listed in PSR, one prior was listed in the pre-trial notice, two priors discussed during a pre-trial hearing.
- Oral notice is sufficient – court will look to the entire record to determine notice requirement

MANDAMUS – PRETRIAL IMMUNITY

- *Ex parte Jones*, CR-2023-0229 (CCA June 23, 2023)
 - Jefferson County Case – Judge May denied pretrial immunity. Mandamus is filed 107 days later. The presumptively reasonable time period for filing is 42 days. The delay in getting the transcript was not good cause – petition dismissed as untimely.
 - “Jones should have filed the petition within the presumptively reasonable time and simultaneously moved this Court to allow him to supplement the petition with the transcript once the transcript had been certified. ”
- *Ex parte Johnson*, CR-2021-0117 (CCA March 24, 2023)
 - Denial of pretrial immunity determination upheld even though the circuit court found that the defendant shot first when the stipulated facts were that all witness statements were that the deceased shot first. Cole dissents with Minor joining.

RULE 32

- ***Morgan v. State*, CR-21-0337 (CCA March 24, 2023)**
 - Reversed summary denial of R. 32 remanding for hearing on whether the petitioner was w/o counsel for a 7-month period. Jurisdictional Issue.

- ***Robinson v. State*, CR-2022-1055 (CCA March 14, 2023)**
 - 1992 murder conviction. Petitioner argues he is entitled to resentencing under the voluntary guidelines/the guidelines replaced 13A-5-9.1
 - No, the voluntary guidelines don't apply to sentences before their effective dates.

SCOTUS PREVIEW

- ***Culley v. Alabama***, No. 22-585, cert granted 4/17/2023
 - Civil forfeiture case arising out of 11th circuit to decide the test to apply to the timing of a retention hearing on the continued deprivation of property during civil forfeiture proceedings.
- ***McElrath v. Georgia***, No. 22-721, cert. granted 6/30/2023
 - Whether the double jeopardy clause of the Fifth Amendment prohibits a second prosecution for a crime of which a defendant was previously acquitted.
- ***United States v. Rahimi***, No. 22-915, cert. granted 6/30/2023
 - Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic violence restraining orders, violates the Second Amendment on its face.
 - 5th circuit said yes – under Justice Thomas’s historical analysis test developed in *Bruen*
 - Alabama implications – 13A-11-72(a) – prohibiting firearm possession if “subject to a valid protection order for domestic abuse”



THANK YOU

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