2023 Criminal Law Update – GBCDLA
September 21, 2023

Alisha McKay
The Law Office of J.D. Lloyd
2320 Arlington Ave S
Birmingham, AL 35205
Alisha@JDLloydlaw.com
(205) 672-6720
www.AfterTheTrial.com/

First Amendment

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

Kagan (7-2). SCOTUS holds that to prosecute "true threats" (thus no First Amendment violation) requires the government to show the defendant had a subjective understanding of the threating nature of the statements. But a reckless type of standard applies requiring the defendant "consciously disregarded a substantial and unjustifiable risk that the conduct will cause harm to another."

Fourth Amendment

***McCoy v. State*, CR-20-0821 (Ala. Crim. App. February 10, 2023)**

This case deals with an issue of first impression in Alabama on the Fourth Amendment: whether a person has a reasonable expectation of privacy in blood drawn for medical purposes. McCoy was involved in a wreck, asked to go to the hospital, and after seeing an open can of beer the officer on the scene asked him to consent to a blood test, but McCoy refused. Blood was drawn for medical purposes in the ambulance, but once at the hospital McCoy refused treatment and left. The drawn blood

was thrown into a locked hazard-waste container. The officer came by the hospital asked if McCoy had had blood drawn and when told it been thrown away, broke open the waste container and found the vials of blood that he submitted to DFS. This issue wasn't raised as a 4th Amendment claim and McCoy later raised it on Rule 32 via ineffective assistance of counsel. The Court—Judge McCool—held that because it was an issue of first impression, counsel couldn't be said to be ineffective for not raising the claim at trial but said that the claim may well have merit if it was properly raised.

Judge Kellum dissented to say it could still be ineffective even if the issue was one of first impression.

Fifth Amendment

Smith v. United States, No. 21-1576 (SCOTUS June 15, 2023)

Alito (9-0). Case originating out of the 11th Circuit – Smith, an Alabama resident, was convicted in the N.D. Fla. For theft of trade secrets involving a social media site where he revealed data from StrikeLines, a company that collected and sold coordinates of privately constructed artificial reefs to fishers. He moved to dismiss his indictment based on venue (he lived in Mobile, StrikeLines is in the M.D. Fla). District Court decided to let the jury decide venue – he was convicted and the 11th Cir. held while the venue was improper, he could be retried.

SCOTUS agrees noting that retrial is the preferred remedy in almost all situations (Speedy trial excluded). It rejects Smith's venue based

challenges and his argument based on the vicinage right of the Sixth Amendment. It also rejects his argument that the 11th Circuit's venue determination would bar retrial under the Double Jeopardy Clause explaining that the 11th Cir. did not adjudicate culpability.

***State v. Burton*, CR-20-0844 (Ala. Crim. App. May 5, 2023)**

The Court reversed the circuit court's dismissal of the charges on double jeopardy grounds. Previously the circuit court dismissed a murder indictment against Burton due to insufficient evidence, but legally the court lacked any power to do so. The State, however, did not appeal that decision and waived its opportunity to object to the dismissal. When the State later indicted Burton for capital murder based on the same factual basis, Burton claimed this violated double jeopardy and the circuit court agreed because in Burton's view the previous dismissal functioned as an acquittal on the charge. The Court rejected this argument because jeopardy had not attached at the time of the earlier dismissal.

Sixth Amendment

***Samia v. Unites States*, No. 22-196 (June 23, 2023)**

Addressing the *Bruton* rule – admission of a non-testifying co-defendant's confession against the other defendant violates the Confrontation Clause even if the court instructs to consider the confession against only the defendant who made it. Bruton had been identified by name. Cases since *Bruton* address differing circumstances, for example, when the confession omits the name of a defendant but in

context is connected to a certain defendant. (That's fine – *Richardson v. Marsh*, 481 U.S. 200 (1987)). Solely redacting the name? That's not okay. *Gray v. Maryland*, 523 U.S. 185 (1998).

Here, Sania's name was replaced by "other person" and "the other person he was with." These redactions are okay – no confrontation clause violation for Sania. Kagan, Sotomayor, & Jackson dissent.

***Bragg v. State*, CR-21-0361 (Ala. Crim. App. March 24, 2023)**

Issue of first impression in Alabama on whether testimony via two-way video link violates the Confrontation Clause. *Maryland v. Craig*, 497 U.S. 836 (1990) sets forth the applicable test and recognizes that face to face confrontation is not absolute; instead, a court must consider if public policy, reliability of testimony is ensured, and the case-specific need for the accommodation. Here, all factors weighed for the State. Two witnesses were active-duty fighter pilots in the French Navy stationed in France. They were the alleged robbery victim and a witness to the robbery and necessary to the State's case. Given an oath, subject to cross, in full view for the jury, no issues with the video. Judge Minor dissented on this issue.

Decision also addresses somewhat related video testimony issues at a pre-trial hearing – ultimately, if there was any issue it was harmless.

Capital Litigation

***Iervolino v. State*, CR-21-0283 (Ala. Crim. App. August 18, 2023)**

Death penalty direct appeal. The Court affirmed Iervolino's convictions and death sentence. There are two notable procedural aspects of discussed in the opinion.

First, Rule 45A previously mandated plain error review in all death cases, but 45A now makes plain error review discretionary. The Court took notice of this and stated that it intends to continue reviewing the entire record for plain error review, but will exercise its discretion in addressing plain error claims in opinions going forward.

Second, § 13A-5-53(a) requires Crim. App. to determine whether the trial court's findings on aggravating and mitigating evidence were supported by the evidence. But when the legislature ended judicial override, it so removed subsection (d) from § 13A-5-47, which required the trial court to make specific findings of fact about the existence of statutory aggravating circumstances and statutory and nonstatutory mitigating circumstances. Now the trial court is only required to do so in cases where jury sentencing has been waived. Nor are juries required to do special verdicts on aggravators and mitigators. Therefore, the Court cannot review whether these were supported by the evidence.

Judge Kellum wrote the main opinion and a separate concurrence that specifically addressed these two procedurally aspects.

Substantively, the Court addressed the following claims: (1) whether the circuit court erred in requiring Iverolino to wear a stun belt during trial; (2) change of venue; (3) whether the voir dire process violated state and federal law as inadequate; (4) death qualifying jurors; (5)

failure to remove jurors for cause; (6) Batson challenges; (7) authentication of surveillance; (8) pictures of the victim and crime scene; (9) St. Clair DA's office was improperly involved after recusing; (10) victim impact during guilt phase; (11)substantial omissions in the record on appeal; (12) insufficient evidence; (13) prosecutorial misconduct during closing; (14) jury instructions at guilt and penalty phase; and (15) Violated *Ramos v. Louisiana* because not unanimous.

***Burgess v. State*, CR-19-1040 (Ala. Crim. App. June 23, 2023)**

The Court affirmed the denial of Burgess's Rule 32 petition challenging his capital murder conviction and death sentence. Issues raised:

On appeal, Burgess argues (1) that the circuit court erred in denying his motion for leave to amend his petition; (2) that he sufficiently pleaded the claims in his petition and that he did not have to plead the names of the experts he contends his counsel should have used to assist in his defense; (3) that, for many reasons, his trial counsel and appellate counsel were constitutionally ineffective; (4) that one of his trial attorneys had an actual conflict of interest; (5) that Alabama's compensation scheme for appointed attorneys in a capital case is unconstitutional; (6) that his conviction violates international law; (7) that juror misconduct occurred in his case; (8) that the State withheld exculpatory evidence; (9) that the prosecutor presented false testimony; (10) that his death sentence is unconstitutional; (11) that Alabama's death-penalty statute is unconstitutional; (12) that the circuit court should have disqualified the Attorney General and all attorneys in the

District Attorney's Office for the Eighth Judicial Circuit; (13) that the circuit court erred in denying his requests for discovery; and (14) that "the cumulative effect of the errors" in his case deprived him of a fair trial.

***Capote v. State*, CR-20-0537 (Ala. Crim. App. May 5, 2023)**

One of the first death penalty Rule 32 decisions sine the Fair Justice Act altered the timelines for Rule 32 in death penalty cases. One issue at the circuit court level and on appeal was whether the circuit court could have granted a stay in the Rule 32 proceedings. The Court sidestepped this issue procedurally, but it is something to note going forward. The Court also affirmed the denial of the various claims of ineffective assistance.

Rule 404(b)

***Williams v. Alabama*, CR-2022-0543 (Ala. Crim. App. February 10, 2023)**

Williams was convicted of numerous child sex offenses. On appeal, he argued that the circuit court erred in allowing 404(b) evidence that when he was 18, he had been charged with the rape of a 12-year old 13 years earlier. The State offered the 404(b) evidence to show motive. Williams objected on the basis that the evidence couldn't be used to show motive given the length of time between the charges. The Court disagreed because Alabama has never set a time limit for when collateral acts are considered too remote. Nor was the fact that the

testimony was all based on hearsay grounds to exclude the evidence. Judge Cole dissented on this issue.

Williams also challenged the use of the current version of the child hearsay exception instead of the one in effect at the time of the offense. The Court disagreed because the change was procedural, rather than substantive, in nature. The Court also rejected Williams' argument about a unanimity instruction.

Probation Revocation

***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 (Ala. Crim. App. May 5, 2023)**

A cautionary tale for issue preservation. Child sex assault case raising five issues: (1) circuit court error for exclusion of evidence that

child was previously sexually assaulted, (2) denial of motion in limine to exclude child's video-recorded interview, (3) fair cross-section issue based on COVID and exclusion of Black prospective jurors, (4) non-unanimous verdicts, and (5) sufficiency of the evidence. Affirmed but remanded to impose post-release supervision required by § 13A-5-6(c).

(1) Defense counsel didn't preserve anything for appeal because there was no offer of proof at trial as to the excluded evidence. Without an adequate offer of proof neither the CC nor CCA can address this claim. (2) The second issue was essentially moot since the child testified and was cross-examined. (3) On the fair-cross section argument, there was no proof of systematic exclusion as required by *Duren v. Missouri*. (4) Defense counsel indicated he was satisfied with the jury instructions, so any type of unanimity issue was not preserved for review. (5) The testimony contained numerous examples of sexual contact – so sufficiency fails.

So all the defendant gets is a remand to impose an additional 10-years of post-release supervision under 13A-5-6(c).

Issues in Cases with Multiple Victims

***Crayton v. State*, CR-20-1006 (Ala. Crim. App. May 5, 2023)**

The Court rejected Crayton's arguments challenging the sufficiency of the evidence on his attempted murder conviction based on insufficient evidence of specific intent to kill; the trial court's refusal to instruct the jury on 2nd and 3rd degree assault as lesser included offenses of attempted murder, the giving of a flight instruction, that provocation manslaughter and attempted murder were mutually

exclusive verdicts, and that his life-without-parole sentence for attempted murder is grossly disproportionate to the crime.

***Peterson v. State*, CR-2022-0642 (Ala. Crim. App. March 24, 2023)**

Convictions for murder and two counts of attempted murder upheld. The Court of Criminal Appeals rejects a claim that a recent pending gun charge against a key State witness was admissible either as Rule 404(b) evidence, impeachment, or because the State opened the door to this testimony. The Court also rejected several jury instruction issues in a somewhat complicated fact scenario where the defendant testified that he shot at one individual in self-defense and denied shooting at or hitting the other two individuals. Of note is the discussion in cases involving multiple victims and self-defense: the Court notes that the defense of self-defense does not transfer to unintended victims – self-defense can only apply to the person the defendant is reasonably in fear of.

Proper Service

***Grandquest v. State*, CR-2022-1067 (Ala. Crim. App. March 24, 2023)**

Defense win: Mobile Cnty Sheriff's Deputy held in criminal contempt for failing to appear as a witness at a trial. Issue was whether the State properly served him when it emailed the subpoena to him and the deputy responded "email received." The CCA reversed his conviction and sentence ($100 fine) holding that email is not a proper form of service, so it didn't matter that the deputy acknowledged receipt of the email.

Sufficiency of the Evidence

***Vandusen v. State*, CR-2022-0571 (Ala. Crim. App. May 5, 2023)**

The Court rejected Vandusen's arguments that the State failed to present sufficient evidence to support his conviction for abuse of a corpse and obstructing justice by using a false identity. The Court considered what constituted treatment that would "outrage ordinary family sensibilities" and determined that knowingly concealing a corpse without making arrangements for proper burial was sufficient. But his splits were illegal, so sentences were reversed.

***Moore v. State*, CR-2022-0914 (Ala. Crim. App. February 10, 2023)**

This was a sufficiency of the evidence case dealing with first-degree elder abuse and what constitutes "serious and protracted disfigurement" to show "serious physical injury." The Court held that the relatively minor scar was insufficient for serious disfigurement and the first-degree elder abuse had to be set aside. But because the jury was instructed on second-degree elder abuse, the Court remanded the case for the circuit court to enter an order convicting Moore of that offense instead.

Self-Defense

***Darby v. State*, CR-20-0919 (Ala. Crim. App. March 24, 2023)**

Defense win: Officer involved shooting and resulting murder conviction overturned. Case raised on interesting public trial right issue when the circuit court intermittently turned off the audio feed to the

overflow/public seating area that Darby argued was an extension of the courtroom. But the majority opinion didn't get into this issue deciding instead that the circuit court's refusal to give a jury instruction on consideration of a reasonable officer's actions in using deadly force, which was a correct statement of the law under § 13A-3-27(b)(2), required a new trial. Judge McCool concurred to his own writing to address why Darby shouldn't win on the other issues.

Authentication of Social Media Evidence

***Harrison v. State*, CR-21-0423 (Ala. Crim. App. August 18, 2023)**

Harrison was convicted of capital murder and sentenced to LWOP. He raised arguments related to (1) failure to give a reckless manslaughter instruction, (2) denial of access to jury list 24-hours before trial, (3) authentication of Facebook Live videos, and (3) improper closing arguments.

First, that the circuit court erred when it refused to instruct the jury on reckless manslaughter as lesser included offense. Because evidence could have shown that Harrison killed the victim while returning fire, there was no grounds for a reckless manslaughter instruction because that would be self-defense.

Second, that the circuit court erred in denying Harrison's request for the jury summons list 1 day prior to trial. This was rejected because Harrison requested the list before his first trial, not his second trial, and objections do not carry over.

Third, that the circuit court erred in admitting Facebook videos that were not authenticated, relevant, and any relevancy was outweighed by

unfair prejudice. The authentication issue is noteworthy because it required the Court to address an unanswered issue about silent witness authentication of a video the defendant is charged as the maker of. The Court held that in such circumstances, the *Voudrie* test don't have to be completely satisfied because videos on social media are often made with cellphones making completely satisfying the *Voudrie* test impossible. This is going to allow almost any social media video to be authenticated.

Fourth, that the circuit court erred by overruling objections made during the State's closing arguments.

Motions in Limine

***State v. Shaw*, CR-2022-1003 (Ala. Crim. App. August 18, 2023)**

State's Appeal. The State moved pre-trial to (1) restrict Shaw from introducing evidence concerning the outcome of his brother and co-defendant's trial where his brother was acquitted of all charges; (2) be allowed to introduce a fire report about a fire that occurred at Shaw's house 24 hours before the murders; and (3) to be allowed to call officer Rodriguez Jones to testify.

On the motion to restrict Shaw from introducing evidence, this issue was not properly before the Court because Rule 15.7(a) is specific on what grounds the State may appeal pre-trial and the denial of a motion in limine is not an authorized ground.

On the fire report and excluding the officer's testimony, the Court held that the circuit court did not abuse its discretion. Notably the officer's testimony was excluded in part because the State violated the open file discovery order.

HFOA Cases

***Thomas v. State*, CR-2022-0789 (Ala. Crim. App. August 18, 2023)**

Thomas was convicted of murder and sentenced to life without parole as a habitual felony offender. On appeal Thomas raised 3 main issues: (1) denial of motions for cause, (2) limits on cross-examination of witness, (3) HFOA notice.

No new law, but a reminder of the status of HFOA notice: Court rejected Thomas's argument that he had not been given sufficient notice about prior felonies despite getting written notice about one prior, changing lawyers multiple times, and getting copies of priors and presentence report just before sentencing.

The CCA noted: all three priors were listed in the presentence report, one prior was noticed pretrial in writing, oral notice will suffice, the State noted two priors during a pre-trial motion hearing and based on the pretrial notice and PSR the State intended to rely on three priors under the HFOA.

***Blevins v. State*, CR-2022-1148 (Ala. Crim. App. May 5, 2023)**

Sentencing win: Blevins challenged his sentences on appeal. The Court rejected his claim that the State failed to present documentation about his previous convictions rendered his HFOA sentence illegal. The Court did agree that his life without parole sentence for second-degree assault was illegal because life with parole was the maximum statutory punishment under § 13A-5-9(c), Ala. Code 1975

Miller Hearings

***Miller v. State*, CR-20-0654 (Ala. Crim. App. August 18, 2023)**

This is Evan Miller of *Miller v. Alabama* fame. Unfortunately, while Evan's case has gotten a lot of juveniles on LWOP relief, he won't be getting relief. The Court's opinion reviewed his arguments that the circuit court erred in sentencing him to LWOP in detail and affirmed.

Transactional Immunity

***State v. Norris*, CR-2022-0521 (Ala. Crim. App. February 10, 2023)**

The Court reversed the circuit court's dismissal of the indictment again the former Clarke County Sherriff. The circuit court dismissed the indictment based on arguments that Norris had reached a plea agreement with the State that involved him resigning. The Court held that this was not a plea agreement based on the circumstances, but was transactional immunity that was non-enforceable.

Illegal Sentencing

***State v. Tanniehill*, CR-2022-1121 (Ala. Crim. App. August 18, 2023)**

Tanniehill filed a Rule 32 alleging that the sentence from his 2013 guilty plea was illegal. But, because his sentence ended before he challenged it, the Court held that the circuit court lacked jurisdiction to vacate the sentence.

Brookside Cases

***Town of Brookside v. Newton*, CR-2023-0059 (Ala. Crim. App. August 18, 2023)**

***Town of Brookside v. Gengler*, CR-2023-0061 (Ala. Crim. App. August 18, 2023)**

***Town of Brookside v. Rowser*, CR-2022-0506 (Ala. Crim. App. March 24, 2023)**

The Court reversed the circuit court's order granting all the motions to dismiss. Circuit courts can't make credibility and sufficiency determinations pre-trial. Rule 13.5(c)(1) is very specific in the grounds for dismissing indictments pre-trial and this isn't one of the grounds.

Mandamus – Pre-trial Immunity

***Ex parte Jones*, CR-20223-0229 (Ala. Crim. App. June 23, 2023)**

The Court denied Jones' petition for a writ of mandamus asking that the circuit court' order denying stand your ground immunity be reversed because the petition was untimely. The order was issued on 12/11/22 and the mandamus was filed on 3/28/23—107 days later. Mandamus must be filed in a presumptively reasonable time—42 days under Rule 21(a). Jones argued that the delay in getting the transcript from the court reporter constituted good cause for the delay. The Court disagreed. "The court reporter's delay in preparing the transcript does not constitute good cause for this Court to consider the petition."

***Ex parte Johnson*, CR-21-0117 (Ala. Crim. App. March 24, 2023)**

Mandamus relief denied on pretrial immunity. The circuit court's findings are upheld even through those findings were that Johnson shot first even though the stipulated facts were essentially that no witness told police that Johnson shot first. Judge Cole dissented asserting in part that the ore tenus rule shouldn't apply to stipulated facts that this Court is in the same position and the circuit court to review.

Rule 32

***State v. Cross*, CR-2023-0079 (Ala. Crim. App. June 23, 2023)**

The Court reversed the circuit court's grant of Rule 32 relief. Cross alleged that her 20-year sentence for identity theft violated the 8th amendment since it would violate the current sentencing standards. The circuit court agreed. The Court of Criminal Appeals reversed because that's not how they say it works because identity theft is a not an eligible offense and HFOA correctly applied.

***T.C.S. v. State*, CR-2022-1285 (Ala. Crim. App. June 23, 2023)**

The Court affirmed the denial of the Rule 32 petition alleging juror misconduct on procedural grounds.

***Morgan v. State*, CR-21-0337 (Ala. Crim. App. March 24, 2023)**

Reversal and remand to hold a Rule 32 hearing on the jurisdictional claim that the petitioner was without counsel for a 7-month period during the pendency of his case. While the petitioner had multiple

different attorneys, he alleged he appeared in court and had numerous plea negotiation discussions with the State while unrepresented. Taking this allegation as true, he should have received a hearing.

***Wallis v. State*, CR-2022-0984 (Ala. Crim. App. May 5, 2023)**

The Court affirmed the denial of Wallis's Rule 32 petition raising claims of newly discovered evidence and ineffective assistance. The petition did not satisfy all 5 requirements for newly discovered evidence under Rule 32.1(e). The ineffective assistance claims were untimely and lacked the pleading for equitable tolling.

***Robinson v. State*, CR-2022-1055 (Ala. Crim. App. March 24, 2023)**

Denial of Rule 32 Petition affirmed. Petitioner was convicted in 1992 of murder and sentenced to life. He argued he was entitled to resentencing under the voluntary guidelines because they rendered his sentence illegal and replaced the now repealed 13A-5-9.1. This doesn't go anywhere good – the voluntary guidelines don't apply to sentences imposed before their effective date.

Hearings – MNT & Denial by Operation of Law

***C.L.A. v. State*, CR-2022-0651 (Ala. Crim. App. June 23, 2023)**

The Court rejected the weight of the evidence arguments, but did reverse the denial of the motion for new trial and remanded for a hearing on whether the victim said after trial that the allegations had been made up.