

THE ALABAMA PROSECUTOR



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Upcoming Events

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| Secretaries Association Conference | Sept. 1-5 | Orange Beach, AL |
| ADAA Congressional Reception | Sept. 22-26 | Washington D.C. |
| AL Child Support Conference | Oct. 28-31 | Orange Beach, AL |
| Fall Extended Business Session | Nov. 21-25 | Point Clear, AL |
| ADAA Winter Conference | Jan 21-23 | Birmingham, AL |

Message from the Director

Recently I was listening to an interview with a very prominent sports figure. He first described his latest win as “lucky”. He then went on to say that without the hard work of his team and all of their efforts, he would not have been in a position for “luck” to come his way. Some would say that the success of the Alabama District Attorneys Association over the past several years is luck. I would tend to agree - to a point. However, like the athlete above, our luck is the by-product of forward thinking DA's, hard work, preparation and being in the right place for luck to fall upon us.

In the last several years, ADAA has been the measuring rod by which other District Attorneys Associations across the U.S. gauge themselves. Due to the foresight of our DAs and the generosity of Senator Shelby and others in the Alabama Congressional Delegation, we have single handedly been responsible for millions of federal dollars being focused on state prosecution efforts in Alabama. Together we have passed some very sweeping anti-methamphetamine legislation, computer crime and child pornography statutes. We have taken the unusual step of initiating a drug prevention effort by creating the ZeroMeth campaign; a proactive educational approach to meth prevention.

Similarly, ADAA has led the nation in our efforts regarding digital evidence and computer crime. We are the first state in the U.S. to establish a state-wide system of computer forensics labs operated by – and for – the district attorneys. We are setting national standards in the area of computer crime training at the National Computer Forensics Institute in Hoover.

With these accomplishments in mind, there is still much work to do. In the next several months, for the first time in ADAA's history, we will establish our own computer server and encrypted email system which will enable us to be self sufficient and absolutely secure with respect to electronic communications. This service is a direct result of our activity in Washington. Through the assistance of a grant facilitated by Congressman Bachus we will now have a secure and fluid means of digital storage and communication. This will inevitably make our lives better and our jobs easier.

This year, in addition to our other responsibilities, we are focusing our attention on member services and specialized training. After our new computer system is installed and fully operational we will have the ability to offer additional services such as a comprehensive brief bank. Currently we are gathering sample motions and briefs that are being uploaded in the database that will be available to each office in the next few months.

As for training, we are taking a new and unorthodox approach which will take advantage of space made available at the NCFI in Hoover. In addition to our winter and summer conferences, we will unveil a series of short, intensive, specialized seminars available to all DAs, ADAs and support personnel. These trainings will be limited to narrowly defined topics that are difficult to teach in a large conference setting. Topics will include; New Prosecutor Boot Camp, DUI Boot Camp, Basic PowerPoint, Office Management, etc.

Prosecution specialists at ADAA/OPS are currently traveling the state training law enforcement and others in the areas of digital evidence and DUI. Prosecutor Brandon Hughes is now a regular trainer at the Alabama State Trooper Academy in Selma, Alabama. As you would imagine, we are excited at the prospects that these new programs and opportunities bring to our association and look forward to providing new and innovative services in the years to come.

Lastly, as a point of personal privilege, I would like to take this opportunity to express my sincere appreciation to our outgoing president, Russell County District Attorney, Ken Davis. For 30 years Ken has dedicated his life, selflessly, to his work and the principals we all espouse. His tenure as ADAA president has been a testament to us all and without his leadership, wisdom and hard work our association would not be where it is today!

Please know that we at ADAA/OPS are here to assist you with whatever issues you may encounter. We welcome calls for assistance and will do everything we can to help.

Randy Hillman
Executive Director
ADAA



This article first appeared in the Alabama Prosecutor back in 2003 and was later published nationally in the Prosecutor Magazine. It is republished here today and dedicated to the only person in the justice system that actually seeks justice, the tireless prosecutor who give of themselves everyday in that pursuit.

When asked why he or she took a job in the District Attorney's office, the first answer out of a prosecutor's mouth is almost always, "For the trial experience." Still others come to build political equity or to command attention. This is certainly not the case for everyone entering the prosecution arena; many come because of a desire to help make a difference in the communities in which they live. Regardless of the reason we come to the profession of criminal prosecution, if we stay long enough we learn a lot about ourselves and what kind of person it takes to do this job and make a career of it. A great prosecutor once told me to never let a verdict determine if I had done a good job. In other words, success is not measured by your destination; it is the journey itself that defines our value. How we carry ourselves on that journey determines what kind of person we will become.

My son David (13) and my daughter Rachel (8) and I, love to watch old movies. One of our favorites is, "To Kill a Mocking Bird". I am sure you know the story of Scout and Jem's father, Atticus Finch. In the fictional town of Maycomb, Alabama, Finch decides to take on a case involving a black man named Tom Robinson who has been accused of raping a very poor white girl named Mayella Ewell, a member of the notorious Ewell family. The Finch's face harsh criticism because of Atticus's decision to defend Tom Robinson, but Atticus insists upon going through with the case because his conscience could not let him do otherwise. Both Scout and Jem face whispering taunts and ridicule from family and town members because of the position taken by their father.

My daughter Rachel has always reminded me of the character of "Scout". She not only resembles the fictional "Scout", but she also shares some of her precociousness and carefree spirit. She is never at a loss for words nor is she afraid to mix it up with the boys in athletic contests. For this reason I gave Rachel the nickname of "Scout" several years ago. One hot summer afternoon, a year or so ago, I called her to come in from playing. I yelled out, "Scout"! She answered with, "I'm coming Atticus",



and I laughed. When she came in I asked her why she had called me by Atticus. She said, “You’re a lawyer like Atticus in the movie”. I reminded her that although I am a lawyer by profession, the character in the movie that shares my job was the other lawyer, not Atticus Finch. She paused for a moment and pondered what I had said. Looking at me with her big brown eyes, she said, “but he was not after the truth and you say all the time that you are all about the truth, why aren’t you Atticus Finch”?

I hear the same tired lawyer jokes you hear. I also hear the same call from the legal profession for a champion of character that you hear. The profession cries out, where are the Atticus Finchs’ of the world. Criminal defense attorneys claim that banner as, “seekers of justice”, but we know they are mere advocates of whatever position the person that hired them has taken, and true justice is the last thing they want. With this in mind, I have often reflected on the exchange between my daughter and me, since that hot summer day. I have come to the realization that if the world is truly looking for a modern day Atticus Finch, it need look no further than the career prosecutor. Although it makes good theater and Hollywood loves to portray the lone criminal defense attorney as David against the Goliath of the State. We [Prosecutors] know otherwise. We are the voice of the voiceless and the only person in the justice system sworn to seek justice. The American Bar Association Standards for Criminal Justice as cited by the National College of District Attorneys states, “The prosecutor is both an administrator of justice and an advocate . . . The duty of the prosecutor is to seek justice, not merely to convict”. We have all taken the oath to carry the burden of proof and we take it serious. We are called upon every day to make decisions that affect the lives of not only our victims and defendants, but our entire community. We draw a line in the sand of human tolerance and say enough is enough.



If the story of Tom Robinson were written today, I have no doubt that Atticus Finch would be the District Attorney or a staff career prosecutor. With community pressure mounting and an element of society wanting



Tom’s head on a platter, Atticus would again be called on to make a hard decision. Faced with the evidence or lack of evidence, District Attorney Finch would add the case to his already overcrowded Grand Jury Docket. Mayella Ewell and her father would be subpoenaed. The local law enforcement agency would have conducted a thorough investigation. The Department of Forensic Sciences would have examined all scientific evidence and issued reports. Mayella would be sworn, as would be her father. After a complete examination, the Grand Jury would do the right thing and No Bill the case. Then District Attorney Finch would open a perjury investigation into the Ewells. District Attorney Finch would be called all manner of things in the court of public opinion, but an injustice would be prevented. The book

might not be as long and it probably would not win a Pulitzer Prize. Mr. Gregory Peck would be short one Academy Award, but truth would win out and the right thing would be done.



This scenario is played out every day in District Attorneys Offices all over this country. Atticus Finch can be found where a young Assistant District Attorney decides to charge a well known individual in her community, because she knows the facts and evidence call for it, even though she knows her decision will be unpopular and will strain her relationships in the community. Atticus is there when a District Attorney and his Deputy indict a long time public official they have known all their lives and grew up with his children. They know as bad as they feel, they would feel much worse if they had not indicted, because it was the right thing. In another area, a career prosecutor declines a warrant even though he knows the decision to charge would be popular, he also knows a key witness is lying, and he further knows there is exculpatory evidence. If he charged, he may still win, but justice would not be served.

It has been understood, since the very first appointment of a prosecutor in America, that the person holding that position must be cut from a different bolt of cloth. In 1704 a Connecticut statute set forth the first prosecutorial office in that colony. It stated:



Henceforth there shall be in every county, a sober, discreet, and religious person appointed ... to be the attorney for the Queen, to prosecute and implead in the law, all criminals and to do all other things necessary or convenient as an attorney to suppress vice and immorality.

Perhaps one of the greatest statements regarding the professionalism of those involved in prosecution came in 1940 when Attorney General Robert H. Jackson addressed a conference of United States Attorneys. He said:

“The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abusive power, and the citizens’ safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes and who approaches his task with humility.”

In the story, “To Kill a Mockingbird”, Atticus tells Scout that you never really know somebody until you crawl up in their skin and walk around for awhile. Only another prosecutor can truly understand the burden that we carry and likewise, only another prosecutor can understand the joy and satisfaction we gain from our profession. We must, as professional prosecutors, remember our fundamental obligation to ourselves, our victims and the public we represent. We are to be firm and uncompromising in our principles, with fairness and honesty as our standard.

Yes Scout, we are all about the truth, and Atticus Finch’s office is now in the Courthouse.

THE **CRASH**

C O U R S E

Word Choice Matters:

Crash vs. Accident

Brandon Hughes
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As prosecutors, we must recognize that when delivering an opening statement or closing argument or when we stand before a judge at sentencing - Word Choice Matters. Words have impact. Words evoke images and even stir emotions. Take for instance the words “Crash” and “Accident”. These two words are often used to describe the same event, but in reality each word conjures up a very different image. Any event involving a vehicle and a collision, whether another vehicle is involved or not, is frequently referred to as a traffic accident, one of life’s little mishaps.

Let’s consider this scenario. A car runs a red light and collides with another vehicle in the intersection. Just another traffic accident, right? Now, consider that the driver who ran the red light is driving 70 mph in a 45 mph zone. Still an accident? Suppose

that same driver also had a blood alcohol content of 0.14.

Would your answer be the same?

An accident is something that cannot be reasonably foreseen or predicted and cannot be avoided. It just happens. A crash, on the other hand, is the result of choices made and risks disregarded. When I hear the word “crash”, I picture a pile-up on the back stretch at Talladega. It’s a word that evokes a violent image and shouts blame. After all, crashes don’t just happen, do they? Somebody is always at fault in a crash. But what about accidents? Nobody’s fault? Just an unfortunate event? Simply in the wrong place at the wrong time? Does it really matter?

Jurors see the pictures and hear testimony. During the course of a trial, they know victims are dead or injured because of the actions of the defendant. They know it is not *really* an accident. Don’t they? This is an important question that I suggest you don’t leave unanswered. When you present your case and talk about the “accident scene” and the “accident report” or the “accident investigation”, expect that the defense attorney will do the same. Now, he probably won’t be blatant about it and ask the investigator “Isn’t this simply just

an accident?” However, rest assured he will use the term accident as much as he can and most certainly will point out your use of the word to the jury.

“Ladies and gentleman, this is not murder. This was a horrible, terrible accident. You heard the prosecutor refer to this case as an accident yourselves numerous times.”

A really alert defense attorney may even keep count of the number of times you use the term accident and tell the jury. That term could come up several dozen times during a two or three day trial. It is these very arguments that cause a juror during deliberations to try and convince the other 11 that it really was *just* an accident or cause a judge to give a light sentence because, poor guy, it was *just* an accident.



Part of the job of a prosecutor is to not only paint an accurate picture to the jury but to also inject emotion into the case. Remember, Word Choice Matters and proper word choice can help paint the correct picture. Your words, your arguments should give meaning to the two dimensional photographs that show the twisted metal and shattered glass. Let the jury know this was in fact a crash, a wreck, a collision, or even an explosion. Make sure they understand that it is not an accident. The defendant did not merely run in to the other car. He was drunk and smashed in to it. Choosing words that have impact help you to get the jury to understand and feel the pain and loss the victims felt.

The term “accident” has become somewhat generic. Consider the little boy killed in a crash because the defendant was high on Meth and blew through a stop sign while running from the police. Do you stand before the court and refer to that event as an accident or a crash? How about the retired couple who are now dead because the defendant was operating his pickup truck at more than 100 mph in a rainstorm causing the defendant to cross the double yellow line and hit their Winnebago head on. Crash or accident? Word Choice Matters.

Now, fast forward to the next time you are standing before a jury asking them to convict some defendant for murder after killing all of the occupants in a car he or she hit. How many times will the defense attorney use the term “accident”? How many times will you?





A Digital Mouflage

I must confess something to my fellow Prosecutors. I have long suffered from an affliction called AGRW, or Andy Griffith Rerun Watcher. The Andy Griffith Show, or *CSI Mayberry*, as I like to call it, is an old faithful. Like comfort food or a favorite chair, it always there and always familiar.

One of my favorite episodes and one that has provided many classic quotes is “The Cow Thief”. In it, a serial cow thief is making off with the local prize heifers so the Mayor, eager to score political points, calls in a “state” investigator to solve the crime. On one of the crime scenes the “state” investigator has seen the footprints of the thief; and speaks to Barney. The following exchange occurs;

Upchurch: Sheriff tells me you decided not to make a *mouflage*.

Barney: (*confused*) Mouflage? Yeah, that’s right. We decided not to make a mouflage. (*Now cocky*) Oh, we told a few people, but we decided it didn’t make sense upsettin’ folks, runnin’ around, blabbin’, and makin’ a big mouflage out of it.

Andy: Uh, Barney - he means a plaster cast of the prints.

Barney: (*embarrassed*) Oh, That kind of mouflage.

Much has changed since the days of Mayberry, and perhaps nothing has changed greater than our dependence on technology. Today, Barney might well be asked about a *mouflage* of a different sort. A *digital footprint* left by a defendant can tell us where a defendant has been, what he was doing, and long he spent doing the act.

Ask yourself this question: What, in any given day is your digital footprint? Do you wake to a digital music system? Does a digital entertainment system provide background noise in your morning and entertainment in the evening? Do you have a programmable house alarm system? Do you read and send email, use your cell phone, have a GPS navigation system? Does your car have ‘black box’ technology? Do you text message? Do you play digital games like Wii or Xbox? Take digital photographs? Do you access a security system to enter or leave your office? Do you access case files through a computer server? Do you make purchases on line? Are any of these password sensitive?

“Oh, that kind of moulage.”

If you answered yes to any of these, then you have left a footprint that tells a story of your activity. And, if *you* leave such impressions through out your day, so does the thief, the bully, the drug dealer, the rapist, the domestic abuser, the murderer, and the scumbag.

We know that criminal investigations are not stagnant. When you receive an investigative file or a case file for prosecution, you read and examine every aspect of the facts and evidence of the case. If an item of physical evidence has not been forensically tested or compared to known samples, you don't hesitate to push for testing. If a witness has not been located or interviewed, you see that that hole is plugged. We *must* now begin to look at every criminal case in the light of computer forensics and digital evidence.

Drug dealers set up drug distributions via text messaging. I have had cases where they took cell phone pictures of favored meth ingredients and forwarded them to 'mules' so they would know the correct brand names to purchase. Meeting points to deliver cocaine are relayed by text messaging and stored in the GPS device of a drug dealer. And know that even the street level dealer has a cell phone that is 'pinging' a cell tower. That historical data from his phone will provide the corroboration you need to put the dealer on the street when the dope was sold to the informant. Whether deleted or saved, these images and messages can often be retrieved and preserved as evidence by a forensic examiner.

We know the domestic abuser sends threatening and demeaning emails to his victim. These messages can often be retrieved from his phone or computer. We have seen the rapist that views pornography involving women similar to those of his victim. I have had cases where the defendant directed his child victim dress like the graphic adult images on his computer. Search engine results by a murder defendant can provide damning evidence. In the Scott Peterson case, the jury said one of the most compelling pieces of evidence was the fact that before the bodies washed ashore, Peterson Googled the water currents of the bay where his wife and unborn baby were found.

In DUI Homicide, a defendant tells the officer that he had left work prior to the crash, but his cell phone and the cell towers, tell a different story. The onboard "black-box" device in a tractor-trailer can tell the story of speed and recklessness prior to the crash.

Digital evidence can be most compelling in a white collar prosecution. Just recently, two former Hedge Fund managers at Bear Stearns were arrested for their part in a fraud scheme that lead to the collapse of the company and the beginning of the current mortgage meltdown. In the spring of 2007, these two Bear Stearns executives shared their growing fears in a series of e-mail messages to each other about the perilous condition of the giant hedge funds they oversaw. "I'm fearful of these markets," one wrote. The other said later, "Believe it or not — I've been able to convince people to add more money." He concluded that "I think we should close the funds now." But three days later, the pair, Ralph R. Cioffi and Matthew M. Tannin, presented an upbeat picture to worried investors without disclosing that the two funds were plummeting in value and that Mr. Cioffi had already pulled some assets from one of them.

A little more than a month later, the funds, filled with some of the most explosive and high-risk securities available, imploded, evaporating \$1.6 billion of investor assets and setting off a financial chain reaction that has rattled global markets, caused more than \$350 billion in write-downs, cost a number of executives their jobs and culminated in the demise of Bear Stearns itself.

Prosecutors relied heavily on e-mail exchanges between Cioffi and Tannin in trying to paint a picture of fear and desperation inside Bear Stearns as the firm grappled with a crisis that would eventually lead to its end. [The New York Times, Landon Thomas, Jr. 6-20-08] Remember, Alabama crooks use email too.

My point is simple. I never want to walk into my office after a trial and know that evidence existed that I could have presented but failed. I never want to look at my victim, my investigator, my co-counsel or my self in a mirror and know I did not do all I could do. Whether you have been a prosecutor for decades or for only months, why would you not want to have every tool available in the prosecution of a case? We expect to have fingerprints, DNA, and photographs. We have grown accustomed to 'blood and guts' forensics and evidence collection. We must now become equally accustomed to the digital evidence arena.

With the help of Senator Richard Shelby, your **Alabama Computer Forensic Laboratories (ACFL)** are owned by the District Attorneys, and work for you. The ACFL are staffed by Russell Yawn (Chief Investigator), Larry Crocker, and Mike Trotter. Each is a computer forensic expert, as well as seasoned trained law enforcement. Having worked in all areas of law enforcement, they know how to seize the haystack and find the needle.

If you have any digital or computer evidence questions, please contact the lab in your area or me, at OPS.

With every good wish, I am,
Sincerely,

Barry D. Matson
Chief Prosecutor, ACFL
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334-242-4191



ZeroMeth Update

The ZeroMeth commercials that have been airing state wide concluded the end of May. As of the date of this publication we are continuing to see multiple billboards throughout the state that are making an impact with Alabama teens. The ZM website is continuing to receive hits and correspondence daily. As promised, we are in the process of working on additional grass roots facets of the program. We have recently concluded taping at several locations, including the Julia Tutwiler prison, for a segment that will appear in the DVD that will be distributed to every school in Alabama this fall. During this process we have been working with the state school board and have received their commitment to distribute this DVD and monitor any feedback. Furthermore, we are in the final stages of development and proofing the ZeroMeth brochure that will be available to each DA in order to distribute to different community groups during presentations. If you have any questions regarding the ZeroMeth Program please feel free to contact me or the ZeroMeth Committee Chairman, Jimmie Harp, District Attorney, Etowah County.

Jason Swann
Staff Attorney



SEARCH AND SEIZURE

State of Alabama v. Patricia Williams (Houston County) **CR-06-1752**

Holding: A “knock and talk” warrant was being executed on the defendant’s residence. While at the location, officers observed a chemical odor commonly associated with the manufacturing of methamphetamine emanating from the residence as well as a shed approximately five feet behind the defendant’s trailer. Through the shed’s open door, the officers observed all the elements of an operating meth lab. The officers then entered the home without a warrant and without permission to clear the house for safety reasons. The officers searched the house including breaking a padlock to enter the defendant’s bedroom where they found materials used for making methamphetamine as well as the finished product.

The defendant appealed saying the police conducted an unlawful warrantless search. For a warrantless search to be legal, law enforcement officers must show that they had probable cause to enter the home and that exigent circumstances also existed. The defendant does not dispute that they had probable cause; she merely argues that there were no exigent circumstances to sustain a warrantless search.

The Court stated that based on the inherent dangers of an operating meth lab, “We now hold that discovery of such a lab by law-enforcement officials constitutes an exigent circumstance justifying a warrantless search.” **AFFIRMED**

State of Alabama v. Ragon King (Chambers County) **CR-06-1269**

Holding: Two members of the Chambers County Sheriff’s Department stood outside a residence waiting for back up to arrive so they could execute a search warrant on the premises. While waiting, the deputies observed the defendant leave the residence, enter a vehicle and attempt to drive away. The deputies stopped the vehicle, asked the defendant to exit and subsequently conducted a patdown search for weapons. The deputy felt an object he could not identify and asked King for consent to retrieve the object to determine what it was. The object was a closed black film canister that the deputy opened and found it contained methamphetamine.

The defendant appealed saying that though he gave consent to retrieve the film canister from his pocket, the deputy exceed the scope of his consent to search by opening the canister.

The Court held that “it was reasonable for the deputy to believe the consent to retrieve the canister also encompassed consent to open (the canister)”. Furthermore, “a reasonable person would have understood that retrieving the object to find out what it was would, of necessity, include opening the canister.” **AFFIRMED**

State of Alabama v. Corey Lee Williams (Lee County)

CR-06-1451

Holding: Two Opelika police officers chased a suspect into a house where they were assaulted by several individuals. The individuals who assaulted the officers fled the house. One of the officers stated that he had sprayed some of the assailants with mace. The mace used was one that contains a fluorescent substance that glows under blacklight for up to 72 hours. The defendant came to the police station less than 48 hours after the assault to be questioned by the police about the incident. The police took him to a room where they turned off the overhead lights and turned on a blacklight which showed evidence of the defendant being hit with mace. The defendant's picture was taken in this lighting to show the fluorescent pattern.

The defendant appealed saying the photographs taken of him in the ultraviolet light constituted an illegal search.

The court held that under current Alabama law, a "search" involves "probing secret places" and "implies forcible dispossession of property of one by exploratory acts." The defendant was not asked to expose any portion of his body not already open to public view nor was any contact made with the defendant to determine whether or not a fluorescent pattern would emerge. The Court could not see where having one's photograph taken under ultraviolet light is any more or less intrusive than having a photograph taken under any other circumstances.

AFFIRMED

Virginia v. Moore, Supreme Court of the United States

No. 06-1082

Holding: Two City of Portsmouth police officers conducted a traffic stop of a vehicle the defendant was driving. The officers determined that the defendant's license was suspended and arrested him for misdemeanor of driving on a suspended license. Under Virginia law, the officers should have issued the defendant a summons instead of arresting him as driving on a suspended license is not an arrestable offense. The search incident to arrest revealed the defendant carrying 16 grams of crack cocaine and he was subsequently convicted of possession of cocaine. The Virginia Supreme Court overturned the conviction saying the search violated the Fourth Amendment because the officers should have issued a citation under state law and the Fourth Amendment does not permit search incident to citation.

The U.S. Supreme Court reversed the Virginia Supreme Court decision saying that when an officer has probable cause to believe a person committed even a minor crime, the arrest is constitutionally reasonable. This Court's decisions counsel against changing the calculus when a State chooses to protect privacy beyond the level required by the Fourth Amendment. The Court adheres to this approach because an arrest based on probable cause serves interests that justify seizure. Arrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation. A State's choice of a more restrictive search-and-seizure policy does not render less restrictive ones unreasonable, and hence unconstitutional. While States are free to require their officers to engage in nuanced determinations of the need for arrest as a matter of their own law, the Fourth Amendment should reflect administrable bright-line rules. Incorporating state arrest rules into the Constitution would make Fourth Amendment protections as complex as the underlying state law, and variable from place to place and time to time. **REVERSED AND REMANDED**

Note: §32-1-4 Code of Alabama is similar to the Virginia statute regarding arrests for misdemeanor traffic offenses addressed in this case.

RULE 32: OUT-OF-TIME-APPEAL (DEATH PENALTY)

State of Alabama v. Michael David Carruth (Russell County)

CR-06-1967

Holding: The defendant was convicted of four (4) counts of capital murder and sentenced to death in 2003. The Court of Criminal Appeals upheld his capital convictions and the death sentence. He filed an application for rehearing in the aforementioned court but did not file a petition for writ of certiorari in the Alabama Supreme Court. Final judgment was rendered in November 2005 and in October 2006 he filed a Rule 32 petition in which he sought an out-of-time appeal to the state Supreme Court and further alleged ineffective assistance of counsel because his attorney did not petition the Alabama Supreme Court for certiorari review.

The circuit court granted the defendant permission to file an “Out of Time Petition for Writ of Certiorari to the Alabama Supreme Court” and stayed the other issues in the Rule 32 petition until the state Supreme Court ruled on the petition for writ of certiorari. The State appealed the circuit court’s ruling.

In overturning the circuit court’s ruling, the Court stated that “...Rule 32.1(f) only applies in situations where the notice of appeal from a conviction and sentence or from a dismissal or denial of a Rule 32 petition is untimely. It...does not have any application to petitions for writs of certiorari in the Alabama Supreme Court.” The Court went on and addressed the defendant’s assertion of ineffective assistance of counsel saying that the defendant could not have had ineffective assistance of counsel based on his attorney not filing a petition for writ of certiorari in the Alabama Supreme Court because it is well settled that a defendant is not entitled to counsel on a discretionary appeal to the Alabama Supreme Court. The right to counsel does not extend beyond the first appeal as of right. **REVERSED AND REMANDED**

JURISDICTION (DUI)

State of Alabama v. William Lyle Marshall (Baldwin County)

CR-07-0004

Holding: The defendant plead guilty to felony DUI and was sentenced to five years in prison and fine \$4100. The defendant appealed saying that one of his prior DUI convictions was improperly considered for enhancing his punishment to that of a felony instead of misdemeanor DUI. The prior conviction in question was more than five years old and subsequent to Hankins v. State in which the court held the legislative change in 2006 restricted use of prior DUI convictions to five years preceding the current conviction.

The Court, in the current case, held that if a case is indicted as a felony DUI but the State fails to prove the requisite prior DUI convictions to elevate the offense to a felony, the Circuit Court retains jurisdiction. The Courts reasoning was based on the misdemeanor offense arising out of the same incident as the felony and maintaining consistency with Rule 1.2 Ala. R. Crim. P. which addresses just and speedy determinations of every criminal matter.

The Court went on to specifically state, “To the extent that our previous opinions...have held or implied otherwise, they are hereby and expressly overruled.” **AFFIRMED AS TO CONVICTION; REVERSED AND REMANDED AS TO SENTENCING**

Legislative Roundup

Regular Session 2008

During this years regular session there were 653 bills filed in the House and 953 filed in the Senate for consideration. Upon review of the over 1500 bills our office identified 257 bills that we felt had an impact on Alabama's District Attorneys. As you are all aware these bills were maintained on our legislative tracking report and sent out every week for your review. Although the bulk of our responsibilities includes the review and maintenance of crime bills that impact the District Attorneys, our legislative agenda for this session included several local solicitor's bills, some additional computer crime bills, DUI legislation as well as a statewide solicitor's bill.

Although bills continually moved through the House a log jam was created in the Senate over passage of two bills; the Macon County Gambling bill and the "Food Tax" bill. Due to filibuster over these bills only a handful of bills were signed by the Governor and enacted into law. Even though the majority of legislative working days were consumed by these two issues we were fortunate to have 5 local solicitor's bills pass the legislature. Alternatively, several other bills of note that we were able to address such as the expungement bill did not pass . The expungement bill would have given a convicted offender the absolute right to an expungement of his offense including the destruction of records under certain circumstances.

The following is a brief overview of bills that passed in the regular session affecting DA's:

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| 19 th Judicial Circuit Judge required to live in the County | Act 2008-82 |
| Mediator not compelled to testify | Act 2008-387 |
| Revise Alabama Juvenile Justice Act | Act 2008-277 |
| GF approp: Child Advocacy Program | Act 2008-380 |
| General Fund Approp bill | Act 2008-466 |
| Crime of Unlawful operation of recording device in Movie | Act 2008-272 |
| Russell Co. legislature adjust court cost | Act 2008-288 |
| Russell Co. DA employ Investigators | Act 2008-412 |
| Game and Fish Violations; Fines increased | Act 2008-384 |
| Escambia Co: Assess solicitors fee | Act 2008-454 |
| Calhoun Co: Assess solicitors fee | Act 2008-457 |
| Russell Co: Add solicitors fee, Criminal Cases | Act 2008-459 |
| Clarke Co: Assess solicitors fee, Criminal Cases | Act 2008-490 |
| Washington Co: Assess solicitors fee, Criminal Cases | Act 2008-491 |

I would like to take this opportunity to personally thank you all for you participation and support during the last regular session. It is extremely helpful to have DA's present during the session. The next regular session will take place on February 2nd 2009 and we look forward to your continued support. Similarly, please forward me any information on any upcoming bills you would like included on our legislative tracking sheet.

Thanks,

Jason Swann
Staff Attorney
ADAA

NOTE: We have reason to believe that the Governor will call a special session at the end of July dealing with Jefferson County and potential economic incentives for new industry. Therefore, we are in the process of positioning the remaining solicitor's fund bills for consideration should the Governor request the legislature to convene. Alternatively, if the Governor does not call a special session, the advertisement language sent to each District Attorney will enable you to file the bill in the next regular session without having to advertise the bill again.