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Fall Extended Business Session	November 17-20, 2012	Point Clear
ADAA Winter Conference	January 23-25, 2013	Birmingham
ADAA Summer Conference	June 25-28, 2013	Orange Beach
Legislative Session Begins	February 5, 2013	

THE **CRASH** C O U R S E

The Myth of the DUI Defense: GERD

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Prosecute enough DUI cases and the excuses you will hear for the defendant's behavior will be both numerous and imaginative; you have to be prepared for anything. A DUI defense is typically more akin to a unicorn than a thoroughbred. You see, like myths, DUI defenses usually have some basis in truth; however, it is the perversion of this truth where the DUI defense most often lies. As such, it is important for the prosecutor to understand the underlying truth of the defense in order to be able to point out the fallacy of the defense and make sure the finder

of fact renders a verdict based not on fanciful conjecture, but on the evidence.

One such defense is the GERD (Gastro-Esophageal Reflux Disorder) defense and if you have not seen it yet, odds are you will. The basis in truth for this defense is that GERD is real medical condition; the perversion of this truth is that persons with GERD produce artificially high Breath Alcohol Concentrations (BrAC) and, as a result, are not guilty of Driving Under the Influence of Alcohol.

Understanding what GERD is and, more importantly, what it is *not* is the first step in overcoming this defense.

The Truth

Put simply, GERD is a more severe form of acid reflux, which is the backward flow of the stomach's contents into the esophagus. It

is important to understand that GERD is more than just occasionally experiencing heartburn. A person who truly suffers from GERD will most likely have been diagnosed as such by a physician and takes medication—perhaps even daily—to deal with the problem. In fact, it is not unusual for a GERD sufferer to require surgery to address the problem. It is estimated that approximately 7-10% of the population in the United States suffers from GERD to some extent.¹ Drinking alcohol, smoking and eating spicy foods have been known to exacerbate the symptoms of GERD.

The Defense

First and foremost, the GERD defense is nothing more than a mouth-alcohol defense. The defendant will claim that since he or she suffers from GERD then the BrAC as measured by the Draeger was inflated and therefore not an accurate representation of their actual BrAC. They will claim that the BrAC was inflated because the GERD caused alcohol from the stomach to flow up the esophagus

and into the mouth creating mouth-alcohol and therefore causing a flawed result.

According to “Developing a GERD Defense”², the fact pattern that supports a *scientifically valid* GERD defense includes: physician diagnosed GERD, impairment that is not consistent with the defendant’s BrAC and a *strong* possibility of alcohol present in the stomach at the time of the breath test. (Emphasis added). As you can see, there is more to it from a defense perspective than just throwing out the term GERD.

The Gerd Effect

Does GERD really have a significant impact on the BrAC? Perhaps the most notable study on this issue was conducted at the University Hospital in Linköping, Sweden in 1998³. The participants in the study were 10 individuals (five men and five women) who had been diagnosed as chronic sufferers of GERD and who were in line for antireflux surgery. The subjects were dosed with either beer, white wine or vodka mixed with orange

juice after a 10 hour overnight fast. At specified intervals, blood was drawn from each subject and the subject gave a corresponding breath test immediately after the blood sample was taken. Some of the subjects were even subjected to having a GERD episode induced prior to giving a breath sample and in every case they were able to blow an adequate volume and for an adequate amount of time. The conclusion reached in the study was “that the risk of alcohol erupting from the stomach and into the mouth owing to gastric reflux and falsely increasing the result of an evidential breath-alcohol test is *highly improbable*.” The study further concluded “that the risk of a person experiencing gastric reflux during the time he or she participates in a breath-alcohol test procedure is very low. Even if reflux does occur, our study shows that it is not very likely that an abnormally high BrAC reading will be obtained.” In arriving at these conclusions, the authors of the study reiterated the

importance of the pre-test deprivation period as well as taking duplicate breath samples as safeguards against a GERD defense. Both of which are just two of the four safeguards used in Alabama to ensure that no false positives occur due to mouth-alcohol.

As the previous study proved, an *active* GERD episode *may* cause the presence of mouth alcohol, but simply saying it doesn’t make it so.

Handling the Defense

When trying a case where a GERD defense has been asserted, it is important not let the case become solely about whether or not the defendant was suffering from GERD at the time of the breath test. Also, just because the defendant may suffer from GERD—even if he or she has been diagnosed as such by a doctor—the defense must show that the defendant was suffering from a GERD episode *at the time of the breath test*. This is a tough standard. Hold them to this.

Keep the jury focused on the driving behavior, the observations by the officer and the defendant's performance on the Standardized Field Sobriety Tests. As I wrote in a [previous article](#), the arrest decision is made based on evidence observed prior to the evidentiary breath test. The breath result is simply the sprinkles on the cake so don't let the issue get clouded by arguing over a suppositious defense. Make sure the jury understands that the reason for the defendant's behavior that night was impairment by alcohol and not a severe form of indigestion.

In per se DUI cases where attacking the GERD defense head-on may be best strategy, prosecutors in Alabama can take heart in knowing the breath-testing program in this state makes attacking a GERD claim fairly straightforward. There are four safeguards built into the program to essentially eliminate the threat of mouth-alcohol affecting the BrAC result. The first safeguard is the 20-minute

deprivation period prior to testing. When a person drinks an alcoholic beverage, residual alcohol remains inside the mouth for several minutes after the drink is taken and if a breath sample is given within a few minutes of that drink, the breath-testing instrument could measure the mouth-alcohol and could render an inflated BrAC. There have been numerous studies done to determine how long residual mouth-alcohol remains and it is widely accepted that all mouth-alcohol is eliminated within 12 to 15 minutes after alcohol has been introduced. Alabama's 20-minute deprivation period exceeds that 12 to 15 minute window creating an even greater assurance for the defendant. It is important to note that this 20-minute period in Alabama is a *deprivation* period and not an *observation* period. This is a critical distinction because defense attorneys will argue that since the officer did not maintain a 20-minute "eyes-on" watch of the defendant then the 20-minute deprivation requirement was not met. This is not true. All

that is required is that the officer deprives the defendant from introducing anything into his or her mouth for at least 20 minutes prior to the defendant providing a breath sample and this time can include the ride from the scene of the traffic stop to the jail. Of course, the defense attorney in a GERD case would likely argue that the officer couldn't know if the defendant silently burped, hiccupped or regurgitated causing the introduction of alcohol into the mouth. The next three safeguards in place can put that particular claim to rest and further debunk the GERD claim.

The next safeguard is "Slope Monitoring". For the purposes of this article, know that Slope Monitoring is the measurement of the breath alcohol curve as the defendant is providing a breath sample. The Draeger monitors the entire breath sample; therefore, a proper breath curve will start with a low BrAC at the beginning of the blow and continue to rise until the alveolar

(deep lung) air is obtained. As a result, the Draeger is designed to examine this breath alcohol curve during the blow and if the BrAC concentration declines at any point during the breath sample, the instrument indicates "mouth-alcohol" and will not render a result. The instrument will then lock down for 20 minutes to allow for the dissipation of the mouth-alcohol. In short, the Draeger is designed to detect mouth-alcohol, and when it does so, it will not render a result.

The third of the four safeguards against the Draeger rendering a BrAC result based on mouth-alcohol is that the Draeger requires *two* breath samples and both samples must agree within 0.020 g/210L. For example, if a subject's first breath result is a 0.125 and the second sample is measured at 0.127, the Draeger will report the result. If, however, the first breath sample is measured at 0.167 and the second sample measures at 0.142, the Draeger will indicate "Test Outside +/- Tolerance" and will not report a result. The

instrument will then finish the test and automatically start a new test requiring two more breath samples. This new test does not require the operator to do anything other than instruct the subject to blow when the instrument indicates it is time for a sample.

The fourth and perhaps the most compelling safeguard is that all of the data generated when a breath sample is given is recorded, stored and can be generated for court review. This includes the breath alcohol curves. When you have a case where GERD or mouth-alcohol is an issue, send a written request to the Implied Consent Laboratory of the Department of Forensic Sciences and request a "Data Pack" for the breath test in question. This takes some time to assemble, so give DFS as much lead time as possible to put it together. You will need to bring someone in from Implied Consent to testify and present the breath alcohol curve to the jury. This will be the definitive proof you need to overcome the GERD claim.

The Role of Law Enforcement

Yes, even law enforcement can play a role in quashing a GERD claim. First, during the DUI investigation, note when the defendant had his or her last drink. This is important because "a prerequisite for such interferences is, of course, that there is a relatively high concentration of alcohol remaining in the stomach *at the time of the test*. Without any alcohol erupting from the stomach into the mouth and throat prior to a breath-test, *the GERD defense is bogus*. Accordingly, an important element for a valid GERD defense is *a relatively short time after end of drinking until making the breath-test.*"⁴ (All emphasis added) For GERD to even have an opportunity to play a role, alcohol must be present in the stomach. If the stomach is devoid of alcohol, there can be nothing to regurgitate to even remotely impact the BrAC. The stomach could be empty of alcohol as recent as 30 minutes after the defendant's last drink so knowing how much time has elapsed

between last drink and breath sample could be key in disproving the GERD claim. Secondly, observe and note the defendant's behavior. Specifically, was he or she belching, hiccupping or coughing—all signs of an *active* GERD episode? Third, just ask the defendant if they suffer from GERD. As noted earlier, if they are a GERD sufferer, they likely know it and have been diagnosed as such. Additionally, a denial on the night of the offense makes an 11th hour GERD defense easier to deal with.

Conclusion

When dealing with GERD—or any defense in a DUI case—determine what the nugget of truth is at the heart of the defense's claims then determine how that truth is being exploited to accomplish their goal of a not guilty verdict.

Remember: 1. GERD is simply a mouth-alcohol defense; 2. The defendant must prove that he or she was having an active GERD episode at the time of the breath test; 2.

Use facts and data to disprove the claim; 3. Don't lose sight of all the other evidence of the defendant's impairment at the time of the offense.

Armed with a little bit of knowledge and utilizing the safeguards in Alabama's breath testing program you can successfully prosecute any DUI case in the face of a GERD claim.



¹ Jones, AW (January 2007). "Gastric Reflux, Regurgitation, and Potential Impact of Mouth-Alcohol on Results of Breath Alcohol Testing," *DWI Journal: Law & Science*, Vol. 22, No. 1.

² McShane, Justin J., et al. "Developing a GERD Defense." *Understanding DUI Scientific Evidence*, 2011 ed. West, Aspatore Books, 2011. 135-156. Print.

³ Kechagias S, Jönsson K-Å, Franzén T, Andersson L, Jones AW. "Reliability of Breath-Alcohol Analysis in Individuals with Gastroesophageal Reflux Disease," *J Forensic Sci* 1999; 44(4): 814-818

⁴ Jones, AW (September 2005). "Reflections on the GERD Defense," *DWI Journal: Law & Science*, Vol. 20, No. 9.



THE DIGITAL Domain

“Prosecutor Loses Criminal Records of 200 Alabamians” How to Avoid this Headline

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What was the last thing that you lost? For me it was a set of keys and the only damage that resulted from that loss was the inconvenience of tracking down a replacement set. Consider what the damage could have been if that set of keys had instead been a thumb drive. It happens often and the resultant headlines are not easy to stomach; “Under Armour Payroll Data Lost in Mail” (Newspaper. 2012), “HIPAA Auditor Involved in Own Data Breach”(Nicastro. 2011), and “Philadelphia Family Planning Council Data Breach Affects 70,000

Patients” (Horowitz. 2011) are some of the most recent headlines resulting from the loss of thumb drives. Think about the files you keep on your thumb drive. If you would not want those files published in a newspaper or on the Internet and if you do not want to read your name in a headline like the ones above, then the time to protect yourself, is now. You do not have to purchase expensive software or 007 gadgetry. You can do it for free.

Encrypting the files on your thumb drive is the best way to render them useless to unauthorized people. Encryption is the process of converting data into a cipher, free of discernable patterns, and can be done on an individual file, a “container”, that can hold many files or an entire thumb drive. I will focus on the “container” concept here. I like to use an encrypted container because it can be

easily moved from device to device and remain encrypted. It also leaves the rest of the thumb drive unencrypted so that it can be used to store files that do not need to be encrypted.

TrueCrypt is my encryption software of choice. It is open-source software meaning that the actual program files written to create the software are available for review. This helps to ensure that there are no “back doors” or other security flaws written into the code. If we were to purchase a closed-source product, we would have to take the developer at his word that there are no “back doors”. When it comes to data security, we should all be pessimistic.

Other features that make TrueCrypt a great choice for us (did I mention it’s free) is that it is compatible with Microsoft Windows, Apple OS X, and the various iterations of Linux operating systems. It is a small program that does not require a lot of computing power to run and it performs the encryption or decryption process “on the fly”. Once you enter the correct password to access your files, you won’t even notice that encryption is being used.

Now that I have given an overview of what to do, let me explain how to do it. The first thing to do is to obtain a thumb drive large enough to keep all the files you will need. Most any modern thumb-drive will have plenty of capacity. Next, download the installation files for all the operating systems that you use. Most people use Microsoft Windows, but if you use something different, download those installation files also. You can download these files by going to www.truecrypt.org/download and selecting the appropriate links. Move these files to the thumb drive and then run the appropriate TrueCrypt installation program so that you can create your encrypted container file. There are several steps to creating the container file and step-by-step instructions with screen captures can be found in the “Beginner’s Tutorial” at www.truecrypt.org/docs. At one point during this process, you will have to create a password for the container. Remember that the encryption is only as strong as your password so use one that is long and has

special characters, numbers, and both upper and lower case letters. You should also create a text file or document that contains your contact information so that if your thumb-drive is found, it can be easily returned. Name the file “Read_If_Found” or maybe “Reward_If_Found”. Ultimately, your thumb drive should have files similar to figure 1. This provides for the easy return of your thumb drive if it is lost, provides the installation files for TrueCrypt in case you need to access your encrypted container from a computer that does not have the software installed, and gives you space to store files that you do not need encrypted.

Figure 1 – Example Files on Thumb Drive

Read_If_Found.txt	TrueCrypt for Windows	TrueCrypt for OS X	TrueCrypt for Linux	Unencrypted Files	Encrypted Container
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Using the encrypted container is very simple. First, make sure your thumb drive is connected to the computer. If the computer already has TrueCrypt installed then run the program like you would any other (Start Menu in Windows, or Finder on OS X). Next, select a drive letter and point to your encrypted container file to mount it. Enter the correct password and the container will show up on your computer like another thumb drive. You can now work with these files just like you would any other file on your computer. When you are finished working with your encrypted files, simply un-mount the container using the TrueCrypt program and your files will now be safe from unauthorized access. Again, the “Beginner’s Tutorial” has detailed instructions on using your encrypted container.

Anything portable is easily lost or stolen. If you keep files with with personal information on a portable device, then maintain them in an encrypted format. A small amount of diligence now can save you a large amount of aggravation and possibly help mitigate any liability later.



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Gavel Glinns



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Case Summaries By Subject

CHAIN OF CUSTODY

Wilson v. State, CR-07-0684, 2012 WL 976825 (Ala. Crim. App. March 23, 2012)

Facts: Wilson was charged with Capital Murder during a Robbery and Capital Murder during a Burglary. At trial, the State presented testimony and exhibits resulting from the autopsy performed by an ADFS forensic pathologist. That testimony and the photographs showed an estimated 114 contusions and abrasions, 32 of which were on the victim's head. That evidence conflicted with Wilson's statement to police that he accidentally hit the victim with a baseball bat. Wilson was convicted of both counts of Capital Murder, the jury recommended death with a vote of 10 to 2, and the trial court followed the recommendation. Wilson appealed, arguing among other things, that the State failed to prove the chain of custody for the victim's body as a condition precedent to the admission of autopsy testimony and photographs.

Issue: Did the State prove the chain of custody for the victim's body?

Holding: Yes.

Discussion: The Court of Criminal Appeals noted that Wilson's argument was that the State's evidence of chain did not sufficiently show that the autopsied body was that of the victim. Reviewing the record, the Court found proof of chain of custody in testimony from the following individuals as to the condition and handling of the body from scene to autopsy: the initial reporting officer; the lead investigator; the coroner; an ADFS employee who transported the body; and the ADFS forensic pathologist. The Court noted that per §12-21-13, a complete chain was not even required given that the condition of the body was not at issue.

CHILD HEARSAY

State v. Baker, CR-10-1831, 2012 WL 415461 (Ala. Crim. App. Feb. 10, 2012)

Facts: Baker was charged with Sodomy 1st of a small child who attended an in-home daycare run by Baker's wife. Baker filed a motion in limine to exclude the victim's statements made to her parents and to a forensic interviewer at the local child advocacy center. Those statements identified Baker as the person who committed the illegal acts. After the motion in limine was filed, the Court of Criminal Appeals ruled in M.L.H. that the child hearsay statute was abrogated by Rule 801 of the Alabama Rules of Evidence. After a hearing on the motion and on the State's request to continue the matter to await the Supreme Court's review of M.L.H., the circuit court excluded the statements. The State appealed. During the briefing process, the Supreme Court reversed M.L.H.

Issue: Are the child's statements admissible as substantive evidence under the child hearsay statute?

Holding: Yes.

Discussion: The Court of Criminal Appeals reversed the exclusion of the statements, relying on Supreme Court's opinion in M.L.H. In that case, the Supreme Court distinguished between Rule 801, which simply defines hearsay, and Rule 802, which declares hearsay not admissible except where allowed by rule or statute. In this case, the child hearsay statute, §15-25-31, provides for admissibility of a child's out-of-court statements with certain conditions.

Ex parte State (In re: M.L.H. v. State), 1101398, 2011 WL 6004617 (Ala. Dec. 2, 2011)

Facts: M.L.H. was charged with Sodomy 1st. The trial court granted youthful offender status and held a Y.O. trial. At trial, the State presented testimony from L.H., the child victim, who testified about his contact with M.L.H. The State also called L.H.'s mother, two pediatricians who examined L.H., and the forensic interviewer and licensed professional counselor who talked with L.H. Those witnesses testified to statements L.H. made to them that were inconsistent with his trial testimony in regard to how much M.L.H. had touched him. The circuit court found M.L.H. guilty of being a youthful offender. M.L.H. appealed. The Court of Criminal Appeals reversed, holding that Rule 801 of the Alabama Rules of Evidence superseded the child hearsay statute found at §15-25-31, and controlled the admission of inconsistent child hearsay statements. The State sought review in the Supreme Court.

Issue: Did the adoption of Rule 801 supersede §15-25-31, thereby excluding as substantive evidence certain child hearsay statements?

Holding: No.

Discussion: The Supreme Court noted that Rule 801 is a rule that excludes from the definition of hearsay certain prior inconsistent statements, thereby making Rule 802 inapplicable and the statements admissible as substantive evidence. However, the Court observed that Rule 801 did not govern all prior inconsistent statements. It pointed out that those not covered by Rule 801 are governed by Rule 802, which declares that “[h]earsay is not admissible except as provided by these rules, or by other rules adopted by the Supreme Court of Alabama or by statute.” The Supreme Court held that Rule 802 still allowed for the admission of child hearsay because child hearsay qualifies under one of the exceptions to exclusion – exceptions created “by statute.” The Supreme Court acknowledged that the Court of Criminal Appeals got it partially right in concluding that Rule 802 allowed for the statutory exception to hearsay. However, it found that the error occurred when the lower court went on to analyze the prior inconsistent statements as “nonhearsay” under Rule 801, finding them inadmissible because all the requirements for admissibility as nonhearsay were not met, i.e., they were not prior inconsistent statements given under oath. The Supreme Court delineated the application of Rule 801 to statements made “nonhearsay” by definition (and thus not subject to Rule 802 exclusion) and Rule 802 to hearsay statements that are excluded as substantive evidence unless an exception applies. In sum, the failure of a prior inconsistent statement to qualify as “nonhearsay” under Rule 801 does not preclude its admissibility as substantive evidence under an exception to Rule 802.

COMMUNITY CORRECTIONS

Reese v. State, CR-10-1220, 2012 WL 415464 (Ala. Crim. App. Feb. 10, 2012)

Facts: After his plea to UPOM 1st, Reese was sentenced to serve 15 years in the community corrections program in his county. While he was in community corrections, Reese’s community corrections officer filed a delinquency report after Reese violated the ban on electronic media devices and as a result was charged with Promoting Prison Contraband. The circuit court revoked him out of community corrections and sent him to prison. Reese appealed, claiming he was a technical violator entitled to release after 90 days. He also claimed he was entitled to a revocation hearing, which the court did not give him.

Issue: Does a prisoner revoked from serving imprisonment in community corrections qualify as a technical violator with a limit on the resulting incarceration period?

Holding: No.

Discussion: The Court of Criminal Appeals followed its recent precedent and held that Reese was not a technical violator because his revocation did not involve probation but instead was a revocation from community corrections status. However, the Court reversed the revocation because the record indicated the circuit court did not follow probation revocation procedure (applicable to community corrections revocations), which requires a meaningful hearing with the opportunity to cross-examine sworn witnesses.

CORROBORATION OF ACCOMPLICE TESTIMONY

Jackson v. State, CR-10-1269, 2012 WL 415463 (Ala. Crim. App. Feb. 10, 2012)

Facts: Jackson was charged with two counts of Capital Murder. At trial, accomplices testified that Jackson was involved in a robbery murder. The State also presented testimony from a female witness who said her aunt asked one of the accomplices to leave her residence some time after the homicide because the aunt had heard a rumor that that accomplice, Jackson and others were involved in the homicide.

Issue: Was Jackson sufficiently linked to the crime for the charges to withstand a motion for judgment of acquittal?

Holding: No.

Discussion: The Court examined the State's claim that 4 witnesses tended to implicate Jackson in the crime. The Court found that one witness's testimony that a person of the same gender and race as Jackson purchased duct tape similar to that used in the crime was insufficient to connect Jackson to the crime if that witness was unable to make a positive identification. The Court also found no linkage in other witnesses' testimony about the crime scene and a piece of work glove found at the scene. The Court rejected reliance on rumor of Jackson's involvement to establish his linkage to the crime.

CREDIT FOR TIME SERVED

Johnson v. State, CR-10-11590, 2011 WL 6278309 (Ala. Crim. App. Dec. 16, 2011)

Facts: Johnson was involved in a vehicle crash in July 2007. He was charged and later indicted for one count of Assault 1st and two counts of Assault 2nd. That indictment was later nolle prossed in March 2010. The same day of that dismissal, Johnson was arrested on a new indictment for three counts of Assault 2nd. Johnson was in and out of jail on bonds and an FTA warrant under both indictments. He later pled guilty to two counts of Assault 2nd and one count of Assault 3rd. The circuit court ordered credit for time served but denied him credit for the time he was incarcerated on the first indictment. Johnson appealed.

Issue: Should Johnson received credit for time spent incarcerated on a separate indictment arising out of the same incident?

Holding: Yes.

Discussion: The Court of Criminal Appeals observed that §15-18-5 requires credit for "all of [a defendant's] actual time spent incarcerated pending trial for such offense." The Court went on to apply an incident-based calculation as opposed to a case-based calculation to hold that Johnson was entitled to credit served under the original arrest and dismissed indictment.

DEATH PENALTY

Whatley v. State, CR-08-0696, 2011 WL 6278296 (Ala. Crim. App. Dec. 16, 2011)

Facts: Whatley was charged with Capital Murder during a Robbery. He was convicted in the guilt phase. In the penalty phase, the State asserted that the aggravating factors were the Robbery, Whatley's previous conviction of a crime of violence (for Murder in another state), and the heinous, atrocious and cruel nature of the murder. The State introduced evidence of Whatley's future dangerousness, his conduct in jail, and his statements about harming other inmates. The jury recommended a death sentence with a vote of 10 to 2. The circuit court followed that recommendation. Whatley appealed, challenging, among other things, the admission of much of the penalty phase evidence.

Issue: Was the admission of the penalty phase evidence error?

Holding: No.

Discussion: The Court of Criminal Appeals looked to Ala. Code §13A-4-45(d), which allows sentencing hearing evidence of "any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances." The Court looked to Alabama opinions and U.S. Supreme Court precedent permitting future dangerousness at capital sentencing hearings. It also noted that much of the other sentencing hearing evidence was rebuttal of Whatley's claimed remorse and religious conversion.

Woodward v. State, CR-08-0145, 2011 WL 6278294 (Ala. Crim. App. Dec. 16, 2011)

Facts: Woodward shot and killed a police officer at a traffic stop. He was convicted of Capital Murder of a Police Officer and Capital Murder by shooting from a vehicle. Woodward was convicted of both counts. After a sentencing hearing, the jury voted 8 to 4 to recommend LWOP. The circuit court overrode the jury's recommendation and sentenced Woodward to death.

Issue: Did the trial court have a basis for overriding the jury recommendation of LWOP?

Holding: Yes.

Discussion: The Court of Criminal Appeals gave a detailed recitation of the circuit court's order explaining its justification for overriding the jury's recommendation. The Court found that there was an evidentiary basis for the override with much of that evidence unavailable to the jury in the penalty phase but presented to the trial court at the sentencing hearing. [The trial court's order is quoted extensively and is an excellent example of written justification for an override. The details in the order also evidence the exhaustive efforts of the prosecution to find information rebutting Woodward's penalty phase evidence.]

DOUBLE JEOPARDY

Blueford v. Arkansas, No. 10-1320, 2012 WL 1868066 (U.S. Ark. May 24, 2012)

Facts: Blueford was charged with Capital Murder related to the death of a toddler. During jury instructions, the trial court also charged the jury on the lesser included offenses of Murder 1st, Manslaughter and Negligent Homicide. The court instructed the jury to consider the greater offense first and make a decision on that before moving to each lesser offense if Blueford was found not guilty on the greater offense. The court provided verdict forms in which the jury was to find Defendant guilty on one of the charges or not guilty on all the charges. The jury deliberated a few hours and advised the court it could not reach a verdict. The court delivered an Allen charge and instructed them to deliberate further. After further deliberations, the jury reported back that it was hopelessly deadlocked. The court asked the jury what the votes were on the charges. The foreperson orally advised that the jury unanimously decided “no” on Capital Murder and Murder 1st and it was split on Manslaughter. There had been no vote on Negligent Homicide. The court gave a second Allen charge, and the jury resumed deliberations. The court denied Blueford’s request to give new verdict forms to the jury for them to document their verdicts on the two highest charges. The court ultimately declared a mistrial without receiving any formal verdicts. The State later sought to retry Blueford on all the charges. Blueford moved to dismiss the Capital Murder and Murder 1st charges on Double Jeopardy grounds. The court denied that motion. The Arkansas Supreme Court affirmed the denial of the motion. Blueford sought the U.S. Supreme Court’s review.

Issue: Was it a double jeopardy violation to go forward on the Capital Murder and Murder 1st charges?

Holding: No.

Discussion: The U.S. Supreme Court held that the Double Jeopardy clause did not bar a retrial on the Capital Murder and Murder 1st charges. The Court reasoned that the foreperson’s report was not a final vote because the jury’s deliberations were not yet concluded. They were still at liberty to reconsider the votes and find Blueford guilty of one of those charges. The continuing deliberations prevented the vote report from having the finality necessary to bar retrial on those charges. The court rejected Blueford’s contention that the instructions requiring the jury to vote on higher offenses before lesser ones prevented the jurors from reconsidering the votes on the higher charges. The Court determined that the jury was free to reconsider a greater offense if it so chose. The Court held that the report of the foreperson was not a final decision. The Court found no error in the trial court’s declaration of a mistrial on all the charges.

404(B) EVIDENCE

Marks v. State, CR-10-0819, 2012 WL 415469 (Ala. Crim. App. Feb. 10, 2012)

Facts: Marks was charged with Rape 1st and received LWOP because he is an habitual offender. That charge arose from Marks' involvement with a 15-year-old in May 2009. At trial, she testified that they met via a wrong number and made plans to meet at her apartment. Marks kidnapped her at gunpoint when they met, he took her to an abandoned apartment, raped her, threatened to kill her if she told anyone, and instructed her to call him. She reported the crime the next morning, and the police later had her record incriminating conversations with him on the phone. Marks testified that he knew the victim, that he was drinking and doing drugs the night of the alleged incident, and that he did not have sex with her. The State admitted testimony from two other victims who testified they had non-consensual sex with Marks in the two weeks prior to the crime charged. Over Marks' objection, the circuit court admitted the 404(b) testimony. Marks was convicted, and he appealed.

Issue: Was the jury instruction regarding the 404(b) evidence specific enough?

Holding: No.

Discussion: The Court of Criminal Appeals cited the Alabama Supreme Court's recent Billups opinion as requiring a jury instruction as to the specific use of 404(b) evidence. The Court observed that the lower court's instruction allowed the jury to consider the evidence as tending to prove motive, opportunity, plan, knowledge and modus operandi. It found that instruction too general and authorized the jury to use the evidence for "implausible purposes" like "identity." The Court pointed out that at trial, identity was not an issue given that Marks admitted knowing the victim and having contact with her on the occasion in question. The Court specifically avoided any ruling on whether the evidence was admissible for any 404(b) purpose.

HABITUAL FELONY OFFENDER ACT

Gomillion v. State, CR-08-1062, 2011 WL 6279027 (Ala. Crim. App. Dec. 16, 2011)

Facts: Gomillion pled guilty in one county to three charges of Robbery 1st in county #1. He was not adjudicated or sentenced. Six months later, he was arrested on Burglary 1st and Burglary 3rd in county #2. A year later, he again pled guilty in county #1 to the same Robbery 1st charges and was sentenced. Two months after that, Gomillion was convicted of Burglary 1st and Burglary 3rd in county #2. At sentencing, the circuit court in county #2 found that Gomillion had the Robbery 1st convictions at the time he committed the Burglary 1st in county #2 and sentenced him as an habitual felony offender to LWOP.

Issue: Did Gomillion have Robbery 1st convictions at the time he committed the Burglary 1st?

Holding: No.

Discussion: The Court of Criminal Appeals set out the test for using a conviction under the HFOA – whether an adjudication of guilt occurred before the criminal act for which the defendant is being sentenced. It noted that a trial court’s failure to use formal words of adjudication creates confusion when determining whether a conviction counts under HFOA. The Court noted that in the absence of formal words of adjudication, one must look to the record to see if the court clearly intended to adjudicate a defendant guilty. The Court noted that its precedent recognized an “implied adjudication” where the record contains the entry of a guilty plea and a sentencing. The Court distinguished Gomillion’s situation, finding that there was no “implied adjudication” (no clear indication of judicial intent in the record) where a guilty plea was entered, no formal words of adjudication were pronounced, no sentencing occurred prior to the new crime and the guilty plea later was re-entered. Pointing to the distinctions between a guilty plea and an adjudication found in its case law and in Rule 26.1(a) of the Ala. R. Crim. P., the Court rejected the State’s argument that a “plea of guilty is a conviction itself.”

HINDERING PROSECUTION

Yearby v. State, CR-10-0500, 2012 WL 976827 (Ala. Crim. App. March 23, 2012)

Facts: Yearby’s brother was wanted for probation violations in his Rape 1st and Sodomy 1st cases. Officers went to Yearby’s house looking for the brother. They knocked on the door and Yearby answered. They asked him if he knew where his brother was and if they could search the house. Yearby said his brother was not in the house, he had not seen him in two weeks and they could search the house. Officers discovered the brother hiding in a return air vent. Yearby was charged with Hindering Prosecution 1st and after his motion to dismiss or amend the charge was denied, he pled guilty with a reservation of the right to appeal that ruling.

Issue: Does Alabama’s Hindering Prosecution 1st statute apply to the act of rendering assistance to a Class A felony probationer who is being sought for a violation of his probation based on conduct that is not a Class A or B felony?

Holding: Yes.

Discussion: The Court of Criminal Appeals rejected Yearby’s argument that he should not have been charged with Hindering Prosecution 1st because his brother had already been convicted of the Class A felonies under which the probation violation writ was issued. The Court sided with the State, which argued that the brother’s probation was a part of his “punishment,” the hindering of which is barred by Alabama’s statute. Alabama Code §13A-10-43 prohibits the rendition of criminal assistance “with the intent to hinder the apprehension, prosecution, conviction or punishment of another for conduct constituting a murder or a Class A or B felony.” The Court went on to reject Yearby’s argument that his Hindering Prosecution charge should have been based on the conduct triggering the issuance of the revocation writs.

INDIGENT COUNSEL FEES

Hutchinson v. State, CR-10-0595, 2012 WL 1450542 (Ala. Crim. App. April 27, 2012)

Facts: Hutchinson was appointed to represent a defendant in a capital murder case that resulted in a plea in 2003. In 2008, Hutchinson filed his bill with the circuit court. By that time, the judge originally overseeing the capital case had retired, his successor was retiring, the other circuit judge recused and a fourth circuit judge was appointed to examine the attorney's fees. The judge approved only part of the requested fee. Hutchinson appealed and the Court of Criminal Appeals remanded for the court to enter an order explaining the basis for the reduction in light of the possible punishment the defendant had faced and the factors set out in the Alabama Supreme Court's Pharmacia opinion. The circuit court entered an order explaining the fee reduction by citing the untimely filing of the fee request, two ethical violations (counsel had his wife include a solicitation for defense funds in a mail out of the solid waste authority where she worked and he had an ex parte conversation with the original judge), a lack of credibility on the part of Hutchinson for the hours he testified to at a hearing on the fee issue, excessiveness of the hours submitted and a history of excessive billing on appointed cases. Explaining how the approved amounts were calculated, the court stated that it used co-counsel's submission and increased that amount to account for Hutchinson having been the lead attorney. Hutchinson again appealed.

Issue: Were the circuit court's reductions justified by the record?

Holding: No.

Discussion: The Court of Criminal Appeals cited 13 potential factors for assessing the reasonableness of an attorney's fee. The Court examined the three reasons cited by the circuit court for reducing the fee: (1) untimely submission almost 6 years after the plea; (2) Hutchinson's ethical violations during the representation; and (3) the lack of credibility in Hutchinson's testimony regarding the number of hours he worked. As to the untimely submission, the Court noted that although there was no justification in the record for the timing of the fee submission, there also was no issue made of it at the hearing addressing the requested fee. The lack of a question raised at the hearing led the appellate court to conclude that the delay justified a reduction in the fee. The Court noted there was nothing in the record supporting the first ethics issue. It then rejected ethics violations as an appropriate basis for reduction of fees, saying that such violations are matters for the State Bar. Addressing the third reason for the reduction, the Court also found a lack of evidence in the record supporting the circuit court's conclusion that Hutchinson had a history of being far higher than other local attorneys when billing for appointed cases. The Court pointed out that two attorneys testified that Hutchinson's fee declarations were reasonable. The Court went on to question the circuit court's formula for reducing the fees, saying the stated percentages did not appear to have been applied and the explanation for the percentage reductions was insufficient. Finding that the uncontradicted evidence supported the requested fees, the Court reversed the lower court's order.

[Of the 13 factors for assessing reasonableness, 3 do not appear to apply to an appointed counsel situation. The trial court's order appears to address 8 of the factors, with one remaining factor not addressed and the other remaining factor, reasonableness of expenses, not at issue because the original circuit court approved out-of-pocket expenses and the subsequent circuit court did not take issue with the overhead expense rate.]

INEFFECTIVE ASSISTANCE OF COUNSEL

Lafler v. Cooper, 132 S. Ct. 1376 (2012)

Facts: The State of Michigan charged Cooper with Assault with Intent to Murder and three other felonies. The State offered to dismiss two charges and allow him to plead guilty to the remaining two charges with a recommended sentence of 51 to 85 months. Cooper rejected the offer on his attorney's recommendation and advice that the State would be unable to prove "intent" because the victim was shot below the waist. Cooper was convicted on all counts and received a sentence of 185 to 360 months. Cooper later asserted alleged ineffective assistance, a claim rejected by the trial court. The state appellate court affirmed, rejecting the same argument. Cooper filed a federal habeas petition. The federal district court held that his attorney was ineffective, ordered the conviction vacated and required the State to renew the original plea offer. Conceding that Cooper's attorney was ineffective, Michigan sought review in the United States Supreme Court to challenge the lower courts' application of Strickland's prejudice test in the context of advice regarding plea offers.

Issue: How should the Strickland prejudice test be applied where a plea offer was rejected based on ineffective assistance of counsel and the defendant subsequently was convicted at trial?

Holding: To establish prejudice, a defendant must show that but for the ineffective assistance there is a reasonable probability that he would have accepted the plea offer and presented it to the court, that the court would have accepted the terms and that the conviction and/or sentence under the terms of the offer would have been less severe than the conviction and sentence actually imposed.

Discussion: The Supreme Court first noted the general test for prejudice under Strickland – whether there is a reasonable probability that but for counsel's ineffective assistance, the result of the proceeding would have been different. It then noted the specific test in the plea context – whether the outcome of the plea process would have been different with competent advice. The alleged prejudice in Cooper's case was having to stand trial, not the loss of the right to a trial as addressed in prior Supreme Court opinions dealing with ineffective assistance where a plea was entered. In a case dealing with a rejected offer, the prejudice test used by lower

courts requires a defendant to show that but for the ineffective assistance there is a reasonable probability that the defendant would have accepted the plea offer and presented it to the court, that the court would have accepted its terms and that the conviction and/or sentence under the terms of the offer would have been less severe than the conviction and sentence actually imposed. The Court rejected Michigan's argument that there could be no Strickland prejudice in the plea bargaining context if a defendant is later convicted in a fair trial. The Court reasoned that the Sixth Amendment Right to Counsel applies before and after the trial proceeding and that the vast majority of convictions in the federal and state criminal justice systems occur as a result of pleas, not trials. The Court went on to lay out the proper remedy for ineffective assistance for cases like Cooper's: order the State to reoffer the plea agreement and if Cooper accepts the offer, the trial court can then exercise its discretion in determining whether (1) to vacate the convictions and resentence Cooper pursuant to the plea agreement, (2) to vacate only some of the convictions and resentence Cooper on the remaining convictions, or (3) to leave the convictions and sentences resulting from the trial unchanged.

Missouri v. Frye, 132 S. Ct. 1399 (2012)

Facts: Frye was charged with Driving With a Revoked License, in Frye's case a felony carrying a maximum 4 years in prison given Frye's three prior convictions for the same. The prosecutor sent defense counsel a written offer of a misdemeanor and 90 days jail time. Defense counsel did not communicate the offer to Frye before it expired. Frye subsequently picked up a new charge for the same crime. Frye later pled guilty on the original felony charge and was sentenced to 3 years in prison. He later filed a post-conviction challenge to the plea. The trial court rejected the challenge. The Missouri appellate court reversed, holding that Frye had established ineffective assistance and prejudice. The State sought review in the United States Supreme Court.

Issue: Does the right to effective assistance of counsel extend to plea offers that lapse or are rejected?

Holding: Yes.

Discussion: The Supreme Court held that a defendant can maintain an ineffective assistance claim under the Sixth Amendment where counsel failed to inform him of a plea offer. The Court remanded the case to the Missouri appellate court because a lack of clarity as to that state's law related to plea offers and agreements prevented the Court from assessing Frye's proof of prejudice under the Strickland test.

JURY ALTERNATES

Peak v. State, CR-10-0753, 2012 WL 1450541 (Ala. Crim. App. April 27, 2012)

Facts: Peak was tried for Capital Murder during a Robbery, Kidnapping and Burglary. During the trial, there were multiple issues with the jury. First, on the Tuesday of trial, juror J.G. (a principle juror) learned that her uncle died. The funeral was

scheduled for that Friday morning. Second, on Wednesday evening, Peak's girlfriend, who had been in court during the trial, encountered juror S.W. at the girlfriend's place of employment – Walmart. Though it was clear that the juror did not recognize her, the girlfriend proceeded to identify herself as Peak's girlfriend. The juror informed the court the next morning (Thursday). The court examined the juror and confirmed that the juror could remain impartial. Later, during a recess but while the jury was in the jury room, the girlfriend made threats about the juror in the hallway. The victim's sister overheard those threats and reported them to the court. The court banned the girlfriend from the courthouse. At that point, the court designated J.G. and S.W. as alternates, and reassigned the previously designated alternates (K.L. and A.D.) as principle jurors. The court then excused S.W. After charging the jury, the court excused J.G. with the caveat that she was not to discuss the case with anyone until mid-morning the next day, Friday. J.G. agreed, gave the court her cell phone number and left the courthouse. The next morning, the court was faced with yet another juror issue – juror A.D. reported that she had observed Peak's relative make what she perceived as a threatening gesture during the jury charge the previous day, that during the lunch break the previous day she overheard Peak's family referencing her, and that on her way out of the courthouse the previous evening, one of Peak's family members gave her a look so threatening that she had difficulty driving home. The court excused A.D. from jury service, and called J.G. as she was walking into her uncle's funeral. J.G. reported to court after the funeral and confirmed that she had not discussed the case with anyone. At that point, the court reinstated J.G. as a juror and instructed the jury to disregard all previous deliberations and restart deliberations from the beginning. Before their dismissals, the court confirmed with A.D. and S.W. that they had not discussed their incidents with any of the other jurors. Peak made a general motion for a mistrial after J.G. was called back to court, arguing that it was improper to reinstate her to the jury. The circuit court denied that motion. The jury later convicted Peak of felony murder. In his motion for a new trial, Peak later argued that returning J.G. to the jury violated Rule 18.4(g)(1) of the Alabama Rules of Criminal Procedure. Peak appealed.

Issue: Did the circuit court abuse its discretion in reinstating J.G. to the jury?

Holding: No.

Discussion: The Court of Criminal Appeals first noted that Peak failed to preserve his issue as it related to Rule 18.4(g)(1) because he did not cite that rule when moving for a mistrial. The court went on to examine the issue generally as to whether the trial court abused its discretion in recalling J.G. and restarting jury deliberations. The Court cited the Alabama Supreme Court's opinion in Lloyd Noland Hospital as instructive on the issue. The Court found no abuse of discretion given that the trial court took the necessary steps to ensure that J.G. had not discussed the case and could be impartial as well as instructing the jury to begin deliberations anew. The Court went on to find that even if it was error to substitute J.G. for the excused juror, that error did not injure Peak's substantial rights, thus preserving the conviction

under Rule 45 of the Ala. R. App. P. (no error of pleading or procedure may result in a reversal unless there is the probability it injuriously affected a substantial right).

JUVENILE TRANSFER

Clancy v. State, CR-10-1228, 2012 WL 976829 (Ala. Crim. App. March 23, 2012)

Facts: Clancy was charged with Murder. Because he was 15 at the time of the crime, he was charged in juvenile court. Pursuant to §12-15-34, the State sought to transfer him to adult circuit court. After the transfer motion was filed, Clancy's mother filed a petition asking the juvenile court to commit Clancy to a mental health facility. The juvenile court held a hearing on both motions. It granted the State's motion and dismissed the commitment petition. Clancy separately appealed both rulings. The Court of Criminal Appeals eventually affirmed the transfer order. The appeal of the dismissal of the commitment petition went to the Alabama Supreme Court pursuant to statute. The challenge to the denial of commitment remained pending in the Supreme Court. Clancy subsequently was convicted of Murder and appealed claiming the circuit court did not have jurisdiction to try the case because the pending appeal of the denial of commitment also should be considered an appeal of the transfer order, which would bar circuit court jurisdiction prior to appellate adjudication.

Issue: Did the circuit court have jurisdiction to try the case?

Holding: Yes.

Discussion: The Court of Criminal Appeals first noted that a trial court does not have jurisdiction over a case when an appeal of a transfer order is pending. However, it concluded, and Clancy did not dispute, that the appeal of the transfer order had been adjudicated. Addressing Clancy's claim that the pending appeal of the commitment denial in the Supreme Court also was an appeal of the transfer order, the Court of Criminal Appeals acknowledged that if Clancy won that appeal it may affect the circuit court's jurisdiction over the Murder charge since a determination of whether Clancy was committable is a prerequisite to a valid transfer order. However, the Court noted that Clancy cited no authority holding that an appeal of a commitment denial was an appeal of a transfer order, which would bar circuit court jurisdiction. The Court of Criminal Appeals ruled that the two were not the same. The Court reasoned that one was a criminal proceeding, the other a civil proceeding, with appeals of each going to different appellate courts. The Court then cited the Supreme Court's recent opinions in gambling machine cases wherein that court noted the prohibition of the use of civil proceedings to impede related criminal proceedings. The Court affirmed Clancy's conviction, holding that the appeal of the transfer order was not pending at the time of trial.

LESSER INCLUDED OFFENSES

Campbell v. State, CR-10-0932, 2012 WL 415467 (Ala. Crim. App. Feb. 10, 2012)

- Facts:** Campbell struck his girlfriend. As she was wiping blood from her face, he threw a lit napkin beside her on the bed. She used the bedspread to put out the fire and then ran away. Officers reporting to the scene and investigators later inspecting the residence smelled gasoline and found that it had been poured over furniture in the house. A gas can was found inside the residence. An arson investigator found damage to the mattress and a blanket on the bed. Campbell was charged with Arson 1st and convicted at trial. Campbell appealed, claiming the State failed to prove “damage to the building,” an element of Arson 1st. On appeal, the State conceded that there was no evidence of actual damage to the building.
- Issue:** Can the appellate court enter judgment against Campbell on the lesser-included offense of Attempted Arson 1st?
- Holding:** Not in this case.
- Discussion:** The Court of Criminal Appeals reversed and rendered on the conviction for Arson 1st. It addressed the possibility of entry of a judgment for Attempted Arson 1st, as argued by the State relying on federal and Connecticut precedent. The Court of Criminal Appeals declined to follow that precedent because Alabama Supreme Court precedent forbade appellate entry of a judgment on a lesser-included offense when the jury was not charged on that lesser-included offense.

PLEA COLLOQUY

McCary v. State, CR-10-0863, 2011 WL 6278307 (Ala. Crim. App. Dec. 16, 2011)

- Facts:** Defendant was charged with Sodomy 1st involving a victim under 12 years of age. He agreed to plead guilty to Sodomy 1st and accept a Life sentence. Within the one-year window, he filed a Rule 32 challenging his guilty plea as involuntary, claiming that he did not know §15-22-27.3 made him ineligible for parole and was not informed of that direct consequence of his plea. Following the State’s response, which cited an affidavit from McCary’s attorney at the plea and the Ireland form filled out at the plea, the circuit court denied the petition. McCary appealed.
- Issue:** Was the trial court required to inform McCary of the ineligibility for parole arising from his plea and agreed sentence in order for the plea to be voluntary?
- Holding:** Yes.
- Discussion:** The Court of Criminal Appeals first acknowledged that McCary was not eligible for parole based on the nature of the charge to which he pled. The Court noted that a defendant is entitled to information about the direct consequences of any plea but not to information about potential collateral effects or future contingencies. The Court reviewed case law as delineating “direct consequences” as being those having a “definite, immediate and largely automatic effect on the range of the defendant’s punishment.” Reversing the trial court’s denial of McCary’s petition, the Court followed its recent precedent finding ineffective assistance where counsel failed to

advise a defendant of parole ineligibility under the same statute. However, the Court distinguished scenarios with similar facts where the sentence at issue is fixed in years and the statute does not effectively increase the maximum sentence as with a Life sentence. The Court remanded the case for the circuit court to receive McCary's evidence supporting his claim.

PROBATION

Goodson v. State, CR-11-0209, 2012 WL 1450538 (Ala. Crim. App. April 27, 2012)

Facts: Goodson pled guilty to Burglary 3rd. The circuit court sentenced him to 10 years split to serve 3 years with 5 years probation upon release. In addition, the court ordered that Goodson move out of Alabama upon release. Goodson filed a motion rejecting the probation and split sentence. The circuit court denied the motion. Goodson appealed.

Issue: Does a defendant have a right to reject an order of probation?

Holding: Yes.

Discussion: The Court of Criminal Appeals cited its precedent for the proposition that a defendant has a right to accept or reject an order of probation. The Court found no acceptance of probation in the record and remanded the case to the circuit court for resentencing.

POST-CONVICTION DNA TESTING

Ex parte Hammond, CR-10-1777, 2012 WL 976830 (Ala. Crim. App. March 23, 2012)

Facts: Hammond filed a motion for post-conviction DNA testing after his Capital Murder conviction and LWOP sentence were upheld. The trial court denied the motion on March 16, 2011. The Court of Criminal Appeals dismissed the appeal, finding that the ruling was not appealable. Hammond then filed a mandamus petition on August 19, 2011.

Issue: Was Hammond entitled to post-conviction DNA testing?

Holding: No.

Discussion: The Court of Criminal Appeals accepted the State's first untimely filing argument, concluding that the petition was filed well past the presumptively reasonable time period of 42 days. However, the Court went on to substantively address Hammond's petition. The Court examined the evidence in the case and Defendant's theory for testing (his companion committed the crime) against the standard for such a motion – a reasonable probability that the Defendant's theory if proved true would undermine confidence in the outcome. The Court concluded that Hammond was not entitled to testing because the testing would not show his innocence. Instead,

the testing might show that his companion handled the evidence, a fact already established by testimony at Hammond's trial.

PUBLIC RECORDS

S.A.R. v. State, CR-10-0261, 2012 WL 976826 (Ala. Crim. App. March 23, 2012)

Facts: S.A.R. was convicted of two counts of Rape 1st and two counts of Sodomy 1st based in part on an audiotape of one of the sexual assaults made by his sole victim (16 years old) in anticipation of a forced encounter. The circuit court sentenced him to concurrent Life sentences on three of the convictions and a consecutive Life sentence on the fourth. He later filed a Rule 32 petition challenging his convictions. He also sought a copy of the audiotape made by the victim. The circuit court dismissed the petition without addressing the discovery request for the audiotape. S.A.R. appealed. The Court of Criminal Appeals remanded for several lower court determinations. One of those issues related to the request for the audiotape. The circuit court denied that request, holding that S.A.R. had not shown just cause to be given access to the tape. On return to remand, the Court of Criminal Appeals addressed the issue of the audiotape.

Issue: Was S.A.R. entitled to the audiotape?

Holding: No.

Discussion: Pointing to §15-1-2(b), which provides that court records of sexual abuse or exploitation victims under 18 years old are to be protected in the same manner as juvenile offender records, the Court of Criminal Appeals rejected S.A.R.'s argument that the audiotape was a public record. The Court found no abuse of discretion in the circuit court's finding that good cause to obtain the tape had not been shown.

REBUTTAL EVIDENCE

Hammond v. State, CR-10-1263, 2012 WL 1450540 (Ala. Crim. App. April 27, 2012)

Facts: Hammond was charged with multiple sex crimes relating to an underage female. On direct examination, Hammond denied the accuser's allegations. On cross-examination, the State confirmed his direct examination denial and also asked "you wouldn't do that kind of thing, would you?" Hammond's counsel objected, but the trial court permitted the question. Hammond agreed that he would not do the things alleged by the victim. The State then began a line of cross-examination relating to a similar allegation from another underage female. It also presented rebuttal testimony from the other female over defense objections. Hammond was convicted of multiple counts of rape, sodomy and sexual abuse.

Issue: Did Hammond open the door to the cross-examination and rebuttal testimony about the other allegation?

Holding: No.

Discussion: The Court of Criminal Appeals found that the State, not Hammond, opened the door to the other incident. Relying on recent Alabama Supreme Court precedent holding that a defendant does not put his character at issue by responding to cross-examination designed to broach that subject, the Court of Criminal Appeals reversed Hammond's convictions. Citing a lack of timely notice, the Court also rejected the State's argument that the testimony was admissible under 404(b). The State learned of the allegation in the middle of trial and delayed notifying the defense until after Hammond gave his direct testimony.

RECONSIDERATION

Ex parte State (In re: State v. Utley), CR-11-0244, 2012 WL 1450535 (Ala. Crim. App. April 27, 2012)

Facts: Utley pled guilty to Enticing a Child for Immoral Purposes and two counts of Transmitting Obscene Material. The circuit court denied his request for probation on July 5, 2011, and sentenced him to concurrent 3-year terms in prison. On July 22, 2011, Utley filed a notice of appeal. On August 4, 2011, Utley filed a motion for an appeal bond and a motion to reconsider probation. On August 19, 2011, the circuit court denied Utley's second probation request. At Utley's request, the Court of Criminal Appeals dismissed his appeal on September 29, 2011. Utley then filed another motion for reconsideration. The circuit court granted the request for probation on November 4, 2011. The State petitioned for Mandamus review but did not file a motion to stay the order of probation.

Issue: Did the circuit court have jurisdiction to reconsider the request for probation?

Holding: No.

Discussion: The Court of Criminal Appeals noted that a court retains jurisdiction to modify a sentence for 30 days after the sentence is pronounced. Also, the court has jurisdiction beyond the 30 days (or less than the 30 days, as the case may be) until the sentence is executed, i.e., the prisoner is been turned over to DOC. Given that Utley began serving his sentence on July 5, 2011, the circuit court's November 4 order was void. The Court noted that a stay was not necessary when challenging a void judgment.

RECUSAL

Ex parte State (In re: State v. Jones), 1101129, 2011 WL 6117895 (Ala. Dec. 9, 2011)

Facts: Jones was convicted of Capital Murder and sentenced to death. That result was affirmed on appeal. He later filed a Rule 32 petition, alleging one of his jurors

during the trial informed the trial court that the juror was an alcoholic, the trial court gave the juror permission to drink while being sequestered and the trial court failed to inform defense counsel of that information. Jones also filed a motion to recuse arguing that §12-1-12 prevented the judge from ruling on the Rule 32 petition because the judge would likely be a witness in the proceedings. The trial court denied the recusal motion. Jones filed a mandamus petition. The Court of Criminal Appeals issued an order requiring recusal. The State filed its own mandamus petition with the Supreme Court.

Issue: Is a trial court required to recuse from handling a Rule 32 petition because the judge may be a witness to some of the events underlying the claims in the petition?

Holding: No.

Discussion: The Supreme Court accepted the State's argument that one could not reasonably question the judge's impartiality because he would not be a material witness in the case. The Court reasoned that the judge did not have information about the claims that could not be obtained from another source, the juror himself. The Court noted that the State's mandamus petition included an affidavit from the juror, which suggested his availability for testimony on the issue. The Court rejected Jones' arguments that the judge was the only source for information about why the judge handled the alleged situation as he did and what the judge thought or believed about the juror's situation during the trial. The Court pointed out that the juror's conduct and competency were at the heart of the claims in the Rule 32 petition, not the state of mind of the court. Jones having failed to show that the judge was the source of otherwise unobtainable evidence, the Court concluded that recusal was not required. Thus failing to qualify as a material witness, the Court held that there was no reasonable basis for questioning the judge's impartiality.

RIGHT TO COUNSEL

Howes v. Fields, 132 S. Ct. 1181 (2012)

Facts: Fields was convicted and incarcerated in a Michigan jail for an unrelated crime. While he was in jail, deputies came to speak with him about an incident with a child, which occurred before he was sent to jail. The deputies did not read him his Miranda rights but did tell him on multiple occasions that he was free to leave at any time and go back to general population. During the multi-hour interview, Fields told the deputies he no longer wished to speak with them but did not ask to go back to his cell. Fields eventually confessed to sexual acts with the boy. He was charged with Criminal Sexual Conduct. He moved to suppress his statement to the deputies. The trial court denied that motion. He was convicted at trial, during which one of the deputies testified to his confession. The state appellate court affirmed the conviction. On habeas review, a federal district court sided with Fields. On appeal, the Sixth Circuit affirmed, holding that the jail interview was custodial and as such required a Miranda waiver. Michigan sought the U.S. Supreme Court's review.

Issue: Is there a per se rule requiring a Miranda waiver for the admissibility of a statement taken from a prisoner incarcerated on an unrelated matter?

Holding: No.

Discussion: The U.S. Supreme Court held that custody in a prison does not necessarily mean “custody” for purposes of triggering the Miranda requirements. The Court acknowledged that some facets of Fields’ case support the argument that the interrogation was “custodial” for purposes of Miranda. However, the Court pointed to other circumstances that foreclosed that holding. Specifically, the Court noted the statements made to Fields that he was free to leave when he wanted, he was not in handcuffs, the interview was done in a well-lit conference room with the door sometimes open, and he was offered food and water. The Court concluded that a reasonable person would have felt free to end the interview and return to the general population. The Court rejected a categorical rule that the questioning of any prisoner requires Miranda, instead reaffirming its case-by-case analysis dependant upon the circumstances of each interrogation. The Court reasoned that questioning someone already serving a prison sentence lacks the shock of an arrest and potential for coercion that occurs when a person is taken from the street and put in a police-dominated atmosphere. Also, the Court pointed out that questioning an existing prisoner lacks the potential for statements induced by the hope of a quick release in the typical custody triggering Miranda, given that prisoners under a sentence of confinement probably do not believe their questioners have the ability to affect release.

Presley v. City of Attalla, CR-10-0935, 2011 WL 6278308 (Ala. Crim. App. Dec. 16, 2011)

Facts: Presley was charged with Giving a False Name, Driving without a License and Driving without Insurance. Presley represented himself. The jury convicted him, and he appealed, arguing that his Sixth Amendment Right to Counsel was violated.

Issue: Was Presley’s Sixth Amendment Right to Counsel violated?

Holding: Yes.

Discussion: The Court of Criminal Appeals reviewed the record and found no evidence of the trial court engaging in a Faretta colloquy with Presley prior to trial and a waiver of his right to counsel. That colloquy includes not only a discussion of the right to counsel but also the dangers of self-representation. The only discussion of Presley’s right to an attorney occurred post-conviction in the context of providing him counsel on appeal. A court is not allowed to presume waiver where the record is silent or where a defendant waived the right to counsel in a prior case.

Thompson v. State, CR-10-0714, 2011 WL 6278306 (Ala. Crim. App. Dec. 16, 2011)

Facts: During a domestic dispute, Thompson shot his girlfriend in the neck, killing her. Thompson was not compliant with reporting officers, so they placed him in the back

of a cruiser, without handcuffs. After about an hour, they took him to the police station for an interview with a detective. Prior to Miranda being read, Thompson told the detective that he had nothing to hide but then stated “I guess I got to call an attorney if I needed one, right? Is this the time now when I need to?” The detective responded, “no, I’ll let you know right here in just a second.” Biographical information was taken and then the detective read him his Miranda rights and informed him that he was not under arrest. Thompson waived those rights and gave a statement. In the middle of the statement, Thompson asked to call his mother and made an equivocal reference to getting an attorney. He was allowed to make the call, and the interrogation resumed. He was later charged with Murder. He filed a motion to suppress, arguing that he was interrogated after he asserted his right to counsel. That motion was denied. The jury convicted Thompson of Manslaughter. He appealed.

Issue: Did Thompson invoke his right to counsel?

Holding: No.

Discussion: The Court of Criminal Appeals reviewed the Miranda law, noting that unequivocal requests for counsel before or after a Miranda waiver must be honored but that equivocal references to an attorney after a Miranda waiver carry no such requirement. Moreover, a detective is not required to clarify equivocal references after a Miranda waiver. However, a detective must clarify an equivocal reference to an attorney before a Miranda waiver. Finding no positive declaration of a desire for an attorney, the Court found that Thompson made a pre-Miranda equivocal reference to an attorney, which required the detective to ask questions to clarify the reference. The Court found that the detective’s Miranda colloquy was clear and clearly understood by Thompson. It also determined that the detective clearly answered Thompson’s earlier question about when he could ask for an attorney.

RULE 32

Apicella v. State, CR-06-1059, 2011 WL 6278293 (Ala. Crim. App. Dec. 16, 2011)

Facts: Apicella filed a Rule 32 petition challenging his conviction for Capital Murder related to the deaths of five people. He later filed an amended petition and then a second amended petition. The circuit court struck the second amended petition and then dismissed the amended petition. Apicella appealed and eventually won when the Supreme Court ruled that the second amended petition should not have been struck. On remand, Apicella filed a third amended petition, which the circuit court struck as unduly delayed and prejudicial to the state under the principles in Rhone. The court then dismissed the second amended petition. The Court of Criminal Appeals affirmed the circuit court. The Supreme Court reversed, holding that Rhone was distinguishable because there was a final judgment in that case but in Apicella’s case, there was no final judgment because the previous reversal of the circuit court’s judgment restored the parties to their prejudgment positions. It further instructed the Court of Criminal Appeals to review the circuit court’s

decision to strike the third amended complaint in light of the Rhone and Jenkins decisions.

Issue: Did the trial court adhere to the principles of the Rhone and Jenkins decisions when it struck the third amended complaint?

Holding: No.

Discussion: The Court of Criminal Appeals first noted the provisions of Rule 32 dealing with amendments. Those provisions allow for amendments at any time before judgment is entered. In this case, there was no existing judgment when Apicella filed his third amended petition. Also, the Court pointed out that the third amended petition was filed 90 days before the Rule 32 hearing on the day that Apicella's new counsel filed an appearance. Accordingly, the Court rejected the trial court's conclusion that allowing the third amendment would result in undue delay and prejudice to the State. Thus, the Court found error in striking the third amended petition and remanded the circuit court to consider the claims in that petition.

Smith v. State, CR-07-1412, 2012 WL 415477 (Ala. Crim. App. Feb. 10, 2012)

Facts: Smith was convicted of Capital Murder. His appeals were rejected. He later filed a Rule 32 petition. The circuit court summarily dismissed the petition. The Court of Criminal Appeals reversed because the dismissal addressed claims that had been superseded by an amended petition. It remanded for the circuit court to address the claims in the amended petition. On remand, the circuit court required Smith to elaborate on certain of his claims and invited him to submit affidavits in support of those claims. Smith filed a memorandum elaborating on those claims and affidavits in support thereof. The State responded and submitted affidavits regarding the same. The circuit court summarily denied the claims in the amended petition. The parties addressed that order on return to remand.

Issue: Did the circuit court err in entering a summary dismissal instead of a dismissal based on findings of fact?

Holding: Yes.

Discussion: The Court of Criminal Appeals remanded the case for the circuit court to make written findings of fact. Where a dismissal is not based on lack of a material issue and a hearing is held, Alabama Supreme Court precedent and Rule 32.9 require findings of fact as to each material issue of fact where a court permits the parties to submit evidence. That precedent held there was an implicit finding of a material issue where the circuit court had an evidentiary hearing. The Court found that permitting Smith to submit evidence obligated the lower court to make findings of fact on the issues relating to that evidence.

SCIENTIFIC EVIDENCE

Thompson v. State, CR-05-0073, 2012 WL 520873 (Ala. Crim. App. Feb. 17, 2012)

Facts: Thompson confessed to killing three police officers subsequent to his arrest for possession of a stolen vehicle. At trial, Thompson sought to admit the testimony of a forensic psychologist and a clinical psychiatrist who would say that Thompson lacked a specific intent to kill because his PTSD put him in a dissociative state where he followed scripted behavior learned from years of playing the video game Grand Theft Auto. The court allowed those witnesses to testify that Thompson had PTSD and to tell the jury that he was in a dissociative state. However, finding that Thompson's theory consisted of novel scientific evidence (the forensic psychologist said that she had never seen symptoms like Thompson's), the circuit court applied the Frye test. It excluded proffered opinion testimony that Thompson unconsciously reverted to learned behavior resulting from years of playing the video game. Thompson was convicted. He appealed, arguing that Rule 702 of the Alabama Rules of Evidence should have governed the admissibility of the proffered testimony.

Issue: Was it error to apply the Frye standard to the proffered testimony linking Thompson's behavior to years of playing a video game?

Holding: No.

Discussion: The Court of Criminal Appeals first noted that Frye applied to novel scientific evidence for the time period in question. That test requires that prior to admission, the proponent of the evidence show that the scientific or medical principle in question has achieved general acceptance in the scientific field to which it belongs. [Ala. Code §12-21-160 now requires application of a codified Daubert test to all scientific evidence.] Finding the proffered testimony to be scientific in nature and requiring general acceptance, the Court of Criminal Appeals noted the lack of scientific evidence linking behavior with the playing of violent video games. Thus, the Court found that Thompson failed to meet his burden.

SEARCH AND SEIZURE

Gracie v. State, CR-10-0596, 2011 WL 6278304 (Ala. Crim. App. Dec. 16, 2011)

Facts: Gracie was a frequent visitor to a convenience store near his mother's car wash. On the day in question, Gracie visited the store prior to a robbery and purchased a phone card. The store was subsequently robbed. Gracie was taken into custody after being found in his vehicle at a motel near the convenience store after the robbery. In his possession was a jacket matching that described by the store clerk, a ski mask, a cell phone and an amount of currency similar to the estimate given by the clerk as being taken. Gracie's story about being with someone at the motel did not match that of the residents who denied being with Gracie or the manager who stated that Gracie was not a resident. A detective examined the contents of the cell phone for evidence of accomplices. He found an inculpatory text message on the phone. Gracie moved to suppress the text message because there was no search

warrant to examine the phone. The trial court denied the motion. A jury convicted Gracie of Robbery 1st. Gracie appealed arguing error in the denial of his suppression motion.

Issue: Was a search warrant required to examine the contents of the phone?

Holding: No.

Discussion: The Court of Criminal Appeals noted that the warrantless search of a cell phone was one of first impression in Alabama. It looked to California precedent on point and U.S. Supreme Court opinions dealing with warrantless searches incident to arrest. The Court noted that the U.S. Supreme Court's Robinson and Edwards decisions had approved warrantless searches of clothing and packages within clothing if the search is conducted incident to arrest. The Court pointed out that the high court's Chadwick decision rejected the warrantless search of luggage if the search is remote in time or place from the arrest. The California Supreme Court's decision to allow a warrantless search of a cell phone turned on whether the cell phone was personal property immediately associated with the defendant's person. The California court concluded that it was and upheld the search. The Court of Criminal Appeals cited other federal courts and state courts that had approved warrantless searches of cell phones. The Court discussed a Florida state opinion that concluded "[d]igital files and programs on cell phones" were technological "replacements for personal effects like address books, calendar books, photo albums, and file folders." That opinion went on to hold that a cell phone is merely a container searchable as incident to arrest. The Court of Criminal Appeals held that Gracie's phone could be searched because it was a container associated with his person incident to an arrest. [The Court footnoted in its recitation of facts that Gracie's cell phone was not password protected.]

SELF DEFENSE

Kidd v. State, CR-2010-1487, 2011 WL 1450539 (Ala. Crim. App. April 27, 2012)

Facts: Kidd was charged with Murder related to the shooting death of his friend. At trial, Kidd asserted self defense. The State presented one witness who testified that the victim was unarmed. Another State witness testified that the victim had a gun but it was not loaded. Kidd testified that he went to his friend's house with his loaded .40. He said the victim wanted to trade the victim's .45 for Kidd's .40. Kidd refused and the victim became upset. Kidd gave in and swapped pistols with the victim. Kidd told the jury that as he turned to leave he heard someone yell to shoot him (Kidd). Kidd turned back to see the victim pointing Kidd's .40 at him. He drew the .45 and shot the victim, saying that he feared for his life because the victim had a reputation for violence. Kidd admitted that at the time of the shooting, he was a convicted felon unable to legally carry a pistol. The jury convicted Kidd. Kidd appealed, arguing that the trial court's jury instruction on self defense was flawed in that it did not define "unlawful activity" (which would bar use of the "stand your ground" provision of the self defense law) to include only those felonies referenced in the

self defense statute as justifying deadly force. In effect, Kidd argued that the undefined jury instruction imposed upon him a duty of retreat, which did not exist.

Issue: Did Kidd have a right to stand his ground under the self defense statute?

Holding: No.

Discussion: The Court of Criminal Appeals first noted that Kidd's argument was not made to the trial court. Instead, it pointed out that Kidd's counsel asked the trial court to elaborate on the duty to retreat because it might come into play based on the argument of the State. Notwithstanding the failure to preserve the issue, the Court went on to review the portion of the self defense statute's commentary that discusses the requirement that one asserting self defense be free from fault in provoking the conflict. The Court observed that Kidd's unlawful possession of the firearm contributed to the argument that eventually led to the victim's death. Accordingly, it concluded that Kidd was not free from fault and had a duty to retreat under the law of self defense.

SPLIT SENTENCES

State v. Brand, CR-10-0376, 2012 WL 6278302 (Ala. Crim. App. Dec. 16, 2011)

Facts: Brand pled guilty to two counts of Sexual Abuse 1st. He received sentences of 20 years split to serve 5 years in prison and 10 years probation upon release. The circuit court did not specify that the sentences were to be served concurrent, so by default, the sentences were treated as consecutive. He filed a Rule 32 petition claiming his sentences were illegal because they exceeded what was allowed under Alabama law. The circuit court summarily dismissed the petition.

Issue: Are consecutive split sentences that exceed the maximum 5 years specified in §15-18-8(a)(1) illegal?

Holding: No.

Discussion: The Court of Criminal Appeals rejected Brand's argument that the Supreme Court's opinion in Jackson controlled his case. In Jackson, the Supreme Court held that a youthful offender could not serve consecutive YO probationary periods beyond the maximum three years authorized by the YO statute. The Court distinguished Jackson by saying that the YO provisions in the code are the unique provisions of a legislative scheme designed to benefit youthful offenders. In affirming the legality of Brand's sentences, the Court noted its own 1989 precedent, Hatcher, which held that the split sentence statute authorized probationary periods up to the balance of a split sentence remaining after service of the split, i.e., 12 years (the statute originally limited splits to 3 years on base sentences of 15 years). Noting that Brand had two separate sentences for two separate convictions, it rejected Brand's argument that the maximum incarceration for all of his splits would be 5 years. The Court noted that it need not consider whether §14-3-38 requires the probationary

portions of the sentences to run consecutively given that each probationary period is legal under §15-18-8.

ULTIMATE ISSUE TESTIMONY

Naylor v. State, CR-10-1540, 2012 WL 1890826 (Ala. Crim. App. May 25, 2012)

Facts: Naylor was charged with multiple counts of sexual acts with his step-daughter. The victim testified at trial. An investigator and a forensic interviewer also were called as witnesses, and each of them testified he or she believed that the victim was sexually assaulted and, by direct testimony or by inference, that Naylor perpetrated the abuse. Naylor was convicted of Rape 2nd and Sodomy 2nd. Naylor appealed.

Issue: Was it error to allow the non-eye-witness testimony attributing the abuse to Naylor?

Holding: Yes.

Discussion: The Court of Criminal Appeals reversed the convictions, finding that the testimony exceeded that allowed lay witness (and experts for that matter) by going to the ultimate issue to be decided by the jury. [The Court did not reference the existing case law allowing a properly qualified expert to give an opinion of whether a victim has been abused without attribution of involvement or guilt to the defendant. In this case, one witness, a DHR worker, gave such testimony, but she was never tendered as an expert witness.]

UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE

Wells v. State, CR-09-1735, 2011 WL 6278300 (Ala. Crim. App. Dec. 16, 2011)

Facts:.....Wells was charged with four counts of UPOCS after four different controlled substances were found in plain view in a search of her residence. Those substances were methamphetamine, morphine, diazepam and dihydrocodeine. All four counts were in one indictment and the alleged possession of those four substances arose from the same incident. Wells filed a motion to dismiss the indictment, arguing it was a double jeopardy violation to charge her with multiple possessions of different substances under the same statute. The circuit court denied the motion, Wells pled guilty to two of the UPOCS counts and reserved the right to appeal.

Issue:.....Can multiple charges be brought under the UPOCS statute where a person is alleged to have possessed different substances prohibited by the statute?

Holding:Yes.

Discussion:.....The Court of Criminal Appeals acknowledged that it misinterpreted §13A-12-212 in its opinion in Holloway v. State, issued in 2007. The Court pointed out that the original law prohibiting the possession of controlled substances, §20-2-70(a), referenced “controlled substances” in the plural. Thus, a line of case law developed

finding a double jeopardy violation in the prosecution of more than one UPOCS charge for different substances simultaneously possessed. In Wells' case, the State argued, and the Court agreed, that the repeal and replacement of that statute by a Ala. Act 87-603, codified at §13A-12-212, displayed a legislative intent to prohibit the possession of each controlled substance that a person might have. Specifically, the statute's prohibition of the possession of "a controlled substance" (in the singular) allowed for a UPOCS charge for each controlled substances found in a defendant's possession. The Court concluded that the change from the plural unit of prosecution to the singular allowed for multiple UPOCS charges against Wells. The Court noted this interpretation mirrored the interpretation of the trafficking statute. [On Wells' application for rehearing, the Court issued an additional opinion affirming the retroactive application to Wells' case because the statutory change to singular units of prosecution was a substantive change.]

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