ALABAMA’S UNCONSTITUTIONAL DOUBLE JEOPARDY LAW

Why the time has come to fix it?

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SECTION I

DEFINITION OF ALABAMA'S UNCONSTITUTIONAL DOUBLE JEOPARDY LAW

THE STATE OF ALABAMA IS ILLEGALLY SECURING CRIMINAL CONVICTIONS FOR BURGLARY AND THEFT OF PROPERTY IN A MANNER THAT VIOLATES THE DOUBLE JEOPARDY CLAUSES OF THE ALABAMA AND UNITED STATES CONSTITUTION. THESE ILLEGAL CONVICTIONS CONTRIBUTE TO OVERSENTENCING IN THE APPLICATION OF THE HABITUAL FELONY OFFENDER LAW

"WISDOM SOMETIMES DRAGS ITS TARDY FEET AND COMES LATE, BUT WHEN IT COMES IT SHOULD NOT BE REJECTED BECAUSE PRIOR GENERATIONS HAVE BEEN DEPRIVED ITS BENEFICENT GLOW."

- Justice Simpson in Gayden v. State, 80 So.2d 501 (Ala. 1955)
SECTION II

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fifth Amendment, U.S. Constitution

In our tripartite form of government (divided into three branches: Legislative, Executive, and Judicial), with each branch having its own function and sphere of governance, it is the sole and exclusive province of the judicial branch to give interpretation and meaning to the various articles, sections and clauses of our respective State and Federal Constitutions. On the State level, it is the responsibility of each State's highest judicial branch—in Alabama, this is the Alabama Supreme Court—to ultimately interpret that State's constitution. On the Federal level, the Supreme Court has the last word when interpreting the various clauses and provisions of the United States Constitution.

Today, we concern ourselves with the specific laws, judicial opinions and clauses on the State and federal level that deal exclusively with double jeopardy.

In 1932, the United States Supreme Court issued a landmark decision for double jeopardy jurisprudence when it interpreted the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution in the case *Blockburger v. United States*, 284 US 299 (1932). In that decision the Court interpreted the double jeopardy clause to mean that a U.S. citizen could not be twice subject to criminal punishment for the same offense:

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

In 1969, the United States Supreme Court further held in *Benton v. Maryland*, 395 US 784 (1969), that the Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Along this vein, once the United States Supreme Court gives interpretation to a clause of the United States
Constitution, that interpretation becomes the "supreme law of the land" pursuant to the Supremacy Clause, Article VI, Clause 2, of the United States Constitution:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

As acknowledged by the Alabama Supreme Court in Ex parte James Otis Harris, 387 So. 2d 868 (Ala. 1980), once the United States Supreme Court interprets a provision of the U.S. Constitution and that provision or clause is deemed applicable to each State, then every Court in the State of Alabama is obligated to follow and comply with that ruling:

"Indeed every Court in this State is obliged to apply the decisions of the United States Supreme Court interpreting the United States Constitution."

Thus, the United States Supreme Court has established the legal framework of double jeopardy jurisprudence, and the Alabama Supreme Court has acknowledged its obligations to comply with and follow the framework that has been established. We now turn our attention to Alabama case law as it relates to double jeopardy and its application to burglary and theft related offenses to show how citizens in Alabama are being denied the protections guaranteed by the Fifth and Fourteenth Amendment.
SECTION III

MANUFACTURING CONVICTIONS FOR MAXIMUM PUNISHMENT AS A HABITUAL OFFENDER

The State of Alabama, like many other states, has implemented recidivist statutes to enhance punishment for what it deems “repeat” or “habitual” offenders. Alabama's habitual offender law, though, has increasingly come under attack in recent years. One of the main contributors to this negative attention has been media exposure of people in Alabama sentenced as habitual offenders in circumstances that are clearly "cruel and unusual" punishments. This includes a 72-year-old grandmother being sentenced to Life Without Parole as a habitual offender for a drug offense involving a relatively small amount of drugs. Another example includes a man sentenced to Life Without Parole and serving almost 40 years in prison for a robbery conviction involving $50.00 where no one was injured. In another case, Alabama sentenced a man to Life Without Parole and held him in prison for over 22 years for 14 pounds of marijuana.

Many, if not most, people in Alabama sentenced as a habitual offender have their sentence enhanced with non-violent property offenses like burglary, theft, receiving stolen property, drug possession or sales, possession of forged instruments, etc. Some Alabama defendants have life without parole sentences as a habitual offender even though they have never committed an act of physical violence against anyone.

Clearly, Alabama has earned its reputation as having one of the most punitive, draconian and out-of-date habitual felony offender statutes on records. Unfortunately, this desire to incarcerate and mete out as much punishment as possible under the State's recidivist statute has led to unique features in the law that are, quite frankly, illegal and unconstitutional. The use of burglary and theft convictions as enhancement prior felonies have, without a doubt, been used and abused.

BURGLARY DEFINED (BURGLARY, 13A-7-5 through 7, Ala. Code 1975) A "MULTIPLE INCIDENT" OFFENSE

In Alabama the offense of burglary is described as a "multiple incident offense," meaning that multiple different crimes have to be committed before the crime of burglary is established. For purposes of brevity, this article will outline the statutory elements of burglary third degree, Section 13A-7-7, Ala. Code 1975, to show how this offense is consummated. This statute reads as follows:

§ 13A-7-7 Burglary; third degree

(a) A person commits the crime of burglary in the third degree if any of the following occur:
(1) He or she knowingly enters or remains unlawfully in a dwelling with the intent to commit a crime therein;

(2) He or she knowingly enters or remains unlawfully in an occupied building with the intent to commit a crime therein; or

(3) He or she knowingly enters or remains unlawfully in an unoccupied building with the intent to commit a crime therein.

(b) Burglary in the third degree is a Class C felony.

A BREAKDOWN OF THE STATUTORY ELEMENTS OF BURGLARY

(1) Criminal trespass

The first statutory element necessary to commit the crime of burglary is a criminal trespass. This is the part of the statute that states "knowingly enter or remain unlawfully in an unoccupied building":

§ 13A-7-4 Criminal trespass; third degree

(a) A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises.

(b) Criminal trespass in the third degree is a violation.

(2) Intent to commit crime

The second statutory element necessary to commit the crime of burglary is stated within the phrase "with the intent to commit a crime therein." This second statutory element, which is committed at the time of the trespass, is most often stated as, "with the intent to commit a theft of property." Other intended crimes might include "with intent to commit a murder", or "with intent to commit an assault." Here, we are concerned with those situations where the criminal trespass was committed with the intent to commit a theft of property. Together, these two crimes (criminal trespass and theft) make up the offense of burglary.
SECTION IV
OVER PROSECUTION
CURRENT PRECEDENT IN ALABAMA AND HOLDINGS BY THE
ALABAMA SUPREME COURT *IN EX PARTE DAWSON* AND *EX PARTE MCKELVEY*

The current landscape of the criminal justice system in America reveals that prosecutors hold all of the cards when it comes to which charges to file for a criminal incident. Some prosecutors will bring as many charges as possible with the intent of forcing the defendant to accept a plea bargain in exchange for dismissing other redundant or excessive charges. Because the prosecutor has sole discretion in deciding which charges to prosecute, they will sometimes overcharge a defendant, even with charges that they know they can't secure a conviction on.

In a related context, some prosecutors will pile on as many felony convictions as possible, mostly for non-violent property offenses and minor drug sales crimes, while offering minimum sentences or even probation. The unsuspecting defendant—usually young, inexperienced with the criminal justice system, and has no idea of the long-term ramifications of their conviction—does not realize that not only have they lost important civil and social rights and privileges, but also they are now set up to be locked up for life or life without parole for any future crime that they may commit as a “habitual offender.” In Alabama, this process plays itself out in property-related burglary and theft offenses and minor drug offenses all the time.

For example, police may set up a drug sting operation where they conduct multiple "controlled buys" from an unsuspecting drug dealer. The officers may conduct back-to-back-to-back drug buys. Finally, when they make their arrest, the mostly small time dealer will end up being charged by the prosecutor for each controlled buy that was conducted. Once an indictment is issued, the dealer will face five, six or seven drug sales, even though the narcotics agent had grounds to make an arrest after the first sale. When this defendant appears in court, they are now confronted with the prospects of defending against multiple drug sales, multiple convictions, and multiple sentences. The prosecutor now uses the threat of multiple convictions and punishments to their advantage when negotiating a plea deal. Many of these low-level dealers agree to plead guilty to, say, three of the charges. While the sentence for these minor crimes may be light—drug court, diversion program, home monitoring, probation or community services—the consequences of these multiple convictions carry extreme consequences.

If this low-level drug dealer got into any trouble with the law again, this person would now have enough qualifying felonies (three) to be considered a “habitual offender.” With three prior felony convictions, the defendant would now face a sentence of Life or Life Without Parole under the habitual offender statute.

In the context of burglary and theft offenses, the ability of prosecutors to secure multiple convictions is embedded in the culture of Alabama's criminal justice system – but not its laws. When a person in Alabama breaks into a building or department store to steal property, they are automatically charged with no less than two felony charges: burglary and theft. At one time,
Alabama was also adding a third charge for receiving stolen property. Upon conviction, this individual now has two qualifying felonies for purposes of the States habitual offender enhancement provisions. The problem is this, though: the burglary charge already punishes the conduct of theft. As was shown above, the offense of burglary requires multiple elements to complete the offense. One of those elements is criminal trespass and the other is theft. Thus, when the defendant is also convicted in a second count for theft, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is violated.

A burglary indictment in Alabama would look like this:

"The Grand Jury of Madison County charge that Donovan Caldwell did knowingly enter and remain unlawfully upon the premise or entered the building of Belk Hudson department store with the intent to commit a theft of property."

While the theft indictment would read like this:

"The Grand Jury of Madison County charge that Donovan Caldwell did commit the act of theft of property of Belk Hudson department store of four pairs of pants, four shirts, and five pairs of shoes, with intent to deprive said over of such property."

Notwithstanding the fact that the defendant has already been convicted and punished for the act of theft in the burglary count, the State then convicts the defendant a second time for the SAME theft in a second count. This is clearly a violation of double jeopardy . . . But, Alabama has created its own machinations to attempt to justify this blatant violation of citizens constitutional rights. They call it a judicially created "narrow exception." Let's take a look at how.
SECTION V

EX PARTE McKELVEY AND EX PARTE DAWSON
THE MYTHICAL "NARROW EXCEPTION" TO BLOCKBURGER

Let's start with Ex parte Dawson, 675 So. 2d 905, 907 (Ala. 1966). When the Alabama Supreme Court rendered this Opinion, it first correctly identified the holding of the United States Supreme Court in Blockburger. But as soon as it recognized Blockburger, it also set out to judicially create a so-called "narrow exception" to that Supreme Court decision:

"In 1932, the United States Supreme Court held that multiple punishments for multiple statutory offenses do not violate the prohibition against double jeopardy where each statutory offense requires proof of an additional fact that the other statutory offenses do not require. Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). In other words, as long as each statutory offense requires proof of additional facts, the double jeopardy prohibition is not implicated.

However, in 1992, this Court held that where a defendant is charged with both burglary and theft arising from a transaction that is the foundation for both charges, the defendant may receive only one punishment. Ex parte McKelvey, 630 So. 2d 56 (Ala. 1992). As the Court of Criminal Appeals noted in its opinion in this present case, 630 So. 2d at 58, McKelvey relies on the fact that "[theft] and burglary are of the same kindred of crimes." That court held, and we agree, that the rationale in McKelvey concerning theft-burglary situations constitutes a narrow exception to the Blockburger double jeopardy test."

As you can see, the Alabama Supreme Court's "narrow exception" holding is predicated on the defendant receiving "only one punishment," which, in the context of criminal law, means imposition of a concurrent sentence. See, e.g., Brown v. State, 821 So 2d 219 (Ala. Crim. App. 2000).

"In accordance with § 15-3-8, Ala. Code 1975], the appellate courts of this state have consistently held that where a defendant is charged with both burglary and theft (or larceny) arising from a transaction that is the foundation for both charges, the defendant may only receive one punishment." A court may sentence a defendant for burglary and theft if the sentences are made concurrent, rather than consecutive. Pardue v. State, 571 So. 2d 320, 330 (Ala.Crim.App. 1989).

However, even a cursory reading of Section 15-3-8, Code 1975, reveals that this statutory law does not provide any basis for a multiple convictions and concurrent sentences for both burglary (with intent to commit theft) and theft to be imposed as a "narrow exception" to a defendant's constitutional right to immunity from double jeopardy.
§ 15-3-8. Crimes punishable under different provisions.

Any act or omission declared criminal and punishable in different ways by different provisions of law shall be punished only under one of such provisions, and a conviction or acquittal under any one shall bar a prosecution for the same act or omission under any other provision.

Furthermore, in a concurring opinion issued by Justice Almon in Ex Parte Howard, 710 So. 2d 460 (Ala. 1997), it was stated that Section 15-3-8, Ala. Code 1975 offers more protections than what is afforded by the Double Jeopardy Clause of the both the State and Federal Constitution:

"The plain terms of § 15-3-8 prohibit double punishment or successive prosecutions for "any act or omission." This Code section provides protections for accused persons over and above those provided by the double jeopardy clauses of Article I, § 9, of the Alabama Constitution of 1901 and Amendment 5 to the United States Constitution, as applied to the States through Amendment 14. Baldwin v. State, 47 Ala. App. 136, 251 So. 2d 633 (Ala. Crim. App. 1971)."

The plain language of Section 15-3-8, Ala. Code 1975 indicates that this is a general statute of statewide application that does not create any "narrow exception" or exclusion from its application to the criminal offenses of burglary (with intent to commit a theft) and theft. One becomes hard-pressed to try to discover where the Alabama Supreme Court was looking when it found legal authority for its "narrow exception."

THE "NARROW EXCEPTION" IS ILLEGAL AND NOT AUTHORIZED BY LAW

In Ex parte Harris, 387 So. 2d 868 (Ala. 1980), the Alabama Supreme Court stated that the courts of this State are "obligated" to follow decisions of the United States Supreme Court regarding constitutional rights of U.S. citizens. The United States Constitution is unequivocally the "supreme law of the land." Marbury v. Madison, 5 U.S. 137 (1803). So one has to wonder first, and foremost, where does the Alabama Supreme Court get the authority to create exceptions at will to decisions of the United States Supreme Court?

Recall that former Alabama Supreme Court Chief Justice Roy Moore attempted to create exceptions to United States Supreme Court rulings on two occasions both ending ignominiously for Chief Justice Moore. The first occurrence was when Justice Moore attempted to circumvent the
United States Supreme Court's First Amendment ruling that Justice Moore could not display the Ten Commandments monument in the atrium to the Alabama Judicial Building. When Justice Moore refused to obey the Federal Court's order to remove the monument, Justice Moore was removed from office as Chief Justice.

Next, Justice Moore attempted to circumvent the United States Supreme Court's ruling on gay marriage by ordering Probate Courts to not issue marriage certificates to same-sex couples. Again, the United States Supreme Court's jurisprudence prevailed as the supreme law of the Nations. In both instances, it was proven that the Alabama Supreme Court lacked the authority to create exceptions to rulings by the United States Supreme Court concerning the United States Constitution. Yet, here we are again with a purported "narrow exception" being created by the Alabama Supreme Court.

Moreover, not only does the Alabama Supreme Court lack authority to create an exception to the Blockburger rule concerning double jeopardy, but the actual exception itself -- concurrent sentences -- is also incompatible with United States Supreme Court jurisprudence. In a litany of cases, most prominently in **Ball v. United States**, 470 U.S. 856 (1985), the United States Supreme Court held that, even with a concurrent sentence, the Double Jeopardy Clause is still violated because of the double **convictions**:

*The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. See Benton v Maryland, 395 US 784, 790-791, 23 L Ed 2d 707, 89 S Ct 2056 (1969); Sibron v New York, 392 US 40, 54-56, 20 L Ed 2d 917, 88 S Ct 1889, 44 Ohio Ops 2d 402 (1968). Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.*

Additional enunciations by the United States Supreme Court further illustrate the error in the Alabama Supreme Court's holdings in **Ex parte Dawson and Ex parteMcKelvey**. In Ex parte **Nielson**, 131 U.S. 176 (1889), the High Court held:
"But be that as it may, it seems to us very clear that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense".

We already know that burglary is a crime that has various incidents in it. These multiple felony convictions for both burglary and theft, whether the sentences are run concurrently or not, are providing fuel for an untenable criminal justice system that is overrun by excessive sentencing under habitual felony offender laws. At the same time those defendants are subject to these excessive convictions and excessive sentences for burglary and theft convictions, in other contexts involving the exact same laws, the State of Alabama is doing the exact opposite.
SECTION VI

UNEQUAL APPLICATION OF THE LAW

In Ex parte Smith, 601 So. 2d 488 ( Ala. 1992), the defendant was charged in Count I with burglary with intent to destroy property and in Count II with criminal mischief, which also includes as one of its essential elements intent to destroy property. After Smith unsuccessfully sought relief from his multiple convictions in the lower appellate courts on double jeopardy grounds, the Alabama Supreme Court held that Smith's multiple convictions did indeed violate double jeopardy:

"We granted the writ of certiorari in this case to review a judgment of the Court of Criminal Appeals holding that a defendant, who had previously been convicted of criminal mischief (Ala. Code 1975, § 13A-7-22) for destroying school property, could subsequently be tried and convicted of burglary in the third degree (Ala. Code 1975, § 13A-7-7) for unlawfully entering or remaining in a school building with intent to destroy school property.

After reviewing the record, we are convinced that the defendant's right against being twice placed in jeopardy was violated; therefore, we reverse the judgment of the Court of Criminal Appeals and remand the cause to that Court with instructions to render a judgment in favor of the defendant.

The facts of the case are sufficiently set out in the opinion of the Court of Criminal Appeals and in the dissenting opinion of Judge Bowen. It is not disputed that the conduct giving rise to both offenses arose out of an incident at the East Three Notch Elementary School in Andalusia. The conduct made the basis of the criminal mischief charge, according to the majority opinion, "was [the defendant's] alleged destruction of the glass panels in the main entrance, the principal's door, a secretary's door, and a classroom door and [defendant's] alleged use of a concrete block on the school property." The conduct made the basis of the burglary charge "was [the defendant's] alleged action in unlawfully entering or remaining in the school with the intent to destroy school property."

This case clearly shows that a defendant cannot be constitutionally convicted for both burglary and the intended crime charged in burglary, be it theft, destruction of property or otherwise, and then be convicted in a separate count for the same crime already encompassed in the burglary charge. The single act or crime of theft is an essential element of both offenses. While the statutory offense of burglary requires an additional element that the statutory offense of theft does not, criminal trespass, the statutory offense of theft does not require any additional elements that the crime of burglary does not. Indeed, it is the exact same criminal act."
CONCLUSION

The time has come for change in the way that people are being convicted and sentenced in Alabama in clear violation of the double jeopardy clause. People are receiving multiple convictions when they should only have one, while others are subjected to enhanced sentences under the habitual offender act for multiple felonies that should be counted as only one conviction. Concurrent sentences upon convictions for both burglary and theft are also illegal according to the US Supreme Court, and they count as two convictions, not one under Alabama’s habitual offender law. The result is excessive convictions and punishments that violate double jeopardy and result in cruel and unusual punishment in violation of the Eighth Amendment.

Additional guidance and support for this argument can be found in the excellent opinion rendered by the Eleventh Circuit in Williams v. Singletary, 78 F. 3d 1510 (1996) (holding that cumulative sentences for burglary with assault and assault violated double jeopardy). These unconstitutional convictions and sentences have to come to end. The time to end them is now.

ABOUT THE AUTHOR

Bennu Hannibal Ra-Sun, formerly known as Melvin Ray, AIS #163343, is an Author, Leading Human Rights Activist and Organizer, and dedicated Jailhouse Attorney. He is currently serving a sentence of life without parole as a habitual offender in the Alabama Department of Corrections. In 1988, when Bennu was just 16 years old and still a child under Alabama law, he was arrested along with 5 other juveniles for burglary of a department store. All six of these juveniles, known as the Gadsden 6, were transferred to adult court for criminal prosecution. They were transferred without a hearing, without legal representation, and without their parents being present or notified of the transfer.

All 6 members of the Gadsden 6 were forced into plea deals in adult court to a total of over 30 felony convictions. These convictions led to subsequent enhancements, including two who received life without parole, because of their illegal Gadsden priors. Bennu is currently challenging his wrongful conviction and illegal sentence, as well as the juvenile proceedings in Etowah County.

If you would like to offer assistance to Bennu, please write to him directly or email justiceforthegadsden6@gmail.com.