

REL: October 12, 2018

Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala.R.App.P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

## Court of Criminal Appeals

State of Alabama

Judicial Building, 300 Dexter Avenue

P. O. Box 301555

Montgomery, AL 36130-1555

MARY B. WINDOM

Presiding Judge

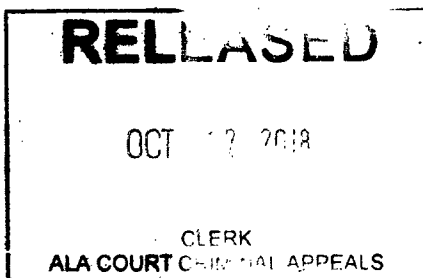
SAMUEL HENRY WELCH

J. ELIZABETH KELLUM

LILES C. BURKE

J. MICHAEL JOINER

Judges



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### MEMORANDUM

CR-17-0883

Dallas Circuit Court CC-98-461.63

James Rodgers, Jr. v. State of Alabama

BURKE, Judge.

James Rodgers, Jr., appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief. The petition challenged his 2001 conviction for capital murder and his resulting sentence of life imprisonment without the possibility of parole. This Court affirmed Rodgers's conviction and sentence on appeal in an unpublished memorandum issued on November 21, 2001. See Rodgers v. State, (No. CR-00-1232) 851 So. 2d 633 (Ala. Crim. App. 2001) (table). The Alabama Supreme Court denied certiorari review and this Court issued a certificate of judgment on May 17, 2002.

APPENDIX  
"A"

On or about March 26, 2018, Rodgers filed the instant petition, his fourth. Rodgers also filed a petition to proceed in forma pauperis, which was granted by the circuit court. In his petition, Rodgers argued that the statute under which he was convicted was facially unconstitutional because it "fails to contain the necessary gang relation element that constitutes the aggravating circumstance needed to constitute capital murder." (C. 19.)

On April 10, 2018, the State filed a motion to dismiss Rodgers's petition, arguing that Rodgers's petition was barred as successive under Rule 32.2(b), Ala. R. Crim. P.; that his petition was time-barred by Rule 32.2(c), Ala. R. Crim. P.; and that his petition was precluded under Rule 32.2(a)(5), Ala. R. Crim. P., because his claim could have been, but was not, raised on appeal.

After Rodgers filed a response to the State's motion to dismiss, the circuit court summarily dismissed Rodgers's petition. The circuit court found that Rodgers's petition was time-barred by Rule 32.2(c), Ala. R. Crim. P., and precluded by Rule 32.2(a)(5).

On appeal, Rodgers reasserts the claim that he raised in his petition.

When reviewing a circuit court's summary dismissal of a postconviction petition "[t]he standard of review this Court uses ... is whether the [circuit] court abused its discretion." Lee v. State, 44 So. 3d 1145, 1149 (Ala. Crim. App. 2009) (quoting Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005)). If, however, the circuit court bases its determination on a "'cold trial record,'" we apply a de novo standard of review. Ex parte Hinton, 172 So. 3d 348, 353 (Ala. 2012). Moreover, "when reviewing a circuit court's rulings made in a postconviction petition, we may affirm a ruling if it is correct for any reason." Bush v. State, 92 So. 3d 121, 134 (Ala. Crim. App. 2009).

Rodgers's claim, that the statute was facially unconstitutional because it fails to contain the necessary gang relation element needed to constitute capital murder, is a constitutional claim. Therefore, this claim is subject to the procedural bars in Rule 32.2. See Brown v. State, 724 So.

2d 50 (Ala. Crim. App. 1997) (constitutional claims are not jurisdictional). As the State correctly asserted in its motion to dismiss, this claim is time barred by Rule 32.2(c), Ala. R. Crim. P., because it was raised well after the applicable limitations period in Rule 32.2(c). This claim is also precluded under Rule 32.2(a)(5), Ala. R. Crim. P., because the claim could have been, but was not, raised on appeal.<sup>1</sup> Additionally, this claim is successive under Rule 32.2(b). The law governing successive postconviction petitions is found in Rule 32.2(b), Ala. R. Crim. P., which provides:

"If a petitioner has previously filed a petition that challenges any judgment, all subsequent petitions by that petitioner challenging any judgment arising out of that same trial or guilty-plea proceeding shall be treated as successive petitions under this rule. The court shall not grant relief on a successive petition on the same or similar grounds on behalf of the same petitioner. A successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice."

Here, Rodgers raised this same claim in his most recent Rule 32 petition.<sup>1</sup> See Rodgers v. State (No. CR-06-1256), 27 So. 3d 624 (Ala. Crim. App. 2008) (table).

A circuit court may summarily dismiss a Rule 32 petition without holding an evidentiary hearing pursuant to Rule 32.7(d), Ala. R. Crim. P.,

"[i]f the court determines that the petition is

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<sup>1</sup>This Court may take judicial notice of its own records. See Hull v. State, 607 So. 2d 369, 371, n. 1 (Ala. Crim. App. 1992).

not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition."

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). Accordingly, because Rodgers's claims were precluded or without merit, summary disposition was appropriate.

Based on the foregoing, the judgment is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Kellum, and Joiner, JJ., concur.



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27-CC-1998-000461.63

CIRCUIT COURT OF

DALLAS COUNTY, ALABAMA

CHRISTMAS GREEN-WILLIAMS, CLERK

## IN THE CIRCUIT COURT OF DALLAS COUNTY, ALABAMA

STATE OF ALABAMA

V.

RODGERS JAMES JR  
Defendant.

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Case No.: CC-1998-000461.63

## ORDER

This matter comes before the Court on the Petitioner's successive Rule 32 Petition for Relief from Conviction or Sentence. Upon consideration of Rodgers' Petition and Exhibits; the State of Alabama's Response and Motion to Dismiss; the Clerk's record of the previous Rule 32 petitions filed by Rodgers, and the Clerk's record of the Alabama Court of Criminal Appeals Memorandums affirming the conviction and dismissal of the previous Rule 32 Petitions; the Court finds that the State's Motion to Dismiss is well-taken and due to be granted. The Court makes the following finding of facts:

1. Rodgers was convicted by a Dallas County jury for Capital Murder and was sentenced to life without the possibility of parole and remanded the custody of the Alabama Department of Corrections on March 13, 2001.

2. Davis raised one ground in his successive petition: that the court was without jurisdiction to render judgment or to impose sentence because Act No. 92-601, as enrolled, is facially unconstitutional (subsections 15, 16, 17 and 18 of Section 13A-5-40(a) Alabama Code (1975) because it fails to contain the necessary aggravating circumstance which is the gang relation element that is revealed in the transcribed journals of both the Alabama Senate and House of Representatives of the 1992 Regular Session. Therefore, Act No. 92-601 as enrolled, always operates unconstitutional because no set of circumstances exist under which the Enrolled Act No.92-601 would be valid, resulting in the trial court having no subject matter jurisdiction to try or convict the petitioner under section 13A-5-40 (a)(17) Alabama Code (1975) which section was codified by the Enrolled Act No. 92-601.

3. This Court will consider this issue under the guidance of the following applicable law:

4. *Charles Clark vs. State of Alabama*, 196 So.3d 285 (Ala.Crim.App. 2015) held, "The burden of proof in a Ala.R.Crim.P. 32 proceeding rests solely with the petitioner, not the State.

APPENDIX  
"C"

In a Rule 32 proceeding, the burden of proof is upon the petitioner seeking post-conviction relief to establish his grounds for relief by a preponderance of the evidence.”

5. Rule 32.3 Alabama Rules of Criminal Procedure states, “The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The State shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence.”

6. Rule 32.6(b) Alabama Rules of Criminal Procedure states in part, “The petition must contain a clear and specific statement of the grounds upon which relief is sought, including a full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.”

7. Rule 32.2(b) Alabama Rules of Criminal Procedure states, “If a petitioner has previously filed a petition that challenges any judgment, all subsequent petitioners by that petitioner challenging any judgment arising out of that same trial or guilty-plea proceeding shall be treated as successive petitions under this rule. The court shall not grant relief on a successive petition on the same or similar grounds on behalf of the same petitioner. A successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render judgment or to impose sentence or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.”

8. With these principles in mind, pursuant to Rule 32.9(d) Alabama Rules of Criminal Procedure, this Court makes the following finding:

9. The Respondent’s argument that Rodgers is not entitled to any relief on this ground is well taken.

10. The Respondent argues this petition is time barred. This Court agrees as this ground was not raised until approximately sixteen years after the initial Certificate of Judgment was issued affirming Rodgers’ conviction in 2002.

11. The Respondent argues this ground is precluded because it could have been raised on

appeal and Rodgers fails to articulate a good cause was this ground was not known or was not asserted in the original Rule 32 Petition for Relief from Conviction or Sentence. This Court agrees. Rule 32.2 (a) (5) Alabama Rules of Criminal Procedure state, "A petitioner will not be given relief under this rule based upon any ground which could have been but was not raised on appeal." This Court finds that this ground is precluded.

12. Finally, the Respondent argues that although Rodgers couched his claim in jurisdictional terms, Rodgers' claim that Act 92-601 is unconstitutional does not implicate the trial court's subject matter jurisdiction to preside over Rodgers' capital murder trial and impose the sentence of life without the possibility of parole after he was duly convicted by a Dallas County jury. This Court agrees.

### CONCLUSION

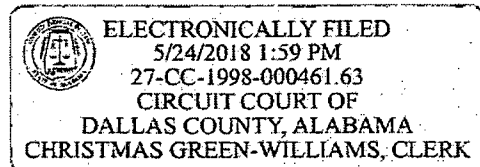
For the foregoing reasons, this Court rules that Mr. Rodgers is entitled to no relief under Rule 32 from his conviction for Capital Murder and sentence of life without the possibility of parole. This Court finds that, pursuant to Rule 32.7(d) Ala.R.Crim.P., this petition is precluded and no material fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings.

Therefore, it is **ORDERED, ADJUDGED and DECREED**, that Mr. Rodgers' Petition is hereby **DISMISSED** for all the reasons stated herein.

The costs of this proceeding are taxed to the Petitioner. These Court ordered payments are to be collected by the Department of Corrections from any funds to which the Defendant becomes entitled while in the penitentiary, whether such funds are to his credit in a welfare fund, inmate fund or in any other source whatsoever. An amount equal to one half of the gross amount of such funds shall be collected by the Department of Corrections and shall be forwarded to the Circuit Clerk of Dallas County monthly to be disbursed by the Clerk according to law.

**DONE this 25<sup>th</sup> day of April, 2018.**

/s/ DONALD L MCMILLAN JR  
**CIRCUIT JUDGE**



**IN THE CIRCUIT COURT OF DALLAS COUNTY, ALABAMA**

STATE OF ALABAMA

V.

RODGERS JAMES JR  
Defendant.

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Case No.: CC-1998-000461.63

**ORDER**

Defendant's motion to vacate is due to be and is hereby ORDERED DENIED.

**DONE** this 24<sup>th</sup> day of May, 2018.

/s/ DONALD L MCMILLAN JR  
CIRCUIT JUDGE

APPENDIX  
"F"



**COURT OF CRIMINAL APPEALS  
STATE OF ALABAMA**

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Clerk  
Gerri Robinson  
Assistant Clerk



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November 9, 2018

**CR-17-0883**

James Rodgers, Jr. v. State of Alabama (Appeal from Dallas Circuit Court: CC98-461.63)

**NOTICE**

You are hereby notified that on November 9, 2018, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

*D. Scott Mitchell*

D. Scott Mitchell, Clerk  
Court of Criminal Appeals

cc: Hon. Donald McMillan, Circuit Judge  
Hon. Lynneethia Robinson, Circuit Clerk  
James Rodgers, Jr., Pro Se  
P. David Bjurberg, Asst. Atty. Gen.

APPENDIX  
"I"