Supreme Court Of The United States
Office of the Clerk
Washington, D.C. 20543-0001

Re: Vertis Anthony v. Louis Boyd, Warden et al, No. 18-7248

MOTION FOR BOND PENDING REVIEW

Revised page(s) 4,5 of 8

Supreme Court Rule 36

Rule 36. Custody of Prisoner in Habeas Corpus Proceedings

1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.

3. (b) Pending review of a decision ordering release, the prisoner shall be enlarged on personal recognizance or bail, unless the court, ... this Court ... orders otherwise.

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Title 28 Judiciary & Judicial Procedure
Part IV Jurisdiction & Venue
Chapter 81 Supreme Court
§ 1254 Courts of Appeal; certiorari, certified question
U.S. Supreme Court of the United States
Part III Jurisdiction of writ of Certiorari
Rule 10.

This courts' Jurisdiction is invoked § 2254 (b(i,ii)) and (d (1,2)) that's predicated upon Collateral Relief entitled to the Plaintiff which is insteeled within the Habeas Corpus 2254 Statute. In that, pursuant to Barnett v. State, 783 So 2d 927 "[I] ... a jurisdictional issue can be reviewed at any time," and can not be rule out because the lower courts elected not to persue a constitutional course.

Accordingly, the Manner in which I was sentenced and incarcerated is fallacious; in that, the terms of both is the same as being convicted for actual homicide. When the resultant, Mr. Joe Turner Smith, Jr., was present during trial and asked for leniency at sentencing. Pursuant to Davis v. United States, 417 US 333, 41 L Ed 2d 109, 94 S Ct 2298. The court held

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Therefore, the policy which the State implemented is in direct conflict with the power of courts to Make rules, per Amendment No. 328, 6.11. In this instance the policy acts to supersede the Declaration of Rights, because the policy serves as an abridgement to the right[s] of the defendant in the initial stage of the precedent. See Ex parte Seymour, 946 So 2d 536 "Jurisdictional power to decide, issue decree or decide subject Matter cases is derived from the Ala. Const., and the Ala. Code. Accordingly, the Amendment No. 328, 6.11 implicates rules and regulation can not be construed to abridged the party rights involved. These issues consist of:

1. Unsigned Complaint/Warrant took the indictment out of the operation of the prosecution. 4th Amend. U.S. Constitution, F.R.Cr.P. 4(c), Ala. Code 1975 §15-7-4, A.R.Cr.P. 3.2, which implement Ala. Code §§ 46-45, 46-46. Being that this critical error occurred at the very initial segment of the proceeding implicates that the State lack Standing to exercise jurisdictional authority to to confine the prisoner, Vertis Jerome Anthony #282673

See Lujan v. Defenders, 119 LED 2D 351. Lujan Supra at 561 the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed. Ala Code §15-7-4, A.R.Cr.P. 3.2, U.S. Const. 4th Amend.

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See also: Earth v. Environment, 145 2LED 2D 610 <*pg. 622>
It is for the District Court, not this court, to address in the first instant any request for reimbursement of cost, including fees..." viz, amount in Controversy. In that, the 5th Cir. Could not conclude that the prevailing party-favorable outcome was triggered a clear Violation under Statute §1365(d) [Emphasis Added per Ala. Code 1975 §15-7-4, A.R.Cr.P. 3.2, Ala. Code §§ 4645, 4646, U.S. Constitution 4th Amendment]

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Farrar v. Hobby, 121 LED2D 494 (Claim 1.) alleged deprivation of liberty & property without due process by Means of Conspiracy and Malicious prosecution aimed...

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Dismissal

Appeals which are not taken in the Manner prescribed by Statute or Supreme Court rule Must be dismissed. Crawford v. Kindred, 418 So 2d 908, 1982 Ala. Civ. App. Lexis 1261 (Ala. Civ. App. 1982)

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Therefore the state court Modified The Anti-Terrorism and Effective Death Penalty Act (1996) in a Manner to enable the lower court to review a matter improperly presented before it. In doing, resulted in a decision that was contrary to, or

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involved an unreasonable application of Clearly establish Federal Law as determine by the S.Ct. of the United States. Per Title 28 U.S.C. §2254(d) See also. U.S. Supreme Court (2018) 536 U.S. 266:: Horn v. Banks; Via, the criteria Set-forth to Stipulate accused under the AEDPA of 1996 is inappropriate upon non-fatal incidents.

Wherefore 2 LED2D 210 claim (12) did not allege a continuing EPCRA Violation); in other words, The Alabama Supreme court did not allege a violation brought under the AEDPA which precluded its decision per requisite Ala. Const. Amendment No. 328, 6.11. See McKinney v. U.S. 208 F.2d 844 "Tardiness is irrelevant where a. Const. issue is raised; where the prisoner is still confined.

Therefore, the Plaintiff Respectfully request this Honorable Court to be exempted from the Stipulations Set-Out in the Anti-terrorism and Effective Death Penalty Act. The criteria as set-out in the Act is contrary to the Conduct of the Plaintiff because the explict intent applicable in consummated homicide is not also applicable to Attempt to Commit Murder. See Cockrell v. State, 890 So 2d 174:: Supreme Court of Alabama (2004) (890 So 2d 184)

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The Plaintiff respectfully request that after a preliminary examination, the Writ of Certiorari be granted and that this Court proceed under its rules to review the Matters complained and reverse the judgment of The Court OF THE UNITED STATE COURTS OF APPEALS, and for Such Other relief as Petitioner May be entitled.

I Certify that I have this day January 28, 2019 Served Copies of this Motion for bail and the invoked jurisdiction of the Court to The Supreme Court of The United States and The United States Solicitor General Office.

/s/ Vertis Anthony 282073
BIBB CF-Inmate Legal Mail
565 Bibb Ln, AS-7A
Brent, Alabama 35034

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BIBB CF-Inmate legal Mail
565 Bibb Ln, AB-7A
Brent, Alabama 35034

Equal Justice Initiative
122 Commerce Street
Montgomery, Alabama 36104
334.269.1803

"Seeking assistance to Counsel because the State refuses to answer the Question of Law."

February 14, 2014

Mr. Vertis Anthony, #282673
Draper Correctional Facility
2828 Alabama Highway 143
Elmore, AL 36025

Dear Mr. Anthony:

Thank you for contacting the Equal Justice Initiative (EJI). We get many requests for legal assistance from people who are incarcerated and it frequently takes us several weeks to review requests for legal aid. We have very limited resources and will not be able to provide direct assistance to most people. However, we want you to know that we have received your letter, that we will review it, and if there is anything we can do to provide assistance, we will get in touch with you as soon as we can. We regret that we cannot provide immediate responses to all inquiries because we recognize that your rights may have been violated and you are dealing with a difficult situation. However, we appreciate your taking the time to contact us and we will try to respond to your request if we can.

Thank you again for your letter.

Sincerely,

Bryan A. Stevenson
Director

EXHIBIT-B-2

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk
(334) 229-0751
Fax (334) 229-0521

MEMORANDUM

CR-13-0698 Bullock Circuit Court CC-10-85.60

Vertis J. Anthony v. State of Alabama

WELCH, Judge.

Vertis J. Anthony appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief. The petition challenged his December 8, 2011, conviction for attempted murder, a violation of §§ 13A-4-2 and 13A-6-2, Ala. Code 1975, and his resulting sentence of 35 years' imprisonment.

This Court affirmed Anthony's conviction and sentence on appeal in an unpublished memorandum issued on September 21, 2012. See Anthony v. State (No. CR-11-0516), ___ So. 3d ___ (Ala. Crim. App. 2012) (table). The certificate of judgment was issued on November 21, 2012.

Anthony filed an in forma pauperis application, which was granted. The instant petition, Anthony's first, was filed on September 11, 2013, and was timely.

Anthony filed the standard Rule 32 form found in the appendix to Rule 32, and attached a supplement setting out his detailed claims. On the standard form, Anthony indicated the following ground by a checkmark: 12(A) -- The Constitution of the United States or the State of Alabama requires a new trial, a new sentence proceeding, or other relief. Anthony checked the following subheadings listed under this ground: 12(A)(2), (Conviction obtained by use of coerced confession); 12(A)(3), (Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure); 12(A)(4), (Conviction obtained by use of evidence obtained pursuant to an unlawful arrest); 12(A)(6), (Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant); 12(A)(7), (Conviction obtained by violation of the protection against double jeopardy); and, 12(A)(9), (Denial of effective assistance of counsel).

Anthony also checked the following grounds: 12(B) -- The court was without jurisdiction to render judgment or to impose the sentence; 12(C) -- The sentence impose exceeds the maximum authorized by law or is otherwise not authorized by law; 12(D) Petitioner is being held in custody after his sentence has expired; 12(E) -- Newly discovered material facts exist which requires that the conviction or sentence be vacated by the court; and, 12(F) -- The petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part.

In his supplement to the petition, Anthony raised, and argued on appeal, numerous claims which he identified by the grounds stated in paragraph 12 of the standard Rule 32 petition. He alleged the following:

In Claim (A), [12(A)(2)] Anthony alleged that his conviction was obtained by coercion, and also alleged that his counsel asked leading questions during cross-examination.

In Claim (B), [12(A)(3)] Anthony alleged that a pistol was taken from his car as a result of an illegal search.

Anthony also alleged that the pistol was not used to commit the offense and the State's evidence was that another pistol found at the scene was used to commit the crime.

In Claim (C), [12(A)(4)] Anthony alleged that he was unlawfully arrested. Anthony claimed the police officer arrested him after hearing the statements of five witnesses, but he had never told the officer he shot the victim.

In Claim (D), [12(A)(6)] Anthony alleged that the State unconstitutionally failed to disclose to the defendant evidence favorable to the defendant. He then quoted the definition of serious physical injury in the criminal code.

In Claim (E), [12(A)(7)] Anthony alleged a violation of the protection against double jeopardy. He alleged that it was possible to have an attempted assault.

In Claim (F), [12(A)(7)] Anthony alleged that he did not receive effective assistance of counsel. He alleged he told the trial judge that appointed counsel was not properly representing him. He also alleged counsel failed to object to a defective indictment, and did not introduce credible evidence in favor of Anthony when a forensic report concluded that he had pulled the trigger.

In Claim (G), [12B] Anthony alleged that the court was without jurisdiction and cited a federal case involving the amendment of a federal indictment. He also alleged he was serving in his fifth year as a guardsman in the Alabama National Guard, and was entitled to relief under 18 U.S.C. 113. He further alleged he had a valid pistol permit.

In Claim (H), [12C] Anthony alleged that his sentence exceeded the maximum authorized by law. He further alleges that he was only guilty of an assault, not attempted murder, therefore his sentence was excessive.

In Claim (I), [12D] Anthony alleged that he was being held in custody after his sentence had expired. He further alleged that the prisons were overcrowded and he should have already been paroled.

In Claim (J), [12E] Anthony alleged that newly discovered

evidence require his conviction be vacated. He further alleged that the injury was not sufficient to implement attempted murder, his conviction was against the great weight of the evidence, it was based solely on circumstantial evidence, and that a single offense cannot be divided into two offenses.

In Claim (K), [12F] Anthony alleged that on direct appeal, the Alabama Supreme Court dismissed his petition for certiorari as untimely but did not consider his request for reconsideration based on the fact that Veteran's Day allowed an extra three days for his petition to be filed.

Without waiting for a response by the State, the circuit court issued an order dismissing the petition:

> "This matter comes before the Court on a Rule 32 Petition. A response having been filed by the State,[1] and after review of the Court file, the Court makes the following findings of fact and conclusions of law as follows:
>
> "The Court finds that the Petitioner's Rule 32 Petition is without merit and is due to be denied. The petitioner has failed to prove that his trial counsel was ineffective. He has brought forth no factual argument that this Court lacked jurisdiction to render judgment. His sentence is valid and within the proper range. The petitioner has presented no newly discovered facts that would entitle him to relief and he is not afforded an out of time appeal.
>
> "It is hereby ORDERED, ADJUDGED and DECREED that said Petition be DISMISSED pursuant to the provisions of Rules 32.2(a), 32.3, 32.6(b). Petitioners request for an evidentiary hearing is DISMISSED. All issues are hereby DISMISSED pursuant to Rule 32.7 (d),Ala. R. Crim. P."

(C. 28.)

---

[1]The record contains no response by the State.

Appeal

To the extent that appellant's pleadings are comprehensible, they are far from establishing a recognizable right to relief. The circuit court correctly concluded that Anthony failed to satisfy the pleading requirements of Rule 32.6(b). For this reason summary denial of appellant's petition without an evidentiary hearing was proper.

None of Anthony's claims are pleaded with the specificity required by Rule 32.(6)(b). Anthony has failed to provide a "clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." See Gilmore v. State, 937 So. 2d 547, 550 (Ala. Crim. App. 2005).

Moreover, Anthony's brief is a mishmash of numerous federal and state case citations, citations to the Code of Alabama, and to the federal code, with no correspondence to the issues in his petition.

Anthony has not complied with Rule 28(a)(10), Ala. R. App. P., which requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." Further, "[a]uthority supporting only 'general propositions of law' does not constitute a sufficient argument for reversal." Beachcroft Properties, LLP v. City of Alabaster, 901 So. 2d 703, 708 (Ala. 2004), quoting Geisenhoff v. Geisenhoff, 693 So. 2d 489, 491 (Ala. Civ. App. 1997). "An appellate court will consider only those issues properly delineated as such and will not search out errors which have not been properly preserved or assigned. This standard has been specifically applied to briefs containing general propositions devoid of delineation and support from authority or argument." Ex parte Riley, 464 So. 2d 92, 94 (Ala. 1985) (citations omitted). See also Spradlin v. Spradlin, 601 So. 2d 76, 78-79 (Ala. 1992) (holding that citation to a single case with no argument as to how that case supports the appellant's contention on appeal was insufficient to satisfy Rule 28(a)(5), Ala. R. App. P., now Rule 28(a)(10), Ala. R. App. P.); and Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002) (noncompliance with Rule 28(a)(10) has been deemed

a waiver of the claims on appeal).

Anthony also argued numerous issues which were not alleged as claims in the petition and has raised them for the first time in his brief on appeal, therefore they are not subject to review. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition").

A circuit court may summarily dismiss a petitioner's Rule 32 petition pursuant to Rule 32.7(d), Ala. R. Crim. P.,

> "[i]f the court determines that the petition is 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). Because the petitioner's claims were not sufficiently specific, failed to state a claim, and were without merit, summary disposition was appropriate.

For the foregoing reasons, the judgment of the circuit court is due to be affirmed.

AFFIRMED.

Burke and Joiner, JJ., concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk
(334) 229-0751
Fax (334) 229-0521

May 22, 2014

CR-13-0698

Vertis J. Anthony v. State of Alabama (Appeal from Bullock Circuit Court: CC10-85.60)

ORDER

Having considered the request for oral argument, the briefs of the parties, and the record on appeal, the Court finds that oral argument is not necessary for proper disposition of this appeal.

Upon consideration of the above, the Court of Criminal Appeals ORDERS that oral argument is disallowed, and therefore this appeal is submitted on briefs of the parties.

Done this the 22nd day of May, 2014.

Mary B. Windom

Mary B. Windom, Presiding Judge
Court of Criminal Appeals

cc: Vertis J. Anthony, Pro Se
William Daniel Dill, Asst. Attorney General

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

April 17, 2015

CR-13-0698

Vertis J. Anthony v. State of Alabama (Appeal from Bullock Circuit Court: CC10-85.60)

NOTICE

You are hereby notified that on April 17, 2015, 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. L. Bernard Smithart, Circuit Judge
Hon. Rashawn Harris, Circuit Clerk
Vertis J. Anthony, Pro Se
William Daniel Dill, Asst. Attorney General

The/this letter was dated April 17, 2015 but the Postmark was the April 20th 2015 which I received at night Mail, per Darper Mail delivery (Legal Mail)

Equal Justice Initiative
122 Commerce Street
Montgomery, Alabama 36104
334.269.1803

"Seeking assistance to Counsel because the State refuses to answer the Question of Law."

February 14, 2014

Mr. Vertis Anthony, #282673
Draper Correctional Facility
2828 Alabama Highway 143
Elmore, AL 36025

Dear Mr. Anthony:

Thank you for contacting the Equal Justice Initiative (EJI). We get many requests for legal assistance from people who are incarcerated and it frequently takes us several weeks to review requests for legal aid. We have very limited resources and will not be able to provide direct assistance to most people. However, we want you to know that we have received your letter, that we will review it, and if there is anything we can do to provide assistance, we will get in touch with you as soon as we can. We regret that we cannot provide immediate responses to all inquiries because we recognize that your rights may have been violated and you are dealing with a difficult situation. However, we appreciate your taking the time to contact us and we will try to respond to your request if we can.

Thank you again for your letter.

Sincerely,

Bryan A. Stevenson
Director

EXHIBIT-B-2

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk
(334) 229-0751
Fax (334) 229-0521

MEMORANDUM

CR-13-0698 Bullock Circuit Court CC-10-85.60

Vertis J. Anthony v. State of Alabama

WELCH, Judge.

Vertis J. Anthony appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief. The petition challenged his December 8, 2011, conviction for attempted murder, a violation of §§ 13A-4-2 and 13A-6-2, Ala. Code 1975, and his resulting sentence of 35 years' imprisonment.

This Court affirmed Anthony's conviction and sentence on appeal in an unpublished memorandum issued on September 21, 2012. See Anthony v. State (No. CR-11-0516), ___ So. 3d ___ (Ala. Crim. App. 2012) (table). The certificate of judgment was issued on November 21, 2012.

Anthony filed an in forma pauperis application, which was granted. The instant petition, Anthony's first, was filed on September 11, 2013, and was timely.

Anthony filed the standard Rule 32 form found in the appendix to Rule 32, and attached a supplement setting out his detailed claims. On the standard form, Anthony indicated the following ground by a checkmark: 12(A) -- The Constitution of the United States or the State of Alabama requires a new trial, a new sentence proceeding, or other relief. Anthony checked the following subheadings listed under this ground: 12(A)(2), (Conviction obtained by use of coerced confession); 12(A)(3), (Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure); 12(A)(4), (Conviction obtained by use of evidence obtained pursuant to an unlawful arrest); 12(A)(6), (Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant); 12(A)(7), (Conviction obtained by violation of the protection against double jeopardy); and, 12(A)(9), (Denial of effective assistance of counsel).

Anthony also checked the following grounds: 12(B) -- The court was without jurisdiction to render judgment or to impose the sentence; 12(C) -- The sentence impose exceeds the maximum authorized by law or is otherwise not authorized by law; 12(D) Petitioner is being held in custody after his sentence has expired; 12(E) -- Newly discovered material facts exist which requires that the conviction or sentence be vacated by the court; and, 12(F) -- The petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part.

In his supplement to the petition, Anthony raised, and argued on appeal, numerous claims which he identified by the grounds stated in paragraph 12 of the standard Rule 32 petition. He alleged the following:

In Claim (A), [12(A)(2)] Anthony alleged that his conviction was obtained by coercion, and also alleged that his counsel asked leading questions during cross-examination.

In Claim (B), [12(A)(3)] Anthony alleged that a pistol was taken from his car as a result of an illegal search.

Anthony also alleged that the pistol was not used to commit the offense and the State's evidence was that another pistol found at the scene was used to commit the crime.

In Claim (C), [12(A)(4)] Anthony alleged that he was unlawfully arrested. Anthony claimed the police officer arrested him after hearing the statements of five witnesses, but he had never told the officer he shot the victim.

In Claim (D), [12(A)(6)] Anthony alleged that the State unconstitutionally failed to disclose to the defendant evidence favorable to the defendant. He then quoted the definition of serious physical injury in the criminal code.

In Claim (E), [12(A)(7)] Anthony alleged a violation of the protection against double jeopardy. He alleged that it was possible to have an attempted assault.

In Claim (F), [12(A)(7)] Anthony alleged that he did not receive effective assistance of counsel. He alleged he told the trial judge that appointed counsel was not properly representing him. He also alleged counsel failed to object to a defective indictment, and did not introduce credible evidence in favor of Anthony when a forensic report concluded that he had pulled the trigger.

In Claim (G), [12B] Anthony alleged that the court was without jurisdiction and cited a federal case involving the amendment of a federal indictment. He also alleged he was serving in his fifth year as a guardsman in the Alabama National Guard, and was entitled to relief under 18 U.S.C. 113. He further alleged he had a valid pistol permit.

In Claim (H), [12C] Anthony alleged that his sentence exceeded the maximum authorized by law. He further alleges that he was only guilty of an assault, not attempted murder, therefore his sentence was excessive.

In Claim (I), [12D] Anthony alleged that he was being held in custody after his sentence had expired. He further alleged that the prisons were overcrowded and he should have already been paroled.

In Claim (J), [12E] Anthony alleged that newly discovered

evidence require his conviction be vacated. He further alleged that the injury was not sufficient to implement attempted murder, his conviction was against the great weight of the evidence, it was based solely on circumstantial evidence, and that a single offense cannot be divided into two offenses.

In Claim (K), [12F] Anthony alleged that on direct appeal, the Alabama Supreme Court dismissed his petition for certiorari as untimely but did not consider his request for reconsideration based on the fact that Veteran's Day allowed an extra three days for his petition to be filed.

Without waiting for a response by the State, the circuit court issued an order dismissing the petition:

> "This matter comes before the Court on a Rule 32 Petition. A response having been filed by the State,[1] and after review of the Court file, the Court makes the following findings of fact and conclusions of law as follows:
>
> "The Court finds that the Petitioner's Rule 32 Petition is without merit and is due to be denied. The petitioner has failed to prove that his trial counsel was ineffective. He has brought forth no factual argument that this Court lacked jurisdiction to render judgment. His sentence is valid and within the proper range. The petitioner has presented no newly discovered facts that would entitle him to relief and he is not afforded an out of time appeal.
>
> "It is hereby ORDERED, ADJUDGED and DECREED that said Petition be DISMISSED pursuant to the provisions of Rules 32.2(a), 32.3, 32.6(b). Petitioners request for an evidentiary hearing is DISMISSED. All issues are hereby DISMISSED pursuant to Rule 32.7 (d),Ala. R. Crim. P."

(C. 28.)

---

[1]The record contains no response by the State.

Appeal

To the extent that appellant's pleadings are comprehensible, they are far from establishing a recognizable right to relief. The circuit court correctly concluded that Anthony failed to satisfy the pleading requirements of Rule 32.6(b). For this reason summary denial of appellant's petition without an evidentiary hearing was proper.

None of Anthony's claims are pleaded with the specificity required by Rule 32.(6)(b). Anthony has failed to provide a "clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." See Gilmore v. State, 937 So. 2d 547, 550 (Ala. Crim. App. 2005).

Moreover, Anthony's brief is a mishmash of numerous federal and state case citations, citations to the Code of Alabama, and to the federal code, with no correspondence to the issues in his petition.

Anthony has not complied with Rule 28(a)(10), Ala. R. App. P., which requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." Further, "[a]uthority supporting only 'general propositions of law' does not constitute a sufficient argument for reversal." Beachcroft Properties, LLP v. City of Alabaster, 901 So. 2d 703, 708 (Ala. 2004), quoting Geisenhoff v. Geisenhoff, 693 So. 2d 489, 491 (Ala. Civ. App. 1997). "An appellate court will consider only those issues properly delineated as such and will not search out errors which have not been properly preserved or assigned. This standard has been specifically applied to briefs containing general propositions devoid of delineation and support from authority or argument." Ex parte Riley, 464 So. 2d 92, 94 (Ala. 1985) (citations omitted). See also Spradlin v. Spradlin, 601 So. 2d 76, 78-79 (Ala. 1992) (holding that citation to a single case with no argument as to how that case supports the appellant's contention on appeal was insufficient to satisfy Rule 28(a)(5), Ala. R. App. P., now Rule 28(a)(10), Ala. R. App. P.); and Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002) (noncompliance with Rule 28(a)(10) has been deemed

a waiver of the claims on appeal).

Anthony also argued numerous issues which were not alleged as claims in the petition and has raised them for the first time in his brief on appeal, therefore they are not subject to review. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition").

A circuit court may summarily dismiss a petitioner's Rule 32 petition pursuant to Rule 32.7(d), Ala. R. Crim. P.,

> "[i]f the court determines that the petition is 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). Because the petitioner's claims were not sufficiently specific, failed to state a claim, and were without merit, summary disposition was appropriate.

For the foregoing reasons, the judgment of the circuit court is due to be affirmed.

AFFIRMED.

Burke and Joiner, JJ., concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk
(334) 229-0751
Fax (334) 229-0521

May 22, 2014

CR-13-0698

Vertis J. Anthony v. State of Alabama (Appeal from Bullock Circuit Court: CC10-85.60)

ORDER

Having considered the request for oral argument, the briefs of the parties, and the record on appeal, the Court finds that oral argument is not necessary for proper disposition of this appeal.

Upon consideration of the above, the Court of Criminal Appeals ORDERS that oral argument is disallowed, and therefore this appeal is submitted on briefs of the parties.

Done this the 22nd day of May, 2014.

Mary B. Windom

Mary B. Windom, Presiding Judge
Court of Criminal Appeals

cc: Vertis J. Anthony, Pro Se
William Daniel Dill, Asst. Attorney General

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

April 17, 2015

CR-13-0698

Vertis J. Anthony v. State of Alabama (Appeal from Bullock Circuit Court: CC10-85.60)

NOTICE

You are hereby notified that on April 17, 2015, 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. L. Bernard Smithart, Circuit Judge
Hon. Rashawn Harris, Circuit Clerk
Vertis J. Anthony, Pro Se
William Daniel Dill, Asst. Attorney General

The/this letter was dated April 17, 2015 but the Postmark was the April 20th 2015 which I received at night Mail, per Darper Mail delivery (Legal Mail)

IN THE CIRCUIT COURT OF BULLOCK COUNTY, ALABAMA

STATE OF ALABAMA, Plaintiff, vs. VERTIS J. ANTHONY, Defendant.	)))))	CASE NO.: CC-2010-85

ORDER

The Defendant, Vertis Anthony, was indicted and arraigned under an Indictment for the charge of Attempted Murder and entered a plea of not guilty to the offense. The case was set for a jury trial before this Court. Thereupon, on the 15th day of November, 2011, came a jury of good and lawful citizens, to-wit: Katherine Smoker, and eleven others, who were duly impaneled, sworn, and charged by the Court according to law, and before whom the trial of this cause was entered upon and continued from day to day and from time to time, said Defendant being in open Court at each and every stage and during all proceedings in this cause:

NOW, on this 16th day November, 2011, said jurors upon their oaths do say:

> "We, the Jury, find the Defendant, Vertis Anthony, guilty of the offense of Attempted Murder, as charged in the Indictment, beyond a reasonable doubt."

The Court, therefore, hereby adjudges the Defendant, Vertis Anthony, guilty of the crime of Attempted Murder.

A pre-sentence report has been requested by the Defendant and the Board of Pardon and Parole shall prepare and submit to the Courts, District Attorney and the Defendant's attorney, said pre-sentence report. A sentencing hearing shall be held before this Court on December 8, 2011 at 8:30 am.

DONE AND ORDERED this 16th day of November, 2011.

Burt Smithart, Presiding Circuit Judge
Third Judicial Circuit of Alabama

EXHIBIT-A-2

Exhibit A

IN THE CIRCUIT COURT OF BULLOCK COUNTY, ALABAMA

STATE OF ALABAMA, Plaintiff, vs. VERTIS J. ANTHONY, Defendant.	)	CASE NO.: CC-2010-85

SENTENCING ORDER

The Defendant was found guilty of the crime of Attempted Murder, by a jury of his peers, and the Court having set aside this 8th day of December, 2011 for sentencing. On this day, appeared the Defendant with his attorney and the Court advised the Defendant of all of his constitutional rights with the colloquy being taken down by the court reporter. The Court inquired of the Defendant if he had anything to say why sentence should not now be pronounced upon him and Defendant said nothing.

IT IS, THEREFORE, the sentence of the law and the judgment of this Court that the Defendant be, and hereby is, sentenced to the penitentiary of the State of Alabama for a period of Thirty (35) years.

IT IS FURTHER ORDERED that the Defendant shall pay $50.00 for the Crime Victim's Compensation Fund, attorney fees, court costs and restitution in the amount of $5,138.15. Amount in Controversy is not listed on appeal.

The Defendant is **FURTHER ORDERED** to attend and complete the Dual Diagnosis Program with the Department of Corrections.

DONE AND ORDERED this 8th day of December, 2011.

Burt Smithart, Presiding Circuit Judge
Third Judicial Circuit of Alabama

REL: 09/21/2012

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk
(334) 229-0751
Fax (334) 229-0521

MEMORANDUM

CR-11-0516 Bullock Circuit Court CC-10-85

Vertis Jerome Anthony v. State of Alabama

WINDOM, Presiding Judge.

Vertis Jerome Anthony appeals his conviction for attempted murder, a violation of §§ 13A-4-2 and 13A-6-2, Ala. Code 1975, and his resulting sentence of 35 years in prison. Anthony did not file any postjudgment motions.

On appeal, Anthony's appellate counsel filed a brief and a motion to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967). In his brief, counsel asserted that he had not found any meritorious issues for this Court to review. On

July 19, 2012, this Court issued an order stating that Anthony had until August 16, 2012, to file any pro se issues. On August 14, 2012, Anthony filed his pro se issues for this Court's consideration. After thoroughly reviewing the record in this case and Anthony's pro se issues, this Court has not found any arguable issues.

Accordingly, the circuit court's judgment is affirmed.

AFFIRMED.

Welch and Joiner, JJ., concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

November 2, 2012

CR-11-0516

Vertis Jerome Anthony v. State of Alabama (Appeal from Bullock Circuit Court: CC10-85)

NOTICE

You are hereby notified that on November 2, 2012 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. L. Bernard Smithart, Circuit Judge
Hon. Wilbert M. Jernigan, Circuit Clerk
Lance Abbott, Attorney
Vertis Jerome Anthony, Pro Se
William Daniel Dill, Asst. Attorney General

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

CR-11-0516

Vertis Jerome Anthony v. State of Alabama (Appeal from Bullock Circuit Court: CC10-85)

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Court of Criminal Appeals; and

WHEREAS, the judgment indicated below was entered in this cause on September 21st 2012:

Affirmed by Memorandum.

NOW, THEREFORE, pursuant to Rule 41 of the Alabama Rules of Appellate Procedure, it is hereby certified that the aforesaid judgment is final.

Witness.D. Scott Mitchell, Clerk
Court of Criminal Appeals, on this
the 21st day of November, 2012.

D. Scott Mitchell

Clerk
Court of Criminal Appeals
State of Alabama

cc: Hon. L. Bernard Smithart, Circuit Judge
Hon. Wilbert M. Jernigan, Circuit Clerk
Lance Abbott, Attorney
Vertis Jerome Anthony, Pro Se
William Daniel Dill, Asst. Attorney General

Writ of Certiorari to Alabama Supreme Court Sub-mitted pre-maturally when submitted before Certificate of Judgment, Certificate of judgment, in this Sense operates as a Certificate Services.

IN THE SUPREME COURT OF ALABAMA

November 27, 2012

1120239

Ex parte Vertis Jerome Anthony. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Vertis Jerome Anthony v. State of Alabama) (Bullock Circuit Court: CC-10-85; Criminal Appeals : CR-11-0516).

ORDER

IT IS ORDERED that the petition for writ of certiorari is dismissed as untimely filed. The filing deadline for a petition for a writ of certiorari is jurisdictional and cannot be waived or extended by this Court. Rule 26(b), Alabama Rules of Appellate Procedure.

Rule 39(c)(2), Alabama Rules of Appellate Procedure, provides that a petition for writ of certiorari must be filed with the Clerk of the Supreme Court pursuant to Rule 25(a), Alabama Rules of Appellate Procedure, within 14 days (2 weeks) of the decision of the Court of Criminal Appeals on the application for rehearing. The application for rehearing was overruled by the Court of Criminal Appeals on November 2, 2012, and a petition for a writ of certiorari was due to be filed on or before November 16, 2012. Therefore, this petition, filed on November 17, 2012, is untimely and is dismissed.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this *27th* **day of** *November 2012*

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

cc:
Hon. D. Scott Mitchell
Vertis Jerome Anthony
Hon. Luther Strange
William Daniel Dill, Esq.

ag

IN THE CIRCUIT COURT OF BULLOCK COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	) Case No.:	CC-2010-000085.00
	)	
ANTHONY VERTIS J	)	
Defendant.	)	

ORDER

This matter comes before the Court on a Rule 32 Petition. A response having been filed by the State, and after review of the Court file, the Court makes the following findings of fact and conclusions of law as follows:

The Court finds that the Petitioner's Rule 32 Petition is without merit and is due to be denied. The petitioner has failed to prove that his trial counsel was ineffective. He has brought forth no factual argument that this Court lacked jurisdiction to render judgment. His sentence is valid and within the proper range. The petitioner has presented no newly discovered facts that would entitle him to relief and he is not afforded an out of time appeal.

It is hereby ORDERED, ADJUDGED and DECREED that said Petition be DISMISSED pursuant to the provisions of Rules 32.2 (a), 32.3, 32.6 (b). Petitioners request for an evidentiary hearing is DISMISSED. All issues are hereby DISMISSED pursuant to Rule 32.7 (d), Ala.R.Crim.P.

DONE this 21st day of January, 2014.

/s/ HON. BURT SMITHART
CIRCUIT JUDGE

Vertis Anthony
Appellant

v.

Court Of Criminal Appeals
Appellee

Circuit Court of Bullock County

Supreme Court No. 1140825

Petition for Writ of Certiorari:

To The Sprene Court of Alabama:

Comes your Petitioner Vertis Anthony and petitions this Court for a writ of Certiorari to issue to the Court of Criminal Appeals in the above Style Cause Under Rule 39, ARAP, and Shows the following:

Key Note

Please be advised, the above received date of May 6, 2015 consist of a typographical error as the Certificate of Service date was May 19, 2015. However, the letter or post mark was dated May 4, 2015, was turned in to the USCA 11 No. 17-14570 as evidence. According to A.R.C.P. (Criminal & Civil), Rules of Appellate Procedure Rule 4(c) timely when placed in Mail on or before last day to file. The 4th was the Last day to file; in that, the correspondence letterhead was 4/29/15

1. Petitioner was convicted of the charge of Attempted Murder, in the Circuit Court of Bullock County, Alabama on December 8, 2011.

The Court of Criminal Appeals Affirmed the Judgment on September 01, 2012. An application for rehearing was filed on August 14, 2012 and Overruled on November 21, 2012.

2. A copy of the opinion of the appellate Court is attached to this petition which shows the Court of Criminal Appeals Case to be No. CR-0698.

3. Petitioner alleges as grounds for the issuance of the Writ the following:

(1.) The basis of this petition for the Writ is Where the appellate Court held valid a State Statute incorrectly initially Constrused a Controlling provision of the Alabama Criminal Code. The issue is Whether the appellate Court erred in holding that the Appellant based on the evidence produced at trial was guilty of Ala. Criminal Code 13A-6-2 and 13A-4-2

(2) The basis of this petition for the Writ is that a Material question requiring decision was one of first impression in the appellate Court of Alabama and was incorrectly decided. The issue is whether the appellate Court erred in affirming the holding of the Conviction from the Circuit Court Where the petitioners Rule 32 Petition issues, claims or request in the Rule 32 petition entitled him to relief, specificly the performance of the ineffective assistance of Counsel to Challenge the sufficientcy of evidence, i.e., fatal variance.

(3.) The basis of this petition for the Writ is that the decision is in conflict with prior decision of the Supreme Court on the same point of law, Northington v. State.

In its opinion, the Appellate Court held:

"For the foregoing reasons, the judgment of the Circuit Court is to be affirmed.

Affirmed.

Burke and Joiner, J.J., Concur."

Appellate CR p.6

In the case of Thomas v. State, 517 So. 2d 640, Ala. Crim. App. 1987 held that, the "Appellant should have been granted a hearing to determine whether he was indeed denied effective assistance of Counsel, When he was found guilty of reckless Murder and the State's evidence proved that his conduct was directed at one individual rather than human life in general."

The Statements of law are in Conflict with previous decision Made by the Appellate Court, the Alabama Supreme Court and The United State Court of Criminal Appeals. Therefore, the appellate Court erred in failing to follow.

United States Courts of Appeal of the Fifth and Eleventh Circuit, 1991, 942 F. 2d. 1530; Thomas v. Harrelson.

"The Alabama Supreme Court has discussed the Constitutional Principle involved in terms of an accused's Sixth Amendment entitlement to be informed of the nature and the Cause of the accusation. Ex parte Washington, 448 So. 2d 404 (Ala. 1984), See also. Ex parte Hightower, 443 So. 2d 1272 (Ala. 1983)

942 F. 2d 1531. "Conviction reversed under rubric of "fatal variance. The State is incorrect in this case in its Contention that Thomas Makes only a Sufficiency of the evidence claim under State law."

942 F. 2d 1532 "13A-6-2(a)(2)" embraces no deliberate intent to kill or injure one particular individual but Manifest an indifference to human life in general."

942 F. 2d 1532. "Alabama case have often reffered to it as reckless Murder, "a rubic that sometimes confuses because it draws attention a way "from whether the defendant acts are directed at one particular victim or at life in general."

942 F. 2d 1532. "This issue before us requires understanding two different species of Murder existent under Alabama law."
942F. 2d 1532. "13A-6-2(a)(2), which provides:

> (a) A person commits the crime of Murder if:
> (2) Under Circumstances Manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and there by causes the death of another person; Section 13A-6-2(a)(2) essentially restates earlier Alabama law. Northington v. State.

Alabama Criminal Code; P. 260, 13A-6-2 "Offense involving danger to the person

Para. 11, "The element of "extreme indifference to human life," by definition, does not address itself to the life of the victim, but to human life generally.

> Northington v. State, 413 So. 2d 1169 (Ala. Crim. 1981)
> Cert. quashed, 413 So. 2d 1172 (Ala. 1982)

942 F. 2d 1532. "The Constitution violation caused by charging "reckless" Murder as set out in 13A-6-2(a)(2) and providing at trial only Intentional Murder as set out in 13A-6-2(a)(1), is described in Northington. In that case, on direct appeal, the court reversed a conviction under an indictment charging "reckless homicide" because all the evidence showed acts directed at the particular victim and no other. Northington was charged with extreme indifference and grave risk of death to her infant by withholding food and Medical attention.

The Court held:

942 F. 2d 1532 " The state presented no evidence that the defendant engaged in Conduct " Under Circumstances Manifesting extreme indifference to human life" for, while the defendant Conduct did indeed evidence an extreme indifference to the life of her Child, there was nothing to show that the Conduct displayed an extreme indifference to human life generally. Although the defendant Conduct created a grave risk of death to another and thereby Caused the death of that person; the acts of the defendant were aimed at the particular victim and no other. Not only did the defendant's Conduct create a grave risk of death to only her daughter and no Other, but the defendant's action (or inactions) were directed specifically against the infant. F. Wharton, The Law of Homicide (3rd ed. 1901) at Section 129. This evidence does not support a Conviction of Murde as Charged under Section 13A-6-2(a)(2). Id at 1171-72, [2]

[2] footnote "The interpretation in Northington was adopted by the Alabama Supreme Court in Mc MorMack v. State, 431 So. 2d 1340 (Ala. 1983) See Ex parte Washington; 448 So. 404, 408 (Ala. 1984)

942 F. 2d 1533 " There was a Constructive amendment in this Case. As in Northington, the offense alleged required proof of extreme indifference to human life generally as opposed to acts Aimed at a particular victim and no Other. The evidence showed only acts directed, at, and Confined to, the Single Victim."

In conclusion, these facts implement Gilmore v. State, 937 So. 2d 547, 550 (Ala. Crim. App. 2005), Where it was decided, "It is well established that if an appellate Court holds the evidence insufficient to support a jury's guilty Verdict on a greater offense, but find the evidence Sufficient to Support a Conviction on a lesser included offense, it may enter a judgment on the lesser included offense, provided that the jury was charged on the lesser included offense."

See Also. Harper v. State, 534 So. 2d 1137, 1988
Thomas v. State, 418 So. 2d 964, 1988
Barnett v. State, 983 So. 2d 927, 2000

Therefore, this conviction results to 13A-4-2 and 13A-6-20 because the victim injuries aren't identified under 13A-6-20 but whether the conditions of the Victim Circumstances are implicated in 13A-6-21. Also see, The Criminal Code 13A-6-20 through 13A-6-23 Commentary, P. 318, para. 2 where assaults committed under 13A-6-2(a)(3) "Assaults under this section are treated as a Class B felony"

Para. 6 refers to "(c) Recklessly causing serious physical injury to another by Means of a deadly weapon or dangerous instrument."

"Assaults under this section are treated as a Class C Felony."

13A-6-21, Alabama Code 1975 implement the Universal Language spoken in the Criminal Code, "Serious physical injuries" 13A-1-2(14) carry the same gravity in all provisions and statutes, any otherwise would state, physical injury not serious. 534 So. 2d 1137, "Shirley Marie Harper, the appellant, was indicted for attempted Murder in Violation of 13A-4-2 and 13A-6-2, Code of Alabama 1975. She was Ultimately Convicted of first degree assault under 13A-6-20, Code of Alabama 1975. The Court Sentenced her to a term of fifteen years' imprisonment. Two of the fifteen years are actually to be served, with the remainder of the Sentence Suspended pending appellant's good behavior on probation."

W R I T O F S U P E R V I S O R Y C O N T R O L

" A writ which is issued only to correct erroneous rulings made by the lower court within its jurisdiction, where there is no appeal, or the remedy by appeal cannot afford adequate relief, and gross injustice is threatened as the result of such rulings. It is in nature of summary appeal to control course of litigation in trial court when necessary to prevent miscarriage of justice, and may be employed to prevent extended and needless litigation."

State ex rel. Regis v. District Court of Second Judicial Dist. in and for Silver Bow County, 102 Mont. 74, 55 p. 2d 1295

" Function of " writ of supervisory control " is to enable the Supreme Court to control course litigation in inferior courts where such courts are proceeding within their jurisdiction, but by mistake of law, or willful disregard of it, are doing gross in justice and there is no appeal or remedy by appeal is inadequate.

State ex rel. state Bank of Townsend v. District Court of First Judicial Dist. in and for Lewis and Clark County, 94 Mont. 551, 25 P. 2d 396.

Inmate Anthony request this court to render the judgment to remand the cause for sentence reduction as before in prior reviews. Inmate Anthony while incarcerated has medical issues where adverse conditions contribute to remain. The adverse condition places Inmate Anthony at high risk of subsiding to inmates that harbor illnesses.

Inmate Anthony has previously filed injunction pending appeal with the courts of Criminal Appeal but have not received a response. Inmate Anthony also has attempted to transfer but has a medical hold (HC3) where classification qualified as ineligible. However, upon consulting with Medical Physican, Dr. Stone, concluded that Anthonys' condition was one that requires the patient to undergo treatment such Emberial or Humeria. In addition, such treatment requires the patient to be away from adverse circumstanceses such as Aids, Hiv, STI's, STD's,etc.,...

Rule 39. Petitions for Writ of Certiorari; Review of Decisions of Courts of Appeal.

(a) Consideration Governing Certiorari Review; Grounds. Certiorari review is not a matter of right, but of judicial discretio. A petition for a writ of certiorari will be granted only when there are special and important reasons for the issuance of the writ.

(D) From decisions in conflict with prior decisions of the Supreme Court of the United States, the Supreme Court of Alabama, the Alabama Court of Criminal Appeals, or the Alabama Court of Civil Appeals; Provided that;

1. When subparagraph (a)(1)(D) is the basis of the petition, the petition must quote that part of the opinion of the court of appeals and that part of the prior decision the petitioner alleges are in conflict;

Advers Rulings

Without waiting for a response by the state, the circuit court issued an order dismissing the petition:

" This matter comes before the Court on a Rule 32 Petition. A response having been filed by the state, [1] and after review of the Court file, the Court makes the following findings of fa- fact and conclusions of law as follows:

" The Court finds that the Petitioner's Rule 32 Petition is without merit and is due to be denied. The petitioner has failed to prove that his trial counsel was ineffective. He has brought forth no factual argument that this Court lacked Jurisdiction to render judgment. His sentence is valid and within the proper range. The petitioner has presented no newly discovered facts that would entitle him to relief and he is not afforded an out of time appeal.

" It is hereby ORDERED, ADJUDGED and DECREED that said Petition be DISMISSED pursuant to the provisions of Rules 32.2(a), 32.3, 32.6 (b). Petitioners request for an evidentiary hearing is DISMISSED. All issues are hereby DISMISSED pursuant topRule 32.7 (d), Ala. R. Crim. P. "

(C. 28.)

---

[1]The record contains no response by the State. P.(4)

Adverse Rulings

A circuit court may summarily dismiss a petitioner's Rule 32 petition pursuant to Rule 32.7 (d), Ala. R. Crim. P.,

> " [i]f the court determines that the petition is 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. " P. (6)

Petitioner respectfully request that after a perliminary examination, the Writ of Certiorari be granted and that this court proceed under its rules to review the matters complained of, and reverse the judgment of the Court of Criminal Appeals, and for such other relief as Petitioner may be entitled.

I certiy that I have this day 19th May 2015 served copies of this petition and the brief on all parties to the appeal in the Court of Appeals and the Court of Criminal Appeals.

Vertis Anthony
Attorney for Petitioner

Vertis J. Anthony, AIS#282673
Draper Correctional Center
2828 Alabama Hwy 143
Elmore, Alabama 36025

Court of Criminal Appeals
State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MEMORANDUM

CR-13-0698 Bullock Circuit Court CC-10-85.60

Vertis J. Anthony v. State of Alabama

WELCH, Judge.

Vertis J. Anthony appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief. The petition challenged his December 8, 2011, conviction for attempted murder, a violation of §§ 13A-4-2 and 13A-6-2, Ala. Code 1975, and his resulting sentence of 35 years' imprisonment.

This Court affirmed Anthony's conviction and sentence on appeal in an unpublished memorandum issued on September 21, 2012. See Anthony v. State (No. CR-11-0516), ___ So. 3d ___ (Ala. Crim. App. 2012) (table). The certificate of judgment was issued on November 21, 2012.

Anthony filed an in forma pauperis application, which was granted. The instant petition, Anthony's first, was filed on September 11, 2013, and was timely.

Anthony filed the standard Rule 32 form found in the appendix to Rule 32, and attached a supplement setting out his detailed claims. On the standard form, Anthony indicated the following ground by a checkmark: 12(A) -- The Constitution of the United States or the State of Alabama requires a new trial, a new sentence proceeding, or other relief. Anthony checked the following subheadings listed under this ground: 12(A)(2), (Conviction obtained by use of coerced confession); 12(A)(3), (Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure); 12(A)(4), (Conviction obtained by use of evidence obtained pursuant to an unlawful arrest); 12(A)(6), (Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant); 12(A)(7), (Conviction obtained by violation of the protection against double jeopardy); and, 12(A)(9), (Denial of effective assistance of counsel).

Anthony also checked the following grounds: 12(B) -- The court was without jurisdiction to render judgment or to impose the sentence; 12(C) -- The sentence impose exceeds the maximum authorized by law or is otherwise not authorized by law; 12(D) Petitioner is being held in custody after his sentence has expired; 12(E) -- Newly discovered material facts exist which requires that the conviction or sentence be vacated by the court; and, 12(F) -- The petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part.

In his supplement to the petition, Anthony raised, and argued on appeal, numerous claims which he identified by the grounds stated in paragraph 12 of the standard Rule 32 petition. He alleged the following:

In Claim (A), [12(A)(2)] Anthony alleged that his conviction was obtained by coercion, and also alleged that his counsel asked leading questions during cross-examination.

In Claim (B), [12(A)(3)] Anthony alleged that a pistol was taken from his car as a result of an illegal search.

Anthony also alleged that the pistol was not used to commit the offense and the State's evidence was that another pistol found at the scene was used to commit the crime.

In Claim (C), [12(A)(4)] Anthony alleged that he was unlawfully arrested. Anthony claimed the police officer arrested him after hearing the statements of five witnesses, but he had never told the officer he shot the victim.

In Claim (D), [12(A)(6)] Anthony alleged that the State unconstitutionally failed to disclose to the defendant evidence favorable to the defendant. He then quoted the definition of serious physical injury in the criminal code.

In Claim (E), [12(A)(7)] Anthony alleged a violation of the protection against double jeopardy. He alleged that it was possible to have an attempted assault.

In Claim (F), [12(A)(7)] Anthony alleged that he did not receive effective assistance of counsel. He alleged he told the trial judge that appointed counsel was not properly representing him. He also alleged counsel failed to object to a defective indictment, and did not introduce credible evidence in favor of Anthony when a forensic report concluded that he had pulled the trigger.

In Claim (G), [12B] Anthony alleged that the court was without jurisdiction and cited a federal case involving the amendment of a federal indictment. He also alleged he was serving in his fifth year as a guardsman in the Alabama National Guard, and was entitled to relief under 18 U.S.C. 113. He further alleged he had a valid pistol permit.

G.I. 8/11

In Claim (H), [12C] Anthony alleged that his sentence exceeded the maximum authorized by law. He further alleges that he was only guilty of an assault, not attempted murder, therefore his sentence was excessive.

In Claim (I), [12D] Anthony alleged that he was being held in custody after his sentence had expired. He further alleged that the prisons were overcrowded and he should have already been paroled.

In Claim (J), [12E] Anthony alleged that newly discovered

evidence require his conviction be vacated. He further alleged that the injury was not sufficient to implement attempted murder, his conviction was against the great weight of the evidence, it was based solely on circumstantial evidence, and that a single offense cannot be divided into two offenses.

In Claim (K), [12F] Anthony alleged that on direct appeal, the Alabama Supreme Court dismissed his petition for certiorari as untimely but did not consider his request for reconsideration based on the fact that Veteran's Day allowed an extra three days for his petition to be filed.

Without waiting for a response by the State, the circuit court issued an order dismissing the petition:

> "This matter comes before the Court on a Rule 32 Petition. A response having been filed by the State,[1] and after review of the Court file, the Court makes the following findings of fact and conclusions of law as follows:
>
> "The Court finds that the Petitioner's Rule 32 Petition is without merit and is due to be denied. The petitioner has failed to prove that his trial counsel was ineffective. He has brought forth no factual argument that this Court lacked jurisdiction to render judgment. His sentence is valid and within the proper range. The petitioner has presented no newly discovered facts that would entitle him to relief and he is not afforded an out of time appeal.
>
> "It is hereby ORDERED, ADJUDGED and DECREED that said Petition be DISMISSED pursuant to the provisions of Rules 32.2(a), 32.3, 32.6(b). Petitioners request for an evidentiary hearing is DISMISSED. All issues are hereby DISMISSED pursuant to Rule 32.7 (d),Ala. R. Crim. P."

(C. 28.)

---

[1]The record contains no response by the State.

To the extent that appellant's pleadings are comprehensible, they are far from establishing a recognizable right to relief. The circuit court correctly concluded that Anthony failed to satisfy the pleading requirements of Rule 32.6(b). For this reason summary denial of appellant's petition without an evidentiary hearing was proper.

None of Anthony's claims are pleaded with the specificity required by Rule 32.(6)(b). Anthony has failed to provide a "clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." See Gilmore v. State, 937 So. 2d 547, 550 (Ala. Crim. App. 2005).

Moreover, Anthony's brief is a mishmash of numerous federal and state case citations, citations to the Code of Alabama, and to the federal code, with no correspondence to the issues in his petition.

Anthony has not complied with Rule 28(a)(10), Ala. R. App. P., which requires that an argument contain "the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." Further, "[a]uthority supporting only 'general propositions of law' does not constitute a sufficient argument for reversal." Beachcroft Properties, LLP v. City of Alabaster, 901 So. 2d 703, 708 (Ala. 2004), quoting Geisenhoff v. Geisenhoff, 693 So. 2d 489, 491 (Ala. Civ. App. 1997). "An appellate court will consider only those issues properly delineated as such and will not search out errors which have not been properly preserved or assigned. This standard has been specifically applied to briefs containing general propositions devoid of delineation and support from authority or argument." Ex parte Riley, 464 So. 2d 92, 94 (Ala. 1985) (citations omitted). See also Spradlin v. Spradlin, 601 So. 2d 76, 78-79 (Ala. 1992) (holding that citation to a single case with no argument as to how that case supports the appellant's contention on appeal was insufficient to satisfy Rule 28(a)(5), Ala. R. App. P., now Rule 28(a)(10), Ala. R. App. P.); and Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002) (noncompliance with Rule 28(a)(10) has been deemed

a waiver of the claims on appeal).

Anthony also argued numerous issues which were not alleged as claims in the petition and has raised them for the first time in his brief on appeal, therefore they are not subject to review. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997)("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition").

A circuit court may summarily dismiss a petitioner's Rule 32 petition pursuant to Rule 32.7(d), Ala. R. Crim. P.,

> "[i]f the court determines that the petition is 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). Because the petitioner's claims were not sufficiently specific, failed to state a claim, and were without merit, summary disposition was appropriate.

For the foregoing reasons, the judgment of the circuit court is due to be affirmed.

AFFIRMED.

Burke and Joiner, JJ., concur.

I N T H E S U P R E M E C O U R T OOFF AALLAABBAAMMAA

May 15, 2015

1140825

ORDER TO SHOW CAUSE

For the forgoing reasons the petitioner deems the petition timely filed as requested in the directive dated May 8, 2015.

Rules of Appellate Procedure, P. 638
Rule 4. Appeal as of Right - When Taken
(c) Appeals by Inmates Confined in Institutions.
" If an inmate confined in an institution and proceeding Pro Se files a notice of appeal in either a civil or a Criminal Case, the notice will be considered timely filed if it is deposited in the institution's internal Mail System on or before the last day for filing."

The correspondence dated May 6, 2015 and found in the NOTICE under FILINGS - NUMBER OF COPIES, COLOR OF COVERS, BINDINGS, SERVICE, ETC.: Para. 5

FILING: Papers are not considered filed until RECEIVED by the clerk of this Court; however, papers shall be deemed filed on the day of mailing if CERTIFIED, REGISTERED, OR EXPRESS MAIL of the UNITED STATES POSTAL SERVICE is used. See Rule 25(a).

Rules of Appellate Procedure, P. 675
Rule 39. Petitions for Writ of Certiorari
Rule 39 (c)(3)
(3) Time for filing."The petition for the writ of certiorari shall be filed with the clerk of the Supreme Court pursuant to Rule 25(a), within 14 days (2 weeks) of the decision of the Court of Criminal Appeals on the application for rehearing,..."

The papers should be deemed timely filed because all the above requirments ware meat in regards to being timely filed. This was accomplished by the stamp of the United Postal Service dated May 4, 2015 on the writ of certiorari, pursuant to Rule 25(a). The New Rule 25A, Alabama Rules of Appellate Procedure, "requires that the appellant documents be signed by at least one attorny of record or, in a case in which the party is proceeding pro se, by the party." Being the Appellant is proceeding Pro Se, his signature was all required,,according to Rule 25A.

There are issues that affect this time frame that this court must take into consideration. As stated in the order to show cause, the petitioner was instructed to comply by " this court within fourteen (14) days from the date of this order as to why the petition should be considered timely filed,". These orders are the same and focus on the date of the typing of the order. Rule 39 (c)(2) implements the same requirements.

Therefore as stated in Rule 4(c), the documents are considered filed when the clerk of the Supreme Court receives them while the postage serves as annotated record stamp as timely filed.This requirement was meet; however, the appellant understand how it may appear to late. Primerely because the letter establishes a starting point in delivery but this date will change if the envelope contain a different date and in the instances of the return judgment from the Court of Criminal Appeals and from the Alabama Supreme Court both contain different letter dates and different postage dates. Moreover and in these instances, when the mail is delivered on Fridays and in these instances it was, the inmates will not receive the mail until after 6pm on the following Monday.

The Courts of Criminal Appeals return judgment on the application re-hearing was dated April 17, 2015; however, the postage dated April 20, 2015 which created a three (3) day difference and another day because the inmate received it after COBD. Therefore in pursuant to Rule 25(a), " Filing: Papers are not considered filed until Received by the clerk of this court; however, papers shall be deemed filed on the day of mailing if, ...Express mail of the United States Postal Service is used. See 25(a)."

Therefore the Courts deemed the documents filed the date received and also where the initial first day as in the fourteen (14) to reply should start once the inmate actually receive the correspondance.

See Also:

Rule 4(c) - Rules of Appellate Procedure, P.638

" If an inmate confined in an institution and proceeding Pro Se files a notice of appeals in either a civil or a Criminal Case, the notice will be considered timely filed if it is deposited in the institution internal Mail System on or before the last day for filing."

For the forgoing reasons, the Petition should be deemed timely filed based upon the date of the postage mark Pursuant to Rule 4 (c) and 25(a). According to 25a, the petitioner signature was the only signature required if the petitioner was filing Pro Se which he did. The only other matter is the petition being hand written or if the petition contain any clerical errors inwhich the petitioner would be gladely to correct any corrections.

C E R T I F I C A T E O F S E R V I C E

I certify that I have this day _____ served copies of this petition and the brief on all parties to the Alabama Supreme Court.

_____
Pro Se

Vertis J. Anthony, AIS# 202673
Draper Correction Center
2828 Alabama Hwy 143
Elmore, Alabama 36025

EXHIBIT-B-4

IN THE SUPREME COURT OF ALABAMA

May 27, 2015

1140825

Ex parte Vertis J. Anthony. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Vertis J. Anthony v. State of Alabama) (Bullock Circuit Court: CC-10-85.60; Criminal Appeals : CR-13-0698).

ORDER DISMISSING PETITION

Upon receipt of the Petitioner's Response to this Court's Order, and upon review of same, it is ordered that the certiorari petition filed in this cause is DISMISSED as untimely filed. See Rule 39(c)(2) and Rule 25(a)(3)(B), Ala. R. App. P.

I, Julia Jordan Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 27th day of May, 2015.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

cc:
Hon. D. Scott Mitchell
Hon. L. Bernard Smithart
Hon. Luther Strange
Vertis Jerome Anthony
William Daniel Dill, Esq.

Review upon order to Show Cause.

/nw

Exhibit to Ala. Code 1975 § 12-11-9, § 12-1-4 implementing § 12-11-30(4) Ala. Code 1975

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

CR-17-0658

Ex parte Drelijah J. Muhammad

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. Drelijah Joshua Muhammad, II)

Clarke District Court No. DC-18-109

ORDER

Drelijah J. Muhammad filed this petition for a writ of mandamus requesting that this Court order his immediate release from custody because, he says, the Clarke County District Court has no legal authority to hold him in custody.

This mandamus petition is filed against a district court. Section 12-11-30(4), Ala. Code 1975, states: "The circuit court shall exercise a general superintendence over all district courts, municipal courts, and probate courts." For the foregoing reasons, this case is hereby **TRANSFERRED** to the Clarke Circuit Court for that Court to exercise its supervisory jurisdiction over the District Court.

Done this 10th day of May, 2018.

MARY BECKER WINDOM, PRESIDING JUDGE

cc: Hon. Gaines C. McCorquodale, Presiding Circuit Judge
Hon. James H. Morgan, Jr., District Judge
Hon. Summer Scruggs Padgett, Circuit Clerk
Spencer Brent Walker, District Attorney
Drelijah J. Muhammad, pro se
Office of the Attorney General

Appendix "G"

2

Ex parte Attorney General Troy King et al.; (In re: Justin Price et al. v. Attorney General Troy King et al.)
SUPREME COURT OF ALABAMA
50 So. 3d 1056; 2010 Ala. LEXIS 72
1090295
April 23, 2010, Released

Editorial Information: Subsequent History

Released for Publication November 4, 2010.As Corrected March 30, 2011.

Editorial Information: Prior History

(Montgomery Circuit Court, CV-09-849). Truman M. Hobbs, Jr., Trial Judge.

Disposition:

PETITION GRANTED; WRIT ISSUED.

Counsel

For Petitioners: Troy King, atty. gen., Corey L. Maze, James W. Davis, William G. Parker, Jr., asst. attys. gen.

For Respondents: Edgar C. Gentle III, K. Edward Sexton II, Mark Englehart, Diandra Debrosse Burnley, Gentle, Turner & Sexton, Birmingham.

Judges: STUART, Justice. Lyons, Woodall, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur. Cobb, C.J., concurs in the result.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner state filed a petition for a writ of mandamus with regard to the order of the Montgomery Circuit Court (Ala.) that denied its motion to dismiss respondent voters' action.Writ of mandamus was issued because plaintiffs lacked standing because none of them or members of the putative class had their own voting rights infringed in 1901 with regard to ratification of the state constitution and as such none of them had suffered a particularized injury that affected him or her in a personal and individual way.

OVERVIEW: The voters asserted that in 1901, election officials in 12 "black belt counties" manipulated election returns to ensure that the 1901 constitution received sufficient votes to be ratified. The voters further claimed that the goal of the constitutional convention of 1901 was to produce a new constitution to maintain white supremacy in the government of Alabama and that the constitution drafted at the convention sought to achieve that end by disenfranchising African-American citizens through the use of poll taxes and residency, literacy, and property-owning requirements. The voters asked the court to declare the 1901 constitution void and to issue a permanent injunction to prohibit the state from enforcing its provisions. The state moved to dismiss on the grounds that the voters lacked standing. The supreme court found that the voters lacked standing because none of the voters or members of the putative class had their own voting rights infringed in 1901, none of them had suffered a particularized injury that affected him or her in a personal and individual way. Because the voters were not personally denied equal treatment, they had not suffered the particularized injury.

This is why the State avoided the Ala. Supreme Court

1

OUTCOME: The petition for a writ of mandamus was granted.

LexisNexis Headnotes

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus

The filing of a petition for the writ of mandamus does not divest the trial court of jurisdiction or stay the case.

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus

A writ of mandamus is a drastic and extraordinary writ that will be issued only when there is: (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss
Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus

In reviewing the denial of a motion to dismiss by means of a mandamus petition, reviewing courts do not change the standard of review.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss

A ruling on a motion to dismiss is reviewed without a presumption of correctness. A reviewing court must accept the allegations of the complaint as true. Furthermore, in reviewing a ruling on a motion to dismiss a court will not consider whether the pleader will ultimately prevail but whether the pleader may possibly prevail.

Civil Procedure > Justiciability > Standing > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements

To say that a person has standing is to say that person is the proper party to bring the action. To be a proper party, the person must have a real, tangible legal interest in the subject matter of the lawsuit. Standing turns on whether the party has been injured in fact and whether the injury is to a legally protected right. In the absence of such an injury, there is no case or controversy for a court to consider. Therefore, were a court to make a binding judgment on an underlying issue in spite of absence of injury, it would be exceeding the scope of its authority and intruding into the province of the legislature. The power of the judiciary is the power to declare finally the rights of the parties, in a particular case or controversy. The law of U.S. Const. art. III standing is built on a single basic idea -- the idea of separation of powers.

Civil Procedure > Justiciability > Standing > Injury in Fact
Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements

Traditionally, Alabama courts have focused primarily on the injury claimed by the aggrieved party to determine whether that party has standing; however, in 2003 the Supreme Court of Alabama adopted the following, more precise, rule regarding standing based upon the test used by the Supreme Court of the United States. A party establishes standing to bring a constitutional challenge when it demonstrates the existence of (1) an actual, concrete and particularized "injury in fact" -- 'an invasion of a legally protected interest; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood

that the injury will be redressed by a favorable decision. A party must also demonstrate that 'he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.

Civil Procedure > Justiciability > Standing > General Overview
Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview

With regard to standing, a wrong to the ancestor is not a wrong to the descendants.

Civil Procedure > Justiciability > Standing > Injury in Fact
Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements

In cases where stigma has been recognized as an injury for standing purposes, it is the plaintiff who has suffered discrimination or who has been denied equal protection.

Opinion

Opinion by: STUART

Opinion

{50 So. 3d 1057} PETITION FOR WRIT OF MANDAMUS

STUART, Justice.

Justin Price, Charles D. James, Colonel Stone Johnson, James Armstrong, Georgia Gray Hampton, Walter Brown, Jr., Tommie Lee Houston, Frederick D. Richardson, Jr., and Kenneth P. Marshall ("the plaintiffs"), purporting to represent a class made up of Alabama voters, sued, in their official capacities, Attorney General Troy King, Lieutenant Governor Jim Folsom, Jr., President Pro Tempore of the Alabama Senate Hinton Mitchem, Speaker of the Alabama House Seth Hammett, and Secretary of State Beth Chapman (hereinafter collectively referred to as "the State defendants"), alleging that they failed to ensure that the current Alabama Constitution ("the 1901 Constitution") was ever properly ratified. In fact, the plaintiffs allege, ratification of the 1901 Constitution was obtained only through voter fraud, and they therefore argue that, under 42 U.S.C. § 1983, the 1901 Constitution should be declared void and that an injunction should be entered prohibiting the State defendants from enforcing the provisions of the 1901 Constitution. The trial court denied the State defendants' motion to dismiss the plaintiffs' action; the State defendants now petition this Court for a writ of mandamus directing the trial court to dismiss the action. We grant the petition and issue the writ.

I.

On February 4, 2009, the plaintiffs initiated this action by filing a complaint in the Bessemer Division of the Jefferson Circuit Court. The gravamen of their complaint was the allegation that, in 1901, election officials in 12 "black belt counties" 1 manipulated election returns to ensure that the 1901 Constitution received sufficient votes to be ratified. The plaintiffs supported their complaint with the affidavit of Wayne Flynt, a professor of history at Auburn University. Flynt stated in his affidavit that the goal of the Constitutional Convention of 1901 was to produce a new constitution to maintain white supremacy in the government of Alabama and that the constitution drafted at the convention sought to achieve that end by disenfranchising African-American citizens through the use of poll taxes and residency, literacy, and property-owning requirements. The 1901 Constitution was ultimately ratified by a

statewide vote of 108,613 to 81,734 on the strength of the vote in 12 black belt counties that voted in favor of ratification 36,224 to 5,471, notwithstanding the fact that the majority of voters in those counties at that time was African-American and that the ratification of the 1901 Constitution was largely contrary to the interests of African-Americans. Flynt states that African-Americans in other parts of Alabama voted overwhelmingly against the ratification of the 1901 Constitution and that it is far more likely that the election returns in the 12 black belt counties were the product of fraud than a desire on the part of the African-American voters in those black belt counties, in effect, to disenfranchise themselves. He accordingly concludes that the 1901 Constitution was never properly ratified, and the plaintiffs in their complaint have adopted his argument and reasoning, asking the court to declare the 1901 Constitution void and to issue a permanent injunction prohibiting the State **{50 So. 3d 1058}** defendants from seeking to enforce its provisions.

Upon receiving the plaintiffs' complaint, the State defendants moved to transfer the action to the Montgomery Circuit Court and, after the plaintiffs consented to the transfer, the trial court transferred the case on April 28, 2009. The State defendants thereafter filed an answer and moved to dismiss the complaint, arguing generally that the trial court lacked subject-matter jurisdiction and that the plaintiffs had failed to state a claim upon which relief could be granted. On October 7, 2009, the trial court entered an order granting the State defendants' motion to dismiss; however, on October 9, 2009, the trial court vacated that order and scheduled a hearing for November 3, 2009. On October 16, 2009, the plaintiffs filed a motion opposing the State defendants' motion to dismiss and, on October 30, 2009, the State defendants filed their reply brief. At the conclusion of the November 3, 2009, hearing, the trial court entered an order denying the State defendants' motion to dismiss.

On November 24, 2009, the State defendants petitioned this Court to issue a writ of mandamus directing the trial court to dismiss the plaintiffs' action. On January 27, 2010, we ordered the plaintiffs to file a response. The plaintiffs filed their response on February 11, 2010, the day after filing an amended complaint in the trial court modifying the putative class to include only African-American voters in Alabama, and identifying with more particularity the injuries they alleged they had suffered. 2 The State defendants filed their response to the plaintiffs' petition on February 17, 2010.

II.

"As this Court has consistently held, the writ of mandamus is a

"*Ex parte Wood*, 852 So. 2d 705, 708 (Ala. 2002)(quoting *Ex parte United Serv. Stations, Inc.*, 628 So. 2d 501, 503 (Ala. 1993)). '"In reviewing the denial of a motion to dismiss by means of a mandamus petition, we do not change our standard of review . . .."' *Drummond Co. v. Alabama Dep't of Transp.*, 937 So. 2d 56, 57 (Ala. 2006) (quoting *Ex parte Haralson*, 853 So. 2d 928, 931 (Ala. 2003)).

{50 So. 3d 1059} "*Pontius v. State Farm Mut. Auto. Ins. Co.*, 915 So. 2d 557, 563 (Ala. 2005). We construe all doubts regarding the sufficiency of the complaint in favor of the plaintiff. *Drummond Co.*, 937 So. 2d at 58."

'"'drastic and extraordinary writ that will be issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.'"

"'In *Newman v. Savas*, 878 So. 2d 1147 (Ala. 2003), this Court set out the standard of review of a ruling on a motion to dismiss for lack of subject-matter jurisdiction:

'"'A ruling on a motion to dismiss is reviewed without a presumption of correctness. *Nance v.*

Matthews, 622 So. 2d 297, 299 (Ala. 1993). This Court must accept the allegations of the complaint as true. *Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C.*, 828 So. 2d 285, 288 (Ala. 2002). Furthermore, in reviewing a ruling on a motion to dismiss we will not consider whether the pleader will ultimately prevail but whether the pleader may possibly prevail. *Nance*, 622 So. 2d at 299."

"'878 So. 2d at 1148-49.'*Ex parte Alabama Dep't of Transp.*, 978 So. 2d 17, 20-21 (Ala. 2007).

III.

In their petition for the writ of mandamus, the State defendants argue that the trial court erred in failing to dismiss the plaintiffs' complaint because, they allege, the trial court does not have subject-matter jurisdiction. 3 The trial court lacks subject-matter jurisdiction, the State defendants argue, because: (1) the plaintiffs lack standing; (2) there is no statute that authorizes an "election contest" such as this; and (3) the complaint raises a nonjusticiable political question. As explained subsequently, we agree that the plaintiffs lack standing; accordingly, we need not consider the State defendants' latter two arguments at this time.

In *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So. 2d 1253, 1256 (Ala. 2004), this Court explained the standing requirement as follows:

"'To say that a person has standing is to say that that person is the proper party to bring the action. To be a proper party, the person must have a real, tangible legal interest in the subject matter of the lawsuit.' *Doremus v. Business Council of Alabama Workers' Comp. Self-Insurers Fund*, 686 So. 2d 252, 253 (Ala. 1996). 'Standing . . . turns on "whether the party has been injured in fact and whether the injury is to a legally protected right."' *[State v. Property at]* 2018 Rainbow Drive, 740 So. 2d [1025,] 1027 [(Ala. 1999)] (quoting *Romer v. Board of County Comm'rs*, 956 P.2d 566, 581 (Colo. 1998) (Kourlis, J., dissenting)) (emphasis omitted). In the absence of such an injury, there is no case or controversy for a court to consider. Therefore, were a court to make a binding judgment on an underlying issue in spite of absence of injury, it would be exceeding the scope of its authority and intruding into the province of the Legislature. See *City of Daphne v. City of Spanish Fort*, 853 So. 2d 933, 942 (Ala. 2003) ('The power of the judiciary . . . is "the power to declare finally the rights of the parties, in a particular case or controversy . . .."' (quoting *Ex parte Jenkins*, 723 So. 2d 649, 656 (Ala. 1998))); *Allen v. Wright*, 468 U.S. 737, 752, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) ('[T]he law of Art. III standing is built on a single basic idea -- the idea of separation of powers.')."Traditionally, Alabama courts have focused primarily on the injury claimed by the aggrieved party to determine whether that party has standing; however, in 2003 this Court adopted the following, more precise, rule regarding standing based upon the test used by the Supreme Court of the United States:

"A party establishes standing to bring a [constitutional] challenge . . . when it demonstrates the existence of (1) an actual, concrete and particularized 'injury in fact' -- 'an invasion of a legally protected interest'; (2) a 'causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be 'redressed by a favorable decision.' *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, **{50 So. 3d 1060}** 119 L. Ed. 2d 351 (1992). A party must also demonstrate that 'he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.' *Warth [v. Seldin]*, 422 U.S. [490,] 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 [(1975)]."*Alabama Alcoholic Beverage Control Bd. v. Henri-Duval Winery, L.L.C.*, 890 So. 2d 70, 74 (Ala. 2003). 4 Accordingly, we first consider whether the plaintiffs have demonstrated the existence of an actual, concrete, and particularized injury in fact.

In paragraph 30 of their amended complaint, 5 the plaintiffs describe their alleged injuries as follows:

> "Plaintiffs and the class, as a result, have been deprived of the right to vote on their form of State Government in violation of the Fifteenth Amendment and have been deprived of their Fourteenth Amendment procedural due process and equal protection rights in never being allowed to effectively vote on the invalid constitution. Piaintiffs and the class have been deprived of their Fourteenth Amendment right to equal protection in other ways as well in that the racially-motivated and fraudulent or fraudulently-procured ratification of the 1901 constitution effectively excluded blacks from participation in elections; and even after the legal removal of the formal barriers to blacks voting in elections, the 1901 constitution's perpetuation causes plaintiffs and the class stigmatic and representational or expressive harms, by continuing to stigmatize plaintiffs and the class, to incite racial hostility, to reinforce racial stereotypes (such as that plaintiffs and the members of the class think alike, share the same political interests, and will prefer the same candidates at the polls), and to signal to elected representatives that they represent **{50 So. 3d 1061}** the white majority and not their constituency (including plaintiffs and the class) as a whole."Thus, the plaintiffs essentially allege that they have suffered two distinct injuries: (1) that they have been deprived of a constitutional right to vote on the constitution establishing their form of state government; and (2) that they have suffered "stigmatic and representational or expressive harms" inasmuch as, they allege, the perpetuation of the 1901 Constitution stigmatizes all African-American voters, incites hostility against them, reinforces stereotypes, and signals to elected officials that they do not represent their African-American constituency. The State defendants argue that neither of these claimed injuries are actual, concrete, and sufficiently particularized so as to provide the plaintiffs with standing.

The first injury alleged by the plaintiffs does not provide a basis for standing because it is readily apparent that the alleged injury is, in fact, no injury at all. There is no right that would grant to each generation of Alabamians the opportunity to vote on the then existing constitution any more than there is a right given to each generation of Americans to vote on the United States Constitution. Although there may be evidence indicating that the voting rights of some African-American voters in Alabama were infringed in connection with the ratification vote in 1901, we may safely conclude, based upon the passage of time, that none of those voters are presently before this Court. Accordingly, because none of the plaintiffs or members of the putative class had their *own* voting rights infringed in 1901, none of them have suffered a particularized injury that affects him or her "ii a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). See also *In re African-American Slave Descendants Litigation*, 471 F.3d 754, 759 (7th Cir. 2006) ("[T]he wrong to the ancestor is not a wrong to the descendants.").

The second injury the plaintiffs allege is the stigmatic and representational harms they claim to have suffered as a result of the perpetuation of the 1901 Constitution. In support of their argument that these injuries are sufficiently concrete and particularized to provide them with standing, the plaintiffs cite a series of decisions by the Supreme Court of the United States concerning gerrymandering and congressional redistricting in which these types of harms are discussed. *Shaw v. Reno*, 509 U.S. 630, 647-48, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993), is representative of these cases:

> "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. See, *e.g., Holland v. Illinois*, 493 U.S. 474, 484, n. 2, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990) ("[A] prosecutor's

assumption that a black juror may be presumed to be partial simply because he is black . . . violates the Equal Protection Clause' (internal quotation marks omitted)); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-631, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991) ("Our society is to continue to progress as a multiracial democracy, it **{50 So. 3d 1062}** must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."). By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

"The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."The State defendants appear to concede that, in certain circumstances, stigmatic and representational harms may be sufficient to support standing; however, they argue that those circumstances do not exist in the instant case because the plaintiffs are essentially arguing that they are being stigmatized as a result of certain African-American voters having been deprived of their equal-protection rights in 1901, not as a result of the plaintiffs themselves being deprived of those rights. Indeed, the State defendants argue, the plaintiffs cannot claim that they personally were deprived of their voting rights in 1901 because they were not voters at that time. We agree. In cases where stigma has been recognized as an injury for standing purposes, it is the plaintiff who has suffered discrimination or who has been denied equal protection. The Supreme Court of the United States articulated this principle in *Allen v. Wright*, 468 U.S. 737, 755, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984), when it stated:

"Neither do [the appellees] have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. See *Heckler v. Mathews*, 465 U.S. 728, 739-740, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984). *Our cases make clear, however, that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct, ibid.*"(Emphasis added.) The Supreme Court has discussed stigmatic harm on several occasions since *Allen*; however, as one author has noted, "[i]n the twenty-three years since it was decided, *Allen* has never been openly questioned by the Court." Thomas Healy, *Stigmatic Harm and Standing*, 92 Iowa L. Rev. 417, 431 (2007). Therefore, because the plaintiffs were not "personally denied equal treatment," they have not suffered the particularized injury that standing requires, and their action against the State defendants should, accordingly, be dismissed.

IV.

The plaintiffs sued the State defendants alleging that the State defendants had failed to ensure that the 1901 Constitution was ever properly ratified. The State defendants moved to dismiss the action, arguing, among other things, that the plaintiffs lacked standing to bring their claims. The trial court denied that motion; however, as discussed *supra*, the trial court erred by doing so because the State defendants have established a clear legal right to the relief they seek. The State defendants' petition for a writ of mandamus is accordingly granted, and the trial court is hereby directed to vacate its order denying the State defendants' motion to dismiss and to enter an order granting the motion and dismissing the action.

{50 So. 3d 1063} PETITION GRANTED; WRIT ISSUED.

Lyons, Woodall, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.

Cobb, C.J., concurs in the result.

Footnotes

1

The 12 black belt counties are not identified in the materials submitted to this Court.

2

The filing of a petition for the writ of mandamus does not divest the trial court of jurisdiction or stay the case. *State v. Webber*, 892 So. 2d 869, 871 (Ala. 2004).

3

Before the trial court, the State defendants also argued that the plaintiffs' complaint should be dismissed on several nonjurisdictional grounds as well. However, their petition to this Court raises only the previously made jurisdictional arguments.

4

The plaintiffs argue that this Court has applied the three-pronged standing test adopted in *Henri-Duval* on only limited occasions and has instead largely continued to use the simpler traditional test of "'whether the party has been injured in fact and whether the injury is to a *legally protected right*.'" *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025, 1027 (Ala. 1999) (quoting *Romer v. Board of County Comm'rs*, 956 P.2d 566, 581 (Colo. 1998) (Kourlis, J., dissenting)). See, e.g., *Ex parte Synovus Trust Co., N.A.*, [Ms. 1080100, December 30, 2009] 41 So. 3d 70, 2009 Ala. LEXIS 298 (Ala. 2009). Accordingly, the plaintiffs urge this Court to apply that traditional test in this case and to, in effect, not consider the latter two prongs of the test articulated in *Henri-Duval*.

However, although the plaintiffs are correct that, even *post-Henri-Duval*, this Court has sometimes addressed only the injury-in-fact prong of the three-pronged test articulated in *Henri-Duval*, we have clearly indicated on at least two occasions that the three-pronged test is the appropriate test for determining standing in Alabama. See *Muhammad v. Ford*, 986 So. 2d 1158, 1162 (Ala. 2007) (stating that, in *Henri-Duval*, "this Court adopted a more precise rule regarding standing"); and *Town of Cedar Bluff*, 904 So. 2d at 1256 ("In [*Henri-Duval*], this Court effectively restated the standard [for standing] . . ."). In *Ex parte Synovus Trust Co.* and other cases decided *post-Henri Duval* in which only the injury-in-fact prong of the test is addressed, it is generally because the only question at issue in those cases was whether the plaintiff had suffered a particularized injury in fact.

5

The State defendants argue that we should conduct our standing analysis based on the plaintiffs' original complaint as opposed to their amended complaint because, they argue, jurisdictional defects cannot be cured by amending the complaint. In support of their argument they cite *Cadle Co. v. Shabani*, 4 So. 3d 460, 463 (Ala. 2008), in which we stated that "[t]he jurisdictional defect resulting from the plaintiff's lack of standing cannot be cured by amending the complaint to add a party having standing " However, *Cadle* is inapposite here because the plaintiffs have not amended their complaint to add parties; rather they have amended it to subtract parties Importantly all the plaintiffs included in the amended complaint were included in the original complaint.

Ex parte Christopher Jacques Seymour (In re: Christopher Jacques Seymour v. State of Alabama)
SUPREME COURT OF ALABAMA
946 So. 2d 536; 2006 Ala. LEXIS 135
1050597
June 30, 2006, Released

Editorial Information: Subsequent History

As Corrected November 27, 2006. Released for Publication January 17, 2007.

Editorial Information: Prior History

Randolph Circuit Court, CC-02-72.60. Thomas F. Young, Jr. Petition for Writ of Cert. to the Court of Criminal Appeals, CR-04-1137). Seymour v. State, 946 So. 2d 535, 2005 Ala. Crim. App. LEXIS 229 (Ala. Crim. App., Nov. 23, 2005)

Disposition:

AFFIRMED.

Counsel For Petitioner: Christopher Jacques Seymour, pro se.

For Respondent: Troy King, atty. gen., and Kevin C. Newsom, deputy atty. gen., and Stephanie N. Morman, asst. atty. gen.

Judges: NABERS, Chief Justice. See, Lyons, Harwood, Stuart, Smith, Bolin, and Parker, JJ., concur. Woodall, J., dissents.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant, who had been convicted of second degree assault and of shooting into an occupied dwelling, filed a petition for postconviction relief pursuant to Ala. R. Crim. P. 32. The trial court denied the petition. The Alabama Court of Criminal Appeals affirmed the trial court's denial of appellant's Rule 32 petition. Appellant then filed a petition for writ of certiorari.Where appellant, who had been convicted of shooting into an occupied building, failed to raise his defective-indictment claim at trial or on direct appeal, his claim was barred by Ala. R. Crim. P. 32.2(a)(3) and (5). Therefore, the trial court properly denied appellant's petition for postconviction relief.

OVERVIEW: Appellant argued that in order for him to be convicted of shooting into an occupied dwelling, the State was required to prove that he acted with a culpable mental state. The indictment charging appellant with that offense failed to allege a culpable mental state. Appellant argued that this omission was a fatal jurisdictional error. The instant court concluded that the validity of appellant's indictment was irrelevant to whether the circuit court had jurisdiction over the subject matter of this case. The defect in the indictment did not divest the circuit court of the power to try the case. Because appellant failed to raise his defective-indictment claim at trial or on direct appeal, his claim was barred by Ala. R. Crim. P. 32.2(a)(3) and (5). Therefore, the trial court properly denied appellant's petition for postconviction relief.

OUTCOME: The appellate court's decision was affirmed.

Because jurisdictional power is derived from the Constitution & the Ala. Code. The code was comprised on the 1901 constitution. If the Constitution is invaild, the Statutes is invaild.

LexisNexis Headnotes

Criminal Law & Procedure > Postconviction Proceedings > General Overview

See Ala. R. Crim. P. 32.2(a).

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction
Criminal Law & Procedure > Postconviction Proceedings > General Overview

The exception under Ala. R. Crim. P. 32.1(b) is limited to claims that the trial court was without jurisdiction to render judgment or impose sentence.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction
Criminal Law & Procedure > Postconviction Proceedings > General Overview

The language "jurisdiction to render judgment or impose sentence" in Ala. R. Crim. P. 32.1(b) refers to the court's jurisdiction over the subject matter, as opposed to the person. Although a court must have both personal jurisdiction and subject-matter jurisdiction in an action, defects in personal jurisdiction are waived if they are not raised before trial.

Criminal Law & Procedure > Accusatory Instruments > Indictments
Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

A valid indictment is the source of the subject matter jurisdiction to try a contested criminal case.

Criminal Law & Procedure > Accusatory Instruments > Indictments
Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Failure to allege an essential element of the charged offense is a jurisdictional defect.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Jurisdiction is a court's power to decide a case or issue a decree. Subject-matter jurisdiction concerns a court's power to decide certain types of cases. That power is derived from the Alabama Constitution and the Alabama Code.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Under the Alabama Constitution, a circuit court shall exercise general jurisdiction in all cases except as may be otherwise provided by law. Ala. Const. amend. 328, § 6.04(b).

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

The Alabama Code provides that the circuit court shall have exclusive original jurisdiction of all felony prosecutions. Ala. Code § 12-11-30.

Criminal Law & Procedure > Criminal Offenses > Weapons > Use > General Overview

The offense of shooting into an occupied dwelling is a Class B felony. Ala. Code § 13A-11-61(b).

Criminal Law & Procedure > Accusatory Instruments > Indictments
Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Defects in an indictment do not deprive a court of its power to adjudicate a case. The objection that the indictment does not charge a crime goes only to the merits of the case.

Criminal Law & Procedure > Accusatory Instruments > Indictments
Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Subject matter jurisdiction of the circuit court and the sufficiency of the information or indictment are two distinct concepts. The blending of these concepts serves only to confuse the issue to be determined.

Criminal Law & Procedure > Accusatory Instruments > Indictments
Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

A defect in an indictment may be error, Ala. R. Crim. P. 15.2(d), or even constitutional error, Ala. Const., art. I, § 8, but the defect does not divest the circuit court of the power to try the case. A defendant who challenges a defective indictment is thus subject to the same preclusive bars as one who challenges any other nonjurisdictional error, such as an illegal seizure or a violation of the Confrontation Clause.

Criminal Law & Procedure > Accusatory Instruments > Indictments
Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

A circuit court has subject-matter jurisdiction over a felony prosecution, even if that prosecution is based on a defective indictment. To the extent that Ex parte Lewis, 811 So. 2d 485 (Ala. 2001), and Ash v. State, 843 So. 2d 213 (Ala. 2002), and other Alabama cases have held to the contrary, they are overruled.

Opinion

Opinion by: NABERS

Opinion

{946 So. 2d 536} PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS.

NABERS, Chief Justice.

The issue presented in this case is whether a conviction is void for lack of subject-matter jurisdiction because the indictment charging the offense omitted an element of the offense. We hold that it is not.

I.

On November 8, 2001, Christopher Jacques Seymour opened fire on a group of five men somewhere in Randolph County. One of the five, Kevin Turner, was shot in his leg below the knee. As Turner retreated into his house, the gunfire continued, and some of the bullets entered Turner's house. Turner's wife and three-year-old son were inside the house.

Seymour was convicted of second-degree assault, § 13A-6-21, Ala. Code 1975, and of shooting into an occupied dwelling, § 13A-11-61, Ala. Code 1975. The Court of Criminal Appeals affirmed those convictions on direct appeal, without an opinion. *Seymour v. State* 910 So. 2d 834 (Ala. Crim. App. 2004)(table).

{946 So. 2d 537} On January 3, 2005, Seymour filed a Rule 32, Ala. R. Crim. P., petition for postconviction relief. The trial court denied the petition. The Court of Criminal Appeals affirmed the trial court's denial of Seymour's Rule 32 petition in an unpublished memorandum; Judge Cobb dissented from the memorandum affirmance with an opinion. *Seymour v. State*, [No. CR-04-1137, November 23, 2005]946 So. 2d 535, 2005 Ala. Crim. App. LEXIS 229 (Ala. Crim. App. 2005). In her dissent, Judge Cobb wrote:

> "For the reasons I joined Judge Shaw's special writing in *Sullens v. State*, 878 So. 2d 1216 (Ala. Crim. App. 2003)(Shaw, J., concurring in part and dissenting in part), I cannot agree with the conclusion in the unpublished memorandum that the indictment in this case, which failed to allege a culpable mental state, was sufficient to charge the offense of shooting into an occupied dwelling, a violation of § 13A-11-61, Ala. Code 1975."We granted Seymour's petition for the writ of certiorari to determine whether the failure to allege a culpable mental state in the indictment charging Seymour with the offense of shooting into an occupied dwelling divested the trial court of jurisdiction over that offense. 1

II.

Seymour argues that in order for him to be convicted of shooting into an occupied dwelling, the State was required to prove that he acted with a culpable mental state. 2 The indictment charging Seymour with that offense failed to allege a culpable mental state. Seymour argues that this omission was a fatal jurisdictional error.

Our analysis begins with the grounds for preclusion of remedy in Rule 32.2, Ala. R. Crim. P. Seymour did not raise his defective-indictment claim at trial or on direct appeal. *See* Rule 32.2(a)(3) and (5), Ala. R. Crim. P. Rule 32.2 thus sharply limits the scope of our review.

> "A petitioner *will not be given relief* under this rule based upon any ground:
>
> ". . ..
>
> "(3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or
>
> ". . ..
>
> "(5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b)."Rule 32.2(a), Ala. R. Crim. P. (emphasis added). The exception under Rule 32.1(b) is limited to claims that "[t]he [trial] court was without jurisdiction to render judgment or impose sentence." 3

Seymour argues that his defective-indictment claim is jurisdictional and that it thus falls within the exception provided in Rule 32.2(a) for claims arising under Rule 32.1(b). Under current Alabama caselaw, he is correct. This Court has held that "[a] valid indictment is the source of the **{946 So. 2d 538}** subject matter jurisdiction to try a contested criminal case." *Ash v. State*, 843 So. 2d 213, 216 (Ala. 2002). Although *Ash* is a recent decision, similar language can be found in opinions dating back, in at least one case, more than a century. *Butler v. State*, 130 Ala. 127, 30 So. 338 (1901); *see also Kyser v. State*, 22 Ala. App. 431, 117 So. 157 (1928). Alabama law has not always been clear as to which defects will invalidate an indictment, but this Court has expressly held that "[f]ailure to allege an essential element of the charged offense is a jurisdictional defect . . .." *Ex parte Lewis*, 811 So. 2d 485, 487 (Ala. 2001). Under *Lewis*, Seymour presents a jurisdictional claim.

In response, the State challenges the statement in *Ash* that a valid indictment is the source of a trial

court's subject-matter jurisdiction. Instead, the State argues, a trial court derives its jurisdiction from the Alabama Constitution and the Alabama Code. We agree.

Jurisdiction is "[a] court's power to decide a case or issue a decree." *Black's Law Dictionary* 867 (8th ed. 2004). Subject-matter jurisdiction concerns a court's power to decide certain *types* of cases. *Wolff v. McGaugh* , 175 Ala. 299, 303, 57 So. 754, 755 (1911) ("'By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought.'" (quoting *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 316, 19 L. Ed. 931 (1870))). That power is derived from the Alabama Constitution and the Alabama Code. *See United States v. Cotton*, 535 U.S. 625, 630-31, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)(subject-matter jurisdiction refers to a court's "statutory or constitutional power" to adjudicate a case). In deciding whether Seymour's claim properly challenges the trial court's subject-matter jurisdiction, we ask only whether the trial court had the constitutional and statutory authority to try the offense with which Seymour was charged and as to which he has filed his petition for certiorari review.

Under the Alabama Constitution, a circuit court "shall exercise general jurisdiction in all cases except as may be otherwise provided by law." Amend. No. 328, § 6.04(b), Ala. Const. 1901. The Alabama Code provides that "[t]he circuit court shall have exclusive original jurisdiction of all felony prosecutions . . . ." § 12-11-30, Ala. Code 1975. The offense of shooting into an occupied dwelling is a Class B felony. § 13A-11-61(b), Ala. Code 1975. As a result, the State's prosecution of Seymour for that offense was within the circuit court's subject-matter jurisdiction, and a defect in the indictment could not divest the circuit court of its power to hear the case.

The United States Supreme Court has long held that "defects in an indictment do not deprive a court of its power to adjudicate a case." *Cotton*, 535 U.S. at 630. As Justice Holmes stated in *Lamar v. United States*, 240 U.S. 60, 64, 36 S. Ct. 255, 60 L. Ed. 526 (1916), "[t]he objection that the indictment does not charge a crime . . . goes only to the merits of the case."

A number of states agree. *See Sawyer v. State*, 327 Ark. 421, 938 S.W.2d 843 (1997); *Howell v. State*, 421 A.2d 892, 895 (Del. 1980); *Ford v. State*, 330 Md. 682, 625 A.2d 984 (1993); *Roth v. State*, 1986 OK CR 21, 714 P.2d 216 (Okla. Crim. App. 1986); *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *Studer v. State*, 799 S.W.2d 263 (Tex. Crim. App. 1990); *but see State v. Byington*, 135 Idaho 621, 21 P.3d 943 (2001). The Supreme Court of Missouri, addressing this precise issue, framed the issue succinctly: "Subject matter jurisdiction of the circuit court and the sufficiency of the information or indictment are two distinct concepts. The **{946 So. 2d 539}** blending of these concepts serves only to confuse the issue to be determined." *State v. Parkhurst*, 845 S.W.2d 31, 34-35 (Mo. 1992). We find this approach persuasive and consistent with both the Alabama Constitution and the Alabama Code.

The validity of Seymour's indictment is irrelevant to whether the circuit court had jurisdiction over the subject matter of this case. A defect in an indictment may be error, *see* Rule 15.2(d), Ala. R. Crim. P. -- or even constitutional error, *see* Ala. Const., Art. I, § 8 -- but the defect does not divest the circuit court of the power to try the case. A defendant who challenges a defective indictment is thus subject to the same preclusive bars as one who challenges any other nonjurisdictional error, such as an illegal seizure or a violation of the Confrontation Clause.

In this case, Seymour failed to raise his defective-indictment claim at trial or on direct appeal. As a result, his claim is barred by Rule 32.2(a)(3) and Rule 32.2(a)(5), Ala. R. Crim. P, and the trial court correctly denied relief. 4

III.

We hold that a circuit court has subject-matter jurisdiction over a felony prosecution, even if that prosecution is based on a defective indictment. To the extent that *Lewis*, *Ash*, and other Alabama

cases have held to the contrary, they are overruled. The decision of the Court of Criminal Appeals is affirmed.

AFFIRMED.

See, Lyons, Harwood, Stuart, Smith, Bolin, and Parker, JJ., concur.

Woodall, J., dissents.

Footnotes

1

Seymour does not challenge the Court of Criminal Appeals' judgment insofar as it affirmed his conviction for second-degree assault.

2

Alabama recognizes four culpable mental states: when a person acts intentionally, knowingly, recklessly, and with criminal negligence. § 13A-2-2, Ala. Code 1975.

3

The language "jurisdiction to render judgment or impose sentence" refers to the court's jurisdiction over the subject matter, as opposed to the person. Although a court must have both personal jurisdiction and subject-matter jurisdiction in an action, *Wolff v. McGaugh*, 175 Ala. 299, 303, 57 So. 754, 755 (1911), defects in personal jurisdiction are waived if they are not raised before trial. *City of Dothan v. Holloway*, 501 So. 2d 1136, 1139 (Ala. 1986). The Rule 32.1(b) exception applies only to claims alleging that the trial court lacked subject-matter jurisdiction.

4

Because Seymour's defective-indictment claim is precluded, we do not reach the merits of his argument that an indictment charging a violation of § 13A-11-61 must allege a culpable mental state, and we express no opinion as to the Court of Criminal Appeals' resolution of that issue.

OFFICIAL PROCEEDINGS

OF THE

CONSTITUTIONAL CONVENTION

OF THE

STATE OF ALABAMA

May 21st, 1901, To September 3rd, 1901.

JOHN B. KNOX, Esq., President.
FRANK N. JULIAN, Esq., Secretary.
PAT McGAULY, Esq., Official Stenographer.

Volume I

will give to them a sense of the responsibility resting upon them, and as they day by day meet for consultation and deliberation, may their minds and hearts, be so guided and controlled by Thy Holy Spirit as that the result of their labors will be of benefit to all the inhabitants and citizens of this State. We pray that Thou wilt restrain them from any unwise proceedings; that Thou wilt uphold them in all undertakings which are for the interest of the people, and that Thou wilt sustain all of their efforts to Thy name's honor and glory, and to Thee we shall give the praise, world without end. Amen."

The roll was here called.

CHIEF JUSTICE McCLELLAN—One hundred and fifty delegates have answered to their names. The business before the Convention this morning is the election of a temporary or permanent president as the Convention may desire.

MR. COLEMAN (Greene)—Mr. Chairman, as suggested by the Chair, I move that we proceed to a permanent organization at once, by the election of a permanent President of the Constitutional Convention of the State of Alabama; and I would put in nomination the name of the Honorable John B. Knox of Calhoun County.

Mr. Chairman, as there seems to be no opposition, I would move further that he be elected by acclamation, if I can secure a second.

MR. SANFORD (Montgomery)—I second the motion, Mr. Chairman.

CHIEF JUSTICE McCLELLAN—It is moved and seconded that the Convention proceed to the election of a permanent President, Mr. John B. Knox being put in nomination, the further motion is made that he be elected by acclamation.

The question was put and the Hon. John B. Knox was unanimously elected President of the Constitutional Convention.

THOMAS W. COLEMAN of Greene—Mr. Chairman, I move the appointment of a committee of three to notify Mr. Knox of his election.

The motion being duly seconded, was put and carried.

The Chairman appointed Hon. Thomas W. Coleman of Greene, Hon. William C. Oates of Montgomery, and Hon. Tennent Lomax of Montgomery to notify Mr. Knox of his election.

The committee escorted the newly-elected President to the Chair.

CHIEF JUSTICE McCLELLAN—Gentlemen of the Convention, I have the honor and pleasure of presenting to you the gentleman whom you have elected to preside over your deliberations, the Honorable John B. Knox of Calhoun County.

MR. KNOX—Gentlemen of the Convention:

I thank you for the high honor you have conferred in electing me to preside over the deliberations of this Convention. Viewed from the standpoint of my profession, to which, up to this moment, my life's work has been devoted, it is a great honor, indeed; for I know of no higher honor that can be conferred upon a lawyer than to be made President of the Constitutional Convention, which represents the sovereignty of his people; and numbers among its delegates, in large part, the intellect and talent of the State—those who have in the past, and will in the future exert a potent influence in shaping and directing the affairs of the State.

IMPORTANCE OF THE ISSUE

In my judgment, the people of Alabama have been called upon to face no more important situation than now confronts us, unless it be when they, in 1861, stirred by the momentous issue of impending conflict between the North and the South, were forced to decide whether they would remain in or withdraw from the Union.

Then, as now, the negro was the prominent factor in the issue.

The Southern people, with this grave problem of the races to deal with, are face to face with a new epoch in Constitution-making, the difficulties of which are great, but which, if solved wisely, may bring rest and peace and happiness. If otherwise, it may leave us and our posterity continuously involved in race conflict, or what may be worse, subjected permanently to the baneful influences of the political conditions now prevailing in the State.

So long as the negro remains in insignificant minority, and votes the Republican ticket, our friends in the North tolerate him with complacency, but there is not a Northern State, and I might go further and say, there is not an intelligent white man in the North, not gangrened by sectional prejudice and hatred of the South who would consent for a single day to submit to negro rule.

If the negroes of the South should move in such numbers to the State of Massachusetts, or any other Northern State, as would enable them to elect the officers, levy the taxes, and control the government and policy of that State, I doubt not they would be met, in spirit, as the negro laborers from the South were met at the State line of Illinois, with bayonets, led by a Republican Governor, and firmly but emphatically informed that no quarter would be shown them in that territory.

One has studied the history of recent events to very little purpose who has failed to discover that race prejudice exists at the

North in as pronounced a form as at the South, and that this question of negro domination, when brought home, will arouse the same opposition in either section.

And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.

This is our problem, and we should be permitted to deal with it, unobstructed by outside influences, with a sense of our responsibilities as citizens and our duty to posterity.

NORTHERN INTERFERENCE

Some of our Northern friends have ever exhibited an unwonted interest in our affairs. It was this interference on their part that provoked the most tremendous conflict of modern times; and there are not a few philanthopists in that section who are still uneasy lest we be permitted to govern ourselves and allowed to live up to the privileges of a free and sovereign people! Some of the same, in like missionary spirit, are greatly concerned about the condition of the Chinaman in China, but we do not find them appealing to Congress, or interfering with the local policy of California, a Northern State, for the protection of the Chinaman who is a resident there, or making any attempt to interfere with the right of that people to govern themselves, and to provide for a pure administration of government and for the protection of property.

If it is the negro who is the object of their solicitude, it would seem—not to speak of Africa itself—they would find an inviting field in Cuba and in our new acquisitions of Hawaii, Porto Rico and the Phillippines. The disinclination they exhibit to enter this field only serves to confirm the well-grounded conviction in this section, that the point of their interference is not so much to elevate the black man as it is to humiliate the white man with whom they have been in antagonism.

But we may congratulate ourselves that this sectional feeling which has served to impair the harmony of our common country, and to limit the power and retard the development of the greatest government on earth, is fast yielding to reason.

While we may and do differ from him politically, there is not an enlightened and patriotic Southern man who fails to see that much of this result is due to the honorable and statesman-like policy of the present Chief Executive of these United States, who, by the consideration he has shown our section in many ways, notably in the Spanish-American war, and by refusing to lend his approval to any movement looking to the reduction of our representation in Congress or in the Electoral College, has shown himself capable of being President of the whole country and not merely one section of it and has been enabled to present the spectacle of a re-united country, and contributed much to place our government in the very front rank with the nations of the world.

THE ATTITUDE OF THE SOUTHERN MAN TOWARDS THE NEGRO

The Southern man knows the negro, and the negro knows him. The only conflict which has, or is ever likely to arise, springs from the effort of ill-advised friends in the North to confer upon him without previous training or preparation, places of power and responsibility, for which he is wholly unfitted, either by capacity or experience.

When it comes, however, to dealing with the negro, in domestic service, or in a business way, the Southerner is infinitely more indulgent to him than his Northern compatriot.

There came to us a well authenticated story from Kentucky, of an old darkey, who, after the war, influenced by the delusion that the only friends the negro had were in the North, wandered up into Illinois, hoping to find an easy fortune. But here he soon found that while the people had much to say to him about the evils of slavery, and the destiny of his race, every one with whom he did business held him to a strict accountability. Trained, as he was, to the slow movement of the mule in the Southern cornfield and the cotton patch, he could not handle the complicated machinery, or keep pace with the quicker methods of farming in the West, and so he was soon cast adrift. When he asked for help he was told to go to work, and so he wandered, foot-sore and weary, back through Indiana and Ohio until he reached again the old Southern plantation in Kentucky. Finding the planter comfortably seated upon his veranda, the old darkey approached, hat in hand, and asked for something to eat.

"Why, you damned black rascal, what are you stopping here for? Go into the kitchen and tell the cook to give you something to eat."

"Before God, Master," the old darkey said, grinning from ear to ear, "them's the sweetest words I'se heard since I left old Dixie."

The old man was home at last. He was among people who understood him, and whom he understood.

WHITE SUPREMACY BY LAW

But if we would have white supremacy, we must establish it by law—not by force or fraud. If you teach your boy that it is right to buy a vote, it is an easy step for him to learn to use money to bribe or corrupt officials or trustees of any class. If you teach your boy that it is right to steal votes, it is an easy step for him to believe that it is right to steal whatever he may need or greatly desire. The results of such an influence will enter every branch of society, it will reach your bank cashiers, and affect positions of trust in every department; it will ultimately [illegible] courts, and affect the administ[illegible]

darkey - is a state of mind embodied by some yesterday sketch

confident that there is intelligence and ability enough here to settle this question to the satisfaction of our people. We have inaugurated the movement and we must succeed. It is not to be expected that a reform movement like this will meet with universal approval, but when your finished work is submitted, and you present, as I believe you will, a practical solution of the evil conditions under which we now live, it will be appreciated and accepted by our people.

AUTHORITY TO FUND THE STATE DEBT

There are other questions which might be considered, but to which I shall be able to give only a passing notice. In view of the fact that a large part of the State's bonded indebtedness will soon mature, it is important and necessary that some provision should be made for funding the indebtedness of the State. Very able lawyers have doubted if there be any authority in the State, under the present Constitution to fund the State's indebtedness. At the time of the adoption of the present Constitution the creation of debt on the part of the State, county and municipal authorities, had been abused to such an extent as to cause great alarm, and so the framers of the present Constitution, in their anxiety to curtail this evil, seem not to have provided as fully as might be for the payment or the funding of the State's indebtedness by the issuance of new bonds or obligations. The provision of the present Constitution on this subject is as follows:

"After the ratification of this Constitution, no new debts shall be created against or incurred by this State or its authority, except to repel invasion or suppress insurrection, and then only by a concurrence of two-thirds of the members of each House of the General Assembly, and the vote shall be taken by yeas and nays and entered on the journal; and any act creating or incurring any new debt against this State, except as herein provided for, shall be absolutely void; provided, the Governor may be authorized to negotiate temporary loans never to exceed $100,000, to meet deficiencies in the Treasury; and until the same is paid, no new loan shall be negotiated; provided, further, that this section shall not be construed as to prevent the issuance of bonds in adjustment of existing State indebtedness."

The power to settle the State's then existing indebtedness has been exercised under the debt settlement acts, and a doubt has been raised whether, under the restrictive terms of the present Constitution, there be any power to issue new bonds to pay or fund the debt at its maturity.

There can be no doubt but that the State debt, under present conditions, can be funded at a greatly reduced rate of interest, and at such a rate as will save the State largely more than the cost of the holding of this Convention.

MUNICIPAL AND COUNTY INDEBTEDNESS

Then again, there is the question of the authority of coun and municipal governments to create debts totally beyond t resources which must be looked to to provide payment. T framers of the present Constitution carefully stipulated a ma mum rate of taxation, but made no provision against the creatic of debt over and beyond the resources of the county or munic pality. Consequently, improvident and unscrupulous officers ha been able to impair the credit and fasten a load of debt upon citi and counties in different portions of the State, which has involve many of them in litigation and bankruptcy. Some just provisio should be incorporated, limiting the power to create debt beyon the reasonable ability of the county or municipality to pay.

EDUCATION

Then, again, there is the great question of education, which so vitally touches the interests of our people. I believe we should keep faithfully the pledges we have given not to increase taxation, but this should not deter us from making every effort to rid our State of the disgrace of its illiteracy. As Dr. Curry forcibly puts it, it will not do to say you are too poor to educate the people—you are too poor not to educate them.

Nothing has so retarded the rapid growth and development of our State as the absence of a well regulated system of public schools, so as to place within the reach of every child in the State, both rich and poor, the means of obtaining free of tuition fees, such instruction as will qualify him for the responsible duties of life.

The productive power of labor in Massachusetts is said to be nearly double that of the average for each inhabitant of the whole United States, and the reason assigned is the superior educational advantages she furnishes to her people.

You cannot expect skilled labor to enter our State, if by doing so their children are to be denied the means of a common school education. We must fight ignorance as we would fight malaria, for it is only by educating its people that a State can gain and maintain a proud position among the nations of the earth.

It has been urged in some quarters as a reason why this movement for a new Constitution should be defeated that we propose to adopt a suffrage plan which will offer to the negro an incentive to obtain an education, while the child of the white man will be without a like stimulus, because protected in his right to vote without regard to the density of his ignorance.

I do not understand that any delegate to the Convention is pledged to any such legislation. We are pledged, "not to deprive any white man of the right to vote," but this does not ex[tend] less this Convention chooses [to]

voters now living. It is a question worthy of careful consideration, whether we would be warranted in pursuing any course which would have a tendency to condemn any part of our population to a condition of perpetual illiteracy. Provisions of the Constitution prescribing educational qualifications for voters as they affect those who now have no right to vote but in the course of time will acquire the right are wisely intended to serve not as a curse, but as a noble stimulus to the acquirement of an education and to a proper preparation for meeting and discharging the duties of a citizen.

There is a strong reason why those who have fought the battles of the State—those who have been trained in the duties of citizenship, and possess character, judgment and intelligence which enables them to appreciate the responsibility it imposes, should not be denied the right to vote, even though they may lack the elements of an education, but it does not follow that it is to the interest of the State that the indulgence should be extended to the second generation—especially so when learning to read and write are within reach and so easy to obtain!

The States of Mississippi, South Carolina and Louisiana, in dealing with this great question, have rightfully considered that the betterment of facilities for securing an education for all the people was a necessary and essential part of any just and wise scheme for the regulation of the right of suffrage, and for the purification of the ballot.

There are other matters of importance I might refer to, but I have already continued much longer than was intended. Your work is before you. The responsibilities it imposes are great, but I do not doubt that you will discharge them with courage and with fidelity. In my judgment it is better, far better, to have accomplished something for the permanent and everlasting good of your people than to possess any honor which the State can confer.

Abou Ben Adhem awakened from a dream, found an angel, writing in a book of gold the name of those whom love of God has blessed. "And is mine there?" he asked. But the angel answered, "Nay." "I pray thee, then," he said, "write me as one who loves his fellow men." The angel wrote and vanished. The next night it came again, with a great awakening light, and showed the names whom love of God had blessed. And lo! Ben Adhem's name led all the rest."

THE PRESIDENT—The next business before the Convention will be the election of a Secretary.

MR. BROOKS—Mr. President, before proceedings to the election of a Secretary, I desire to submit a motion that the re- of the Chair be spread upon the minutes, or on the journal,

in order that they may find a permanent place among the record of this Convention.

The motion being seconded, was put by Mr. Brooks and unanimously carried.

MR. ROBINSON—The Enabling Act does not provide for the subordinate officers of the Convention; therefore there will have to be some resolution creating those officers of this Convention.

MR. BULGER—Mr. President, I desire to offer a resolution

The resolution was read by the Secretary:

Resolved, That the President appoint a committee, consisting of nine members, to be known and designated as a Committee on Rules, of which committee the President of the Convention shall be chairman.

MR. BULGER—I move the adoption of the resolution.

The motion was seconded.

MR. HEFLIN (Chambers)—I would like to amend that by saying two from each Congressional District. I do not think that two from each Congressional District will be too many, I move that as a substitute, or I would like to amend the motion with the gentleman's consent, so as to read that two shall be appointed from each Congressional District instead of one.

MR. O'NEAL (Lauderdale)—I desire to offer a substitute resolution.

MR. LOMAX—I rise to a point of order. I submit that this Convention should complete its permanent organization before it proceeds to the consideration of any resolutions whatsoever.

THE PRESIDENT—In the opinion of the Chair the point of order is well taken.

MR. WEAKLEY—I desire to nominate for Secretary of this Convention Mr. Frank N. Julian of Colbert.

THE PRESIDENT—Mr. Colbert's Name is placed in nomination.

MR. deGRAFFENREID—I rise to a point of order. The act does not provide for a secretary. It says secretary or clerk and I think that any nomination for any office will be out of order until this Convention determines what subordinate officers it shall have.

MR. ASHCRAFT—I desire to offer a resolution.

The resolution was read by the Secretary:

Ex Parte Birmingham & Atlantic Ry. Co.
SUPREME COURT OF ALABAMA
145 Ala. 514; 42 So. 118; 1905 Ala. LEXIS 183

[NO NUMBER IN ORIGINAL]
April 28, 1905, Decided

Editorial Information: Prior History

Original writ in Supreme Court.

Prohibition, on behalf of the Birmingham & Atlantic Railway Company, to restrain Hon. John Pelham, individually and as judge of the seventh judicial circuit, from hearing and determining a cause pending in the circuit court of St. Clair county, wherein one Spears was plaintiff and petitioner was defendant. The allegations are that Spears brought suit against the petitioner at Pell City, in St. Clair county, in the circuit court, that the same was set down for hearing on a certain day, and that witnesses had been summoned, etc.; that petitioner had protested to the said judge of the seventh judicial circuit against said cause being set down for trial, and had requested him to notify his clerk at Pell City to remove said cause from the docket and not to summon witnesses, etc. Petitioner avers that Pelham claims to have authority to hold said court at Pell City and to try said cause, and that, unless restrained from doing so, he would proceed and try the same. It is alleged that he claims his authority under and by virtue of ordinance No. 390, passed by the constitutional convention of the state of Alabama, Const. 1901, and by virtue of an act of the Legislature approved February 17, 1903 (Loc. Acts 1903, pp. 29-32, inclusive), and under and by virtue of the authority of an act approved October 6, 1903 (Loc. Acts 1903. p. 539). It is averred that such judge has no other authority, and claims no other authority, than that conferred by said ordinance and said acts as above set out. It is also averred that said ordinance does not confer any authority or warrant of law upon the said judge to hold said term of court at such time and place, for the following separate and several reasons: (a) Said constitutional convention, in the call thereof made by the Legislature, was required to submit all of its acts to the people of the state of Alabama for ratification, and petitioner avers that said ordinance was never submitted to the people of Alabama for their ratification, and that on such account the same has never become operative and is of no force. (b) Said constitutional convention, in attempting to pass such ordinance, was legislating in regard to local matters, and said convention had no authority to enact such local legislation, and on this account said ordinance is void and of no effect. (c) Said ordinance was passed by the said constitutional convention of 1901, but was not included in such constitution as submitted to and ratified by the people. (d) Said ordinance is not included in, nor is it a portion of, the constitution of 1901. For which separate and several reasons said ordinance is unconstitutional and void, and does not confer the authority sought to be exercised by the said Hon. John Pelham, or any other judge, to hold such court at such a legal time and place. It is further averred that if said ordinance No. 390 is valid and of full force and effect, which petitioner denies, the said Pelham is without authority or warrant of law to hold said court at such a legal time and place, in that no provision has ever been made for carrying such ordinance into effect and providing for holding courts at Pell City, Ala., except that certain act of the Legislature contained in Loc. Acts 1903, p. 28. It is averred that said act of the Legislature is unconstitutional and void for the following reasons: (a) It is unconstitutional and without warrant of law. (b) It is unconstitutional, in that it is a local act as defined by section 110 of the constitution of Alabama of 1901, and no notice of the intention to apply for such local legislation was published in the county where the matter or thing to be affected was situated, giving the substance of the

proposed law, and no proof thereof by affidavit was given that said notice was made and exhibited in the houses of the Legislature and spread on the journals of both of such houses. Other allegations of a similar nature are made. It is further averred that to the certain other act of the Legislature above referred to (Loc. Acts 1903, p. 539) is unconstitutional for similar reasons. Respondent answered, admitting the truth of some of the allegations, but denying that ordinance No. 390 was void and of no effect, and also denying the unconstitutionality of the act referred to in the petition. The ordinance is made an exhibit to the petition and will be found in the journal of the proceedings of the constitutional convention of 1901. It is admitted that this ordinance was not submitted to and ratified by the people of the state of Alabama at the election held for the purpose of ratifying the constitution adopted by the constitutional convention of 1901. The other facts sufficiently appear in the opinion.

Disposition:

Relief sought granted and writ made peremptory.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner railroad sought a writ of prohibition to restrain respondent judge of the seventh judicial circuit from hearing and determining an action in the circuit court of St. Clair County that was pending against the railroad because Local Ordinance No. 390 was unconstitutional.An ordinance and act that established a courthouse at a particular location was void because the constitutional convention did not comply with the pre-passage notification and ratification procedures, and a writ of prohibition was warranted.

OVERVIEW: The railroad claimed that Ordinance No. 390 of the constitutional convention, providing for an additional courthouse in certain counties, and 1903 Local Acts pp. 28 and 539, were unconstitutional because they were not presented to the people of Alabama for ratification. The court agreed, finding that (1) Ordinance No. 390, which located the additional courthouse at Pell City, was void because it was not properly ratified; (2) 1903 Ala. Acts p. 28, which carried out the provisions of Ordinance No. 390, being local and not confined solely to setting the time for hearing cases, was repugnant to Ala. Const. of 1901, § 106 because the voters were entitled to notice that the constitutional convention was considering passage of the ordinance; (3) 1903 Ala. Acts p. 539 was valid because it was expressly excluded from the pre-passage notice provisions of Ala. Const. of 1901, § 106; and (4) because the ordinance and act establishing the courthouse at Pell City were void, 1903 Ala. Acts p. 539 was inoperative, so far as it provided the time for holding court at that place, but to all other intents and purposes was valid and binding.

OUTCOME: The court granted a peremptory writ of prohibition.

LexisNexis Headnotes

Governments > Legislation > Initiative & Referendum
Governments > State & Territorial Governments > Employees & Officials

The people's ratification of an unauthorized act of delegates to a constitutional convention renders the act valid and binding.

Governments > Legislation > Initiative & Referendum
Governments > State & Territorial Governments > Employees & Officials
Governments > State & Territorial Governments > Elections

• When a convention is called to frame a constitution which is to be submitted to a popular vote for adoption, it cannot pass ordinances and give them validity without submitting them to the people for ratification as a part of the constitution. The delegates to such a convention are but agents of the people, and are restricted to the exercise of the powers conferred upon them by the law that authorizes their election and assemblage.

Headnotes

Prohibition to Restrain the Judge of the 7th Judicial Circuit from Hearing and Determining a Cause at Pell City, Ala.

• 1. *Constitutional Law; Constitutional convention; Powers; Passage of Ordinance.*--The Constitutional Convention assembled by virtue of the act convening the same (Acts 1900-01, p. 224) had no authority to enact an ordinance providing for an additional courthouse in certain counties.

• 2. *Constitutional Law; Ratification.*--Although the Constitutional Convention was without authority to enact an ordinance providing for courthouses in certain counties, yet if such ordinance be ratified by a vote of the people, it may become valid.

3. *Same Submission to Vote.*--The act providing for the holding of the Constitutional Convention also provided for an election by the people for the purpose of ratifying or rejecting the constitution promulgated by said convention. The constitutional convention also provided that the instrument promulgated by it should be submitted to the electors for ratification or rejection. The constitution was submitted to a vote of the people for ratification or rejection, but the ordinance providing a court house at Pell City, in St. Clair county, Ala., was not included in the submission and was not voted upon by the people. Held, the vote for the ratification of the constitution by the electors was not a ratification of the ordinance.

4. *Statutes; Local Laws; Notice.*--Under § 106, Constitution of 1901, the Acts providing for an additional court house in the counties of St. Clair and Shelby being local laws, are invalid because notice of intention to apply for the passage of said acts was not given as required by said section.

5. *Statutes; Terms of Court.*--A local law fixing the time of holding courts in the county is not rendered invalid through want of notice of intention to apply therefor under the express provision of § 106, Constitution 1901.

Counsel

KNOX, DIXON & BURR, for petition.--A writ of prohibition is proper remedy where a judge is holding court established by a void and unconstitutional law.--Ex parte Roundtree, 51 Ala. 42; Lancaster v. Gafford, 139 Ala. 373; Ex parte Branch, 63 Ala. 383; Enc. of P. & P. Vol. 16, page 1122.

When the act from which a constitutional convention derives its powers provides for the submission of the convention's work to the people, it must be so submitted and only becomes operative upon the approval of the electors.--6th Am. & Eng. Enc. of Law, 2d. Ed. pp. 896-898; Jameson on Constitutional Conventions, pages 425, 426, 414, 424, 493, 98; Cooley's Constitutional Limitation, 7 Ed. pg. 61; McDanield's case, 2d. Hill (S. C.) page 2701; Quinlan v. Houston, 34 SW. Reports 738; Wells v. Bain, 15 Am. Reports,

563; Wood's Appeal, 75 Pa. St. 59; Goodrich v. Moore, 72 Am. Decision, pg. 78 (note); 8 Cyc., page 723.

A constitutional convention has no authority to enact and pass local legislation.--Plowman v. Thornton, 52 Ala. 569; Authorities supra.

The provisions of the ordinance passed by the constitutional convention requiring the Legislature to enact certain laws is directory only--not mandatory.--Ex parte State, 52 Ala. 237; Cooley's Constitutional Limitations (7th Ed.) 119; 6th Am. & Eng. Enc. of Law, (2d Ed.) p. 917.

INZER & MONTGOMERY, M. M. SMITH, and MCLANE TILTON, JR., for respondent. CABANISS & WEAKLEY associated on rehearing.--The power of a constitutional convention to legislate is well established. The constitutional convention of 1865 passed many ordinances legislative in their character similar to the one under consideration, and its authority to do so was upheld in the following cases.--Dorman v. The State, 34 Ala. 216; Tarlton v. Southern Bank, 41 Ala. 722; Kirkland v. Moulton, 41 Ala. 548; Scheible v. Banco, 41 Ala. 423; Washington v. Washington, 69 Ala. 281, which in effect overrules the dictum in Plowman v. Thornton, 52 Ala. 559; Ferdinand v. The State, 39 Ala. 706; Jeffries v. The State, 39 Ala. 655; Aaron v. The State, 39 Ala. 648. The constitutional convention of 1867 adopted ordinances similar to the one under consideration, legislative in their character and these ordinances have been upheld.--Jones v. Jones, 95 Ala. 443; Crane v. McGinnis, 19 Am. Dec. 237; Powell v. Boone, 43 Ala. 459; McElwain v. Mudd, 44 Ala. 48; Ex parte Hall, 47 Ala. 675; Crump v. Battle, 49 Ala. 233; Balkrum v. Satcher, 51 Ala. 81; Watson v. Stone, 52 Ala. 150; Pearce v. Pope, 42 Ala. 319. Other cases in which the legislative ordinances of 1867 were cited, construed and applied are the following.--Stikes v. Swanson, 44 Ala. 655; Bibb v. County Commissioners, 44 Ala. 119; Coleman v. Hodges, 44 Ala. 124; Roach v. Gunter, 44 Ala. 209; Hale v. Huston, 44 Ala. 135; Lawson v. Miller, 44 Ala. 617 (p. 626); Ex parte Norton, 44 Ala. 177 (pp. 186-7); Moseley v. Tuthill, 45 Ala. 621 (p. 655); Griffin v. Ryland, 45 Ala. 688.

The act calling the constitutional convention, did not require this ordinance to be submitted to the people. This question is no longer a judicial one. The legislature has recognized its binding force in the several local laws passed to effectuate and put in operation the provisions of this ordinance.--Taylor v. Commonwealth, (Va.), 44 S E. 754; Secomb v. Kettelson, 29 Minn. 55; State v. Piper, 17 Neb. 614; Miller v. Johnson, 92 Ky. 589; Wood's Appeal, 75 Pa. St. 59.

Judges: ANDERSON, J. MCCLELLAN, C. J., and HARALSON, SIMPSON, and DENSON, JJ., concur. TYSON and DOWDELL, JJ., dissent.

Opinion

Opinion by: ANDERSON

Opinion

{145 Ala. 519} {42 So. 119} ANDERSON, J.--The issue in this case involves the validity of Ordinance No. 390 of the constitutional convention, providing for an additional court house in the counties of St. Clair and Shelby, respectively, as well as Local Acts 1903, pp. 28 and 539. The constitutional convention assembled under and by virtue of the act of the Legislature of 1901 (Acts 1900-01, p. 224)

entitled "An act to provide for the holding of a convention, to revise and amend the Constitution of the State." Section 22 of said act provides for the holding of an election for the ratification or rejection of the Constitutional. The ordinance in question pertains is no way to an amendment or revision of the Constitution, and it was beyond the power of the convention to pass this ordinance, and it could not become binding or of legal force without having been submitted to and ratified by the people.-- *Plowman v. Thornton*, 52 Ala. 559; 6 Am. & Eng. Ency. Law (2d Ed.) pp. 896-898; Jameson on Constitutional Conventions, pp. 98, 414, 424, 426 and 493; Cooley's Constitutional Limitations (7th Ed.) p. 61; *McDaniel's Case*, 2 Hill Law (S. C.) 270; *Quinlan v. Houston*, (Tex. Sup.) 34 S.W. 738; *Wells v. Bain*, 15 Am. Rep. 563; Woods's Appeal, 75 Pa. 59; *Goodrich v. Moore*, (Minn.) 72 Am. Dec. 78; 8 Cyc. p. 723, note.

Jameson, in his work on Constitutional Convention, says: "Now, in the light of these principles, is the exercise by a convention of legislative or other governmental powers, in addition to those clearly belonging to it, to be considered as within its competence as a constitutional body? Is such an assumption of power one which threatens no danger to the commonwealth? By the theory of those who accord to its such powers, as soon as the convention is assembled, the control of the existing government over it is at an end; the Constitution lies torn in fragments under its feet; and, while the work of its instauration is in progress, that body alone constitutes the state, gathered into its single hands the reins ordinarily held by the four great systems of agencies constituting the government, to whose functions it succeeds. If this be so, what, but its own sense of justice, is to restrain such a body from running riot, as did the Thirty Tyrants at Athens? The jurists of the Illinois **{145 Ala. 520}** convention of 1862, as we have seen, affirmed that the act under which such a body assembles is no longer binding when once it has become organized. If at that moment it has also cast upon it, by virtue of its great commission, all governmental powers, how easy to extend the scope and the period of the exercise of those powers, under the plea that expediency demands it. The expedient is the appropriate domain of a Legislature. If, at the moment of organizing, a convention is endowed with legislative powers, it may be deemed expedient to subvert the system of guaranties by which our liberties are assured to us, and at the same time to withhold from the popular vote the constitutional provisions by which the change is to be effected. Such a consummation would be not merely possible. It would be probable. And, clearly, the possibility of its occurring with an appearance of rightfulness is enough to stamp as dangerous that theory of conventional powers from which it must flow. In the science of politics, **{42 So. 120}** it is an important point gained to have settled the limit where normal action under the Constitution ends, and revolution begins. To have done that is practically, in most cases, to have rendered revolution impossible. The result is that a convention cannot assume legislative powers. The safety of the people, which is the supreme law, forbids it. Even if we suppose the body expressly empowered by the Legislature to exercise such powers, the right so to do must be denied, because the same supreme law places an absolute interdict on such a grant. It is beyond the power of a Legislature to delegate any such authority."

We quote from the Supreme Court of Pennsylvania (*Woods's Appeal*, 75 Pa. 59): "There is no subject more momentous or deeply interesting to the people of this state than an assumption of absolute power by their servants. The claim of a mere body of deputies to exercise all their sovereignty, absolutely, instantly, and without ratification, is so full of peril to a free people, living under their own instituted government and a well matured Bill of Rights, the bulwark and security of their liberties, that they will pause before they will allow the **{145 Ala. 521}** claim, and inquire how they delegated this fearful power and how they are thus absolutely bound and can be controlled by persons appointed to a special service. Struck by the dangers, and prompted by self-interest, they will at once

distinguish between their own rights and the powers they commit to others. These rights it is the judiciary is called on to maintain. The very rights of the people and freedom itself demand, therefore, that no such absolute power shall be imputed to the mere delegates of the people to perform the special service of amendment, unless it is clearly expressed, or as clearly implied, in the manner shown by the people to communicate their authority. A convention has no inherent rights. It exercises powers only. Delegated power defines itself. To be delegated, it must come in some adopted manner to convey it by some defined means. This adopted manner, therefore, becomes the measure of the power conferred. The right of the people is absolute, in the language of the Bill of Rights, to alter, reform or abolish their government in such manner as they may think proper.' This right being theirs, they may impart as much or as little of it as they shall deem expedient. It is only when they exercise this right, and not before, they determine by the mode they choose to adopt the extent of the powers they intend to delegate. Hence the argument which imputes sovereignty to a convention, because of the reservation in the Bill of Rights, is utterly illogical and unsound. The Bill of Rights is a reservation of rights out of the general powers of government to themselves, but is no delegation of powers to a convention. It defines no manner or mode in which the people shall proceed to exercise their rights, but leaves that to their after choice. Until then it is unknown how they will proceed, or what powers they will confer on their delegates. Hence, we must look beyond the bill of rights, to the mode adopted by the people, to find the extent of the power they intend to delegate. These modes were stated and discussed in the opinion of *Wells, et al. v. Bain, et al., supra*. If by a mere determination of the people to call a convention, whether it be by vote or otherwise, the entire sovereignty **{145 Ala. 522}** of the people passes *ipso facto* into a body of deputies or attorneys, so that these deputies can, without ratification, alter a government and abolish its Bill of Rights at pleasure, and impose at will a new government upon the people, without restraints upon the governing power, no true liberty remains. Then the servants sit above their masters by the merest imputation, and a people's welfare must always rest upon the transient circumstances of the hour, which produce the convention and the accidental character of the majority which controls it. Such a doctrine, however suited to revolutionary times, when new governments must be formed as best the people can, is wholly unfitted when applied to a state of peace and to an existing government instituted by the people themselves and guarded by a well matured Bill of Rights. The people have the same right to limit the powers of their delegates that they have to bound the power of their representatives. Each are representatives, but only in a different sphere. It is simply evasive to affirm that the Legislature cannot limit the rights of the people to alter or reform their government. Certainly it cannot. The question is not upon the power of the Legislature to restrain the people, but the right of the people, by the instrumentality of the law, to limit their delegates. Law is the highest form of a people's will in a state of peaceful government. When the people act through a law, the act is theirs; and the fact that they used the Legislature as their instrument to confer the powers makes them the superiors, and not the Legislature. The idea which lies at the root of the policy that a convention cannot be controlled by law is that the convention and the people are identical. But, when the question is to be determined between the people and the convention, the fallacy is obvious. Such a metonymy may do for a flourish of rhetoric, but not for grave argument. The parties to the question are the people on the one hand and the convention on the other. The people allege a usurpation of power in this: That the convention seeks to bind them without their ratification. The question then is, what power was conferred? The judiciary sits to decide between them. The **{145 Ala. 523}** people having challenged their power to set a government over them at will, the agents must show their authority to do this. The latter put in evidence the act of 1871 as their**{42 So. 121}** authority. Then the issue is, does the act of 1871, simply ordering a convention to be called, confer this absolute, extraordinary, and dangerous power upon a body of men not yet called into being, and which

can have neither being nor power except by the further act of the people through the instrumentality of a law? To make the law odious, it is assumed that the Legislature is or may be corrupt. But this is aside from the true question of power. In a governmental and proper sense, law is the highest act of a people's sovereignty, while their government and Constitution remain unchanged. It is the supreme will of the people, expressed in the forms and by the authority of their Constitution. It is their own appointed mode through which they govern themselves and by which they bind themselves. So long as their form of government is unchanged in its grant of all legislative powers, these laws are supreme over all subjects unforbidden by the instrument itself. The calling of a convention and regulating its action by law is not forbidden in the Constitution. It is a conceded manner through which the people exercise the rights reserved in the Bill of Rights. It falls, therefore, within the protection of the Bill of Rights as a very manner in which the people may proceed to amend their Constitution and delegate the only powers they intend to confer, and as the very means whereby they may, by limitation, defend themselves against those who are called in to exercise the powers. The Legislature may not confer powers by law inconsistent with the rights, safety, and liberties of the people, because no consent to do this can be implied; but they may pass limitations in favor of the essential rights, safety, and liberties of the people, because consent to do this can be implied; but they may pass limitations in favor of the essential rights of the people. The right of the people to restrain their delegates by law cannot be denied, unless the power to call **{145 Ala. 524}** a convention by law and the right of self-protection be also denied. It is, therefore, the right of the people, and not the Legislature, to be put by law above the convention, and to require the delegates to submit their work for ratification or disapproval. To argue a want of authority in the law from the alleged character of those who passed it is bad logic and an undeserved reproach, in view of the subsequent act of 1872, which opened a wide door to men of all parties and filled the convention with the best men in the State. When it is conceded that a convention can be called and organized by law, the number or the qualifications of the delegates prescribed, their districts defined, their mode of selection or appointment determined, their time and place of meeting fixed, and their compensation declared by law, the binding force of law must be conceded. The convention was a creation of law, and its members the offspring of law--by the mere force of law,--without a popular election. How, then, can the power of law be denied? Without it, no delegates had existed, and no power had been transmitted to them. It is a solecism and a fallacy to assert that a law has the power to transmit the authority of the people, and yet it is a nullity in the terms of its transmission. If the authority of the people passes to the convention outside of the law, the people are left without the means of self-protection, except by revolution. Then the singular spectacle is presented of the absolute sovereignty of the people being vested in a body of agents without any known means of transmission or limitation. But, clearly, this cannot be when the fundamental rights of the people are at stake. To estop them from their right to accept or reject the work of the convention, there must be an evident channel pointed out through which their power passed to the convention to ordain at pleasure a Constitution or binding ordinance. The force of the argument cannot be avoided by reference to the well-known purity of character of the delegates. The personnel of the convention has nothing to do with the question of delegated power. It may help to suppress an inquiry into the power; but, however presently popular the doctrine of self-imputed **{145 Ala. 525}** sovereignty may be to those whose integrity forbids intentional wrong, as a question of power the doctrine is unfounded in principle, repugnant to right reason, incompatible with safety, dangerous to liberty and unsuited to times of agitation and excitement which sometimes overcome the people. No argument for the implied power of absolute sovereignty in a convention can be drawn from revolutionary times, when necessity begets a new government. Governments thus accepted and ratified by silent submission afford no precedents for the power of a convention in time of profound

tranquility and for a people living under self-established safe institutions. Then, looking at the body to which this power may be imputed: The number may be any designated in the law--133, 33, or 3 times 3. The delegates may not be chosen by the whole people as under the act of 1872. On what principle of sound mind or logical deduction does such a body possess, by mere imputation, all the powers of the people not conferred on them by law? They possess them by no act of the people independently of law. And certainly there is no popular afflatus outside of the law to breathe into them the spirit of prophecy in the name of the people. In conclusion, we find nothing in the Bill or Rights, in the vote under the act of 1871, or the authority conferred in the act of 1872, nothing in the nature of delegated power, or in the constitution of the convention itself, which can justify an assumption that a convention, so called, constituted, organized, and limited, **{42 So. 122}** can take from the people their sovereign right to ratify or reject a Constitution or ordinance framed by it, or can infuse present life and vigor into its work before its adoption by the people."

In *McDaniel's Case*, 2 Hill Law, 270, the Supreme Court of South Carolina said: "The sole difficulty seems to me to have arisen from confounding together the authority attributed by the convention to the people, and with that of the convention. Certainly the convention was not the people for any other purpose than that for which the people elected and delegated them. An argument was **{145 Ala. 526}** drawn from the supposed absurdity of the Legislature, an inferior authority, putting limits to the power of its superior and creator. But I think it is not a correct stating of the question. The question is the authority of the convention. An ordinance is produced to us passed by a certain number of individuals assembled at Columbia. This gives it no authority as an act of the people. But we are told they were elected by the people. This, however, is not enough. To what purpose were they elected by the people? To represent their sovereignty. But was it to represent their sovereignty to every purpose, or was it for some specific purpose? To this no other answer can be given than the act of the Legislature under which the convention was assembled. Certainly the people may, if they will, elect delegates for a particular purpose, without conferring on them all their authority. To deny this would be to detract from the power of the people, and to impose on them a most inconvenient and dangerous disability. If, before the adoption of the present Constitution, the people, electing delegates in their primary capacity, had, by a majority of their ballots, specified a particular measure to be considered and decided in the convention, will it be pretended that the convention would have possessed authority for any other purpose? But the Legislature, in passing the act for calling together the convention, were not acting in their legislative capacity. The act has no relation to general powers of legislation. They were the agent of the people for this particular purpose, and instructed by the convention to speak their voice. But, suppose there had been no such provision in the Constitution, and the Legislature had passed an act recommending to the people to meet in convention for a specific purpose, and in its pursuance of the recommendation the people had elected delegates accordingly, what right or reason would I have to conclude that the people intended to intrust this convention with their authority for any other than the purpose specified? This would be plain usurpation of the power of the people."

Judge Cooley, in his work on Constitutional Limitations (7th Ed., p. 61, § 4), says: "In accordance with **{145 Ala. 527}** universal practice, and from the very necessity of the case, amendments to an existing Constitution, or entire revision of it, must be prepared and matured by some body of representatives chosen for the purpose. It is obviously impossible for the whole people to meet, prepare, and discuss the proposed alterations, and there seems to be no feasible mode by which an expression of their will can be obtained, except by asking it upon the single point of assent or disapproval. But no body of representatives, unless specially clothed with power for that purpose by the people when choosing them, can rightfully make definite action upon amendments or revisions. They must submit the result

of their deliberations to the people--who alone are law--for ratification or rejection. The constitutional convention is the representative of sovereignty only in a very qualified sense, and for the specific purpose and with the restricted authority to put in proper form the questions of amendment upon which the people are to pass; but the changes in the fundamental law of the state must be enacted by the people themselves."

The supreme court judges of Massachusetts, in 6 Cush. 574, 575, in discussing this question, said: "Upon the first question, considering that the constitution has vested no authority in the Legislature, in its ordinary action, to provide by law for the submitting to the people the expediency of calling a convention of delegates for the purpose of revising or altering the constitution of the commonwealth, it is difficult to give an opinion upon the question, what would be the power of such a convention, if called? If, however, the people should, by the terms of their votes, decide to call a convention of delegates to consider the expediency of altering the constitution in some particular part thereof, we are of opinion that such delegates would derive their whole authority and commission from such vote; and upon the general principles governing the delegation of power and authority they would have no right, under such vote, to act upon and propose amendments in other parts of the constitution not so specified."

{145 Ala. 528} The supreme court of Arkansas in *Bragg v. Tuffts*, 49 Ark. 554, 561, 6 S.W. 158, said: "The first question that suggests itself is, what right had the convention--a body consisting of but a single chamber--to enter upon the domain of general legislation? For the raising of revenue, the providing of ways and means to meet the expenses of administering the government, and the prescribing of the funds in which taxes are to be paid, are legislative functions, not of a fundamental character. But by the constitution of 1836, and by all other constitutions that have ever been in force in this state, the legislative power has been confided to a General Assembly, consisting of a senate and house of representatives. The Governor also has always had a voice in legislation--a limited power of vetoing measures which did**{42 So. 123}** not meet with his approval. Now a convention called, for instance, to frame a new constitution, has no inherent right to legislate about matters of detail. All of the powers that it possesses are such as have been delegated to it, either by express grant or necessary implication. The passage of an ordinance, then, to raise revenue, was an assumption of power by the convention that was never ratified by the people of the state; for it is a noteworthy fact that the convention of 1861 never submitted any of its work to the test of a popular vote--neither its ordinance of secession, nor the constitution which it promulgated on the 1st of June, 1861"--citing the *Wood case, supra*, and Jameson on Constitutional Conventions, p. 419.

It is contended that, if the adoption of the ordinance was beyond the authority of the convention, it is nevertheless valid and binding, because the constitution was submitted to and was ratified by the people. The authorities are almost uniform that the ratification of an unauthorized act by the people (and the people are the principal in this instance) renders the act valid and binding. We cannot assume, however, that this ordinance has been ratified. It is true the convention provided that the ordinance should become a law only upon a ratification of the constitution, and that the constitution was ratified. But can it be contended that such a **{145 Ala. 529}** condition secured a ratification of the ordinance, simply because the constitution was submitted and ratified, and which did not contain the ordinance, nor was it annexed thereto? The act formulating a call of the convention, and which was voted on by the people, provided only for "amending and revising" the constitution, and section 22 also required that the instrument framed should be submitted to the people for ratification or rejection. The people, therefore, in voting for the holding of a convention, not only limited the powers of the convention to the amendment and revision of the constitution of 1875, but required that its action be

submitted back to them. The convention, realizing the requirements placed thereon by the powers calling it into existence, provided by paragraph 4 of section 287 that the constitution be submitted to the electors of the state for ratification or rejection, but no provision was made for a submission of the ordinance in question. Paragraph 5 of section 287 directed the Governor to take such steps as would give general publicity and circulation to the constitution prior to the election for ratification or rejection. The governor, pursuant to said direction, had printed in pamphlet form and circulated all over the state the constitution, but which failed to contain the ordinance in question. The governor also issued a proclamation appointing the day for the holding of an election for the adoption or ratification of the constitution, and nothing was said in the proclamation as to the ordinance. Every step that was taken, either by the convention or the governor, relating to the election for ratification, had reference only to the constitution, and not to ordinances that had been adopted by the convention. Nothing whatever was done to put the electors of Alabama on notice that they were to vote for the ratification of anything but the constitution as framed and as contained in the pamphlets that were put in circulation. We cannot hold that this ordinance has ever been ratified.

We have examined the authorities relied upon by counsel for the respondent, but find them no great impediment in reaching the foregoing conclusion, which is fortified by a great weight of authority. What was said as **{145 Ala. 530}** to the validity of the ordinance was dictum in the case of *Ex parte Hall*, 47 Ala. 675. The Illinois case did not decide this point, but the ordinance fell because the public failed to ratify the constitution. In the case of *State v. Keith*, 63 N.C. 140, this point was not touched, as the ordinance fell because it was *ex post facto*. In the case of *State v. Neal*, 42 Mo. 119, what was said was dictum as to this point, and which we consider unsound. In the case of *Stewart v. Crosby*, 15 Tex. 546, the ordinance was upheld because it was appended to the constitution as a part of the fundamental law of the land and was adopted by the people along with the constitution. Besides, the supreme court of Texas, in the case of *Quinlan v. H. & T. C. Ry. Co.*, 89 Tex. 356, 34 S.W. 738, in commenting on the *Crosby case, supra*, says: "We are of opinion, however, that the ordinance was not valid. The convention which met on June 1, 1868, was assembled in pursuance of an act of congress passed March 23, 1867. It was called for the purpose of framing a constitution for the state, with a view to its restoration to the Union. The constitution to be framed by it was to be submitted for ratification to a vote of the people. See Act. Cong. March 23, 1867, §§ 3, 4, 15 Stat. 2; 2 Pasch. Dig. p. 1093. The act of Congress did not invest the convention with the power of independent legislation. It is true that the question of the propriety of incorporating any specific provision into the fundamental law was for the sole determination of the convention. But we are of opinion that, when a convention is called to frame a constitution which is to be submitted to a popular vote for adoption, it cannot pass ordinances and give them validity without submitting them to the people for ratification as a part of the constitution. The delegates to such a convention are but agents of the people, and are restricted to the exercise of the powers conferred upon them by the law which authorizes their election and assemblage. The ordinance of the convention in question, which divided the state into congressional districts, and that which provided for a submission of the proposed constitution to a vote of the people, are appended to the constitution as framed, and the whole**{42 So. 124}** are **{145 Ala. 531}** signed by the president and members as one instrument. 2 Pasch. Dig. pp. 1134, 1135. Section 1 of the latter ordinance contains the provision that the constitution adopted by this convention be submitted for ratification or rejection to the voters of this state,' etc. There is no provision for a submission of the independent ordinances. In *Stewart v. Crosby*, 15 Tex. 546, an ordinance attached to the constitution of 1845 was held valid. In that case the court say: For the present, then, it may suffice to say we think it free from doubt that the ordinance appended to the constitution is a part of the fundamental law of the land. Having been framed by the convention that framed the constitution of the state, and adopted

by the convention and the people along with the constitution, it is of equal authority and binding force upon the executive, legislative, and judicial departments of the government of the state as if it had been incorporated in the constitution, forming a component part of it.' This decision was followed without comment in *Grigsby v. Peak*, 57 Tex. 142, in passing upon the validity of an ordinance of the convention of 1866. From what has been quoted from the opinion in *Stewart v. Crosby, supra*, it appears that the ordinance then in question was submitted with the constitution and voted upon by the people. The convention which passed the ordinance which was held valid in *Grigsby v. Peak* was called by virtue of the proclamation of President Johnson. This proclamation did not require any part of the works of the convention to be submitted to the vote of the pecule, and in our opinion that convention, therefore, had the power to pass ordinances without submitting them for adoption to a popular vote. The ordinance now under consideration was not submitted to a vote, though two others, which were added to, incorporated into, and signed as a part of the constitution, were so submitted. Since the convention could not finally legislate, and since a vote of the people was necessary to make its action effective, we conclude that the ordinance in question was invalid and not effective for any purpose."

The ordinance in the case of *Plowman v. Thornton*, 52 Ala. 559, was upheld on the theory that it was essential **{145 Ala. 532}** to maintain the system of government until the officers elected under the new constitution could assume control. It was deemed legislation, which was condemned by Judge BRICKELL, who declared that the convention had no "legislative power." In the case of *Washington v. Washington*, 69 Ala. 281, the ordinance of 1865 legalizing the marriage of former slaves was upheld, notwithstanding the fact that it was not made a part of the constitution and was not ratified by the people. This ordinance, however, was adopted by a convention assembled pursuant to a proclamation of the President of the United States, issued at a time when Alabama had no recognized civil government, and to enable the "loyal people of the state to enact a Constitution to restore the state to its constitutional relationship to the federal government." The convention so assembled had to deal with new conditions, wrought by the termination of a long and bloody Civil War, which resulted in freeing from slavery nearly one-half of the people of the state. The exigencies of the times required prompt and immediate action in dealing with them, and the speedy enactment of laws to meet the changed conditions of our citizenship. Besides, the proclamation of the president calling the convention into existence extended to it "all the powers necessary and proper" to enable the loyal people of the state to formulate a plan of government that would meet said changed conditions, and at the same time restore our relationship to the federal government. The authorities generally except ordinances, and even Constitutions, enacted in time of war, or upon the heels thereof, from the more rigid rule as applicable to those adopted in time of peace and tranquility.

The ordinance locating this additional courthouse being void, Acts 1903, p. 28, to carry into effect the provisions thereof, being local, and not confined in its purpose solely to fixing the time for the holding of courts, is repugnant to section 106 of the Constitution, because no notice was given of the intention to apply therefor, and must go down with the ordinance. Acts 1903, p. 539, having for its sole purpose the fixing of the time of holding court in the Seventh circuit, while a local law, is expressly **{145 Ala. 533}** excluded from section 106 of the Constitution of 1901 as to giving notice before the passage thereof, and is therefore valid. Since the ordinance and act fixing the courthouse at Pell City are void, the last-mentioned act is inoperative, so far as it provides the time for holding court at that place, but to all other intents and purposes is valid and binding.

It is doubtless true that the county has expended a large sum for a courthouse and jail, and that a failure to hold a term of court at Pell City may put many of the people to no little inconvenience. These

facts should be considered by the Legislature, which is the only department of the government with authority to establish two courthouses in one county, and then only after complying with the constitutional provisions. Considerations of need and expediency should not and will not deter the courts of the land from annulling an ordinance that is so illegal and unwarranted, and the upholding of which would establish a precedent revolutionary in its character, and which would be a menace to coming generations in the enjoyment of rights guaranteed under a republican form of government.

The relief sought is granted, and the writ is made peremptory.

MCCLELLAN, C. J., and HARALSON, SIMPSON, and DENSON, JJ., concur. TYSON and DOWDELL, JJ., dissent.