

# ALABAMA COURT OF CRIMINAL APPEALS

APPENDIX A

CR-20-0161

Michael A. Livingston v. State of Alabama (Appeal from Mobile Circuit Court: CC02-2148.61)

## 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 March 5th 2021:

**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 14th day of May, 2021.

D. Scott Mitchell  
Clerk  
Court of Criminal Appeals  
State of Alabama

cc Hon. Michael A. Youngpeter, Circuit Judge  
Hon. JoJo Schwarzauer, Circuit Clerk  
Michael A. Livingston, Pro Se  
Marc Alan Starrett, Asst. Atty. Gen.

# IN THE SUPREME COURT OF ALABAMA



APPENDIX (B)

May 14, 2021

1200461

Ex parte Michael A. Livingston. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Michael A. Livingston v. State of Alabama) (Mobile Circuit Court: CC-02-2148.61; Criminal Appeals : CR-20-0161).

## CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on May 14, 2021:

**Writ Denied. No Opinion.** Bryan, J. - Parker, C.J., and Shaw, Mendheim, and Mitchell, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. 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 14th day of May, 2021.

*Julia Jordan Weller*  
Clerk, Supreme Court of Alabama

GRAND JURY NO. 240  
CIRCUIT COURT OF MOBILE COUNTY

2148

THE STATE OF ALABAMA,  
MOBILE COUNTY,The GRAND JURY of said County charge, that, before the finding of this indictment  
Michael A Livingston

July Session, 2002

APPENDIX C

whose name is to the Grand Jury otherwise unknown than as stated,  
id, with the intent to cause the death of **Cynthia Meinhardt**, a violation of §13A-6-2 of the Code of Alabama,  
attempt to cause the death of **Cynthia Meinhardt**, by stabbing her with a knife; in violation of §13A-4-2 of the  
Code of Alabama,  
against the peace and dignity of the State of Alabama.

No Prosecutor

A True Bill

JOHN M. TYSON, JR.  
District Attorney for the 13th Judicial Circuit of Alabama  
(County of Mobile)

\$ 30,000 R. STOUT  
Bail fixed in open court at \$ ~~30,000~~ this the 19<sup>th</sup> day of July, 2002

*Barbara Miller*  
Foreperson of the Grand Jury

R. STOUT  
Judge

Presented to the Court by the Foreperson of the Grand Jury in the presence of 16 other Grand Jurors

Filed in open court this the 19<sup>th</sup> day of July, 2002

*Susan J. Wilson*

Clerk Circuit Court, Mobile, County, Alabama

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er*

RELEASER

REL: March 5, 2021

MAR - 5 2021

CLERK  
ALA COURT CRIMINAL APPEALS

APPENDIX D

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

## ALABAMA COURT OF CRIMINAL APPEALS

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CR-20-0161

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Michael A. Livingston v. State of Alabama

Appeal from Mobile Circuit Court CC-02-2148.61

### MEMORANDUM DECISION

KELLUM, Judge.

Michael A. Livingston appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his 2003 conviction for attempted murder and his resulting sentence of life imprisonment. This Court affirmed Livingston's conviction and sentence on direct appeal in an unpublished memorandum issued on February 20, 2004. Livingston v. State (No. CR-02-1502), 910 So. 2d 832 (Ala. Crim. App. 2004) (table). This Court issued a certificate of judgment on March 10, 2004.

## APPENDIX D

On July 9, 2020, Livingston filed this, his second, Rule 32 petition.<sup>1</sup> As best we can discern, Livingston alleged in his petition: (1) that the trial court lacked jurisdiction to render the judgment or to impose the sentence and that his life sentence was illegal; and (2) that his right to be free from double jeopardy was violated. On October 30, 2020, the State filed a response and motion to dismiss Livingston's petition, arguing that Livingston's claims were precluded by Rules 32.2(a)(3), (a)(5), (b), and (c), Ala. R. Crim. P., were insufficiently pleaded, and/or were meritless. On November 2, 2020, the circuit court summarily dismissed Livingston's petition, finding that claim (1) was meritless and precluded by Rules 32.2(a)(3), (a)(5), and (c), and that claim (2) was "nonsensical." (C. 51.) On November 19, 2020, Livingston filed a reply to the State's response and a postjudgment motion to set aside the circuit court's judgment. The circuit court denied the motion the same day.

\* On appeal, Livingston reasserts claim (1), as set above, and argues that the circuit court erred in denying him relief on this claim. In his petition, Livingston alleged that the trial court lacked jurisdiction to render the judgment or to impose the sentence and that his life sentence was illegal because, he said, he was convicted of an offense that does not exist. Specifically, he argued that attempted murder is not an offense under the Alabama Criminal Code, and that the prosecutor could not combine two statutes -- the murder statute, § 13A-6-2, Ala. Code 1975, and the attempt statute, § 13A-4-2, Ala. Code 1975 -- to create an offense that does not otherwise exist. According to Livingston, the legislature intended the murder statute to apply only if the victim died and did not intend to create the offense of attempted murder instead creating the assault offenses to cover those instances in which the victim did not die. Because his victim did not die, Livingston argued, he could be convicted, at most, of the offense of first-degree assault, which is a Class B felony punishable by no more than 20 years' imprisonment, thereby rendering his life sentence illegal. A claim that the petitioner was convicted of an offense that does not exist is jurisdictional. See, e.g., Crane v. State, 964

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<sup>1</sup>Livingston did not appeal the summary dismissal of his first petition.

# APPENDIX D

So. 2d 1254 (Ala. Crim. App. 2007); Pilgrim v. State, 963 So. 2d 697 (Ala. Crim. App. 2006); Connor v. State, 955 So. 2d 473 (Ala. Crim. App. 2006); Watkins v. State, 941 So. 2d 343 (Ala. Crim. App. 2006); and Casey v. State, 925 So. 2d 1005 (Ala. Crim. App. 2005). However, this claim is meritless.

\* Contrary to Livingston's belief, attempted murder is an offense under the Alabama Criminal Code and the legislature plainly intended to create that offense by virtue of § 13A-4-2, Ala. Code 1975, which provides, in relevant part:

"(a) A person is guilty of an attempt to commit a crime if, with the intent to commit a specific offense, he does any overt act towards the commission of such offense.

"....

"(d) An attempt is a:

"(1) Class A felony if the offense attempted is murder."

(Emphasis added.) The Commentary to this statute states, in relevant part:

"It is universally recognized, supported by a wealth of case law and statutory material, that one is criminally liable for attempting the commission of a crime even though his endeavor falls short of the ultimate intended objective. Section 13A-4-2 establishes a general provision which applies to all crimes. It affords standards as to the required intent and conduct and covers such problems as impossibility of accomplishment, abandonment of criminal intent, and a classification of punishments.

"....

"An 'attempt' to commit a crime consists of three elements: (1) an intent to commit a crime; (2) performance of some overt act toward commission of the offense; and (3) the failure to consummate its commission."

(Emphasis added.) See also Vason v. State, [Ms. CR-18-0797, August 14, 2020] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2020), and Murphy v. State, 108 So. 3d 531, 540-41 (Ala. Crim. App. 2012) (both setting out the elements of the offense of attempted murder). Moreover, because attempted murder is a Class A felony, Livingston's life sentence was within the authorized range of punishment. See § 13A-5-6(a)(1), Ala. Code 1975.

Livingston does not reassert in his brief on appeal claim (2), as set out above. Therefore, that claim is deemed abandoned and will not be considered by this Court. See, e.g., Ferguson v. State, 13 So. 3d 418, 436 (Ala. Crim. App. 2008) ("[C]laims presented in a Rule 32 petition but not argued in brief are deemed abandoned."); and Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ("We will not review issues not listed and argued in brief.").

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

"[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 ...."

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). "Summary disposition is also appropriate when the petition is obviously without merit or where the record directly refutes a Rule 32 petitioner's claim." Lanier v. State, 296 So. 3d 341, 343 (Ala. Crim. App. 2019). Because the only claim Livingston pursues on appeal is meritless, summary disposition of

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Livingston's Rule 32 petition was appropriate.

Based on the foregoing, the judgment of the circuit court is affirmed.

**AFFIRMED.**

Windom, P.J., and McCool, Cole, and Minor, JJ., concur.

**Additional material  
from this filing is  
available in the  
Clerk's Office.**