

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT P. GOSPODARECK, Petitioner

VS.

STATE OF ALABAMA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

The Supreme Court of Alabama

COPY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. When Alabama first enacted Assisted Suicide legislation in 2017 which specifically provided that it **amended existing law and also created a new crime**, should it not apply to Petitioner who was convicted of murder for hire and remains in prison 30 years later for being hired by the deceased to assist with his own suicide? [Code of Alabama, §§ 22-8B-1 et seq. and/or HB 96, Act 231, 2017 Reg. Session]

LIST OF PARTIES

1. Petitioner, Robert P. Gospodareck, #165966, 1000 St. Clair Road, Springville, Al 35146
2. William M. Dawson, Volunteer Atty for Petitioner
3. Danny Carr, District Attorney of Jefferson County, 801 Richard Arrington Blvd, Birmingham, AL 35203
4. Beth Poe, Assistant Attorney General, 801 Washington Avenue, Montgomery, Al 36130.

RELATED CASES

There are no related cases, as the only other individual possibly subject to this situation in Alabama, Gregory Brown, who was convicted along with Petitioner Gospodareck, died in prison within the last year.

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TABLE OF AUTHORITIES CITED

CONSTITUTIONAL PROVISIONS:

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CASES CITED

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OPINIONS BELOW

There are no published opinions in this effort to appeal denial of post-conviction relief. The Alabama Court of Criminal Appeals issued a Memorandum Decision which is attached hereto, but it is not reported and is only the law of the case. See, Ala. R. App. P. 54(d). Petitioner's effort at certiorari review was denied without written opinion by the Supreme Court of Alabama. The initial conviction was affirmed by those two Courts in 1993 with written opinions with serious dissents, [(666 So.2d 835, 844, (1995)]

JURISDICTION

Petitioner filed his post-conviction Petition in the Circuit Court of Jefferson County, Alabama seeking relief from his 1993 conviction. Appeal to the Alabama Court of Criminal Appeals was denied on December 10, 2021 with rehearing denied on May 13, 2022, and his Petition for Writ of Certiorari to the Alabama Supreme Court was denied without written opinion on September 16, 2022 with the certificate of Judgment entered that date by the Clerk.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner was convicted of capital murder under § 13A-5-40(a)(7), Code of Alabama which provides:

The following are capital offenses: (7) Murder done for a pecuniary gain or other valuable consideration or pursuant to a contract or for hire.

The Alabama statute which amends existing law and creates a new offense is Code of Ala. §§ 22-8B-2(1) which is known as the Assisted Suicide Ban Act. The codified version does not include Sec. 8 of the Bill as it was passed, being HB 96, Act 231 Regular Session 2017. It is copied in its entirety and is attached to the Appendix herein as Appendix E.

Petitioner raises violations of the Fourteenth and Eighth Amendments to the United States Constitution in this Petition.

STATEMENT OF THE CASE

Petitioner was indicted for capital murder pursuant to a contract for hire, § 13A-5-40(a)(7) and for pecuniary gain under that section. He was tried and convicted only of the first charge. His appeals to the Court of Criminal Appeals and to the Alabama Supreme Court were denied but both contained written dissenting opinions. [666 So.2d 835, 844, (1995)] The evidence is without dispute that the deceased, Callahan intentionally enlisted Petitioner and another, Greg Brown to assist in ending his life. Efforts by defense counsel to raise the issue of assisted

suicide at trial were not allowed. The trial and appeal proceeded upon the serious issues of police misconduct. Hence, the two dissents.

Decades later Alabama passed its Assisted Suicide Act, §§ 22-B-1, et seq. which “amended existing law” and “created new law”, though the later codified version does not include Sec. 8 as provided in the Bill as passed. Petitioner filed a Rule 32 petition in the trial court seeking relief under that new law, but relief was denied on January 11, 2021. This appeal was denied by the Court of Criminal Appeals in a memorandum opinion on December 10, 2021 and his Application for Rehearing was denied without written opinion on May 13, 2022. A petition for certiorari in the Alabama Supreme Court was denied without written opinion and the Certificate of Judgment was entered on September 16, 2022. There has been no formal appellate decision dealing with this statute. The Memorandum Decision “shall have no precedential value and shall not be cited” as precedent. [See Rule 54(d) Ala. R. App. P.]

REASONS FOR GRANTING THE PETITION

This case raises the important due process issue of why a new and amended criminal statute should not be applied to Petitioner who was convicted and sentenced thirty years ago to a capital offense whereas under the amended law, assisted suicide is now a minor felony with a maximum sentence of ten years. This matter raises a material question which is a matter of first impression as the new Assisted Suicide Law has never been applied or interpreted by Alabama courts. Petitioner is the only person affected by this change in substantive law.

The Court of Criminal Appeals issued its Memorandum Opinion which is the law of the case but is not precedent or included in the Southern Reports series. While it affirmed the denial of relief by the trial court, important factual matters were ignored. In addition, the Court's legal analysis fails to address the substance of the matters raised on appeal. Also, under Rule 54(d) Ala. R. App. P., the appellate decision has no value as precedent and shall not be cited in other cases.

The newly enacted Assisted Suicide Ban Act makes criminal "any person who deliberately assists another person to commit suicide or provides aid in dying". § 22-8B-4(a), Code of Ala. That language covers action assisting or providing aid in dying. Nowhere in the statute is any prohibition or restriction as to what constitutes "aid in dying". Section 3 of the Act incorporates language consistent with murder in its definition, even including the age-old term premeditation and intent to cause death. This relates to the crime of murder and indicates an intent of the Legislature to amend existing law. That intention to amend is clearly stated, yet the memorandum opinion ignores that. [Sec. 8 of HB 96, Act 231 of 2017 Regular Session]

The Legislature also clearly stated that the Act "defines a new crime or amends the definition of an existing crime." The only applicable crime in existence is murder or capital murder. Clearly Callahan voiced his intention to end his life, even to the point of stating it in his uncontradicted letter. Other circumstantial evidence is the fact that he sought to die under circumstances which would not cancel the insurance policies on his life. Also, he gave directions to his girlfriend on how to enter his apartment in order to find his body.

The Memorandum decision lumps the arguments by Petitioner into two claims: lack of retroactive application and factual differences which do not meet what the Act prohibits. The Act is broad enough without its stated required amendment of existing law to be applicable to the facts here.

Considerations of statutory construction require the application of the Act in a manner consistent with application to Petitioner. The Act relates to matters of substance and not just procedural rights. The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature when it enacted a statute. *Daughtery v. Town of Silverhill*, 672 So.2d 813, 815 (Ala. Crim. App. 1995). Legislative intent may be gleaned from “the language used, the reason and necessity for the act, and the purpose sought to be obtained.” *Parker v. Hilliard*, 567 So.2d 1343, 1346 (Ala. 1990).

The Memorandum decision cites *Hardy v. State*, 570 So.2d 871 (Ala. Crim. App. 1990) and other cases for opposing retroactive application. Those cases wrongfully cite the absence of clear legislative intent and do not deal with the “amending existing laws” language in the Act here.

The Court has the power to apply the Act for the benefit of Petitioner as a violation of the Eighth Amendment. Where there is a specific indication of intent in the statute, retroactive application is proper. *Ex parte Zimmerman*, 838 So.2d 408, 410 (Ala. 2002) Other Alabama cases have found Eighth Amendment violations and granted similar relief. *See, State v. Adams*, 91 So.3d 724 (Ala. Crim. App. 2010); *Wilson v. State*, 830 So.2d 765 (Ala. Crim. App. 2001). The obligation to consider

proportionality in sentencing was ignored, not considering the scope of review mandated by *Solem v. Helm*, 463 U.S. 277 (1983) and *Harmelin v. Michigan*, 501 U.S. 957 (1991).

It was argued that Equal Protection is satisfied by the rationale of preserving the finality of judgments and assuring that penal laws maintain their desired deterrent effects. The enhanced punishment of Petitioner alone does not further a legitimate articulated state purpose. *McGinnis v. Royster*, 410 U.S. 263 (1974); *Ex parte Zimmerman*, 838 So.2d 408 (Ala. 2002); *Hilsabeck v. State*, 477 So.2d 462 (Ala. 1985). Likewise, radically reducing the possible punishment is no greater deterrent.

Alabama has allowed the Eighth Amendment's cruel and unusual punishment protection to provide relief for others where retroactive application of changes in the law occur. *Brooks v. State*, 622 So.2d 477 (Ala. Crim. App. 1993); *Clark v. State*, 166 So.3d 147 (Ala. Crim. App. 2014); *M.A.M. v. State*, 177 So. 3d 222 (Ala. Crim. App.2015); *Jones v. Casey*, 445 So.2d 873 (Ala. 1983).

The Eighth Amendment was raised at the hearing as Petitioner was seeking prospective relief. In *Miller v. Alabama*, 567 U.S.460 (2012) juveniles were granted new hearings to contest life without parole sentences. *Click v. State*, 215 So.3d 1189 (Ala. Crim. App. 2016) and other cases have allowed Rule 32 relief in successive petitions. The jurisdiction to correct illegal sentences exists at any time. *Montgomery v. Maryland*, 136 U.S.718 (2016); *Wallace v. State*, 959 So.2d 1165 (Ala. Crim. App. 2006); *Pardue v. State*, 793 So.2d 838 (Ala. Crim. App. 1998); *Holt v. State*, 960 So.2d 726 (Ala. Crim. App. 2006).

Some important facts omitted from the rather meaningless Memorandum are included hereafter as the Court's rendition is in large part a reiteration of the argument of the prosecution. While several instances are listed where the deceased Callahan made it clear to others that he intended to die by suicide, that clear conclusion was never stated. In addition, the Court's factual statement points out instances where Callahan orchestrated his death and discovery but ignores the inference of suicide as being present. Likewise, the exculpatory suicide note by Callahan was mentioned only in passing, even though it was authenticated by the State's premiere handwriting examiner for prosecutions for many years. Callahan gave the note to defendant Brown, as he sought to have his death appear not to be suicide so to have his life insurance payable to his estate. In it, Callahan gave his reasons for wanting to take his own life and the fact that he did not wish for any prosecution of anyone.

The Rule 32 proceeding did not provide an opportunity to balance the evidence favorable to Petitioner's claims, as the trial court concluded "that while Petitioner makes a compelling argument, "However, the Court's interpretation of the controlling case and statutory laws do (sic) support the relief sought."

Callahan's jewelry businesses were failing and he was heavily in debt, with \$1,100,000 in promissory notes in default, secured only by life insurance. He had mentioned on occasion that he would be better off dead. He also had told his major creditor that the life insurance would not pay if he killed himself. Callahan had carefully planned the circumstances of his death, involving a young woman he had

been seeing. He had instructed her to come to his apartment at 5:00 p.m. and to knock on the unlocked door, but if not answered, to come on inside. She did as directed and found his lifeless body.

His letter listed two prominent surgeons whom he claimed would attest to his deteriorating condition and chance of survival or of a decent existence. He claimed to be undergoing brain surgery the next day and did not expect to survive. He said that he had called on his friend for the ultimate act of friendship which would lessen the suffering for his family. Both doctors testified to not knowing nor treating Callahan and the autopsy found no indication of disease of the brain.

Much of the 1991 trial focused on the detention and interrogation of both Brown and Petitioner. Though discussed at length by Justice Cook in his dissent, the record contains a transcript of the police phone communications during the 12-hour period of detention prior to Petitioner finally making his admission.

Defense counsel sought to raise the issue of assisted suicide at several stages of the prosecution. A motion to dismiss on that basis was filed and denied. In discussing pre-trial publicity, it was noted that the media reported that the Judge had stated during Brown's trial that this was not a mercy killing. During questioning of prospective jurors, the prosecutor asked several questions dealing with assisted suicide, Dr. Kervorkian and his book, *Final Exit*, living wills and abortion. He also asked whether jurors expected or favored law enforcement prosecuting persons assisting suicide.

The lengthy interview of Petitioner by the Hoover police was replete with the detectives' references to mercy killing and assisted suicide. They stated as fact "that we knew Jerry wanted Greg to kill him"; "I believe he begged you to do it"; "We see mercy killings..."; etc. The defense filed a motion for judgment of acquittal based on consent and participation by the victim. An objection to the oral charge was made on that basis. The defense submitted nine written requested jury instructions dealing with the issue related to assisted suicide but all were not given to the jury. Probably because of the clear evidence of assisted suicide, the sentencing verdict was returned in only twenty minutes, unanimously for life without parole. And 30 years later Petitioner remains alone after fellow inmate Brown died of Covid.

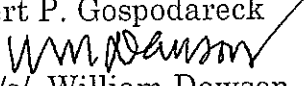
The conviction was for violation of § 13A-5-40(a)(7), Code of Ala. which charged killing pursuant to a contract or for hire. There is no mention that Petitioner was charged in a two-count indictment but found not guilty of the other offense of murder for pecuniary gain under that section. At page 7 of the Memorandum there is acknowledgement that Petitioner denied receipt of any payment. There is no evidence elsewhere to support such claim of payment.

The appellate Memorandum gives the pertinent citations of the appellate rulings of this Court and the Alabama Supreme Court in 1993 and 1995 but fails to mention or discuss the fact that the trial and direct appeal primarily focused upon alleged police misconduct in keeping Petitioner detained and unable to see his lawyer for many hours – until after lengthy and threatening interrogation ended.

Petitioner was not allowed to litigate issues of assisted suicide or the effect of consent by the victim at either the trial or appellate level. Defense efforts at interjecting that theory were thwarted at every step by the trial judge. Every written proposed jury charge was denied as was a request for a judgment of acquittal based on consent. Likewise, the oral charge omitted mention of consent or assisted suicide. The definition of contract given clearly could be applied to the agreement between Petitioner and Callahan. Yet the 1993 Alabama Supreme Court Opinion mentions assisted suicide. [666 So.2d 841-842] The significance of this argument is that Petitioner is being judged decades later on a trial, transcript and appellate decisions which foreclosed the central issue raised here. It is patently unfair to try to apply the limited facts from that trial to the new Assisted Suicide Law. Had it been in effect in 1991 it would have been proper for consideration by the jury as a possible lesser included offense.

CONCLUSION

Petitioner respectfully requests that the matter be granted certiorari review and that he be granted appropriate relief.

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Rel: December 10, 2021

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

CR-20-0319

Robert Gospodareck v. State of Alabama

Appeal from Jefferson Circuit Court CC-91-2137

MEMORANDUM DECISION

COLE, Judge.

Robert Gospodareck appeals the circuit court's denial of his Rule 32, Ala. R. Crim. P., petition for postconviction relief.

Facts and Procedural History

In 1991, Gospodareck was indicted for capital murder for shooting and killing Jerry Wayne Callahan pursuant to a contract or for hire, a violation of § 13A-5-40(a)(7), Ala. Code 1975. At his trial, the State's evidence tended to establish the following:

APPENDIX A

DECISION OF COURT OF
CRIMINAL APPEALS

"Jerry Wayne Callahan, the victim, was the proprietor of two businesses: J.C.'s, a wholesale diamond business, and Riverchase Jewelers, in which he owned a 90% interest. Pat Costello owned the other 10% interest in Riverchase Jewelers. Colleen Norton testified that she had loaned Callahan money over several years to finance his businesses. Norton testified that she decided to 'call' the notes evidencing the loans to Callahan and that she relayed this information to Callahan in late November 1990. This information upset Callahan and he indicated to Norton around December 13, 1990, that he 'would just have to have himself killed' (R-1003) so that the insurance would pay his debts. Norton said that on another occasion, Callahan told her that he would not 'be around' for the Super Bowl in January. Callahan died on February 7, 1991.

"Pat Costello testified that Callahan was upset over his financial situation and that he once commented that he would be better off dead. He indicated that Callahan liked to gamble. Costello testified that Greg Brown, a bookie, frequented their jewelry store on average twice a month to accommodate Callahan's gambling activities. The frequency of Brown's visits increased in January 1991. Costello testified that approximately 7 to 10 days before Callahan's death, Brown entered the store with the appellant. Brown went to the rear of the store to talk to an employee and the appellant stayed at the counter in the front of the store. Costello stated that the appellant expressed an interest in looking at watches while he waited on Brown. Diana Treat, an employee, testified that she overheard the appellant say to Costello that 'he was going to be coming into some money soon and he wanted to buy a fine watch.' (R-1025.)

"Jerry Noto, the owner of the Pic-a-Pac convenience store; Frank Garner, a friend of Noto's; and Jeff King and Mike Koutroulakis, City of Hoover police officers, testified that on Tuesday, February 5, 1991, at around 5:30 p.m., Brown was in

the store and was displaying two guns. These guns were later determined to have been owned by Callahan.

"....

"Costello testified that Callahan did not come to the jewelry store on Thursday, February 7. Costello testified that Brown came into the store twice that day. Brown first came into the store between 10:00 and 10:30 a.m. to pick up a ladies diamond solitaire ring, with an appraised value of \$15,600, that Callahan had instructed be given to Brown. Brown came to the store a second time between 1:00 and 1:30 p.m. to pick up some paperwork on the ring. Costello testified that during the interim he talked with the victim by telephone. Costello testified that Brown never paid for the ring.

"Noto testified that Brown came to his store twice on Thursday, February 7. On the first occasion, Brown showed him a ladies diamond ring. Frank Garner also testified that he saw Brown at the store on this date displaying the ring. Noto testified that he left the store and returned around 4:30 or 5:00. Several police officers indicated that they had seen Brown at the store between 4:30 and 5:00 and that he was alone. Noto testified that when he returned to the store, Brown was not there but he said that Brown arrived shortly thereafter with the appellant. Noto testified that Brown and the appellant talked and that the appellant then got into his truck and drove away. Testimony established that Callahan's apartment was near Noto's store.

"George DeGraw, a neighbor who lived in the apartment directly above Callahan's, testified that between 3:30 and 4:00 p.m. on the day of the incident he heard a knock on his door. When he answered the door, he saw a man going down the stairs. He called to the man but the man did not respond.

DeGraw described the man as 'husky' (R-1043) and stated that his build resembled [Gospodareck's].

"Jayne Boyd, a neighbor of Callahan's, testified that she heard a loud bang sometime between 3:30 and 5:00 p.m. on Thursday, February 7.

"Amy Hill, who had been dating Callahan, testified that on February 7, she spoke with Callahan by telephone. He instructed her to come to his apartment at 5:00 p.m. She testified that he told her that if he did not come to the door she was to let herself in. She stated that she thought that this was unusual. She arrived at the apartment at the appointed time. When she entered the apartment, she saw Callahan lying on the floor. She said that the door to Callahan's office, which he normally kept locked, was open.

"Emergency and law enforcement personnel were then called to the scene. There was no evidence of a struggle and neither Brown's fingerprints nor [Gospodareck's] were found at the scene.

"The investigation led the police to focus on Brown as a suspect. Detective Eddie Braden of the Hoover Police Department testified that he arranged to meet with Brown and that the police stopped Brown in his automobile when it appeared that he was attempting to flee. Brown showed the law enforcement officers a note he had in his vehicle. After obtaining permission, the officers searched the automobile.

"The note was allegedly written by Callahan. It stated that if certain parties were arrested for his death, he did not want them to be prosecuted. The note indicated that Callahan had a fatal illness, which fact could be attested to by Dr. Clark and Dr. Zeiger. It stated that because of this illness, Callahan had called upon a friend to perform the ultimate act of

friendship. Linda Callahan, Callahan's ex-wife, testified at trial that the note appeared to have been written by Callahan. Lamar Miller, a documents examiner with the department of forensic sciences, testified that, in his opinion, the note had been written by Callahan.

"The two pistols Brown had been displaying earlier, which had belonged to the victim, were also found in the automobile. Brown was placed under arrest. A statement given by Brown led the police to the appellant.

"[Gospodareck], a police officer, was arrested on February 9, 1991, and was taken to the Hoover city jail. Eventually, [Gospodareck] gave a statement. He indicated that he and Brown were friends. He stated that approximately three weeks before Callahan's death, Brown had approached him regarding a problem. Brown told him that he had a friend who was suffering from a fatal illness and that this friend wanted to die before he died from the illness. Brown told [Gospodareck] that Callahan wanted Brown to kill him or to have him killed and that he did not want the killing to look like a suicide. He stated that approximately one week before Callahan's death, Brown again approached [Gospodareck] and stated that Callahan had told him that he 'had to leave this world prior to the 8th of February.' (R-1466.) [Gospodareck] indicated that Brown told him that Callahan's condition was worsening. [Gospodareck] stated that Brown told him that he was getting a good deal on a ring appraised at \$15,800.

"[Gospodareck] stated that Brown met with him one day and told him that he had some 9-mm. ammunition. He also told [Gospodareck] that Callahan had given him some guns. He asked [Gospodareck] to run a check on the serial numbers on the guns. [Gospodareck] ran the check. [Gospodareck] stated that on this occasion Brown again told him that Callahan was expecting Brown to kill him. Brown asked

[Gospodareck] for advice. [Gospodareck] recommended that Brown have Callahan write a note stating that he was dying and that he did not want to commit suicide.

"[Gospodareck] said that Brown telephoned him on Thursday, February 7. Brown told [Gospodareck] that Callahan had won \$15,000 in a card game the previous night and that he was demanding to be paid. Brown asked [Gospodareck] to meet him at the Pic-a-Pac later that day. [Gospodareck] met Brown around 3:30 p.m. Brown told [Gospodareck] that Callahan was going into the hospital the next morning and that he wanted something done right away. Brown told [Gospodareck] that Callahan had written the note and [Gospodareck] stated that he had seen the note. Brown told [Gospodareck] that he could not kill Callahan. [Gospodareck] stated that in addition to the note written by Callahan, he also saw the ring and a promissory note evidencing a \$12,000 debt. [Gospodareck] told Brown that he had to either tell Callahan he was not going to kill him or he had to do it. [Gospodareck] told Brown that he would talk to Callahan for him.

"Brown then drove [Gospodareck] to Callahan's apartment complex. Brown told [Gospodareck] how to find Callahan's apartment. [Gospodareck] testified that he initially went to the wrong apartment and that an older man came to the door of that apartment. At that time Callahan came out of his apartment and told [Gospodareck] that he was Jerry Callahan. Brown had driven away, allegedly to obtain the appraisal on the ring.

"[Gospodareck] initially told the officers that when he entered the apartment he talked with Callahan. He explained to Callahan that Brown would not be able to perform the task he had asked him to perform. According to [Gospodareck], this angered Callahan. Callahan called Brown and told him to

return to pick up [Gospodareck]. [Gospodareck] at first stated that when he left the apartment, Callahan was alive. He indicated that Callahan gave him a gun to give to Brown.

"Upon further questioning, [Gospodareck] confessed to killing Callahan. He stated that when he went to the apartment to talk with Callahan, Callahan started talking about his illness. [Gospodareck] said that Callahan picked up a gun and begged him to 'put him out of his misery.' (R-1583.) [Gospodareck] said that Callahan told him where to place the gun. [Gospodareck] said that he told Callahan that he could not do it. [Gospodareck] stated that Callahan begged him to pull the trigger and that after about two minutes, he complied. [Gospodareck] then picked up the spent rounds of ammunition. [Gospodareck] stated that he disposed of the slide and the barrel of the gun. He placed the remainder of the gun in a warehouse he rented. Although [Gospodareck] admitted shooting Callahan, he contended that he did not do it for pecuniary gain. He stated that he did not receive any payment for killing the victim.

"A search of [Gospodareck's] apartment revealed a notepad with several numbers written on it. Testimony at trial indicated that the numbers on this pad matched the serial numbers on the weapons found in Brown's automobile during the search. Additionally, one of the serial numbers matched a firearms record taken from the victim's apartment.

"A search of the warehouse that had been rented by [Gospodareck] turned up a pistol frame (without a barrel or a slide), a black leather holster, and a .380 caliber magazine.

"Dr. Robert Brissie testified that the victim died as a result of a gunshot wound."

Gospodareck v. State, 666 So. 2d 835, 836-39 (Ala. Crim. App. 1993). The jury found Gospodareck guilty of capital murder. The circuit court, following the jury's recommendation, sentenced Gospodareck to life imprisonment without the possibility of parole.

This Court affirmed Gospodareck's conviction and sentence on direct appeal, see Gospodareck, 666 So. 2d at 843, and the Alabama Supreme Court affirmed this Court's decision, see Ex parte Gospodareck, 666 So. 2d 844 (Ala. 1995). This Court issued a certificate of judgment on August 15, 1995.

Over 20 years later, in 2017, the legislature passed, and the governor signed into law, the Assisted Suicide Ban Act, see Act No. 231, Acts of Alabama 2017, p. 338, which is codified at §§ 22-8B-1 et seq., Ala. Code 1975. The legislature, recognizing that, "[i]n almost every state, it is a crime to assist a suicide," § 22-8B-2(1), Ala. Code 1975, explained that "[a]ny person who deliberately assists another person to commit suicide or provides aid in dying is guilty of a class C felony." § 22-8B-4(a), Ala. Code 1975.

Two years after the Assisted Suicide Ban Act was passed, Gospodareck filed the instant Rule 32 petition, his first. (C. 33-47.) In his petition, Gospodareck alleged that the facts of his case

"make it clear that [he] was convicted of participating in a killing where the victim wanted to die and solicited his own killing by [him] and Brown, the other defendant. At trial, [Gospodareck] opposed the capital charge, as the evidence showed only the assisting the victim in a suicide. At that time, the State of Alabama had not enacted any criminal sanction against assisting suicide."

(C. 40.) Gospodareck further alleged that, because the Assisted Suicide Ban Act "'defines a new crime or amends the definition of an existing crime,'" (C. 41), and because his shooting and killing Callahan constituted assisted suicide, his capital-murder conviction and his sentence of life

imprisonment without the possibility of parole must be reconsidered. According to Gospodareck, if the Assisted Suicide Ban Act had existed at the time he shot and killed Callahan, then he would have been entitled to a jury instruction on the lesser-included offense of assisted suicide. (C. 43.) Gospodareck also claimed that failing to apply the Assisted Suicide Ban Act to his case results in his "[i]llegal continued detention under law that has been changed," which, he said, "is an Eighth Amendment violation." (C. 43.) In short, Gospodareck alleged that the Assisted Suicide Ban Act applies retroactively to his case and either (1) requires that he be resentenced under that act or (2) requires that he receive a new trial where the jury can be instructed on the lesser-included offense of assisted suicide.

On July 23, 2019, the State moved to dismiss Gospodareck's petition, arguing, among other things, that Gospodareck's claim is meritless because, even if the Assisted Suicide Ban Act applied retroactively to actions that occurred before the effective date of that act, Gospodareck's actions do not meet the statutory elements of assisted suicide. (C. 59-77.)

On August 29, 2019, the circuit court held an evidentiary hearing on Gospodareck's petition, at which he was represented by counsel. On January 11, 2021, the circuit court issued an order denying Gospodareck's petition. (Supp. C. 11-13.) This appeal follows.

Standard of Review

" 'The standard of review on appeal in a postconviction proceeding is whether the [circuit court] abused [its] discretion when [it] denied the petition. Ex parte Heaton, 542 So. 2d 931 (Ala. 1989). ' Strickland v. State, 771 So. 2d 1123, 1125 (Ala. Crim. App. 1999) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). However, 'when the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo.' Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). In either instance, this Court may affirm the judgment of the

circuit court for any reason, even if not for the reason stated by the circuit court. See Reed v. State, 748 So. 2d 231 (Ala. Crim. App. 1999) ('If the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition.')."

Acra v. State, 105 So. 3d 460, 464 (Ala. Crim. App. 2012) (footnote omitted).

Discussion

On appeal, Gospodareck raises five arguments, all of which relate to the claims he raised in his Rule 32 petition. Gospodareck's arguments are premised on the following two assumptions: (1) that the Assisted Suicide Ban Act applies retroactively to crimes committed before the effective date of that act, and (2) that Gospodareck's shooting and killing Callahan amounts to "assisted suicide" under the Assisted Suicide Ban Act. If either assumption is not true, then Gospodareck's arguments fail.

To start, the Assisted Suicide Ban Act does not apply retroactively to crimes that were committed before the effective date of that act.

" 'It is well settled that the law in effect at the time of the commission of the offense controls the prosecution.' Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005). See also Davis v. State, 571 So. 2d 1287, 1289 (Ala. Crim. App. 1990) ('A defendant's sentence is determined by the law in effect at the time of the commission of the offense.');

Hardy v. State, 570 So. 2d 871 (Ala. Crim. App. 1990) (unless otherwise stated in the statute, the law in effect at the time the offense was committed controls the offense); and Jefferson v. City of Birmingham, 399 So. 2d 932 (Ala. Crim. App. 1981) (law in effect at the time of the offense governs prosecution). ... As this Court explained in White v. State, 992 So. 2d 783 (Ala. Crim. App. 2007):

" 'It is well settled that "[u]nless the statute contains a clear expression to the contrary, the law in effect at the time of the commission of the offense 'govern[s] the offense, the offender, and all proceedings incident thereto.' " Hardy v. State, 570 So. 2d 871, 872 (Ala. Crim. App. 1990), quoting Bracewell v. State, 401 So. 2d 123, 124 (Ala. 1979). "In Alabama, retrospective application of a statute is generally not favored, absent an express statutory provision or clear legislative intent that the enactment apply retroactively as well as prospectively." Jones v. Casey, 445 So. 2d 873, 875 (Ala. 1983).'

"992 So. 2d at 785."

M.H. v. State, 6 So. 3d 41, 49 (Ala. Crim. App. 2008).

Here, nothing in the Assisted Suicide Ban Act, see Act No. 231, Acts of Alabama 2017, demonstrates the legislature's clear intent that the act apply retroactively to offenses committed before the effective date of that act. What is more, nothing in the act demonstrates the legislature's clear intent that, upon passage of the act, someone who has already been convicted of an offense that would fall within the purview of the act must have his or her convictions converted to a crime under the Assisted Suicide Ban Act and be resentenced accordingly.

Gospodareck argues that the Assisted Suicide Ban Act does include such language because, he says, § 8 of that act provides:

"Although this bill would have as its purpose or effect the requirement of a new or increased expenditure of local funds, the bill is excluded from further requirements and application under Amendment 621, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901,

as amended, because the bill defines a new crime or amends the definition of an existing crime."

Act No. 231, Acts of Alabama 2017, § 8 (Emphasis added). This provision, however, does not demonstrate a legislative intent for the act to apply retroactively; rather, this provision provides the legislature's reason as to why the act falls outside the requirements set out in Art. IV, § 111.05, Ala. Const. 1901. Moreover, the phrase "defines a new crime or amends the definition of an existing crime" refers to the prospective effect of the Assisted Suicide Ban Act not the retroactive effect of the act.

But even if the Assisted Suicide Ban Act applied retroactively to offenses committed before the effective date of that act, Gospodareck would not be entitled to any relief because the facts of his case do not fall within the purview of the act.

Section 22-8B-4(a), Ala. Code 1975, provides that, "[a]ny person who deliberately assists another person to commit suicide or provides aid in dying is guilty of a Class C felony." (Emphasis added). Section 22-8B-3(1), Ala. Code 1975, defines "aid in dying" as "[t]he act of a person providing the means or manner for another person to be able to commit suicide, with actual knowledge that the person deliberately intends on committing suicide by that means or manner." (Emphasis added).

As set out above, even if Callahan had asked Gospodareck to kill him, Gospodareck's shooting and killing Callahan is not an assisted "suicide" under § 22-8B-4(a), Ala. Code 1975. Section 22-8B-3(8), Ala. Code 1975, defines "suicide" as "[t]he act or instance of taking one's own life voluntarily and intentionally." (Emphasis added). In other words, the Assisted Suicide Ban Act makes it a crime for people to provide someone the means to take their own life; it does not cover acts in which a person takes another person's life -- even if that person wanted them to take their life.

In short, because Callahan did not take his own life, and, instead, it was Gospodareck who shot and killed him, Gospodareck's actions do not

fall within the purview of the Assisted Suicide Ban Act. Consequently, Gospodareck's claim that the Assisted Suicide Ban Act applies to his capital-murder conviction is meritless.

Conclusion

Because the Assisted Suicide Ban Act does not apply retroactively to offenses committed before the effective date of that act, and, even so, it would not apply under the facts of Gospodareck's case, the circuit court did not err when it denied Gospodareck's Rule 32 petition. Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

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

At trial the petitioner was convicted, defense counsel sought to raise the issue of consent and/or assisted suicide. Neither was allowed by the trial court in any instructions to the jury. Defense counsel also unsuccessfully sought to raise Eighth Amendment issues during the trial and on direct appeal. Though collateral attack was sought in U.S. District Court following the unsuccessful direct appeal in state court, petitioner had not filed an action under Rule 32 in state court until filing the instant action on July 10, 2019.

The Alabama Legislature passed the Assisted Suicide Ban law in 2017, taking effect in June, 2017. It was initially codified as House Bill 96 (Acts of 2017 – 231) Only later was it codified at §22-8B -1, et seq., Code of Alabama of 1975. It is not included in the Criminal Code of Chapter 13A. Petitioner has sought to attack his conviction on grounds related to this new statute which provides in part that it “defines a new crime or amends the definition of an existing crime”.

The Court also has considered the Petitioner’s constitutional claims extensively. The petitioner makes a compelling argument. However, the Court’s interpretation of the controlling case and statutory laws do support the relief sought by the Petitioner. It is not clear from the record that what occurred was in fact an assisted suicide. There has been no substantive change to the elements of capital murder or its sentencing range. There is no legal mechanism to alter a jury’s finding under these circumstances. The new crime of Assisted Suicide was enacted in August 2017. But, it is well settled law that a defendant cannot be convicted of a crime that was not in existence at the time the offense was committed. There is no express or clear legislative intent for that statute to be applied retroactively. Based on the pleadings along with oral arguments presented in

this case, the Court hereby ORDERS this cause of action DISMISSED.

DONE this 11th day of January, 2021.

/s/ T. TODD
CIRCUIT JUDGE

IN THE SUPREME COURT OF ALABAMA



September 16, 2022

SC-2022-0568

Ex parte Robert Gospodareck. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Robert Gospodareck v. State of Alabama) (Jefferson Circuit Court: CC-91-2137; Criminal Appeals: CR-200319).

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 September 16, 2022:

Writ Denied. No Opinion. Stewart, J. -- Parker, C.J., and Wise, Sellers, and Mendheim, 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, Megan B. Rhodebeck, certify that this is the record of the judgment of the Court, witness my hand and seal.

Megan B. Rhodebeck
Clerk, Supreme Court of Alabama

APPENDIX C
DECISION OF ALABAMA
SUPREME COURT

Alabama Acts of the 2017 Regular Session

HB 96, Act 231

ENROLLED, An Act,

To establish the Assisted Suicide Ban Act; to prohibit a person or a health care provider from providing aid in dying under certain conditions; to provide civil and criminal penalties; and in connection therewith to have as its purpose or effect the requirement of a new or increased expenditure of local funds within the meaning of Amendment 621 of the Constitution of Alabama of 1901, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. This act shall be known and may be cited as the Assisted Suicide Ban Act.

Section 2. The Legislature finds all of the following:

(1) In almost every state, it is a crime to assist a suicide. These bans are long-standing expressions of the commitment of the states to protect and preserve all human life.

(2) The state has an interest in protecting vulnerable groups, including the impoverished, the elderly, and disabled persons from abuse, neglect, and mistakes. A ban on assisted suicide reflects and reinforces our belief that the lives of those in vulnerable groups are no less valued than the lives of the young and healthy.

(3) The state has an interest in protecting the integrity and ethics of the medical profession, including its obligation to serve its patients as healers and adhere to the principles articulated in the Hippocratic Oath.

(4) The state recognizes the close link between physician-assisted suicide and euthanasia where a right to die can easily become a duty to die. A prohibition against assisted suicide is the only reasonable means to protect against foreseeable abuses.

(5) The state recognizes the distinction between a patient refusing life-sustaining medical treatment where he or she dies from the underlying fatal disease and a patient ingesting or administering a lethal medication prescribed by a physician, where the medication is the cause of death. The state also recognizes the difference between pain management intended to alleviate pain and pain medicine used to assist in causing death.

Section 3. As used in this act, the following terms shall have the following meanings:

(1) AID IN DYING. ~~The act of a person providing the means or manner for another person to be able to commit suicide, with actual knowledge that the person deliberately intends on committing suicide by that means or manner.~~

(2) ARTIFICIALLY PROVIDED NUTRITIONAL HYDRATION. A medical treatment consisting of the administration of food and water through a tube or intravenous line, where the recipient is not required to chew or swallow voluntarily. Artificially provided nutrition and hydration does not include assisted feeding, such as spoon or bottle feeding.

(3) DELIBERATELY. More than knowing the consequences of an act or action; meaning to consider carefully; done on purpose; intentional; requiring premeditation; with intent to cause the death of a person.

APPENDIX D - ALA HOUSE BILL 96
AND ITS CODIFICATION 222-8B-1

(4) **HEALTH CARE PROVIDER.** Any individual who may be asked to participate in any way in a health care service, including, but not limited to, a physician, physician's assistant, nurse, nurse's aide, medical assistant, hospital employee, clinic employee, nursing home employee, pharmacist, pharmacy employee, researcher, medical or nursing school faculty member, student, or employee, counselor, social worker, or any professional, paraprofessional, or any other person who furnishes or assists in the furnishing of health care services.

(5) **LIFE-SUSTAINING TREATMENT.** Any medical treatment, procedure, or intervention that, in the judgment of the attending physician, when applied to the patient, would serve only to prolong the dying process where the patient has a terminal illness or injury, or would serve only to maintain the patient in a condition of permanent unconsciousness. These procedures include, but are not limited to, assisted ventilation, cardiopulmonary resuscitation, renal dialysis, surgical procedures, blood transfusions, and the administration of drugs and antibiotics. Life-sustaining treatment does not include the administration of medication or the performance of any medical treatment where, in the opinion of the attending physician, the medication or treatment is necessary to provide comfort or to alleviate pain.

(6) **PERSON.** Any natural person, and when appropriate, an organization, to include all of the following:

a. A public or private corporation, company, association, firm, partnership, or joint-stock company.

b. Government or a governmental instrumentality.

c. A foundation, institution, society, union, club, or church.

(7) **PHYSICIAN.** A person licensed to practice medicine in the state, including medical doctors and doctors of osteopathy.

(8) **SUICIDE.** The act or instance of taking one's own life voluntarily and intentionally.

Section 4. (a) Any person who deliberately assists another person to commit suicide or provides aid in dying is guilty of a Class C felony.

(b) Any physician or health care provider who prescribes any drug, compound, or substance to a patient deliberately to aid in dying or assists or performs any medical procedure deliberately to aid in dying is guilty of a Class C felony.

Section 5. (a) Any person, physician, or health care provider who deliberately violates this act by aiding in dying shall be liable for damages.

(b) If any person deliberately aids in dying in violation of this act that results in death, the personal representative or administrator of the estate of the decedent may bring an appropriate action for wrongful death.

(c) Any physician or other health care provider who deliberately aids in dying in violation of this act shall be considered to have engaged in unprofessional conduct for which his or her license to provide health care services in the state shall be suspended or revoked by the appropriate licensing board.

Section 6. Nothing in this act shall be construed to prohibit a physician or health care provider from doing any of the following:

(1) Participating in the execution of a person sentenced by a court to death by ~~lethal injection~~ any means recognized by Alabama law.

(2) Following a patient's wishes or health care proxy's instructions to withhold or withdraw life-sustaining treatment or artificially provided nutritional hydration.

(3) Prescribing and administering palliative care or pain medication treatment options intended to relieve pain while the illness or condition of the patient follows its natural course.

(4) Following the wishes or instructions of an individual which are made in compliance with Chapter 8A of Title 22, Code of Alabama 1975.

Section 7. It is the intent of the Legislature that the Attorney General exhaust the internal resources and personnel of the office prior to the retention of any outside counsel to assist in the defense of any constitutional challenge to this act.

Section 8. Although this bill would have as its purpose or effect the requirement of a new or increased expenditure of local funds, the bill is excluded from further requirements and application under Amendment 621, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended, because the bill defines a new crime or amends the definition of an existing crime.

Section 9. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains.

Section 10. This act shall become effective on the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law.

To: William Dawson
Subject: code

Code of Ala. § 22-8B-1

Current through Acts 2022, No. 22-442 of the 2022 Session, but not including corrections and changes made to the 2022 session laws by the Code Commissioner.

Michie's™ Alabama Code > TITLE 22 Health, Mental Health, and Environmental Control (Subts. 1 — 2) > SUBTITLE 1 Health and Environmental Control Generally (Chs. 1 — 40A) > CHAPTER 8B Assisted Suicide Ban Act (§§ 22-8B-1 — 22-8B-7)

§ 22-8B-1. Short title.

This chapter shall be known and may be cited as the Assisted Suicide Ban Act.

§ 22-8B-2. Legislative findings.

The Legislature finds all of the following:

- (1) In almost every state, it is a crime to assist a suicide. These bans are long-standing expressions of the commitment of the states to protect and preserve all human life.
- (2) The state has an interest in protecting vulnerable groups, including the impoverished, the elderly, and disabled persons from abuse, neglect, and mistakes. A ban on assisted suicide reflects and reinforces our belief that the lives of those in vulnerable groups are no less valued than the lives of the young and healthy.
- (3) The state has an interest in protecting the integrity and ethics of the medical profession, including its obligation to serve its patients as healers and adhere to the principles articulated in the Hippocratic Oath.
- (4) The state recognizes the close link between physician-assisted suicide and euthanasia where a right to die can easily become a duty to die. A prohibition against assisted suicide is the only reasonable means to protect against foreseeable abuses.
- (5) The state recognizes the distinction between a patient refusing life-sustaining medical treatment where he or she dies from the underlying fatal disease and a patient ingesting or administering a lethal medication prescribed by a physician, where the medication is the cause of death. The state also recognizes the difference between pain management intended to alleviate pain and pain medicine used to assist in causing death.

§ 22-8B-3. Definitions.

As used in this chapter, the following terms shall have the following meanings:

(1) Aid In Dying. The act of a person providing the means or manner for another person to be able to commit suicide, with actual knowledge that the person deliberately intends on committing suicide by that means or manner.

(2) Artificially Provided Nutritional Hydration. A medical treatment consisting of the administration of food and water through a tube or intravenous line, where the recipient is not required to chew or swallow voluntarily. Artificially provided nutrition and hydration does not include assisted feeding, such as spoon or bottle feeding.

(3) Deliberately. More than knowing the consequences of an act or action; meaning to consider carefully; done on purpose; intentional; requiring premeditation; with intent to cause the death of a person.

(4) Health Care Provider. Any individual who may be asked to participate in any way in a health care service, including, but not limited to, a physician, physician's assistant, nurse, nurse's aide, medical assistant, hospital employee, clinic employee, nursing home employee, pharmacist, pharmacy employee, researcher, medical or nursing school faculty member, student, or employee, counselor, social worker, or any professional, paraprofessional, or any other person who furnishes or assists in the furnishing of health care services.

(5) Life-Sustaining Treatment. Any medical treatment, procedure, or intervention that, in the judgment of the attending physician, when applied to the patient, would serve only to prolong the dying process where the patient has a terminal illness or injury, or would serve only to maintain the patient in a condition of permanent unconsciousness. These procedures include, but are not limited to, assisted ventilation, cardiopulmonary resuscitation, renal dialysis, surgical procedures, blood transfusions, and the administration of drugs and antibiotics. Life-sustaining treatment does not include the administration of medication or the performance of any medical treatment where, in the opinion of the attending physician, the medication or treatment is necessary to provide comfort or to alleviate pain.

(6) Person. Any natural person, and when appropriate, an organization, to include all of the following:

- a. A public or private corporation, company, association, firm, partnership, or joint-stock company.
- b. Government or a governmental instrumentality.
- c. A foundation, institution, society, union, club, or church.

(7) Physician. A person licensed to practice medicine in the state, including medical doctors and doctors of osteopathy.

(8) Suicide. The act or instance of taking one's own life voluntarily and intentionally.

§ 22-8B-4. Assisting a suicide prohibited; Class C felony.

(a) Any person who deliberately assists another person to commit suicide or provides aid in dying is guilty of a Class C felony.

(b) Any physician or health care provider who prescribes any drug, compound, or substance to a patient deliberately to aid in dying or assists or performs any medical procedure deliberately to aid in dying is guilty of a Class C felony.

§ 22-8B-5. Civil liability.

(a) Any person, physician, or health care provider who deliberately violates this chapter by aiding in dying shall be liable for damages.

(b) If any person deliberately aids in dying in violation of this chapter that results in death, the personal representative or administrator of the estate of the decedent may bring an appropriate action for wrongful death.

(c) Any physician or other health care provider who deliberately aids in dying in violation of this chapter shall be considered to have engaged in unprofessional conduct for which his or her license to provide health care services in the state shall be suspended or revoked by the appropriate licensing board.

§ 22-8B-6. Exceptions.

Nothing in this chapter shall be construed to prohibit a physician or health care provider from doing any of the following:

- (1) Participating in the execution of a person sentenced by a court to death by any means recognized by Alabama law.
- (2) Following a patient's wishes or health care proxy's instructions to withhold or withdraw life-sustaining treatment or artificially provided nutritional hydration.
- (3) Prescribing and administering palliative care or pain medication treatment options intended to relieve pain while the illness or condition of the patient follows its natural course.
- (4) Following the wishes or instructions of an individual which are made in compliance with Chapter 8A of Title 22, Code of Alabama 1975.

§ 22-8B-7. Constitutional challenges.

It is the intent of the Legislature that the Attorney General exhaust the internal resources and personnel of the office prior to the retention of any outside counsel to assist in the defense of any constitutional challenge to this chapter.

William M. Dawson
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1736 Oxmoor Rd, #101
Birmingham, AL 35209
205 795-3512 work
205 870-7763 FAX

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT P. GOSPODARECK. Petitioner

VS.

STATE OF ALABAMA. Respondent

PROOF OF SERVICE

I, William M. Dawson do swear or declare that on this date November 21, 2022 as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed in forma Pauperis and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding and on every other person required to be served, by depositing an envelope containing the above documents in the U. S. mail properly addressed to each of them with first class postage prepaid within 3 calendar days. The names and addresses of those served are as follows:

--Assistant Atty. General Beth Poe, 801 Washington Avenue, Montgomery, AL 36130; and

--Danny Carr, District Attorney of Jefferson County, Alabama, 801 R. Arrington Blvd., Birmingham, AL 35203.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 21, 2022.

Wm Dawson