NO. CR-12-1385

IN THE ALABAMA COURT OF CRIMINAL APPEALS

DEWAYNE WILLIAMS,	*	
	*	
Appellant,	*	On Appeal from the
	*	Dallas County Circuit Court
v.	*	No. CC-2010-97
	*	
STATE OF ALABAMA,	*	
	*	
Appellee.	*	

REPLY BRIEF OF THE APPELLANT

BRYAN A. STEVENSON
RANDALL SUSSKIND
ERICA SELIG
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
E-mail: bstevenson@eji.org
rsusskind@eji.org
eselig@eji.org
Phone: (334) 269-1803
Fax: (334) 269-1806

J. GARRISON THOMPSON
P.O. Box 862
Selma, AL 361 02-A862
Email: garythompson@jgtpc.net
Phone: (334) 877-9986

BLANCHARD L. MCLEOD
P. O. Box 656
Selma, AL 36702-0656
Email: bmclaw@zebra.net
Phone: (334) 875-2282

Counsel for Mr. Williams

January 22, 2014

ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

The State has conceded that Section 13A-6-65(a)(3) is invalid on its face and as applied to Mr. Williams because "the Supreme Court's decision in Lawrence [v. Texas, 539 U.S. 558 (2003)] prohibits prosecution for consensual anal sex." (State's Br. 13.) To the extent that this Court has lingering questions on the implications of Mr. Williams's facial challenge to Section 13A-6-65(a)(3), Mr. Williams respectfully requests that oral argument be granted in this case pursuant to Rule 34(a) of the Alabama Rules of Appellate Procedure.

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SUMMARY OF THE ARGUMENT

DeWayne Williams was convicted of engaging in consensual, anal sex on March 7, 2013 (C. 52; R. 346), almost ten years after the U.S. Supreme Court unambiguously held that laws that criminalize private sex acts between consenting adults violate the Due Process Clause of the 14th Amendment, Lawrence v. Texas, 539 U.S. 558, 578-79 (2003). The State now concedes that prosecuting Mr. Williams for engaging in consensual sex violated his constitutional rights under Lawrence. However, the State incorrectly argues that this Court may rewrite Alabama's anti-sodomy statute - § 13A-6-65(a)(3) - to include an element of nonconsent. Under state and federal law, courts are prohibited from rewriting a law so that it conforms to constitutional requirements. Moreover, the Alabama Legislature has made clear that nonconsent is neither an element of, or, a defense to, sodomy, as defined by § 13A-6-65(a)(3). Therefore, this Court is bound by Lawrence to find § 13A-6-65(a)(3) facially invalid and strike it down in its entirety.

The State also incorrectly argues that Mr. Williams may be re-prosecuted for nonconsensual sex under a rewritten § 13A-6-65(a)(3). It is a longstanding principle of state and federal law that "when an accused is placed on trial, the

trial runs to completion, and the accused is acquitted, the accused is no longer subject to a second trial without violating his constitutional rights." Ex parte Collins, 385 So. 2d 1005, 1008 (Ala. 1980). Moreover, the evidence the State presented at trial was insufficient to convict Mr. Williams of nonconsensual sex. The record shows that Mr. Williams and A.R. engaged in consensual sex. (R. 134, 147, 251-53, 259-263, 269.) The judge explicitly instructed the jury to find Mr. Williams not guilty of first-degree sodomy - the only lawful crime he was charged with - if the jury found that A.R. consented to sex with Mr. Williams. (R. 334-35; see also R. 343.) Mr. Williams was acquitted by the jury of nonconsensual sodomy. (C. 53; R. 346.)

ARGUMENT

I. UNDER LAWRENCE V. TEXAS, SECTION 13A-6-65(a)(3) IS INVALID ON ITS FACE AND AS APPLIED TO MR. WILLIAMS.

A. The State's argument that there is sufficient evidence to convict Mr. Williams under Section 13A-6-65(a)(3) is inapposite because it is invalid on its face and as applied to Mr. Williams.

DeWayne Williams was convicted of engaging in consensual, anal sex on March 7, 2013 (C. 52; R. 346), almost ten years after the U.S. Supreme Court unambiguously held that laws that criminalize private sex acts between consenting adults violate the Due Process Clause of the 14th Amendment, Lawrence v.

Texas, 539 U.S. 558, 578-79 (2003). In its brief, the State rightly concedes that § 13A-6-65(a)(3) is invalid on its face and as applied to Mr. Williams: "the Supreme Court's decision in Lawrence prohibits prosecution for consensual anal sex." (State's Br. 13.) At Mr. Williams's trial, the State failed to present sufficient evidence that Mr. Williams engaged in nonconsensual sex (see C. 53; R. 346), and, therefore, sought to convict him of consensual sex, despite repeat objections and argument by defense counsel, (R. 301, 343, 346, 350-54, 359-61). The State's assertion that this Court "must [now] accept as true all of the evidence introduced by the State" (State's Br. 29) (internal quotation marks omitted), is inapposite because the jury found this evidence insufficient to prove rape (C. 53; R. 346).

The evidence at trial shows that Mr. Williams checked into the Jameson Inn on January 9, 2010 and gave the hotel clerk his true address, telephone number, and credit card. (C. 156; R. 247-49.) On the night of the incident, January 10, 2010, Mr. Williams had an hour-and-a-half-long, intimate conversation with A.R., a clerk at the Jameson Inn. (R. 249-50; see also R. 141.) Following their conversation, Mr. Williams requested A.R.'s help in fixing his television set. (R. 250-51.) While A.R. was checking on the television set,

Mr. Williams touched A.R.'s thigh. (R. 251.) Mr. Williams then asked A.R. whether that was okay and A.R. did not object and was visibly aroused. (R. 251-52.) A.R. told Mr. Williams, "[w]e cannot do this here." (R. 252.) Mr. Williams asked him, "[i]s there somewhere we can go?" (R. 252.) A.R. said there was an employee bathroom in the office, which Mr. Williams would not have known about without A.R. telling him. (R. 252; see also 163-64.) On A.R.'s suggestion, Mr. Williams walked to the bathroom and A.R. followed him there. (R. 252-53.) Mr. Williams testified that he and A.R. kissed for some time and then A.R. asked to have anal sex. (R. 256, 259.) Both Mr. Williams and A.R. testified that A.R. gave Mr. Williams lotion to assist in the sex act. (R. 134, 259.) Following that, Mr. Williams and A.R. continued to talk for about an hour, interrupted only when guests checked in and when a fellow clerk and her boyfriend joined them. (R. 262-67.) At some point, A.R. gave Mr. Williams his cell phone number. (R. 264-65.) Toward the end of their night together, Mr. Williams said he called A.R.'s cell phone "[s]o he would have [his] number." (R. 265.) Mr. Williams testified that A.R. did not appear to be under the influence of drugs or alcohol and that he used no force whatsoever against A.R. (R. 268-69.) A.R. testified that the picture the State

entered into evidence and called a bruise to prove "forcible compulsion" was, in truth, a "hickey." (R. 126-27, 147.)

Three character witnesses were called by the defense to bolster Mr. Williams's credibility. (R. 217-246.) No character witnesses were called to bolster A.R.'s credibility. A.R. admitted that he uses Xanax, Soma, and pain relievers, although he denied taking Soma and pain relievers on the day of the incident. (R. 145-47.) A.R. testified that he had a history of nerve and stomach problems. (R. 159.) While A.R. testified that he went back to the employee bathroom because he heard an incoming fax and not because he wanted to have sex with Mr. Williams, the only faxes received that day were received many hours before the incident occurred (R. 107, 157-58.)

In addition to the jury finding Mr. Williams's version of events credible and A.R.'s uncredible, the State failed to provide crucial evidence that may have conclusively shown whether or not the sex was consensual. The Jameson Inn had surveillance cameras recording the area around the front desk and the employee bathroom on the day of the incident, however, the State elected not to retrieve or present the surveillance footage. (R. 148-55.) Moreover, the medical records taken the day after the incident were not consistent with domestic

violence and also showed that A.R. suffered no outward physical trauma and, in fact, "denie[d] pain." (C. 165-72.)

In its brief, the State incorrectly asserts that the jury did not consider consent in this case. (State's Br. 11, 29.) In fact, the judge charged the jury to find Mr. Williams not guilty if they found that the complaining witness "consented to sexual intercourse." (R. 334-35; see also R. 343.) Indeed, Mr. Williams's defense at trial was that A.R. consented to sex (see R. 247-70; see also R. 131-67, 171-72), and Mr. Williams was acquitted by the jury of rape, (C. 53; R. 346). At trial and on appeal, Mr. Williams has never denied that he had consensual sex with A.R., but, rather, has continually objected that it is unconstitutional for the State to prosecute him for such conduct, which is protected under the Due Process Clause. (See R. 301, 343, 346, 350-54, 359-61; Appellant's Br. 10-11, 16-20.) As the State concedes in its brief (State's Br. 13-18), prosecuting Mr. Williams for engaging in consensual sex violates his constitutional rights to Due Process under the 14th Amendment, Lawrence v. Texas, 539 U.S. 558, 578-79 (2003). Accordingly, this Court should vacate Mr. Williams's illegal conviction and sentence.

B. Because Section 13A-6-65(a)(3) is facially invalid, it cannot be redrafted by this Court so that it comports with the constitutional requirements of *Lawrence v. Texas*.

Under state and federal law, courts are prohibited from redrafting a law so that it comports with constitutional requirements. See, e.g., Reno v. Am. Civil Liberties Union, 521 U.S. 844, 884-85 (1997) ("This Court will not rewrite . . . law to conform it to constitutional requirements.") (internal quotation marks omitted); United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 479 (1995) (finding that "redraft[ing] [a] statute to limit its coverage" amounts to "judicial legislation"); Ex parte Perkins, 851 So. 2d 453, 455 n.1 (Ala. 2002) (noting that courts should "refrain from making policy decisions" because "the judicial branch of government . . . can only interpret the law").

Courts may not legislate, even if, as the State suggests in its brief, failing to legislate may leave a gap in a state's criminal code. (See State's Brief 19.) The Alabama Supreme Court has repeatedly found that "[such] questions of propriety, wisdom, necessity, utility, and expediency are exclusively for the Legislature to determine and are matters with which the courts have no concern." Friday v. Ethanol Corp., 539 So. 2d 208, 211 (Ala. 1988) (citing Reed v. Brunson, 527 So. 2d 102 (Ala. 1988); Fireman's Fund Am.

Insurance Co. v. Coleman, 394 So. 2d 334, 352-53 (Ala. 1980); Alabama State Fed'n of Labor v. McAdory, 18 So. 2d 810, 815 (Ala. 1944)).

In its brief, the State cites Ex parte Henderson, No. 1120140, 2013 WL 4873077, at *18 (Ala. Sept. 13, 2013), to state the proposition that when "a statute become[s] invalid or unconstitutional in part, the part that is valid will be sustained where it can be separated from that part that is void." (State's Br. 19.) Indeed, in Henderson, the Alabama Supreme Court found that the new constitutional requirement elucidated in Miller v. Alabama, 132 S. Ct. 2455 (2012), narrowed, rather than prohibited, the State's authority to punish juveniles with life without parole. Henderson, 2013 WL 4873077, at *18. Moreover, the State's authority to punish adults with life without parole was wholly unaffected by Miller. See Henderson, 2013 WL 4873077, at *18. Because of this, the Court in Henderson found that it could "[s]ever[e] the mandatory nature of a life-without-parole sentence for a juvenile to provide for the ameliorative possibility of parole" and that Miller "[did] not invalidate § 13A-5-39." Henderson, 2013 WL 4873077, at *18.

Unlike in Miller, where the Court narrowed the states' authority to impose a category of punishment, in Lawrence, the

Court prohibited states from criminalizing certain behavior entirely, finding that laws that criminalize consensual sex violate the Due Process Clause of the 14th Amendment. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003). Also, unlike in Miller, in Lawrence, the Court was considering a facial challenge to a state law: "The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." Lawrence, 539 U.S. at 562. Not only did the Lawrence Court find the Texas statute facially invalid, it also explicitly overruled Bowers v. Hardwick, 478 U.S. 186 (1986), thereby prohibiting all states from criminalizing private, consensual sex acts between adults. Lawrence, 539 U.S. at 578. Under Lawrence, any anti-sodomy statute that broadly prohibits private, consensual sex acts between adults is facially invalid and, thus, states lack the authority to enforce such laws in any capacity. Id. at 558, 578-79; see also MacDonald v. Moose, 710 F.3d 154, 167 (4th Cir. 2013) (finding that Virginia's anti-sodomy statute facially violated the Due Process Clause and could not "be squared with Lawrence without the sort of judicial intervention that the Supreme Court [has] condemned").

The statute at issue here, like in Lawrence and Bowers,

is a general anti-sodomy statute that prohibits all acts of oral and anal sex and therefore, on its face, violates the Due Process Clause of the 14th Amendment. Id. at 578-79. Because § 13A-6-65(a)(3) is facially invalid, it may not be applied against anyone. This Court may not, as the State suggests, "rewrite . . . [the] law to conform it to constitutional requirements," Reno, 521 U.S. at 884-85, by grafting onto the anti-sodomy statute a new judicially-created element of nonconsent, which the Alabama legislature has made clear is neither an element of, or, a defense to, sodomy, Ala. Code §§ 13A-6-70(a) & 13A-6-65(a)(3).

The State's proposed revision, striking out sections of the criminal code that state that consent is neither a defense to, or, an element of, sodomy (State Br. 27-28), is not a judicial interpretation of § 13A-6-65(a)(3), but, rather, a judicial reinvention of it. See Perkins, 851 So. 2d at 455 n.1. In cases like this, where the constitutional challenge implicates an entire statutory provision, "the Act must stand or fall as a whole." Wyoming v. Oklahoma, 502 U.S. 437, 460 (1992); see also MacDonald, 710 F.3d at 167. The "editorial freedom" to strike down substantive parts of the law "belongs to the Legislature, not the Judiciary." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3162

(2010).

This Court, in "testing the constitutionality of [§ 13A-6-65(a)(3)]," may only decide upon the "question . . . of legislative power, not of legislative expediency or legislative wisdom." Friday, 539 So. 2d at 211. After Lawrence, the State of Alabama no longer has the authority to criminalize private, consensual sexual conduct and therefore § 13A-6-65(a)(3) must be struck down in its entirety, rather than expediently rewritten to avoid Lawrence's constitutional prohibitions.

In its brief, the State argues that "if § 13A-6-65(a)(3) is struck down in its entirety, there will be no Alabama law prohibiting any person (male or female) from having nonconsensual anal or oral sex with another adult (male or female), unless other circumstances would support a charge of first or second-degree sodomy." (State's Br. 26.) However, § 13A-6-65(a)(3) has never operated to protect victims of nonconsensual anal and oral sex because it explicitly prohibits *consensual* anal and oral sex and serves no other purpose. Indeed, the Alabama Supreme Court has found that § 13A-6-65(a)(3) was enacted for the purpose of criminalizing consensual sex acts between same-sex couples: "Lest there be any doubt, the Legislature made it clear that its definition

of deviate sexual intercourse in § 13A-6-65(a)(3) [made] *all homosexual conduct* criminal." Ex parte H.H., 830 So. 2d 21, 29 (Ala. 2002) (internal quotation marks omitted).

Further, the legislative commentary to § 13A-6-65(a)(3) reveals that the legislature intended to specifically criminalize consensual sex between same-sex couples, rather than criminalize nonconsensual sex:

> In the original draft, § 13A-6-65(a)(3) covered deviate sexual intercourse without lawful consent under the same terms and circumstances as subdivision (a)(1) covers vaginal intercourse. If both actors were adult and both consented, there was no offense; but ***this subdivision was changed by the legislature to make all homosexual conduct criminal, and consent is no defense.***

Commentary to Ala. Code § 13A-6-65 (emphasis added). Therefore, rewriting § 13A-6-65(a)(3) to include an element of nonconsent would not effectuate the manifest intent of the legislature.

Moreover, people in Alabama accused of engaging in nonconsensual anal or oral sex in circumstances that do not support a charge of first or second-degree sodomy may still be prosecuted for sexual abuse under Ala. Code §§ 13A-6-66 and 13A-6-67. The general consent provision of Article 4 of the Criminal Code provides that the "lack of consent" element of sexual abuse is satisfied under "any circumstances, in addition to forcible compulsion or incapacity to consent, in

which the victim does not expressly or impliedly acquiesce in the actor's conduct." Ala. Code § 13A-6-70(b)(3). Therefore, depending on the circumstances of an alleged crime, prosecutors in Alabama do have the opportunity to charge an individual with a Class C felony, Ala. Code § 13A-6-66(b), or Class A misdemeanor, § 13A-6-67(b), for nonconsensual sex acts that encompass "sexual abuse" but do not rise to the level of first or second-degree sodomy.

For these reasons, Mr. Williams respectfully asks this Court to find that § 13A-6-65(a)(3) is facially invalid under Lawrence v. Texas, 539 U.S. 558 (2003), and to strike down this provision in its entirety.

II. EVEN IF ALABAMA'S SODOMY STATUTE COULD BE JUDICIALLY REWRITTEN, SUBJECTING MR. WILLIAMS TO A SECOND PROSECUTION FOLLOWING HIS ACQUITTAL FOR RAPE VIOLATES HIS CONSTITUTIONAL RIGHTS UNDER STATE AND FEDERAL LAW.

As discussed above in Part I.A, the State failed to present sufficient evidence that Mr. Williams engaged in nonconsensual sex (see C. 53; R. 346), and, therefore, sought to convict him of consensual sex. Mr. Williams was acquitted by a jury of any criminal wrongdoing - to wit, sodomy in the first degree. (C. 53; R. 346.) It is a longstanding principle of state and federal law that "when an accused is placed on trial, the trial runs to completion, and the accused is acquitted, the accused is no longer subject to a second

trial without violating his constitutional rights." Ex parte Collins, 385 So. 2d 1005, 1008 (Ala. 1980); see also U.S. v. Scott, 437 U.S. 82, 88-89 (1978). While it is true that when an accused person is convicted and his conviction is vacated on any ground besides insufficiency of evidence, retrial (for the convicted offense) is not barred by Double Jeopardy, Collins, 385 So. 2d at 1008; Scott, 437 U.S. at 88-89, here, the State wants to retry Mr. Williams for a greater offense - nonconsensual sex - than what he was convicted of - consensual sex. (State's Br. 29-36.)

Retrying Mr. Williams again for nonconsensual sex places him twice in jeopardy, because his conviction of consensual, anal sex operated as an acquittal to any greater charge based upon the same evidence and same underlying incident. Burton v. State, 22 So. 585, 587 (Ala. 1897) (finding that a conviction of second-degree murder is an acquittal of first-degree murder based upon the same evidence and incident). Moreover, the State may not take advantage of a defunct and unconstitutional law in order retry Mr. Williams for rape, after the State was unsuccessful in obtaining a conviction. (See C. 53; R. 346.)

Mr. Williams's constitutional rights have already been clearly violated by the State of Alabama. Lawrence v. Texas,

539 U.S. 558, 567 (2003) (prohibiting states from treating people who engage in same-sex relationships "as criminals"). Mr. Williams was illegally prosecuted and convicted of engaging in consensual, anal sex. (C. 52; R. 346.) He was then illegally sentenced to twelve months in jail and twenty-four months supervised probation. (R. 368-69.) He was then illegally made to register as a sex offender. (R. 360.) Mr. Williams has spent about four months in jail for conduct that was decriminalized nearly ten years before he was convicted. (See C. 122; R. 368-69.) Both the State and the trial court were on notice that Mr. Williams's conviction and subsequent sentence violated longstanding federal law. (See R. 301, 343, 346, 350-54, 359-61.)

This Court cannot permit the State to drag Mr. Williams back to court for rape - what they call nonconsensual sodomy under § 13A-6-65(a)(3) - following his acquittal of rape and subsequent illegal conviction for the "lesser-included" "crime" of consensual sex. (C. 52-53; R. 346.); Collins, 385 So. 2d at 1008; Scott, 437 U.S. at 88-89; Burton, 22 So. at 587.

Moreover, even assuming this Court finds that re-trying Mr. Williams for rape following his acquittal for rape (and conviction of consensual, anal sex) does not, in and of

itself, constitute a Double Jeopardy violation, this Court should find that the State provided insufficient evidence at trial to prosecute Mr. Williams for rape "as a result of some fraud, artifice or stratagem" and therefore bar the State from re-trying him. See Prantl v. State, 462 So. 2d 781, 784 (Ala. Crim. App. 1984) ("The double jeopardy clauses of the Fifth Amendment to the Constitution of the United States and of the Alabama Constitution preclude a second trial once a reviewing court has found the evidence presented at trial insufficient to sustain the jury's verdict of guilty.") (citing Burks v. United States, 437 U.S. 1 (1978)).

In its brief, the State argues that § 13A-6-65(a)(3) should be re-written to criminalize nonconsensual anal sex in the same way § 13A-6-65(a)(1) criminalizes nonconsensual vaginal sex. (State's Br. 24-25.)[1] Yet, the kind of conduct § 13A-6-65(a)(1) criminalizes is "rape by trick." The Alabama

[1] Note that prosecuting Mr. Williams for nonconsensual anal sex under a newly revised § 13A-6-65(a)(3) would also raise an ex post facto problem under state and federal law. Ex parte Alexander, 475 So. 2d 628, 629 (Ala. 1985) ("[A]n appellate court's decision, which construes a criminal statute to find certain conduct in violation thereof, should be enforced only prospectively due to the constitutional prohibition against the passage of ex post fact laws. . . ."); see also Bouie v. City of Columbia, 378 U.S. 347, 353 (1964) ("[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law. . . .").

legislature explained the purpose of this section: "Section 13A-6-65 is not concerned with aggravated cases of rape . . . rather it is directed toward the more unusual situations where a person has acquiesced to sexual intercourse . . . as a result of some fraud, artifice or stratagem." Commentary to Ala. Code § 13A-6-65.

The State presented no evidence whatsoever at trial that Mr. Williams raped A.R. "as a result of some fraud, artifice or stratagem." See Part I.A; see also Ex parte Hightower 443 So. 2d 1272, 1274 (Ala. 1983) (finding that "[t]here is a difference between 'without consent' and 'with consent obtained by fraud or artifice'" and that they require "entirely different [] proof"). The State's theory at trial was that Mr. Williams forced A.R. to have sex with him by "physically overpower[ing]" him and Mr. Williams was charged accordingly. (R. 167; C. 10.) The jury found that the evidence introduced at trial was insufficient to prove this theory and, thus, Mr. Williams was acquitted of rape. (C. 53; R. 346.)

The State's assertion that Mr. Williams failed to preserve his "claim that the jury was not presented sufficient evidence from which it could have determine[d] that [] consent was absent" in convicting Mr. Williams of *consensual*, anal sex

under § 13A-6-65(a)(3) is inapposite. (State's Br. 29.) Only now, in its brief, is the State asserting that § 13A-6-65(a)(3) should contain a nonconsent element. (State's Br. 18-28.) The Alabama Legislature made clear that nonconsent is *not* an element of the crime elaborated in § 13A-6-65(a)(3), see Ala. Code § 13A-6-70(a), and, therefore, Mr. Williams was under no obligation to "preserve" such a claim at trial.

For the above reasons, Mr. Williams respectfully asks this Court to not remand this case for retrial, as doing so would clearly violate the Double Jeopardy Clause of the U.S. and Alabama Constitutions.

CONCLUSION

For all of these reasons, individually and collectively, and those stated in Mr. Williams's principal brief to this Court, Mr. Williams respectfully requests that this Court vacate the trial court's illegal conviction and sentence. This Court should also find that § 13A-6-65(a)(3) is facially invalid under Lawrence v. Texas, 539 U.S. 558 (2003), and strike the law down in its entirety.

Respectfully submitted,

/s/Bryan A. Stevenson
BRYAN A. STEVENSON
RANDALL SUSSKIND
ERICA A. SELIG
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
E-mail: bstevenson@eji.org
rsusskind@eji.org
eselig@eji.org
Phone: (334) 269-1803
Fax: (334) 269-1806

J. GARRISON THOMPSON
P.O. Box 862
Se1ma, AL 361 02-A862
Email: garythompson@jgtpc.net
Phone: (334) 877-9986

BLANCHARD L. MCLEOD
P. O. Box 656
Selma, AL 36702-0656
Email: bmclaw@zebra.net
Phone: (334) 875-2282

Counsel for Mr. Williams

January 22, 2014

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2014, I served a copy of the attached pleading by electronic mail to Michael Nunnelley at docketroom@ago.state.al.us.

/s/Bryan A. Stevenson
BRYAN A. STEVENSON