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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

GARY WAYNE WRIGHT, II	)	
	)	
	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL CASE NO. 4:22-cv-00615-SGC**
	)	
MARSHALL COUNTY, ALABAMA, et.al	)	
	)	
	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF THE MOTION TO DISMISS

Defendants Marshall County, Alabama, Marshall County Chairman James Hutcheson, Marshall County Commissioners Ronny Shumate, Rick Watson, Lee Sims, and Joey Baker, in both their individual and official capacities, Marshall County Attorney Clint Maze, Rhonda McCoy, and Sheriff Phil Sims, in both their individual and official capacities, hereby respectfully submit this Brief in Support of their Motion to Dismiss. As discussed herein, certain claims alleged against Marshall County, Alabama, and Sheriff Sims, in his official capacity are due to be dismissed, and all claims against the remaining Defendants are due to be dismissed pursuant to Rules 12(b)(1) and/or 12(b)(6) of the Federal Rules of Civil Procedure, as follows:

INTRODUCTION

In response to an ugly incident involving competing protestors, the Marshall County Commission passed a Resolution setting out content-neutral restrictions and requirements for protests occurring in and around the Guntersville and Albertville County Courthouses. Plaintiff contends that these restrictions violate the First Amendment of the United States Constitution. Marshall County is confident that its policy is valid and that Plaintiff will not be able to prevail on his claims, particularly once all of the facts and circumstances surrounding its adoption are presented in evidence; however, it acknowledges that Plaintiff has properly placed the issue of the constitutionality of this policy before this Court.

But it is also clear from both the Complaint itself and Plaintiff's Response to Order (Doc. 12) that Plaintiff views the passage of this Resolution as being part and parcel of a larger problem – a conspiracy, even – and accordingly sees this lawsuit as part of a quest for justice in a broad, societal sense. This Court is not the appropriate forum, and this case is not the appropriate vehicle, for the resolution of such issues. The Motion to Dismiss therefore seeks to strip away the extraneous allegations and claims so that the case can proceed in an orderly manner on the issue of the Resolution's constitutionality. As discussed herein, Defendants respectfully submit that all claims except Counts 1, 2, and 3 relating to the Resolution alleged against Marshall County and Sheriff Sims, in his official capacity, are due to be dismissed.

STANDARD OF REVIEW

Pursuant to Rule 8 of the Federal Rules of Civil Procedure, a plaintiff must provide the defendant from the outset with a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. "The point is to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 974 (11th Cir. 2008). In *Bell Atlantic v. Twombly*, the Supreme Court tightened the pleading standard applicable to complaints, describing the old "no set of facts" as being "best forgotten as an incomplete, negative gloss" on Rule 8. 550 U.S. 544, 563 (2007). Instead, the *Twombly* Court set a "plausibility" standard, pursuant to which the plaintiff must plead enough *facts* (not merely unsupported legal conclusions) to show that, if the facts are proven true, he will plausibly be entitled to the relief that he seeks. *Id.* at 562-63.

The Supreme Court elaborated on this standard in *Ashcroft v. Iqbal*, as follows:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

556 U.S. 662, 678 (2009)(internal citations omitted). The *Iqbal* Court also emphasized that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

This rule furthers the principle that discovery may not be used as a "fishing expedition" to flesh out insufficiently alleged claims. *See, e.g., Porter v. Ray*, 461 F.3d 1315, 1324 (11th Cir. 2006) (affirming denial of motion seeking review of parole files in attempt to prove due process violations when discovery sought would be irrelevant to the claims actually stated). The Twombly Court stressed the importance of applying the Rule 8 standard rigorously "lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." 550 U.S. at 557 (2007) (quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE DUE TO BE DISMISSED TO THE EXTENT THAT THEY ARE BASED ON ARGUMENTS THAT HAVE BEEN OR WILL BE MADE IN RHONDA MCCOY'S CRIMINAL PROCEEDINGS.

Plaintiff has alleged that the Defendants "conspired and attempted to abuse [the Picketing Resolution] in court" (Doc. 1, ¶ 34) and that they have "attempt[ed] to

misrepresent during court proceedings the undated Picketing Resolution in retroactivity…" (Doc. 1, ¶ 79.) These allegations appear to be directed at evidence and/or arguments put forth by Rhonda McCoy in the criminal proceeding against her. There are multiple problems with Plaintiff's attempt to base any claim for relief on such allegations.

First, Plaintiff is a stranger to the criminal proceeding in question and therefore lacks standing to bring any cause of action based on any facet of it. He has not identified any alleged injury that he has suffered because of this alleged wrongdoing. *See, e.g. Warth v. Seldin*, 422 U.S.C 490, 499 (1975) ("A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action…the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (internal citations and quotation omitted)); *Banks v. Secretary, Department of Health and Human Services*, 38 F.4th 86 (11th Cir. 2022) (holding that plaintiff who did not suffer a concrete harm from Medicare's denial of payment did not have standing to bring suit).

Second, the absolute litigation privilege bars liability against anybody on any theory, including both substantive and conspiracy claims, for statements made within the context of criminal proceedings. *See Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (holding that § 1983 did not carve out exception to traditional absolute immunity "for

all persons – governmental and otherwise – who were integral parts of the judicial process"); *Jones v. Cannon*, 174 F.3d 1271, 1286-89 (11th Cir. 1999) (holding that absolute privilege attaches to allegedly perjured testimony given in criminal trial as well as to a claim for a conspiracy amongst the witnesses).

Third, Ms. McCoy's criminal proceedings are still ongoing, as she has exercised her right to appeal the case from the district court to the circuit court for a trial de novo (*City of Guntersville v. McCoy*, CC-2022-000017), which, under Alabama law, is truly an entirely new proceeding in which no consideration is given to the prior proceedings in the district court. *Ex parte Sorsby*, 12 So.3d 139, 146 (Ala. 2007). The principles of abstention annunciated in *Younger v. Harris*, 401 U.S. 37 (1971) and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), would accordingly apply in this case to preclude this Court from taking any action that would interfere with the ongoing State criminal matter, e.g., issuing declaratory or injunctive relief purporting to limit arguments that could be presented to the circuit court in Ms. McCoy's defense.[1] The circuit court has full jurisdiction and authority to rule on the admissibility of evidence and testimony. Therefore, to the extent that Plaintiff is attempting to base his claims on events occurring within the context of McCoy's criminal trial, they are due to be dismissed pursuant to either Rule 12(b)(1) or 12(b)(6) of the Federal Rules of Civil Procedure.

[1]The abstention doctrines arise out of cases seeking to interfere with a state criminal prosecution. If this case were being brought by the alleged victim, the twist in this case – the attempted interference with a defense – would also have significant Seventh Amendment ramifications.

II. PLAINTIFF'S CONSPIRACY CLAIM IS DUE TO BE DISMISSED WITH PREJUDICE.

Plaintiff's conspiracy claim is due to be dismissed with prejudice pursuant to Fed. R. Civ. Pro. 12(b)(6) because of the intercorporate conspiracy doctrine. "The intercorporate conspiracy doctrine holds that acts of corporate agents are attributed to the corporation itself, thereby negating the multiplicity of actors necessary for the formation of a conspiracy. Simply put, under the doctrine, a corporation cannot conspire with its employees, and its employees, when acting in the scope of their employment, cannot conspire amongst themselves." *Denny v. City of Albany*, 247 F.3d 1172, 1190 (11th Cir. 2001) ((quoting *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000) (en banc)).

Plaintiff has specifically alleged that the supposed conspiracy existed amongst "Marshall County and its employees." (Doc. 1, ¶ 77.) This allegation places this claim squarely inside the intercorporate conspiracy doctrine. Admittedly, he has also alleged that "Defendants carried out the conspiracy outside of their duties of office, so they are not entitled to any form or claim of immunity;" however, even if this allegation were construed as an attempt to argue that the individual Defendants were not acting within the line and scope of their duties in forming the alleged conspiracy, it is still conclusory legal invective, unsupported by any factual allegations, and so is not entitled to any

presumption of correctness.[2] *See*, *e.g.*, *Iqbal*, *supra*. Count 5 is accordingly due to be dismissed with prejudice.

III. PLAINTIFF'S DUE PROCESS CLAIM IS DUE TO BE DISMISSED WITH PREJUDICE.

Count 4 alleges that Marshall County has denied Plaintiff "liberty and privileges without due process of law." (Doc. 1, ¶ 73.) It is not clear whether Plaintiff is attempting to allege a violation of his procedural or substantive due process rights; however, either variation of this claim is without merit.

First, Plaintiff cannot base a claim for a violation of his procedural due process rights on the passage of the Resolution. The Resolution was passed by the Marshall County Commission and places content-neutral, generally applicable restrictions and requirements on picketing in and around the Guntersville or Albertville County Courthouse. It is a legislative act and, as such, Plaintiff (or any other person) is not entitled to procedural due process above and beyond that inherent in the legislative process. *75 Acres, LLC v. Miami-Dade County, Fla.*, 338 F.3d 1288, 1294 (11th Cir. 2003); *see also Kentner v. City of Sanibel*, 750 F.3d 1274, 1280 (11th Cir. 2014)

[2]Plaintiff has also preemptively alleged that the "Crime Fraud exception negates any claims to privileged communications or attorney-client privilege." (Doc. 1, ¶ 81.) It is worth noting that Plaintiff has not identified a crime or fraud that was allegedly being committed. Further, the applicability of this exception is limited, and it cannot be invoked by a simple conclusory allegation. Plaintiff would instead be first required to show a factual basis adequate to support a good faith belief by a reasonable person that the communications were made in furtherance of a crime or fraud; then, the Court would need to engage in an *in camera* review of the materials in order to evaluate this claim. *U.S. v. Zolin*, 491 U.S. 554, 572 (1989).

("Because plaintiffs are challenging the Ordinance on its face rather than contesting a specific zoning or permit decision made under the auspices of the Ordinance, we conclude that they are challenging a legislative act.")

Plaintiff also cannot state a claim for a violation of his substantive due process rights based on the alleged violation of his First Amendment rights. *Echols v. Lawton*, 913 F.3d 1313, 1326 (11th Cir. 2019). "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing those claims." *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998)). The requirements of the First Amendment "are not to be supplemented through the device of substantive due process." *Id.* (internal quotation omitted). Count 4 is accordingly due to be dismissed with prejudice.

IV. THE COMMISSIONERS, MAZE, AND MCCOY ARE ENTITLED TO LEGISLATIVE IMMUNITY.

Legislative immunity protects elected officials and their employees from any claims based on acts taken while involved in legislative functions. *Ellis v. Coffee County Bd. of Registrars*, 981 F.2d 1185, 1192 (11th Cir. 1993) (holding that county attorney was entitled to legislative immunity against claim arising out of advice given to county commission); *see also Woods v. Gamel*, 132 F.3d 1417, 1419 (11th Cir. 1998) (holding that members of the Marshall County Commission are entitled to legislative immunity). This immunity applies to both individual capacity claims seeking damages and official

capacity claims for prospective relief. *Scott v. Taylor*, 405 F.3d 1251, 1256 (11th Cir. 2005). "An act is deemed legislative, rather than administrative or managerial, when it is policymaking and of general application…Voting, debating, and reacting to public opinion are manifestly in furtherance of legislative duties." *Woods*, 132 F.3d at 1419 (internal quotations and citations omitted). The analysis depends on the character of the act itself "stripped of all considerations of intent and motive." *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998).

This case is a challenge to a Resolution passed by the Marshall County Commission setting generally applicable, explicitly content-neutral restrictions on picketing in or around the Guntersville and Albertville County Courthouses. As discussed *supra*, passing such an ordinance is plainly legislative in nature. *See, e.g.*, *Bogan*, 523 U.S. at 55-56. While it is not clear from the Complaint exactly what involvement Maze and McCoy are alleged to have had in the passage of the Resolution, any actions that they might have taken would necessarily have been done as part and parcel of the legislative process. All claims against Marshall County Chairman James Hutcheson, Marshall County Commissioners Ronny Shumate, Rick Watson, Lee Sims, and Joey Baker, in both their individual and official capacities, Marshall County Attorney Clint Maze, and Rhonda McCoy are accordingly due to be dismissed with prejudice.

IV. ALL CLAIMS AGAINST CLINT MAZE AND RHONDA MCCOY, AS WELL AS THE INDIVIDUAL CAPACITY CLAIMS AGAINST SHERIFF SIMS, ARE DUE TO BE DISMISSED WITH PREJUDICE.

A. Plaintiff has not stated a claim against these Defendants.

42 U.S.C. § 1983 provides a vehicle for asserting claims of violations of federal law against those persons who, under color of law, causes said violations. Liability "requires proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation." *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986). "Moreover, 'when individuals are being sued in individual capacities for damages for personal injuries, the causation inquiry must be more refined and focused than that undertaken where only declaratory and injunctive relief are sought for constitutional violations.'" *Id.* (internal alterations omitted) (quoting *Williams v. Bennett*, 689 F.2d 1370, 1381 (11th Cir. 1982).

First, it is unclear whether Plaintiff is even attempting to allege a claim against these Defendants in Counts 1-4. These Counts all specifically allege that "Marshall County" has violated Plaintiff's rights, but each Count ends with a *pro forma* declaration that "Defendants [plural] are acting under color of state and local law and are liable for their violation…under 42 U.S.C. § 1983." (Doc. 1, ¶¶ 53, 61, 67, 73 and ¶¶ 58, 64, 70, 75.) In the spirit of candor, and in deference to Plaintiff's pro se status, Defendants concede that such claims could be construed as valid claims against Sheriff Sims in his official capacity to the extent that they seek an injunction against future enforcement

action. But there are no factual allegations plausibly alleging a causal connection between any act by Sheriff Sims, Maze, or McCoy and the passage of the allegedly illegal Resolution – and, as a matter of law, none of them could have "caused" this Resolution to have been passed.

Count 5 is more explicitly alleged against all Defendants – but again, there is no explanation as to what Maze, McCoy, or Sheriff Sims is alleged to have done that would justify holding the individual liable. The absence of any factual allegations (as opposed to conclusory legal invective) is fatal to Plaintiff's attempt to bring claims against them.

B. In the alternative, these Defendants are entitled to qualified immunity.

In an apparent attempt to forestall a qualified immunity defense, Plaintiff has alleged that "Defendants carried out the conspiracy outside of their duties of office." (Doc. 1, ¶ 80.) As discussed *supra*, this conclusory legal invective is not entitled to any presumption of truth. Assuming, *arguendo*, that the discretionary authority analysis is a necessary prerequisite to a grant of qualified immunity, Maze, McCoy, and Sheriff Sims would be entitled to qualified immunity from all claims alleged against them in their individual capacities because they could only advise and assist the Commission in implementing the Resolution (as to Maze and McCoy) or enforce the Resolution (as to Sheriff Sims) in their line and scope of their duties. *See* Ala. Code (1975) §§ 36-22-3 (Listing duties of sheriff); *see also Cook v. St. Clair County*, 384 So.2d 1, 5 (Ala. 1980) (discussing fact that counties necessarily act through agents). The discretionary function

test for qualified immunity asks whether the defendant was "performing a function that, *but for* the alleged constitutional infirmity, would have fallen with his legitimate job description." *Spencer v. Benison*, 5 F.4th 1222, 1231 (11th Cir. 2021) (quotations omitted) emphasis in original). This inquiry must "strip out the allegedly illegal conduct" and focus on the general nature of the action. *Id.* Thus, Plaintiff's allegations of illicit personal motivations are irrelevant to the analysis.

These Defendants are accordingly entitled to qualified immunity unless Plaintiff can show substantial evidence that they violated some right(s), and, further, that the specific right(s) were clearly established at the time. *See*, *e.g.*, *Nam Dang by and Through Vina Dang v. Sheriff, Seminole County Florida*, 871 F.3d 1272, 1279 (11th Cir. 2017). "Because § 1983 requires proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation, each defendant is entitled to an independent qualified immunity analysis as it relates to his or her actions and omissions." *Alcocer v. Mills*, 906 F.3d 944, 951 (11th Cir. 2018).

The United States Supreme Court has summarized the general principles governing the defense of qualified immunity, as follows:

> Under our precedents, officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was "clearly established at the time." *Reichle v. Howa*rds, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). "Clearly established" means that, at the time of the officer's conduct, the law was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. [*Ashcroft v.] al–Kidd*, [563 U.S. 731,] 741, 131 S.Ct. 2074 [(2011)] (quoting *Anderson v.*

Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." *al–Kidd, supra*, at 741, 131 S.Ct. 2074. This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (per curiam), which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority,' " *al–Kidd, supra*, at 741–742, 131 S.Ct. 2074 (quoting *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)). It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. *See Reichle*, 566 U.S., at 666, 132 S.Ct. 2088. Otherwise, the rule is not one that "every reasonable official" would know. *Id.*, at 664, 132 S.Ct. 2088 (internal quotation marks omitted).

The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). This requires a high "degree of specificity." *Mullenix v. Luna*, 577 U.S. ——, ——, 136 S.Ct. 305, 309, 193 L.Ed.2d 255 (2015) (per curiam). We have repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff*, supra, at 2023 (internal quotation marks and citation omitted). A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established." *Anderson, supra*, at 641, 107 S.Ct. 3034.

D.C. v. Wesby, 138 S. Ct. 577, 589–90, 199 L. Ed. 2d 453 (2018). The Eleventh Circuit has held that decisions of the United States Supreme Court, the Eleventh Circuit

Court of Appeals, and the Alabama Supreme Court can clearly establish law for the purposes of qualified immunity. *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826, n.4 (11th Cir. 1997).

Prior to *Pearson v. Callahan*, 555 U.S. 223 (2009), courts had to first consider the merits of the underlying constitutional question before determining whether the relevant law was clearly established. Courts may now "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. at 236. The *Pearson* court recognized that there are situations in which the rigid two-step protocol is unworkable and/or impractical, specifically including when the defense is raised in a motion to dismiss, as follows: "When qualified immunity is asserted at the pleading stage, the precise factual basis for the plaintiff's claims or claims may be hard to identify. *Id.* at 239. Thus, given the well-established "importance of resolving immunity questions at the earlies possible stage in litigation," *Id.* at 232 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)), dismissal is the appropriate remedy when a complaint fails to allege any plausible violation, let alone one of clearly-established law.

The claims against Maze, McCoy, and Sheriff Sims fit neatly into the ambit of *Pearson*. Again, Plaintiff has not given any factual detail as to the alleged nature of each of their individual involvement. But – whatever it may be – there is no clearly established law that would put a reasonable person in the shoes of Maze, McCoy, and/or

Sheriff Sims on notice that he or she could be held personally liable for an allegedly unconstitutional ordinance enacted by the Marshall County Commission. They are accordingly each entitled to qualified immunity from all claims alleged against them in their individual capacities.

CONCLUSION

For the reasons discussed above, all Defendants hereby respectfully request that this Court dismiss any claim to the extent that it is based on matters that have or may occur in the context of McCoy's criminal case, and that Counts 4 and 5 be dismissed with prejudice. Marshall County Chairman James Hutcheson, Marshall County Commissioners Ronny Shumate, Rick Watson, Lee Sims, and Joey Baker, in both their individual and official capacities, Marshall County Attorney Clint Maze, and Rhonda McCoy, in their individual and official capacities, also respectfully assert that they are entitled to absolute legislative immunity from all claims alleged against them. Maze, McCoy, and Sheriff Sims also state that all claims alleged against them in their individual capacities are due to be dismissed with prejudice pursuant to Fed. R. Civ. Pro. 12(b)(6) or because they are entitled to qualified immunity.

Respectfully submitted this the 2nd day of September, 2022.

s/Jamie H. Kidd Frawley
JAMIE H. KIDD FRAWLEY (ASB-7661-M76H)
Attorney for Defendants
WEBB, MCNEILL, & WALKER, P.C.
P.O. Box 238
Montgomery, AL 36101-0238
(334) 262-1850 - T
(334) 262-1772 - F
jfrawley@wmwfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of September, 2022, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will provide a copy to the following:

Gary Wayne Wright II *(pro se)*
103 Mayberry Lane
Arab, AL 35016

s/Jamie H. Kidd Frawley
OF COUNSEL