STATE OF ALABAMA
MADISON COUNTY

IN THE PROBATE COURT
CASE NO. 71619

IN THE MATTER OF ANGELIQUE HARRIS
PETITION APPEALING DENIAL OF VOTER REGISTRATION

To: The Honorable Frank Barger, Probate Judge
Re: Supplemental Briefing on Voter Registration of Ms. Angelique Harris

1. Introduction

Petitioner Angelique Harris should be added to the voter rolls of Madison County because she does not have any disqualifying crimes under the Felony Voter Disqualification Act, Ala. Code § 17-3-30.1 (2017) (HB 282) ("the Act"). Petitioner Harris's prior *federal* felonies do not fit the standard of disqualifying under the Act, which only includes convictions outside of Alabama, "which, if committed in this state, would constitute one of the offenses listed in this subsection." Ala. Code § 17-3-30.1(c)(48). Because this standard requires the federal or out-of-state conviction to constitute one of the Alabama offenses listed in the statue *on its face*—not based on the underlying facts of an individual registrant's conviction—Petitioner Harris's federal convictions are not disqualifying as the statutes upon which they are based do not match or fit entirely within the closest comparable Alabama crimes listed in the Act. The Act itself compels this result. The dual purposes of HB 282 were to remove county-level discretion and create statewide uniformity. If registrars or judges were permitted to examine the underlying facts of a registrant's conviction, disqualification would be determined on a case-by-case basis instead of a statute-by-statute basis.[1] Employing a categorical approach—i.e., making determinations based on the elements of the statutes rather than individual facts—ensures registrars are not put in the position of the legislature (or criminal judges) and unequal application of the law from county to county—the very problems that HB 282 sought to remedy.

Indeed, the Secretary of State has taken this position. The Secretary of State's office has stated that treatment of specific convictions must be uniform from county to county and that registrars are simply "playing the matchmaker to see if [the conviction] fits the crimes that have already been deemed disqualified." *See* Exhibit A, Deposition of Clay Helms, Director of Elections, at 95:20-23. Additionally, the Secretary of State's office has stated that wherever the registrars do not have enough information to determine that a crime should be disqualifying, the default position will be to register the individual. *Id.* 89:4-12.

Finally, this must be the correct level of analysis because the alternatives would lead to absurd results or are simply not possible given the information that the registrars can access. Based on communications with the Madison County registrars it appears that Petitioner Harris's registration

[1] More implementation is required to ensure that there are uniform rules and practices regarding convictions from other states or federal courts. What is truly needed is guidance and training from the Secretary of State directed at the Boards of Registrars, but three years after the effective date of HB 282 no such direction has been issued. Ideally, once a federal or out-of-state statute is determined to be disqualifying or not, the Secretary of State would provide guidance to county registrars.

was denied because the *name* of one of her federal convictions appeared similar to the name of one of the felonies of moral turpitude listed in the Act. But a surface level comparison of the name of a conviction from another jurisdiction to the names of the felonies of moral turpitude in the statute is plainly not the correct level of analysis to determine if a conviction is disqualifying; it would lead to inconsistent and absurd results. And looking to the alleged underlying acts is not practical because registrars do not have access to that information and, moreover, even if they did, it would create disparate results and raise serious constitutional concerns. Accordingly, and as explained fully below, Petitioner Harris is eligible to register to vote in Alabama.

2. Non-Alabama Felonies Under Ala. Code § 17-3-30.1(c)(48) Are Disqualifying if Their *Elements* Match Exactly a Disqualifying Alabama Crime.

Section 182 of the Alabama Constitution provides that a person convicted of a "felony of moral turpitude" shall be disqualified from registering and voting. The Act created a "comprehensive, authoritative" list of felonies that disqualify a person from voting. It provides an exhaustive list of Alabama state-level convictions, which are the only convictions that can strip a person of her right to vote, and adds any convictions, "**which, if committed in this state, would constitute one of the offenses listed in this subsection**." Ala. Code § 17-3-30.1(c)(48).

Prior to HB 282, "felonies of moral turpitude" was undefined. Registrars made the decisions whether a registrants' felony was disqualifying. The only available guidance was non-exhaustive, non-authoritative, vague, and internally inconsistent.[2]

The plain language of HB 282, its legislative history, and the history of confusion surrounding Alabama's felony disenfranchisement scheme dictate that to determine whether a non-Alabama crime is disqualifying, a registrar must look to the face of the statute and compare the statutory language—the elements of the crime—and determine whether conviction under that statute would constitute conviction under any Alabama crime listed in the Act.

a. Plain Language

The phrase "crimes which, if committed in this state, would constitute one of the offenses listed in this subsection," indicates on its face the proper analysis is a comparison of the elements that make up the crimes themselves. The word "constitute" makes clear that the analysis is about the parts that make up the whole. Additionally, the list of "felonies of moral turpitude" is made up of statutory convictions, not descriptions of acts which might result in a conviction, so the word "crimes" in section 48 should also be interpreted as referring only to final convictions, not underlying acts.[3] If the legislature had intended that acts rather than convictions would exclude a person from the franchise, it could have used that word.

[2] *See* Complaint, *Thompson v. Alabama*, 2:16-cv-783-ECM-SMD (M.D. Ala, Sept. 26, 2016).

[3] *Ex parte Emerald Mountain Expressway Bridge, L.L.C.*, 856 So. 2d 834, 842 (Ala. 2003) (applying "ejusdem generis" the principal of statutory interpretation that understands general phrases following an enumerated list as applying only to the same subject matter as the list).

b. Legislative History

HB 282 was passed to remove to remove county-level discretion and create statewide uniformity. Prior to passage of HB 282, "felonies of moral turpitude" was undefined. Registrars made the decisions whether a registrant's crime was disqualifying. The only available guidance was non-exhaustive, non-authoritative, vague, and internally inconsistent.[4]

Article III, Section 177 of the Alabama Constitution clearly delegates the power to determine what is or is not a crime of moral turpitude to the Alabama legislature only. HB 282 recognized that registrars are not constitutionally empowered to make those determinations. Moreover, various county registrars came to differing conclusions about whether particular crimes were disqualifying or not, raising concerns under the U.S. Constitution about unequal and inconsistent application of election laws. *See* Exhibits C & D (newspaper articles providing context on the history and intent of HB 282.)

Crucially, HB 282 sought "to ensure that no one is wrongly excluded from the electoral franchise." HB 282 (2017) § 1(2)(b). HB 282 was intended to remove that county-level discretion and to ensure uniform application of the law no matter where a registrant was in the state. The stated purpose of the law was, "to establish a comprehensive list of felonies that involve moral turpitude which disqualify a person from exercising his or her right to vote." *Id.* at § 1(2)(c). It sought to remedy that "there is no comprehensive list of felonies that involve moral turpitude which disqualify a person from exercising his or her right to vote. Neither individuals with felony convictions nor election officials have a comprehensive, authoritative source for determining if a felony conviction involves moral turpitude and is therefore a disqualifying felony." *Id.* at § 1(1)(b).

c. The Disqualifying Nature of Convictions Cannot Be Analyzed Based on the Names or Underlying Facts.

Only by looking to the face of the federal or out-of-state conviction can one satisfy the language and intent of HB 282. Looking to only the name of the convictions would compel absurd results and violate the plain text of the statute by sweeping in out-of-state and federal convictions that plainly would not constitute felonies involving moral turpitude under Alabama's code. Looking past the elements of the federal or out-of-state conviction to uncover the underlying facts of a registrant's conviction would require information that the registrars do not have access to, will inevitably lead to different counties coming to different conclusions about which crimes are disqualifying and even counties treating individuals with the same conviction differently, and raises serious constitutional concerns.

Looking only to the names of the convictions in question is plainly too surface level. The shorthand names of convictions depend too much on arbitrary decisions of other jurisdictions and would create absurd results. As the prime example, in Petitioner Harris' case, reliance on only the name of the statutes could lead to disparate results even depending on where the registrars look for the name. Petitioner Harris's docket report reports the names of her convictions as "PUBLIC MONEY, PROPERTY OR RECORDS" and "FRAUD, OTHER," neither of which comes close to the names of any convictions listed in the Act. In fact, Alabama's fraud statutes are *not* felonies

[4] *See* Complaint, *Thompson v. Alabama*, 2:16-cv-783-ECM-SMD (M.D. Ala, Sept. 26, 2016).

of moral turpitude. *See* Exhibit B (visible records on Ms. Harris' case from the Federal Court filing system, PACER.gov.) On the other hand, her judgment documents list her convictions as "Theft of Government Property" and "Money Laundering." *Id.* It appears that the theft of government property name is what the registrars relied on in disqualifying her, but even that does not give enough information to match a crime of moral turpitude because it says nothing of degrees, unlike the statute defining Alabama felonies involving moral turpitude. *Id.*

Many states definitions of crimes and the degrees of those crimes bears no relation to the felonies of the same name under Alabama law. For example, in Florida battery and assault retain their common law definitions. An assault in Florida is a mere threat,[5] whereas in Alabama an assault must include an element of physical contact,[6] making it closer to Florida's battery statute.[7] Certain convictions for degrees of battery in Florida might constitute assault under Alabama's definition, but most assault convictions in Florida would only constitute menacing[8] under Alabama law, which is not disqualifying. Despite the name, a Florida conviction for "assault" would not disqualify an Alabama resident from voting.

Moreover, the legislators who crafted HB 282 selected particular degrees of certain crimes to be disqualifying but not others. The distinctions between degrees of a certain crime in a different state often bear no relation to the factors the legislature considered in writing HB 282. For example, Alabama legislators deliberated designated Burglary 1 and 2 disqualifying, but not Burglary 3. The primary difference between Burglary 2 and 3 is that Burglary 2 requires an element of causing serious injury or being armed with an explosive or deadly weapon.[9] Burglary 2 in Kentucky requires neither; it is more akin to Burglary 3 in Alabama.[10] Basing a determination of eligibility solely on the name and degree of the Kentucky statute nullifies the intent of the Alabama legislature in excluding Burglary 3 from the list of felonies of moral turpitude.

Nor is it practical or appropriate for the registrars to attempt to look to the underlying facts of a criminal conviction. As a practical matter, the registrars simply do not have access to that information. The registrars only receive information on the name of the crime and the statute number for crimes from other jurisdictions. In Petitioner Harris's case, even if the registrars had access to her full records from the federal court system, they would not be able to confirm with

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[5] "An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Fl. Rev. Stat. 784.011(1).

[6] "A person commits the crime of assault in the third degree if: (1) With intent to cause physical injury to another person, he causes physical injury to any person; or (2) He recklessly causes physical injury to another person; or (3) With criminal negligence he causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or (4) With intent to prevent a peace officer from performing a lawful duty, he causes physical injury to any person." Ala. Code § 13A-6-22.

[7] "The offense of battery occurs when a person: (1) Actually and intentionally touches or strikes another person against the will of the other; or (2) Intentionally causes bodily harm to another person." Fl. Rev. Stat. 784.03(1)(a).

[8] "A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury." Ala Code § 13A-6-23.

[9] Ala. Code §§ 13A-7-6, 7.

[10] "A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling." K.R.S. 511.030.

certainty the value of the property in question or whether she was convicted for an attempt, receipt, or a taking. In any event, when an individual is convicted of a crime, the only facts found by the jury or judge are those necessary to fulfill the elements of the crime. Looking beyond to the underlying alleged facts could base disqualification on facts not found by the trier of fact in the criminal court of jurisdiction.

For example, consider a situation where two people are convicted under a federal theft statute that does not require a specific value of property for conviction. But in Alabama, theft crimes are delineated based on the value of property and only those above a certain threshold are disqualifying. Person A was convicted for theft of property that was $500 in value. Person B was convicted under the same federal statute but the property in question was worth $1500. If the registrar were somehow able to look to the underlying facts in the registrants' cases, whether or not they consider the federal theft property disqualifying will depend entirely on which individual attempts to register to vote first. Further, if Person B lives in another county, the registrar could come to a different conclusion based on which individual registers. This is exactly the uneven patchwork of rules that HB 282 seeks to avoid and that the Secretary of State has said that their office has a responsibility to prevent. If person A and B register in the same county that could cause even more problems.

The same problem arises with convictions under the federal drug crime statute. Alabama's levels of drug convictions are based on the weight of the drugs in possession. "Possession," "possession with intent to distribute," and "trafficking" are triggered by different weights. Only Alabama's trafficking statute is including on the list of felonies of moral turpitude. The federal drug trafficking statute has no such levels—one can be convicted for possessing drugs in any amount and the information available to registrars does not give additional details.

Finally, registrars attempting to look at the underlying facts of a registrant's conviction would raise considerable due process concerns. Even if each registrar looked at the specific facts for each specific case—something that would require access to information and resources far beyond what registrars are capable of—a registrar could not be certain that the value of the goods in Person B's case was ever definitively found by the jury because the value is not an element of the crime.

3. Application to Petitioner Harris's Convictions

a. A Conviction Under 18 U.S.C. §§ 641 and 642 Is Not Disqualifying.

Petitioner Harris's conviction under §§ 641 and 642 is not disqualifying because (a) no actual taking is required for this conviction and all Alabama's disqualifying theft convictions require an actual taking, and (b) one can be convicted of these federal felonies for any value of property and all of Alabama's disqualifying theft convictions require a specific value of property for conviction.

A conviction under 18 U.S.C. § 641 requires a finding of (1) embezzlement or theft, or selling, conveyance, or disposal of (2) property, money, or records belonging to (3) the United States or its agencies. There are different sentencing guidelines where the total property is less than $1,000, but there is *no required minimum value* for a conviction under this statute.

The closest possible disqualifying crimes in Alabama are Theft of Property 1 or 2 (Ala. Code § 13A-8-3, 4), or Aggravated Theft by Deception (Ala. Code § 13A-8-2.1).

First, Alabama's disqualifying theft statutes require that a person knowingly obtain the property of another—i.e. a "taking". But a person could be convicted of 18 U.S.C. § 641 either for unlawfully obtaining property *or* by receiving the property. The latter act would be more akin to an Alabama conviction for receipt of stolen property, which is not disqualifying.

Second, Alabama's disqualifying theft crimes are delineated by the value of the property. Aggravated Theft by Deception requires that the property by valued at more than $200,000 or $100,000, depending on the type of property. Theft of Property 1 requires that the property be more than $2,500 in value, or an automobile, or a common scheme stealing property valuing $1,000 or more. Theft of Property 2 requires property to be either valued from $1,500-$2,500, a controlled substance, a gun, or livestock. Theft of Property 3, which is not disqualifying, requires property to be valued between $500-$1,499 or a credit or debit card. Theft of Property 4, which is also not disqualifying, is property less than $500.

But 18 U.S.C. § 641 does *not* distinguish based on value. Thus, a person could be convicted for obtaining U.S. property that is valued less than $1,500, which would constitute TOP 3 or 4 in Alabama. Thus, a conviction under 18 U.S.C. § 641 does not categorically match any disqualifying Alabama crime and is not disqualifying.

18 U.S.C 642 is also not equivalent to a disqualifying Alabama theft conviction.

A conviction under 18 U.S.C. § 642 requires a finding of (1) embezzling or taking (2) one of the enumerated instruments for creating official financial documents. Like 18 U.S.C. § 641, it does not set out any minimum value of the materials in question or require a taking. Thus, it likewise does not categorically match any disqualifying Alabama felony and is not disqualifying.

b. <u>A Conviction Under 18 U.S.C. § 1957 Is Not Disqualifying.</u>

Like a conviction under 18 U.S.C. § 642, a conviction under 18 U.S.C. § 1957 does not require a minimum value to the property at issue and does not require an actual taking. Alabama's disqualifying theft crimes have property values associated and require actual takings for conviction.

A conviction under 18 U.S.C. § 1957 requires (1) knowingly (2) engaging or *attempting* to engage in a (3) monetary transaction (meaning deposit, withdrawal, transfer, or exchange) in (4) criminally derived property (5) of a value greater than $10,000.

18 U.S.C. § 1957 is not equivalent to Alabama's Theft of Property 1 or 2 because the federal crime includes attempts, whereas the state crimes require an actual taking.

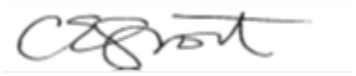
Alabama's Aggravated Theft by Deception also requires an actual taking for a conviction. The statute provides that a person who is convicted of an attempt can be punished as if they had completed the crime. That is not enough to make it disqualifying because, first, attempt convictions are prosecuted under Ala. Code § 13A-4-2, which is not an enumerated crime of moral turpitude.

Moreover, the Bureau of Pardons and Paroles has clarified that inchoate felonies of moral turpitude are *not* disqualifying.[11]

4. Conclusion

For the reasons stated above, Petitioner Harris should be added to the voter rolls of Madison County. Because Petitioner Harris has already submitted a voter registration application before the deadline and timely appealed the denial of that application, if the Court rules in her favor she does not have to resubmit a registration form but should simply be added to the rolls.

Respectfully submitted this 13th day of October, 2020.



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[11] *See* Bd. of Pardons and Paroles Dep. at 237, 5-7, *Thompson v. Alabama*, 2:16-cv-783-ECM-SMD (M.D. Ala, Aug. 20, 2019).