IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

BURT NEWSOME, ET. AL.,
Plaintiffs,

vs.

Case No.: CV-2015-900190

CLARK ANDREW COOPER, ET AL

Defendants.

PLAINTIFFS' SUPPLEMENT TO NOTIFICATION OF FILING POST-TRIAL MOTION IN THE CIRCUIT COURT OF SHELBY COUNTY

Come now Plaintiffs, in the above styled case to supplement their Notification of Filing Post-Trial Motion in the Circuit Court of Shelby County and submit the following:

1. See attached Rule 59 Motion.

Respectfully submitted this the 5th day of July 2016.

/s/Charles I. Brooks

Charles I. Brooks
Attorney for Plaintiffs
THE BROOKS LAW FIRM, P.C.
275 Forest Road, Suite 100
Hueytown, Alabama 35023
Telephone: (205) 744-0058
E-mail: thebrooksfirm2@yahoo.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this document on the following counsel of record by electronic filing and by placing same in the U.S. Mail, first-class postage prepaid:

S. Allen Baker
Amelia K. Steindorff
Balch & Bingham
1901 Sixth Avenue North
Birmingham, AL 35203

James E. Hill, Jr.
Hill, Weisskopf & Hill
Moody Professional Building
2603 Moody Parkway, Suite 200
Moody, AL 35004

Robert Ronnlund
P. O. Box 380548
Birmingham, AL 35238

on this the 5th day of July 2016.

/s/ Charles I. Brooks
Charles I. Brooks

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. CC 2015-000121**
	)	
BURTON WHEELER NEWSOME,	)	
	)	
Defendant	)	

MOTION TO ALTER, AMEND, OR VACATE JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL

Comes now Burton Wheeler Newsome (hereinafter "Newsome") and moves the court to Alter, Amend, or **VACATE** its judgment dated June 8, 2106, granting "Bullock's Motion To Use Contents of Expunged File" (hereinafter "Bullock's Motion) and Seier's "Petition To Set Aside Expungement Pursuant to Ala. Code 1975 § 15-27-17 and Joinder in Victim's Motion" (hereinafter "Seier's Petition"). Alternatively, Newsome moves the court to grant him a New Trial or hearing on the Petition of Seier and the Motion of Bullock. As grounds for this motion, he respectfully shows the court the following:

I. PROCEDURAL BACKGROUND

Neither the *Rules of Criminal Procedure* nor the *Rules of Civil Procedure* mentions "expungements," and the Expungement Act does not specify what procedural rules apply. The *Rules of Criminal Procedure* apply only to "criminal proceedings," Ala. R. Crim. P. 1.1, and "post-conviction remedies." Ala. R. Crim. P. 32.1. "Criminal proceeding[s]" are limited to "prosecution[s]," Ala. R. Crim. P. 1.4(h), and "post-conviction remedies" are limited to cases where a defendant was "convicted of a criminal offense." Ala. R. Crim. P. 32.1. The case is not a "prosecution," and Newsome was not convicted of any criminal offense. Thus, the *Rules of*

Respectfully, B. Newsome 6/28/16

Criminal Procedure don't apply. Indeed, convictions may not be expunged. *See* Ala. Code § 15-27-1; 15-27-2 (1975).

The court in *People v. Lewis*, 356 Ill. Dec. 602, 961 N.E.2d 1237, 1239 (Ill. App. 5 Dist. 2011), addressed this issue:

> [W]e find that expungement actions are not criminal because they are not brought by the State or a municipality. In addition, the possible outcomes of expungement actions do not include convictions, acquittals, negotiated pleas, or *nolle prosequi* dismissals. Neither are expungement actions quasi-criminal, because they are not offenses for which penalties are being sought. Accordingly, we find that expungement proceedings are civil in nature.

Although an expungement is filed "in the criminal division of the circuit court," Ala. Code §§ 15-27-1(a); 15-27-2(a), the Expungement Act does not determine the nature of the action or the procedural rules that apply. The court in *People v. Lewis* continued,

> We note that it makes no difference whether counties file expungement petitions within previously filed, underlying criminal cases or as MR cases, because regardless of the classification or the docket number, expungement is nonetheless a civil remedy (961 N.E.2d at 1239-40).

In the absence of rules addressing expungements, courts in other states have uniformly held that the rules of civil procedure apply. In *Carson v. State*, 65 S.W.3d 774, 784 (Tex. App. – Fort Worth 2001), the court held, "Expunction is a civil proceeding, not a criminal proceeding." *In re Wilson*, 932 S.W.2d 263, 266 (Tex. App. – El Paso 1996). Thus, the rules of civil procedure apply. *See, e.g., Tex. Dep't Pub. Safety v. Mendoza*, 952 S.W.2d 560, 562 (Tex. App.--San Antonio 1997) (applying rules of civil procedure).

In *State v. Rinehart*, 91 L.W – 0094 (2nd) (Ohio App. – 2 Dist. 1991), the court held, "Expungement proceedings are governed by the Ohio Rules of Civil Procedure." In *State v. Hutchen*, 946 N.E.2d 270, 191 Ohio App. 3d 388, (Ohio App. 2 Dist. 2010), the court held that "expungement is a civil proceeding," and it applied the "Ohio Rules of Civil Procedure."

These cases are consistent with Alabama law. In *Ex parte Teasley*, 967 So. 2d 732 (Ala. Crim. App. 2007), the Court of Criminal Appeals held, "Although tangentially touching on criminal matters, [expungement] is in the nature of a civil proceeding. . . ." The *Rules of Civil Procedure* apply "in all actions of a civil nature." Ala. R. Civ. P. 1(a). Thus, this case is governed by the *Rules of Civil Procedure*.

II. FACTUAL BACKGROUND

1. Newsome was charged with menacing in the District Court of Shelby County. He did not plead guilty; he did not sign a deferred-prosecution agreement; and he did not enter a deferred-prosecution program (page 61 *infra*).

2. When the case came before the court on November 12, 2013, it was continued until April 1, 2014, when it was dismissed with prejudice (pages 64-65 *infra*).

3. Newsome filed a Petition for Expungement on February 19, 2015. Judge Reeves knew about the "dismissal & release order"; Newsome attached a copy to his petition (page 65 *infra*). The Petition for Expungement should appear in the court file; nevertheless, a copy is attached hereto (pages 61-67 *infra*).

4. On April 21, 2015, Newsome served discovery responses in his civil suit stating that he had filed the Petition for Expungement, and he attached a copy of the petition. (Interrogatory answer 28, page 81 *infra*). Newsome's discovery responses and his Petition for Expungement were served on Bullock's attorney and Seier's attorney electronically.[1] (pages 77-89 *infra*). They received the documents on April 21, 2015 – almost five months before the expungement was granted.

[1] Seier falsely alleged in his Petition, "Attorney Seier was given no notice of [Newsome's Expungement] Petition . . ." (Seier Petition, ¶ 8).

5. Newsome filed his discovery responses with this court on June 1, 2016, as **Exhibit F** to his Response to Bullock's Motion. Excerpts are also attached hereto (pages 77-89 *infra*).

6. On August 20, 2015, Bullock filed an objection to Newsome's Petition for Expungement. Bullock asserted the same grounds on which this court set aside the expungement on June 8, 2016. Those grounds were, "Newsome has instituted . . . legal action against [him] in clear contravention of his agreement." (page 69 *infra*). This document should appear in the court file, and Newsome filed it with this court on June 1, 2016, as **Exhibit K** to Newsome's Response to Bullock. A copy is also attached hereto (pages 69-70 *infra*).

7. On August 31, 2015, Judge Reeves held a hearing on Newsome's expungement petition. Bullock and his attorney James Hill were at the hearing. Newsome summarized Bullock's arguments in his affidavit: "Attorney Hill argued on behalf of his client that the expungement should not be granted because I had filed a civil action against Mr. Bullock in Jefferson County, Alabama, and also that his client (Bullock) should be able to use the expunged documents in the civil case." (page 72 *infra*). Newsome's testimony was undisputed. Newsome filed his affidavit with this court on June 1, 2016, as **Exhibit L** to Newsome's Response to Bullock; a copy is also attached hereto (pages 72-73 *infra*).

8. Judge Reeves granted Newsome's Petition for Expungement on September 10, 2015.

9. "On September 28, 2015, Newsome filed a post-trial motion in his civil case, and he attached a copy of the expungement order to the motion. He argued that the expunged release was 'not a lawful basis' for dismissing his civil action. He also argued that any defensive use of the expunged release . . . was 'now a criminal offense.'" (Order, ¶ 19) (pages 96-97 *infra*).

10. Newsome's post-trial motion was served on all parties to the civil case electronically; they received it on September 28, 2015, and they then knew that Newsome was asserting that the

expunged release was "not a lawful basis for dismissing his civil action." (pages 96-97 *infra*). Newsome filed the post-trial motion with this court on June 1, 2016, as **Exhibit S** to Newsome's Response to Bullock; excerpts are also attached hereto (pages 91-98 *infra*).

11. Newsome did not trick or fool counsel for Bullock or Seier. He asserted his position of record on September 28, 2015, while they still had time to attack his expungement. The time for filing post-trial motions concerning his expungement did not expire until October 13, 2015.[2]

12. Yet, neither Bullock nor Seier have ever (even to this day) filed a Motion to Intervene; neither filed a motion of any kind within thirty days of September 10, 2015; and neither has offered a reason for their failure to do so. The simple fact is, if Bullock and Seier had standing to file their motions and petitions on February 19, 2016, and May 19, 2016, then they had standing to file a timely post-trial motion. But they didn't.

III. STATEMENT OF FACTUAL GROUNDS

13. Seier's Petition to Set Aside Newsome's Expungement is stamped "filed" on May 19, 2016. The only attachments to the Petition are the "dismissal & release order," Newsome's Complaint in the civil action, Newsome's Motion to Strike Expunged Documents," Seier's Opposition to Newsome's Motion to Strike, and Seier's "Supplemental Reply to [Newsome's] Motion to Strike." Specifically, Seier filed no documents from Newsome's criminal prosecution except the "dismissal & release order," and he filed no affidavits.

14. Seier's Petition grossly misstates the facts. Yet, the Court instructed Seier's attorney and Bullock's attorney to prepare the Order (R. 24), and many of the false statements in Seier's Petition form the basis for the order of June 8, 2016.

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[2] The thirtieth day fell on Saturday October 10, 2015, and Monday October 12, 2015, was a legal holiday (Columbus Day). By application of rule 6(a), the last day for filing post-trial motions was Tuesday, October 13, 2015.

15. Seier alleged, "On November 12, 2013 defendant Burt Newsome pled guilty . . ." This is false. Newsome "never pled guilty to any of the criminal charges . . ." (pages 61, 72 *infra*). If Newsome pled guilty, there would be a guilty plea, but there is none. Nevertheless, this false statement appears in the order. The court granted Bullock and Seier authority "to use . . . Newsome's charge [and] plea." (Order, page 1). No evidence supports the finding that Newsome pled guilty.

16. Seier alleged, "Newsome entered into a 'Deferred Prosecution and Release Agreement,' which was ultimately approved." (Seier Petition ¶ 2). The words "Deferred Prosecution and Release Agreement" are in quotation marks as if they are the title of a document. This is false. There was no "Deferred Prosecution and Release Agreement" – or any "deferred prosecution agreement."

The document Seier alleged to be a "Deferred Prosecution and Release agreement" is a "dismissal & and release order," but the title of the document was hidden on the copy Seier attached to his Petition (Seier Exhibit 1, upper right corner).

The term "deferred prosecution agreement" is a legal term of art for an agreement authorized by section 12-17-226, *et. seq.*. Section 12-17-226.6(d) requires the applicant for a deferred-prosecution program to sign a "guilty plea." Newsome did not sign a guilty plea (pages 61, 72 *infra*). Section 12-17-226.6(d) requires "the court . . . [to] place the [deferred] case . . . on an administrative docket until the offender" has completed a "program." Newsome's case was not placed "on an administrative docket," and Newsome was not required to complete any program.

The "dismissal & release order" contained a paragraph that would have "placed [Newsome's case] on the Administrative Docket until" he completed a program, but this paragraph was not checked:

IN THE DISTRICT COURT OF SHELBY COUNTY, ALABAMA DISMISSAL & RELEASE ORDER

STATE OF ALABAMA V. Burton Wheeler Newsome CASE NO. DC 2013-1434

This matter comes before the Court by the specific AGREEMENT of the parties. The Defendant is ✓ present, is ___ represented by counsel and has NOT knowingly and voluntarily waived the right to the same. After due consideration and pursuant to said agreement, all of the following as specifically noted below is hereby ORDERED, ADJUDGED and DECREED.

( ) This matter is Dismissed with ____ prejudice.
DA This matter is Continued until 4/01/14 9:00 then to be Dismissed with ✓ prejudice, provided that the defendant have no further incidents/arrests.
( ) This matter is placed on the Administrative Docket until _____, then to be Dismissed with ____ prejudice, provided that _____.
( ) DEFENDANT MUST APPEAR IN COURT ON THE ABOVE DATE.

Nevertheless, Seier's false statement appears in the order: "On November 12, 2013, the District Court of Shelby County accepted a deferred prosecution agreement reached between the State and defendant Newsome . . ." (Order, ¶ 6). No evidence supports the finding that Newsome signed a deferred-prosecution agreement. There was no deferred-prosecution agreement.

17. Seier alleged, "[T]he deferred prosecution and release agreement . . . was ultimately accepted approved and adopted by the sentencing judge." (Seier Petition, ¶ 3). This is false. There was no plea of plea of guilt, no finding of guilt, and no sentence; consequently, there was no "sentencing judge."

"The only legal punishments, besides removal from office and disqualification to hold office, are fines, hard labor for the county, imprisonment in the county jail, imprisonment in the penitentiary, which includes hard labor for the state, and death." Ala. Code § `15-18-1 (1975). Newsome did not receive any of these "sentences." A "release" of "civil and criminal claims" is not a legal "sentence" or "punishment."

Nevertheless, Seier's false statement appears in the order: "A valid expungement requires an affirmance under oath by the Petitioner that all requirements of the underlying sentence have been met." (Order, ¶ 27). No evidence supports the finding that Newsome was "sentenced."

18. Seier alleged, "Newsome submitted information to this Court in conjunction with his Petition for Expungement alleging that all terms and conditions of his underlying that agreement and sentence had been completed." (Seier Petition, ¶ 9).

This is false. There was no "sentence," and the order dismissing the case against Newsome had no "terms and conditions." Finally, Newsome filed his Expungement Petition on a State Form, and he DID NOT check the blank swearing that he had "complet[ed] . . . [a] deferred prosecution program":

I, the above-named Defendant/Petitioner, was charged with the above-named Offense which is

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FEB 19 2015
MARY M. HARRIS
CIRCUIT & DISTRICT COURT CLERK

- [✓] a misdemeanor criminal offense,
- [ ] a violation,
- [ ] a traffic violation,
- [ ] a municipal ordinance violation,
- [ ] a non-violent felony,

I hereby file this petition with the circuit court in order to have the records relating to the above charge expunged for one of the following circumstances:

- [✓] The charge was dismissed with prejudice.
- [ ] The charge was no billed by a grand jury.
- [ ] I was found not guilty of the charge.
- [ ] *(Non-felony only)* The charge was dismissed without prejudice more than two years ago and was not refiled, and I have not been convicted of any other felony or misdemeanor crime, any violation, or any traffic violation, excluding minor traffic violations, during the previous two years.
- [ ] *(Non-violent Felony only)* The charge was dismissed after successful completion of a drug court program, mental health court program, diversion program, veteran's court, or any court-approved deferred prosecution program after one year from successful completion of the program.

Newsome DID NOT swear that he had completed a deferred-prosecution agreement or program. Nevertheless, Seier's false statement that he did is the basis of the court's order: "[T]he Defendant false[ly] represent[ed] that he had fulfilled all terms and conditions of the underlying deferred prosecution agreement . . ." (Order, ¶ 23).

In summary, Seier falsely alleged that Newsome pled guilty, was convicted and sentenced, and then committed perjury in his Petition for Expungement. Yet, he did not submit a shred of evidence to support these allegations. The court has committed a grave injustice in accepting Seier's false and unsubstantiated allegations as true.

IV. STATEMENT OF OTHER GROUNDS

1. Under rule 58, an order is not valid unless it is entered in the State Judicial Information System (SJIS). This case (case no. CC 2015-000121) was removed from the SJIS on September 11, 2015, and ceased to exist (pages 74-76 *infra*). Consequently, Bullock's Motion and Seier's Petition were not "filed" in an existing case, and this court lacked subject matter jurisdiction of the motion and the petition. "[B]ecause it was not entered in the SJIS, the [June 8, 2016], order did not constitute a valid order or judgment." *J.K. v. State Department of Human Resources*, 103 So. 3d 807, 810 (Ala. Civ. App. 2012).

2. The parties to a case are named in the case caption. Ala. R. Civ. P. 10(a). Neither Bullock nor Seier was listed in the caption to the Petition for Expungement, the order dated June 8, 2016, or any other order. The order dated June 8, 2016, describes Seier as "a non-party." A court may not grant relief to a non-party. *Cf.* Ala. R. Civ. P. 60(b) ("On motion . . . the court may relieve a party or party's legal representative from a final judgment. . . ."). Consequently, the court lacked subject-matter jurisdiction to grant Bullock's Motion or Seier's Petition. "The [June 8, 2016] order was a nullity." *Penick v. Roberts*, Nos. 214067, 2140581 (Ala. Civ. App. Sept. 18, 2015).

3. Neither Bullock nor Seier has filed a Motion to Intervene or paid the filing fee for such a motion. Neither commenced a new action and paid the filing fee for such an action. "[A]bsent the payment of a filing fee or the granting of a request to proceed in *forma pauperis*, the trial court

fails to obtain subject matter jurisdiction." *Ex parte Courtyard Citiflats*, No. 1140264 (Ala. June 12, 2015) (quoting *Carpenter v. State*, 782 So. 2d 848, 849 (Ala. Crim. App. 2008)).

This jurisdictional defect "may not be cured by the subsequent payment of the filing fee," *Hicks v. Hicks*, 130 So. 3d 184 (Ala. Civ. App. 2012), by "taxing the filing fee as costs at the end of the proceeding," *Carpenter*, 782 So. 2d at 850, or by entering "a *nunc pro tunc* order retroactively approving the hardship statement." *Ex parte Courtyard Citiflats*. As a result, this court did not acquire subject-matter jurisdiction of Bullock's Motion or Seier's Petition, and the order dated June 8, 2016, is void.

4. The circuit judge who presided on June 3, 2016, H. L. Conwill, lacked jurisdiction to hear this case. The case was originally assigned to Judge Reeves; Judge Reeves retired effective March 1, 2016. Laura McCauley Alvis was appointed to replace Judge Reeves effective May 1, 2016. If this case existed as of May 1, 2016, and if any issue was pending in the case, then Judge Alvis had jurisdiction to decide that issue.

Nevertheless, on May 3, 2016 – after Judge Alvis took office – Judge Conwill sent an email setting this case for a hearing on June 3, 2016 (page 100 *infra*). On June 8, 2016, he emailed counsel an "order." This action was void because Judge Alvis had exclusive jurisdiction of the case. In *Ex parte Cunningham*, 19 Ala. App. 584, 586-87, 99 So. 834 (1924), the court held, "The jurisdiction to hear and determine the petition rested with Judge Dan A. Green, as Judge of the Tenth Judicial Circuit. . . . He having died, and Judge Jno. Denson having been appointed and qualified as such judge, application was properly made to him."

5. Under section 15-27-3(c), Seier was not entitled to notice of Newsome's expungement petition, and as such, he had no standing to file a "Petition to Set Aside Expungement" after it was granted. "When a party without standing purports to commence an action, the trial court acquires

no subject-matter jurisdiction." *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025, 1028 (Ala. 1999). Consequently, the court lacked subject-matter jurisdiction of Seier's petition.

6. Similarly, Bullock was not entitled to notice of Newsome's expungement action under section 15-27-3(c), and as such, he had no standing to file a" Motion to Use Contents of Expunged File" or "join in" Seier's Petition. Consequently, the court also lacked subject-matter jurisdiction of his motion and his joinder in Seier's Petition. *State v. Property at 2018 Rainbow Drive, supra.*

7. The court erred in permitting Bullock to "join in" Seier's petition during the hearing. Newsome was given no prior notice of Bullock's intent to join Seier's Petition, and he would have presented other evidence and arguments if he had received timely notice that Bullock was also seeking to set aside his expungement.[3]

8. Even if Bullock had standing, and even if his joinder in Seier's petition was proper, Bullock's joinder in Seier's petition did not "cure" the lack of subject-matter jurisdiction. "The jurisdictional defect resulting from the plaintiff's lack of standing cannot be cured by amending the complaint to add a party having standing." *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025, 1028 (Ala. 1999).

9. The court erred in vacating Newsome's expungement on its own motion. The court gave Newsome no prior notice that it was considering acting on its own motion, and this deprived Newsome of due process of law. Newsome would have presented other evidence and arguments if he had received prior notice that the court was considering acting on its own motion.

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[3] For instance, at the hearing, the court found that Newsome's *lack-of-standing* argument was an adequate defense to Seier's Petition (R. 21). Nevertheless, by permitting Bullock to "join in" Seier's void petition and by granting relief on its own motion without prior notice to Newsome, the court precluded him from presenting other defenses that were necessary to defend Seier's Petition.

10. The court erred in vacating Newsome's expungement on its own motion. "[T]he trial court's determination [on June 8, 2016] was made *sua sponte* at a point when it had no jurisdiction to act." *Ex parte DiGeronimo*, No. 2140611 (Ala. Civ. App. Oct. 9, 2015). "A trial court has no jurisdiction to modify or amend a final order more than 30 days after the judgment has been entered." *George v. Sims*, 888 So. 2d 1224, 1227 (Ala. 2004). Consequently, the order is void for lack of jurisdiction.

11. Section 15-27-17 provides that an "order of expungement shall be reversed" if it "was filed under false pretenses and was granted." The court erred in holding that the authority to "reverse[]" an expungement is vested in the Circuit Court. In every other instance when "shall be reversed" or "shall not be reversed" appears in the Alabama Code concerning a court, the word "reversed" applies to action taken by an appellate court to correct the ruling of a lower court or agency.

12. "The *only* mechanism . . . whereby a litigant may *collaterally* attack a civil judgment by filing a motion in the same civil action is that set forth in Rule 60(b) . . ." *T.B. v. T.A.P.*, 979 So. 2d 80, 91 (Ala. Civ. App. 2007). Under rule 60(b), a motion to set aside a judgment for "fraud . . . [or] misrepresentation" "shall be made . . . not more than four (4) months after the judgment." Ala. R. Civ. P. 60(b)(3); Ala. R. Civ. P. 60(b)(6). The Expungement Petition specifically states that the proper method for contesting a Circuit Court's ruling on an Expungement Petition is a Petition for Certiorari. Neither the District Attorney's Office, Bullock or Seier filed such a Petition and the time for filing has expired.

"False pretenses" is a type of "fraud . . . [or] misrepresentation," and the court vacated Newsome's expungement based on "false representation[s]" (Order, ¶¶ 22-23). If section 15-27-17 authorizes a circuit court to "reverse[]" its own expungement for false pretenses, then any

motion or petition seeking such relief "in the same civil action" must be filed within four months from the expungement. Ala. R. Civ. P. 60(b)(6). Both Bullock's Motion and Seier's Petition were filed "in the same civil action" as the expungement, and both were filed more than four months after the expungement. As a matter of law, they were filed too late.

13. The court erred in holding that Newsome waived any argument that Seier's Petition was not timely. "A trial court lacks jurisdiction to consider an untimely Rule 60(b) motion"; jurisdictional defects cannot be waived. *Noll v. Noll*, 47 So. 3d 275, 279 (Ala. Civ. App. 2010).

14. The court erred in finding that Newsome signed a "deferred-prosecution agreement." (Order, ¶¶ 6, 22). The term "deferred-prosecution agreement" is a legal term of art for agreements authorized by section 12-17-226, *et. seq.*, of the Alabama Code. Newsome did not sign such an agreement (page 61 *infra*).

15. The court erred in finding that "Newsome did not satisfy 15-27-12 (Prerequisites to expungement) as all terms and conditions of the underlying deferred prosecution agreement were not satisfied . . ." (Order, ¶ 22).

Section 15-27-12 does not use the words "deferred-prosecution agreement." The "terms and conditions" that must be satisfied under section 15-27-12 are the "terms and conditions" of the "programs" listed in section 15-27-2(a)(4). These "programs" did not apply to Newsome; they apply only to felony defendants. Newsome was charged with a misdemeanor.

16. The court erred in holding "that the Defendant false[ly] represent[ed] that he had fulfilled all terms and conditions of the underlying deferred prosecution agreement . . ." (Order, ¶ 23). Again, Newsome did not sign a "deferred-prosecution agreement," and he did not "represent" that "he had fulfilled all the terms and conditions" of a deferred-prosecution agreement.

The Official Expungement Form ("Form CR-65 7/2014") prepared by the State of Alabama contains a blank for a petitioner to swear that he has "complet[ed]" a "court-approved deferred prosecution program." Newsome did not check this blank (page 61, 65 *infra*). Regardless of how one interprets section 15-27-17, Newsome did not "swear" that he had "completed" any "agreement" or "program."

17. The court erred in finding that Newsome's "expungement was filed and obtained upon false pretenses" (Order, 28). "False pretenses" cannot be predicated on facts known to the alleged "victim" – Judge Reeves. *Yeager v. State*, 500 So. 2d 1260, 1267 (Ala. Crim. App. 1986). Judge Reeves knew that Newsome had signed a "dismissal and release order"; Newsome attached to it to his petition (page 65 *infra*). Judge Reeves also knew that Newsome was suing Bullock. Bullock argued that "Newsome ha[d] instituted . . .legal action against [him] in clear contravention of his agreement." (page 69 *infra*). The facts on which this court "reversed" Newsome's expungement were known to Judge Reeves. There were no false pretenses. This court simply substituted its judgment for that of Judge Reeves; it lacked jurisdiction to do this.

18. The court erred in vacating Judge Reeves' order without reviewing a transcript. Newsome argued that the issues raised by Bullock and Seier were litigated in the expungement case and were barred by res judicata and collateral estoppel. The court acknowledged these arguments (Order, ¶ 26) and noted that it "ha[d] not been provided with a transcript" (Order, ¶ 27).

Yet, the court vacated Judge Reeves' order; this was error. A successor judge may not set aside the decision of his predecessor "without even considering the record or the transcript upon which the earlier decision was made." *Trail Pontiac-GMC Truck, Inc. v. Evans*, 540 So. 2d 645, 645 (Ala. 1988). The party seeking to set aside the earlier ruling is "responsible for supplying the

record and transcript." (*Id.* at 645-46). Bullock and Seier failed to meet their responsibility; they provided no transcript.

19. The court erred in failing to hold that the issues raised by Bullock and Seier were barred by res judicata and collateral estoppel. The basis on which the court vacated Newsome's expungement had been litigated in the expungement case. Indeed, the language in the order vacating the expungement is almost identical to Bullock's objection before Judge Reeves:

Bullock's Objection Filed 08/20/15	**Order Dated 06/08/16**
Mr. Bullock strongly objects to the expungement of Burt Newsome's criminal record. Since the dismissal of the case against Newsome,	The Court hereby determines that the Defendant's false representation that he had fulfilled all terms and conditions of the underlying deferred prosecution agreement when
[1] Newsome has instituted unsuccessful legal action	[1] he was concurrently prosecuting a civil suit
[2] against Mr. Bullock	[2] against the victim
[3] in clear contravention of	[3] in violation of
[4] his agreement (page 69 *infra*).	[4] the Release and Dismissal Order… constitutes false pretenses.

As a matter of law, the issues raised by Bullock and Seier were barred by res judicata.

20. The court's finding that Newsome falsely represented that "he had fulfilled all terms and conditions of the underlying deferred prosecution agreement" is necessarily predicated on the court's holding that the "civil release of claims contained in the Agreement is valid." (Order, ¶¶ 23, 25). If the "release" is not valid, then it cannot form the basis for a finding that Newsome was violating the "dismissal & release order" by suing Bullock.

21. The court erred in holding that the Release "is valid." The Release is void on its face for the following reasons:

(a) The "consideration" for the release "is in part illegal"; the "dismissal & release order" releases Newsome's "criminal claims." This illegality renders the entire release unenforceable. "[I]t makes no difference if the contract contains an additional

consideration that is legal and valid." *Baker v. Citizens Bank of Guntersville*, 282 Ala. 33, 208 So. 2d 601 (1968).

(b) The Release is not part of an independent contract; it was merged into the "dismissal & release order." As a result, the "release" is not enforceable as a "contract." *Turenne v. Turenne*, 884 So. 2d 844, 849 (Ala. 2003) ("there is no claim that can be enforced on a contract theory"). It is enforceable only if the "dismissal & release order" is itself enforceable."

(c) The "release & dismissal order" was, however, an interlocutory order; interlocutory orders terminate when the underlying case is dismissed. The case was dismissed on April 4, 2014. Thus, the "release & dismissal order then became a nullity. *K.L.R. v. K.G.S.*, No. 2140882 (Ala. Civ. App. Jan. 8, 2016).

(d) Moreover, the court lacked authority to Release Newsome's "civil and criminal claims." A court-ordered release is not a legal "punishment."[4]

> The only legal punishments, besides removal from office and disqualification to hold office, are fines, hard labor for the county, imprisonment in the county jail, imprisonment in the penitentiary, which includes hard labor for the state, and death. Ala. Code § `15-18-1 (1975).

22. Even if the release is not void on its face, Bullock and Seier nevertheless carried that the burden of proving that it is valid. Newsome's Amended Complaint asserted that the Release was secured by fraud; Bullock attached this Amendment to his motion as "exhibit B." In addition, **Exhibit F** to Newsome's Response to Bullock (Newsome's rule-59 motion in the civil case) contained Newsome's argument that the release was obtained by fraud (pages 92-93 *infra*).

"A release obtained by fraud is void." *Taylor v. Dorough,* 547 So. 2d 536, 540 (Ala. 1989). Neither Bullock nor Seier offered any evidence to rebut this contention. The court erred in finding that the release is "valid" without any "evidence" rebutting Newsome fraud claim. *Underwood v. Allstate Insurance Co.*, 590 So. 2d 258, 258-59 (Ala. 1991).

[4] The court characterized the "release of all civil and criminal claims" as part of Newsome's "sentence." (Order, ¶ 27).

23. The court also erred in holding that the release was valid without any evidence that it satisfied the criteria established in *Town of Newton v. Rumery*, 480 U.S. 386 (1987).[5] In *Rumery* the United States Supreme Court held that a release-dismissal agreement is enforceable only if the proponent of the agreement proves that "[1] [the] agreement was voluntary; [2] that there is no evidence of prosecutorial misconduct; [3] and that enforcement of [the] agreement would not adversely affect the relevant public interests" (107 S. Ct. at 1195).

Bullock and Seier offered no evidence to meet this evidentiary burden. Moreover, the document Newsome signed was a form, and releases executed pursuant to a "blanket policy of requiring release-dismissal agreements" are invalid. *Cain v. Borough*, 7 F.3d 377, 383 (3d Cir. 1993); *Kinney v. City of Cleveland*, 144 F. Supp. 2d 908, 917-18 (N.D. Ohio 2001).

24. The court characterized the release as part of a deferred-prosecution agreement (Order, ¶ 22). If so, then the "dismissal & release order" was not admissible evidence.

> Pretrial diversion program records or the records related to pretrial diversion program admission, with the exception of statement of the applicant concerning his or her involvement in the crimes charged or other crimes shall not be admissible in subsequent proceedings, criminal or civil unless a court of competent jurisdiction determines that there is a compelling public interest in disclosing the records (Ala. Code § 12-17-226.6(g) (1975).

The court made no finding of a "compelling public interest" in disclosing the "dismissal & release order"; consequently, the court erred in considering it.

25. The Court erred in granting Bullock's "Motion To Use Contents of Expunged File" because no provision of the Expungement Act authorizes such a motion.

26. The Court erred in granting Bullock's "Motion To Use Contents of Expunged File" because section 15-27-7(a) expressly prohibits the use of expunged documents in civil actions,

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[5] **Exhibit F** to Newsome's Response to Bullock (Newsome's rule-59 motion in the civil case) contained Newsome's argument that the release failed to satisfy the requirements of *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (pages 94-95 *infra*).

such a Bullock seeks to do: "[expunged] records may not be used for any non-criminal justice purpose."

27. The court erred in considering Bullock's Motion because it was filed more than thirty days after the expungement. "[A] trial court has no jurisdiction to modify or amend a final judgment more than 30 days after the judgment is entered." *SSC Selma Operating Company, LLC v. Gordon*, 56 So. 3d 598, 601 (Ala. 2010). The order of expungement was entered on September 10, 2015, and Bullock's Motion is marked filed on January 19, 2016. As a matter of law, the court had no jurisdiction to consider it.

28. Collectively, the actions of the Court have deprived Newsome of due process of law under the Fourteenth Amendment to the United States Constitution and the Alabama Constitution. Those actions include but are not limited to the following:

(a) The Circuit Clerk permitted Bullock to file his Motion and Seier to file his Petition in Case No. CC-2015-000121 even though that case was closed and did not exist on the SJIS.

(b) The Circuit Clerk permitted Bullock to file his Motion and Seier to file his Petition in Case No. CC-2015-000121 even though they were not parties to the case.

(c) The Circuit Clerk permitted Bullock to file his Motion and Seier to file his Petition in Case No. CC-2015-000121 without filing a Motion to Intervene or paying the filing fees applicable to their filings.

(d) The Circuit Clerk refused to accept documents submitted by Newsome for filing in response to Bullock's Motion and Seier's Petition – which the Circuit Clerk had accepted for filing. This included the following documents: [1] the "Opposition to Bullock's Motion to Use Contents of Expunged Filed" tendered on January 25, 2016; [b] the "Response of Burt W. Newsome to Motion of John Bullock to Use Contents of Expunged Filed" tendered on June 1, 2016; [c] the "Response of Burt W. Newsome to Claiborne Seier's 'Petition to Set Aside Expungement Pursuant to Ala. Code § 15-27-17 and Joinder in Victim's Motion" tendered on June 1, 2016; [d] and the "Motion to Expunge" tendered on June 2, 2016.

(e) As a result, Newsome's counsel was required to hand-deliver the documents to the office of Judge Reeves and the Judicial Assistant for Judge Conwill. Newsome does not know whether the documents appear in the official court file because the Circuit Clerk has refused to permit Newsome's attorney or his office manager to inspect the court file.

(f) This case was originally assigned to Judge Reeves; he resigned effective March 1, 2016, and Judge Alvis was appointed to replace him effective May 1, 2016. Yet, on May 3, 2016, Judge Conwill assumed jurisdiction of this case by sending an email to Newsome's counsel

setting a hearing for June 3, 2016. Judge Conwill had never previously presided over the case, and he had no jurisdiction to act in the case.

(g) At the hearing on June 3, 2016, Newsome's counsel asked Judge Conwill to mark the documents described above "filed," and Judge Conwill agreed to do so (R. 22, lines 15-24). Yet, Judge Conwill's Judicial Assistant has told Newsome's counsel that Judge Conwill has not marked the documents "filed" and that "marked filed" copies of the documents are not available for him.

(h) At the conclusion of the hearing Judge Conwill instructed the attorneys for Bullock and Seier to prepare an order (R. 24). The order decided issues that were not raised in the pleadings or discussed at the hearing.

(i) On June 8, 2016, Newsome's counsel was emailed an order signed by Judge Conwill setting aside Newsome's expungement. The order is not stamped "filed," and it does not bear an insignia that it has been entered in the State Judicial Information System as required by rule 58.

(j) Judge Conwill vacated Newsome's expungement although he "was not present for any of the prior proceedings" and was not "provided with a transcript of those proceedings."

(k) Judge Conwill vacated Newsome's expungement based on his own "obligat[ion] or *sua sponte* although he had provided Newsome no prior notice that he was considering acting on his own motion.

(l) On Friday, June 10, 2016, Newsome's counsel went to the office of the Circuit Clerk to inspect the official court file concerning his client, and the Circuit Clerk refused to allow him to inspect the file.

(m) On Tuesday, June 14, 2016, Newsome's office manager, Jennifer Choi, went to the office of the Clerk Office to obtain copies of all pleadings in the case. The clerk told Choi that "all pleadings were given to the presiding judge and he was keeping them in his office" and that she could not give Choi anything (page 76 *infra*).

(n) As of the present date, Case No. CC-2015-000121 does not exist on the SJIS, and it is impossible for Newsome or his counsel to determine whether the order dated June 8, 2016 has been "entered" as required by rule 58, Ala. R. Civ. P.

V. ARGUMENT

I. THE COURT LACKED SUBJECT MATTER JURISDICTION TO VACATE OR MODIFY NEWSOME'S EXPUNGMENT BECAUSE CASE NO. CC 2015-000121 WAS NOT AN EXISTING CASE WHEN BULLOCK FILED HIS MOTION, WHEN SEIER FILED HIS PETITION, OR WHEN THIS COURT ENTERED ITS ORDER.

Under rule 58, an order is not valid unless it is entered in the State Judicial Information System (SJIS). In *J.K. v. State Department of Human Resources*, 103 So. 3d 807, 810 (Ala. Civ. App. 2012), the court explained,

> Although the November 3, 2011, order contains the juvenile court clerk's date stamp, that order was not entered in the State Judicial Information System ("SJIS"). Accordingly, that order was not "entered" by the juvenile court as required by Rule 58(c), Ala. R. Civ. P., which specifies that "[a]n order or a judgment shall be deemed 'entered' within the meaning of these Rules and the Rules of Appellate Procedure as of the actual date of the input of the order or judgment into the State Judicial Information System." Thus, because it was not entered in the SJIS, the November 3, 2011, order did not constitute a valid order or judgment of the juvenile court.

This court entered an order of expungement on September 10, 2015, and no one filed a post-trial motion or sought appellate review. The order of expungement became final, and this case and its number were removed from the SJIS system (pages 74-75 *infra*). As a result, the record of this case could not be accessed, nor could orders be entered in the case.

At the beginning of the hearing on June 3, 2016, the Court asked whether "there [was] another case number" other than the expungement case. There was none:

> THE COURT: Does anybody disagree that all that has been filed is under CC-2015-121?
>
> MR. JUSTICE: Well, when we attempted to file in the clerk's office under that case number, they wouldn't let us.
>
> THE COURT: Well, they don't because it has been expunged (R. 3).

As a matter of law, Bullock's Motion, Seier's Petition, and the order vacating Newsome's expungement are void. They were not filed in an existing case.

II. THE COURT LACKED SUBJECT MATTER JURISDICTION OF BULLOCK'S MOTION AND SEIER'S PETITION BECAUSE NEITHER BULLOCK NOR SEIER WAS A PARTY TO THIS CASE, AND NEITHER FILED A MOTION TO INTERVENE.

The parties to a case are named in the caption. Ala. R. Civ. P. 10(a). The parties in this case are the "State of Alabama" and "Burton Wheeler Newsome" (page 62 *infra*). Neither Bullock nor Seier have ever been named in the caption, and neither are parties.

Although rule 24 allows non-parties to intervene under certain circumstances,[6] neither Bullock nor Seier has filed a Motion to Intervene. Consequently, the court had no authority to grant them relief. *Cf.* Ala. R. Civ. P. 60(b) ("On motion . . . the court may relieve a party or party's legal representative from a final judgment. . . .").

In *Penick v. Roberts*, Nos. 214067, 2140581 (Ala. Civ. App. Sept. 18, 2015), the court held that an order setting aside a summary judgment, based on the motion of a non-party, was void:

> We note that the circuit court's entry of the October 29, 2014, order, in which it purported to set aside its summary judgment and to "reinstate" the case did not address Penick's motion to intervene. The October 29, 2014, order was a nullity because the circuit court, without having ruled on Penick's motion to intervene and his underlying request for Rule 60(b) relief was without jurisdiction at that time to set aside the judgment.

Since Bullock and Seier never filed a Motion to Intervene, and were never granted permission to intervene, this court "was without jurisdiction" to grant Bullock's Motion or Seier's Petition.

[6] "A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Ala. R. Civ. P. 24(c).

III. THE COURT LACKED SUBJECT-MATTER JURISDICTION OF BULLOCK'S MOTION AND SEIER'S PETITION BECAUSE NEITHER BULLOCK NOR SEIER PAID A FILING FEE.

Even if this had been an existing case, and even if Bullock and Seier had filed Motions to Intervene, they never paid a filing fee. Section 12-19-70(a) states, "There shall be a consolidated civil filing fee, known as a docket fee, collected from a plaintiff at the time a complaint is filed . . ." Section 12-19-71 establishes a fee structure; the filing fee for a Motion to Intervene is $297.00. Ala. Code 12-19-71(a) (9). Neither Bullock nor Seier paid this.

"[A]bsent the payment of a filing fee or the granting of a request to proceed in *forma pauperis*, the trial court fails to obtain subject matter jurisdiction." *Ex parte Courtyard Citiflats*, No. 1140264 (Ala. June 12, 2015) (quoting *Carpenter v. State*, 782 So. 2d 848, 849 (Ala. Crim. App. 2008)). In *Fox v. Arnold*, 127 So. 3d 417, 421 (Ala. Civ. App. 2012), the court held that proceedings in the trial court were void:

> Although the mother and the father filed additional pleadings, i.e., contempt petitions and custody-modification petitions, after the entry of the trial court's December 30, 2010, judgment and after the filing of their postjudgment motions, and although the trial court purported to consider and rule upon those additional pleadings during 2011 and 2012, those pleadings were nullities because they purported to initiate a new action that should have been assigned a ".01" suffix by the trial court's clerk and that would have required the payment of a new filing fee.

In *Kyle v. Kyle*, 128 So. 3d 766, 773 (Ala. Civ. App. 2013), the court again held that proceedings in the trial court were void:

> In the case at bar, the husband's emergency motion for contempt was filed as a part of the initial divorce action, case number DR-09-1260. The emergency motion, which was filed subsequent to the entry of the final divorce judgment, sought to hold the wife in contempt of court for violating the provision of the trial courts judgment of divorce concerning the requirement that the wife "catch-up" on the mortgage payments within 45 days of the entry of the judgment of divorce. Because the emergency motion initiated a new cause of action for contempt of court, it should have been assigned an ".01" suffix by the trial court clerk and the husband should have paid the filing fee required by § 12-19-71(a)(7), Ala. Code

> 1975. Because no filing fee was paid, the trial court lacked subject-matter jurisdiction to consider the emergency motion. Thus, the November 2011 contempt order is void.

Finally, In *Merriam v. Davidson*, Civ. No. 2140009 (Ala. Civ. App. June 15, 2015), the court again held that proceedings in the trial court were void:

> The financial-history portion of the trial court's case-action-summary sheet reveals that the guardian ad litem failed to pay a filing fee with the filing of her petition to show cause, and the petition was not assigned a new case number. Because the payment of a filing fee is jurisdictional and the guardian ad litem failed to pay a filing fee when she filed her petition to show cause, we conclude that the trial court lacked subject-matter jurisdiction to rule on the petition.

Neither Bullock nor Seier paid the filing fee for a Motion to Intervene. Neither paid the filing fee for a new action and acquired a new case number (R. 3-4). This jurisdictional defect "may not be cured by the subsequent payment of the filing fee," *Hicks v. Hicks*, 130 So. 3d 184 (Ala. Civ. App. 2012), by "taxing the filing fee as costs at the end of the proceeding," *Carpenter*, 782 So. 2d at 850, or by entering "a *nunc pro tunc* order retroactively approving the hardship statement." *Ex parte Courtyard Citiflats*. This court did not acquire subject-matter jurisdiction of Bullock's Motion or Seier's Petition, and the order dated June 8, 2016, is void.

IV. NEITHER SEIER NOR BULLOCK HAD STANDING TO ATTACK THE EXPUNGEMENT, AND THE COURT HAD NO INDEPENDENT JURISDICTION TO VACATE OR MODIFY THE EXPUNGEMENT ON ITS OWN MOTION.

Seier filed a "Petition to Set Aside" Newsome's expungement. The Court stated at the hearing, "Now, I do agree that Seier, I don't believe, has standing in this case . . ." (R. 21). Bullock, however, "join[ed] in" Seier's Petition, and the Court vacated Newsome's expungement based on Seier's Petition, Bullock's joinder, and the Court's own "obligat[ion]":

> The Court agrees with the Defendant [Newsome] that Attorney Seier has questionable standing to bring such a petition [to set aside] in this Court. However, Attorney Seier's Petition has been joined by the Victim. Further, as the matter having been brought to the Court's attention by an officer of the Court, the Court is obligated to investigate and act as may be necessary and appropriate (Order, ¶ 24).

"The issue of a lack of standing may not be waived . . ." *Ex parte Bac Home Loans Servicing, LP*, 159 So.3d 31, 37 (Ala. 2013). Neither Seier's Petition, Bullock's Oral Joinder, nor the Court's own "obligat[ion]" provided subject-matter jurisdiction for the court to set aside Newsome's expungement.

A. Seier Lacked Standing to File a Petition to Set Aside Newsome's Expungement.

The only entities with standing to attack an expungement after it is granted are the entities who had standing to object to the expungement before it was granted. Section 15-27-3(c) identifies those entities:

> A petitioner shall serve the district attorney, the law enforcement agency, and clerk of court of the jurisdiction for which the records are sought to be expunged, a copy of the petition, and the sworn affidavit. The district attorney shall review the petition and may make reasonable efforts to notify the victim if the petition has been filed seeking an expungement under circumstances enumerated in paragraph a. of subdivision (4) of Section 15-27-2 involving a victim that is not a governmental entity.

Seier had no statutory right to notice of the expungement, and as a result, he had no standing to set it aside. In *Pennsylvania State Police v. Izbicki*, 785 A.2d 166 (Pa. Commw. Ct. 2001), the

Pennsylvania State Police (PSP) filed a Petition alleging that the defendant had obtained his "expungement under false pretenses." The court held that the PSP lacked standing to attack the expungement:

> PSP argues that it is not bound by the expungement order since Izbicki obtained the expungement under false pretenses. We disagree.
>
> Essentially, PSP is attempting to attack the validity of Izbicki's expungement. As PSP conceded at oral argument before this Court, the law is clear that PSP lacks standing to challenge the validity of an expungement order. (785 A.2d at 169).

In *Ein v. Commonwealth*, 246 Va. 396, 436 S.E.2d 610 (1993), defendants in a civil suit filed an independent action to set aside Ein's expungement, alleging that he had obtained it by fraud. The records of Ein's prosecution had been expunged while his civil suit arising from the same incident was pending in a separate court. He had not notified the defendants of his expungement action, and he had not notified the expunging court of his civil suit.

The trial court vacated the expungement, but the Supreme Court of Virginia reversed: "[T]he trial court did not have jurisdiction to vacate the expungement order" (436 S.E.2d at 613). The court reasoned,

> [W]e find nothing in the expungement statutes that would have required Ein to give notice to Barry and Lewis. Code § 19.2-392.2(D) provides that "[a] copy of the [expungement] petition shall be served on the attorney for the Commonwealth of the . . . county in which the petition is filed." Subsection F of Code § 19.2-392.2 provides that the Commonwealth shall be made the party defendant to the expungement proceeding. Subsection F further provides that "[a]ny party aggrieved by the decision of the court [respecting the expungement order] may appeal, as provided by law in civil cases." The trial court's reliance upon subsection F is misplaced because subsection F merely defines who may appeal the court's judgment. Clearly, only the Commonwealth was entitled to notice of the expungement proceeding. Therefore, the expungement order was not void for Ein's failure to give notice to Barry and Lewis. (246 Va. at 400, 436 S.E.2d at 612-13).

In *Hunt v. Pennsylvania State Police of Commonwealth*, 983 A.2d 627 (Pa. 2009), the court held that the State Police had no standing to contest an expungement because the statute did not require that they be given "notice" of the proceeding:

> With respect to the State Police's standing, as the words employed in a statute are the clearest indication of the legislature's intention, we first direct our attention to the language of the CHRIA. The statute itself confers standing on the district attorneys of the various counties for purposes of expungement, but does not confer standing on the State Police:
>
> > The court shall give ten days prior notice to the district attorney of the county where the original charge was filed of any applications for expungement under the provisions of subsection (a)(2) [relating to a court order requiring expungement of nonconviction data].
>
> 18 Pa. C. S. A. § 9122(f) (emphasis added).
>
> Related thereto, the General Assembly requires notice to be provided to the State Police only *after* an expungement has been granted. 18 Pa. C.S.A. § 9122(d) ("Notice of expungement shall promptly be submitted to the central repository which shall notify all criminal justice agencies which have received the criminal history record information to be expunged."). Considering Section 9122, read as a whole, it is plain the General Assembly intended that the district attorney of the county where the original charge was filed has standing to challenge an application for expungement. Moreover, by providing notice to the State Police, as the central repository, only *after* an expungement order is granted, CHRIA does not contemplate State Police standing to challenge an expungement application. The General Assembly certainly knows how to confer standing upon a party. We conclude that the language of CHRIA itself compels a finding that the State Police does not possess standing to challenge an expungement order.
>
> Finally, in *State v. Taylor*, 146 So. 3d 862, 865 (La. App. 4 Cir. 2014), the court held that

DPS had no standing to contest an expungement because the statute did not require that they be noticed:

> Louisiana Revised Statute 44:9B(2) provides that the trial court "shall order all law enforcement agencies to expunge the record" where the trial court finds the defendant is entitled to relief "after a contradictory hearing with the district attorney and the arresting law enforcement agency." There is no mention in the [2014-0217 La. App. 4 Cir. 6] statute that DPS must be noticed. Accordingly, we find that the legislature did not intend for DPS to be a necessary party to an expungement proceeding.
>
> These cases are directly applicable. A person such as Seier, who is not named in the statute,

has no standing to attack an expungement after it is granted. The order granting Seier's Petition is void for lack of subject-matter jurisdiction.

B. Bullock's "Join[der] in" Seier's "Petition" Did Not Save Seier's Void Petition.

1. Bullock had no standing to file a "Motion to Use Contents of Expunged File" or "join in" Seier's Petition. As proposed, the Expungement Act granted the victim an absolute right to notice of an Expungement Petition:

> Section 4 (b). A petitioner shall serve the prosecuting authority a copy of the petition and the sworn affidavit. The prosecuting authority shall notify the victim of the petition and the victim's right to object (page 107 *infra*).

As enacted, the bill removed the victim's absolute right to notice and substituted notice at the district attorney's discretion – and then only for certain felony expungements:

> A petitioner shall serve the district attorney, the law enforcement agency, and clerk of court of the jurisdiction for which the records are sought to be expunged, a copy of the petition, and the sworn affidavit. The district attorney shall review the petition and may make reasonable efforts to notify the victim if the petition has been filed seeking an expungement under circumstances enumerated in paragraph a. of subdivision (4) of Section 15-27-2 involving a victim that is not a governmental entity (Ala. Code § 15-27-3(c)).

Bullock received notice of the expungement and participated in the case, but he had no statutory right to such notice. Section 15-27-2(a)(4) applies only to "felon[ies]" where "the charge was dismissed after successful completion of a drug court program, mental health court program, diversion program, veteran's court, or any court-approved deferred prosecution program. . . ." This section does not apply to Bullock; menacing is not a felony.

Consequently, the cases cited above, showing Seier's lack of standing, apply to Bullock too. He had no standing to attack Newsome's expungement after it was granted. His in-court joinder in Seier's Petition did not save Seier's void Petition.

2. A pleading filed by one without standing may not be "saved" by joining one with standing. Nevertheless, even if Bullock had standing, he could not "save" Seier's Petition by joining it. The Alabama Supreme Court decided this issue in *Cadle Co. v. Shabani*, 4 So. 3d 460, 462-63 (Ala. 2008):

> Perhaps the trial court and the parties assumed that the jurisdictional defect created by Cadle's lack of standing to commence this ejectment action was cured by the pleading purporting to amend the complaint to add additional parties. If so, they were mistaken. Standing is "'"[t]he requisite personal interest that must exist at the commencement of the litigation."'" *Pharmacia Corp. v. Suggs*, 932 So. 2d 95, 98 (Ala. 2005) (quoting *In re Allison G.*, 276 Conn. 146, 156, 883 A.2d 1226, 1231 (2005), quoting in turn H. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)). "When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction." *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025, 1028 (Ala. 1999). The jurisdictional defect resulting from the plaintiff's lack of standing cannot be cured by amending the complaint to add a party having standing. *Id.* ("[A] pleading purporting to amend a complaint, which complaint was filed by a party without standing, cannot relate back to the filing of the original complaint, because there is nothing 'back' to which to relate."). *See also Grand Lodge of Fraternal Order of Police v. Vann*, 344 So. 2d 1212, 1214 (1977) ("We are unaware of any case where any court has reached a substantive issue absent a named plaintiff who has standing at the time the action was filed."). Thus, when, on September 18, 2006, the trial court entered an order purporting to "retain jurisdiction of the matter for thirty (30) days . . . in order to allow [Cadle] to amend its complaint," it had no jurisdiction to retain.

The court reaffirmed this rule in *Bernals, Inc. v. Kessler-Greystone, LLC*, 70 So. 3d 315, 319 (Ala. 2011):

> The question of standing implicates the subject-matter jurisdiction of the court. *Ex parte Howell Eng'g & Surveying, Inc.*, 981 So. 2d 413, 419 (Ala. 2006). "When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction." *State v. Property at 2018 Rainbow Drive*, 740 So. 2d 1025, 1028 (Ala.1999). Moreover, "[t]he jurisdictional defect resulting from the plaintiff's lack of standing cannot be cured by amending the complaint to add a party having standing." *Cadle Co. v. Shabani*, 4 So. 3d 460, 463 (Ala. 2008)." When the absence of subject-matter jurisdiction is noticed by, or pointed out to, the trial court, that court has no jurisdiction to entertain further motions or pleadings in the case. It can do nothing but dismiss the action forthwith." *Id.* When a circuit court lacks subject-matter jurisdiction, all orders and judgments entered in the case, except an order of dismissal, are void *ab initio*. *Redtop Market, Inc. v. State*, 66 So. 3d 204 (Ala. 2010). Thus, if Brentwood lacked standing to commence this action, then the absence of subject-matter jurisdiction was not cured by the substitution of Kessler, and every order and judgment entered by the trial court is void.

Even if Bullock had standing to file a Petition to Vacate Newsome's expungement, he did not file such a petition. His attempt to "join in" Seier's void Petition did not confer jurisdiction on the court.

C. The Court Lacked Subject Matter Jurisdiction to Vacate the Expungement Sua Sponte.

In addition to invoking Seier's Petition and Bullock's joinder, the court invoked its own "obligat[ion]" as a basis for vacating Newsome's expungement. This court had no jurisdiction to modify the expungement after Tuesday, October 13, 2015 – which was the thirtieth day, as extended by rule 6(a).[7] The court's order was not signed until June 8, 2016 – almost nine months after the expungement.

The court summarized the Alabama cases in *George v. Sims*, 888 So. 2d 1224, 1227 (Ala. 2004):

> "A final judgment is an order 'that conclusively determines the issues before the court and ascertains and declares the rights of the parties involved.'" *Lunceford v. Monumental Life Ins. Co.*, 641 So. 2d 244, 246 (Ala. 1994) (quoting *Bean v. Craig*, 557 So. 2d 1249, 1253 (Ala. 1990)). Generally, a trial court has no jurisdiction to modify or amend a final order more than 30 days after the judgment has been entered, except to correct clerical errors. *See* Rule 59(e) and Rule 60, Ala. R. Civ. P.; *Cornelius v. Green*, 477 So. 2d 1363, 1365 (Ala. 1985) (holding that the trial court had no jurisdiction to modify its final order more than 30 days after its final judgment); *Dickerson v. Dickerson*, 885 So. 2d 160, 166 (Ala. Civ. App. 2003) (holding that, absent a timely postjudgment motion, the trial court has no jurisdiction to alter, amend, or vacate a final judgment); and *Superior Sec. Serv., Inc. v. Azalea City Fed. Credit Union*, 651 So. 2d 28, 29 (Ala. Civ. App. 1994) ("It is well settled that after 30 days elapse following the entry of a judgment, the trial court no longer has authority to correct or amend its judgment, except for clerical errors.").

Similarly, in *Ex parte DiGeronimo*, No. 2140611 (Ala. Civ. App. Oct. 9, 2015), the court held,

> At the time the trial court entered its April 2015 order determining that the October 2013 divorce judgment was void, no pending motion had invoked its jurisdiction. Thus, the trial court's determination was made *sua sponte* at a point when it had no jurisdiction to act. We conclude, therefore, that the trial court could not declare the October 2013 judgment void or otherwise set aside that judgment in its April 2015 order.

See also Ex parte State Dept. of Human Resources, 47 So. 3d 823 (Ala. Civ. App. 2010).

[7] The thirtieth day fell on Saturday October 10, 2015, and Monday October 12, 2015, was a legal holiday (Columbus Day). By application of rule 6(a), the last day on which the court could have acted *sua sponte* was Tuesday, October 13, 2015.

As of June 8, 2016, when the court set aside Newsome's expungement, "no pending motion had invoked its jurisdiction." Consequently, the court had no jurisdiction to set aside the expungement on its own motion.

V. THE COURT ERRED IN HOLDING THAT NEWSOME FALSELY SWORE THAT HE HAD "FULFILLED ALL TERMS AND CONDITIONS OF THE UNDERLYING DEFERRED PROSECUTION AGREEMENT."

This court found that Newsome represented "that he had fulfilled all terms and conditions of the underlying deferred prosecution agreement" and "said representations were necessarily false":

> 22. On the facts before the Court, it is clear that Defendant Newsome did not satisfy Section 15-27-12 (Prerequisites to expungement) as to all terms and conditions of the underlying deferred prosecution agreement were not satisfied in full at the time that the Petition for Expungement was filed. To the extent that the Defendant represented otherwise to this Court, said representations were necessarily false by virtue of his pending civil action against, among other persons, the Victim of the underlying offense.
>
> 23. The Court hereby determines that the Defendant's false representation that he had fulfilled all terms and conditions of the underlying deferred prosecution agreement when he was concurrently prosecuting a civil action against the victim in violation of the Release and Dismissal Order of the District Court of Shelby County constitutes "false pretenses" within the meaning of Ala. Code 1975 § 15-27-17. (Order, ¶¶ 22-23).

The court is incorrect on both the law and the facts. As to the law, the law does not require a misdemeanor defendant to "satisfy . . . terms and conditions of [a] . . . deferred-prosecution agreement," and it does not require a misdemeanor defendant to swear that he has "satisfied" the "terms and conditions" of any such agreement. As to the facts, no "deferred prosecution agreement" exists, and Newsome did not swear that he had "fulfilled all terms and conditions" of such an agreement. The Official Expungement Form contains a blank for a petitioner to certify that he has completed a "deferred prosecution program," but Newsome did not check that blank (page 62 *infra*). It only applies to felony expungements.

A. The "Terms and Conditions" in Section 15-27-12 Are the "Terms and Conditions" of the Programs Listed in Section 15-27-2(a)(4).

Section 15-27-12 provides that an order of expungement shall not be granted unless the "all terms and conditions" have been satisfied, but it does not identify what those "terms and conditions" are part of:

> No order of expungement shall be granted unless all terms and conditions, including court ordered restitution, are satisfied and paid in full, including interest, to any victim, or the Alabama Crime Victim's Compensation Commission, as well as court cost, fines, or statutory fees ordered by the sentencing court to have been paid, absent a finding of indigency by the court.

Neither the words "deferred prosecution" nor the word "agreement" appears in section 15-27-12. The "terms and conditions" are those of "the sentencing court," but convicted offenders aren't eligible for expungement, and defendants aren't normally sentenced until they are convicted. What terms and conditions must a petitioner satisfy?

The "terms and conditions" are the "terms and conditions" of the programs listed in section 15-27-2(a)(4). That section authorizes a court to expunge the records of "felony" defendants in the following circumstances:

> (4)a. The charge was dismissed after successful completion of [1] a drug court program, [2] mental health court program, [3] diversion program, [4] veterans court, [5] or any court-approved deferred prosecution program. . . .

Section 12-17-226, *et. seq.*, establishes a "pretrial diversion program," and section 12-17-226.6(a)(7) requires an applicant to submit "a written guilty plea" as a condition of entering the program. "Upon approval of the agreement and acceptance of the guilty plea, . . . [i]mposition of punishment or sentence by the court shall be deferred until the offender has successfully completed the program . . ." Ala. Code § 12-17-226.6(d). This is the "deferred-prosecution program" mentioned in section 15-27-2(a)(4), but Newsome did not participate in it. He signed no guilty plea (page 61, 72 *infra*).

Section 12-17-226.10(b) lists twenty-seven "terms and conditions" that an applicant must satisfy, and it lists by name each program in section 15-27-2(a)(4) except the deferred-prosecution program itself. An applicant may be required to,

> (17) Agree to the terms and conditions of [3] the pretrial diversion program established by the district attorney. . . .
>
> (21) Participate in and complete a certified [1] drug court program, approved by the Administrative Office of Courts. . . .
>
> (23) Complete a certified [2] mental health evaluation and treatment program.
>
> (24) Abide by all conditions imposed for treatment by [4] the United States Department of Veterans Affairs and provide certified proof of completion to the district attorney.

In *City of Pike Road v. City of Montgomery and Dow Corning Alabama, Inc., No.* 1140487 (Ala. Dec. 11, 2015), the court discussed the scope of *pari materia*:

> [T]he principle of *in pari materia* does not require that the statutes being analyzed share an *identical* subject matter. To the contrary, this Court has indicated that the subject matter of the statutes being analyzed need only be "related," "similar," or the "same general[ly]." *See James*, 729 So. 2d at 267 ("In determining legislative intent, a court should examine related statutes."); *Ex parte Johnson*, 474 So. 2d 715, 717 (Ala. 1985) ("It is a fundamental principle of statutory construction that statutes covering the same or similar subject matter should be construed *in pari materia*."); and *Willis v. Kincaid*, 983 So.2d 1100, 1103 (Ala. 2007) ("'[S]tatutes must be construed *in pari materia* in light of their application to the same general subject matter.'" (quoting *Opinion of the Justices No. 334*, 599 So. 2d 1166, 1168 (Ala. 1992))). Pike Road has conceded that § 11-40-6 and § 11-40-10 have, at least, the same general subject matter – municipalities; it is accordingly altogether proper to construe the two statutes *in pari materia* (brackets in original).

Considering section 15-27-12 *in pari materia* with section 15-27-2(a)(4) and the pretrial diversion statute, the "terms and conditions" a petitioner must "satisf[y]" become clear. They are the "terms and conditions" of the programs listed in section 15-27-2(a)(4) – for felonies.

The Pretrial Diversion Act confirms this. Section 12-17-226.10(a) explains the unusual reference to the "sentencing court" in section 15-27-12 of the Expungement Act; a defendant may be sentenced "prior to admission to the [diversion] program":

> If, as part of the pretrial diversion program, the offender agrees to plead guilty to a particular charge or charges and receives a specific sentence, an agreement concerning when the plea of guilt will occur, to what charges to which the offender will plead guilty, and any sentence to be imposed shall be approved by and submitted to an appropriate circuit or district court judge having jurisdiction over the offender within the judicial circuit prior to admission of the offender in the pretrial diversion program.

The Pretrial Diversion Act is the only provision of Alabama law that allows a defendant to be "sentenced" without first being "convicted."

In summary, the "terms and conditions" that a Petitioner must satisfy under section 15-27-12 are the "terms and conditions" of the rehabilitation program he entered pursuant to 15-27-2(a)(4). This section doesn't apply to Newsome; it applies only to felonies. No portion of the Expungement Act requires a misdemeanor defendant to complete such a program or swear that he has done so.

B. Newsome Did Not Agree to the "Terms and Conditions" of a "Deferred-Prosecution Agreement" or Enter a "Deferred-Prosecution Program."

Section 12-17-226.6 describes the procedure when a defendant enters a deferred-prosecution program:

> (d) Upon approval of the agreement and **acceptance of the guilty plea, the court shall expressly place the case** or cases **on an administrative docket until** such time that the court is notified that the offender has fulfilled the terms of the pretrial diversion agreement . . . Imposition of punishment or sentence by the court **shall be deferred** until the offender has **successfully completed the program** or is terminated from the program. . . .
>
> (f) Upon successful completion of the program by the offender, the district attorney shall notify the court in writing of that fact, together with a request that the court enter an order of dismissal of the case pursuant to the agreement or any other disposition that was agreed upon by the district attorney and the offender and approved by the court.

The Form used in Newsome's criminal case contains a paragraph to be checked when the defendant signs a deferred-prosecution agreement, but it was not checked:

IN THE DISTRICT COURT OF SHELBY COUNTY, ALABAMA **DISMISSAL & RELEASE ORDER**

STATE OF ALABAMA V. Burton Wheeler Newsome **CASE NO.** DC 2013-1434

This matter comes before the Court by the specific AGREEMENT of the parties. The Defendant is ✓ present, is ✓ represented by counsel and has Not knowingly and voluntarily waived the right to the same. After due consideration and pursuant to said agreement, all of the following as specifically noted below is hereby **ORDERED, ADJUDGED** and **DECREED.**

( ) This matter is **Dismissed** with _____ prejudice.

(X) This matter is **Continued** until 4/01/14 at 9:00 then to be **Dismissed** with ✓ prejudice, provided that the defendant have no further incidents/arrests.

( ) This matter is placed on the **Administrative Docket** until _____, then to be **Dismissed** with _____ prejudice, provided that _____.

( ) **DEFENDANT MUST APPEAR IN COURT ON THE ABOVE DATE.**

Section 12-17-226.6(d) requires the applicant for a deferred-prosecution program to sign a "guilty plea." Newsome did not sign a guilty plea. (page 61, 72 *infra*). Section 12-17-226.6(d) requires "the court . . . [to] place the [deferred] case . . . on an administrative docket until the offender has fulfilled the . . . agreement." Newsome's case was not placed "on an administrative docket"; it was continued. The "dismissal & release order" contained a paragraph that would have "placed [the case] on the Administrative Docket until ____," but this paragraph was not checked (page 65 *infra*).

Finally, deferred-prosecution agreements are not public records; they may not be disclosed "unless a court of competent jurisdiction determines that there is a compelling public interest in disclosing the records." (Ala. Code § 12-17-226.6(g) (1975). The "dismissal & release order" was not a deferred-prosecution agreement; it was filed electronically, where it was visible for all the world to see.

In summary, there is no deferred-prosecution agreement, and Newsome did not enter a deferred-prosecution program (page 61 *infra*). His case was simply continued until April 1, 2014.

C. Newsome's Did Not Swear that He Had "Satisfied" the "Terms and Condition" of Any "Agreement" or "Program."

The charge against Newsome was menacing, and menacing is a misdemeanor. Ala. Code § 13A-6-23. As a result, Newsome's Petition for Expungement was filed under section 15-27-1:

> (a) A person who has been charged with a misdemeanor criminal offense, a violation, a traffic violation, or a municipal ordinance may file a petition in the criminal division of the circuit court in the county in which the charges were filed, to expunge the records relating to the charge in any of the following circumstances:
>
> (1) When the charge is dismissed with prejudice.

When the charge was a misdemeanor, and "the charge [was] dismissed with prejudice," then the former defendant may petition for expungement There are no other requirements. The requirement that a petitioner "satisfy" the "terms and conditions" of a "deferred-prosecution program" applies only to felony defendants. Ala. Code §15-27-2 (a)(4).

Newsome's Petition for Expungement was filed on a form prepared by the Uniform Judicial System (Form CR-65 7/2014). Newsome checked blanks certifying that he had been charged with a misdemeanor and that the charge had been dismissed with prejudice. No one has alleged that these statements were "false."

The Form also contained a blank for a Petitioner to swear that he had completed a "court-approved deferred prosecution program." Newsome did not check this blank:

I, the above-named Defendant/Petitioner, was charged with the above-named Offense which is:

RECEIVED & FILED
FEB 19 2015
MARY H. HARRIS
CIRCUIT & DISTRICT COURT CLERK
SHELBY COUNTY

- [✓] a misdemeanor criminal offense,
- [ ] a violation,
- [ ] a traffic violation,
- [ ] a municipal ordinance violation,
- [ ] a non-violent felony,

I hereby file this petition with the circuit court in order to have the records relating to the above charge expunged for one of the following circumstances:

- [✓] The charge was dismissed with prejudice.
- [ ] The charge was no billed by a grand jury.
- [ ] I was found not guilty of the charge.
- [ ] *(Non-felony only)* The charge was dismissed without prejudice more than two years ago and was not refiled, and I have not been convicted of any other felony or misdemeanor crime, any violation, or any traffic violation, excluding minor traffic violations, during the previous two years.
- [ ] *(Non-violent Felony only)* The charge was dismissed after successful completion of a drug court program, mental health court program, diversion program, veteran's court, or any court-approved deferred prosecution program after one year from successful completion of the program.

(page 62 *infra*). This Form is impossible to misunderstand. Newsome DID NOT swear that he had "complet[ed]" a "deferred prosecution program" – or that he had "satisfied" the "terms and conditions" of a deferred-prosecution agreement.

D. Newsome's Oath that He "Ha[d] Satisfied the Requirements Set Out in Act # 2014-292" Was Truthful.

Newsome signed the Official Form below the following certification: "I swear or affirm, under penalty of perjury, that I have satisfied the requirements set out in Act # 2014 (codified at Ala. Code 1975, § 15-27-1 et seq.) [and] I √ have not __ have previously applied for an expungement in any other jurisdiction." As a matter of law, this oath was truthful. The only "requirements" applicable to Newsome were that he had been charged with a misdemeanor and that "the charge [had been] dismissed with prejudice."

VI. THE COURT ERRED IN HOLDING THAT NEWSOME'S PETITION WAS FILED AND GRANTED UNDER FALSE PRETENSES.

Even if Newsome's Petition is read as certifying that "he had fulfilled all terms and conditions of [a] deferred prosecution agreement" (Order, ¶ 23), and even if Newsome was violating a "term and condition" of that agreement by suing Bullock, Newsome's Petition was not "granted" based on false pretenses. Judge Reeves knew these facts when he granted the expungement.

First, Judge Reeves knew that Newsome had signed a "dismissal & release order." Newsome attached it to his Petition for Expungement (page 65 *infra*). Second, Judge Reeves knew that Newsome was suing Bullock. Bullock filed an objection to Newsome's petition, asserting,

> Mr. Bullock strongly objects to the expungement of Burt Newsome's criminal record. Since the dismissal of the case against Newsome, Newsome has instituted unsuccessful legal action against Mr. Bullock in clear contravention of his agreement (page 69 *infra*).

As a matter of law, "false pretenses" cannot be based on facts Judge Reeves knew when he granted the expungement. "False pretenses" is a type of fraud. "[F]alse pretense[s] . . . consist[s] of (1) the pretense, (2) its falsity, (3) obtaining property by reason of the pretense, (4) knowledge on the part of the accused of the falsity of the pretense, and (5) intent to defraud." *Lambert v. State*, 55 Ala. App. 242, 314 So. 2d 318, 320 (Ala. Crim. App. 1975).

To be guilty of "false pretenses, the alleged victim must be deceived. If the alleged victim knows the truth, then there are no false pretenses. In *Beaty v. State*, 48 Ala. App. 699, 267 So. 2d 490 (Ala. Crim. App. 1972), the court reversed a conviction because the alleged victim knew the truth:

> A conviction on this charge [false pretenses] cannot stand without showing that there was a reliance on the false representation, and it in fact induced the injured party to part with his goods. . . . *Woodbury v. State*, 69 Ala. 242; *Primus v. State*, 21 Ala. App. 630, 111 So. 194; *Ex parte Thaggard*, 276 Ala. 117,159 So. 2d 820.

> Commissioner Yates' testimony clearly showed he did not believe or rely upon, the misrepresentations, and that he knew of his own personal knowledge that the address given by the appellant did not exist.
>
> Mr. Yates was induced to part with the tag receipt by some reason, but that reason was not the misrepresentations made by the appellant.
>
> *Yeager v. State*, 500 So. 2d 1260, 1267 (Ala. Crim. App. 1986), summarized this holding

as follows:

> The trial judge did give defendant's requested charge number 22, which stated that if Ponder had prior knowledge of the falsity of the representations made by the defendant, if any, they should find the defendant not guilty. *See Beaty v. State*, 48 Ala. App. 699, 703, 267 So.2d 490 (1972), holding that the accused was not guilty of false pretenses where the victim knew the representation to be false and did not believe or rely upon the false representation in issuing a tag receipt.

There were no "false pretenses." This court vacated Newsome's expungement based on facts that Judge Reeves knew. This was error.

VII. THE COURT ERRED IN SETTING ASIDE JUDGE REVEES' ORDER WITHOUT A TRANSCRIPT OF THE PROCEEDINGS BEFORE JUDGE REEVES.

Judge Reeves granted Newsome's Petition for an Expungement on September 10, 2015. This court vacated Judge Reeves' judgment on June 8, 2015, without reviewing a transcript of the proceedings before Judge Reeves. As a matter of law, this was error.

Under rule 63,[8] a successor judge may not vacate or modify his predecessor's orders without reviewing a transcript of the earlier proceedings:

> We must reverse Judge Johnstone's order setting aside the directed verdict. To permit a successor judge to render a decision without even considering the record or the transcript upon which the earlier decision was made, renders the conduct of the first judge meaningless. We remand this case to Judge Johnstone with instructions to consider the record or transcript of the first trial before making a substantive decision whether to set aside the directed verdict. Furthermore, because it was the plaintiff's motion to set aside the directed verdict, the plaintiff is responsible for supplying the record and transcript to Judge Johnstone.

Trail Pontiac-GMC Truck, Inc. v. Evans, 540 So. 2d 645, 645-46 (Ala. 1988).

In *Baldwin v. Baldwin*, 160 So. 3d 34, 39-40 (Ala. Civ. App. 2014), the court again reversed a trial court for setting aside a judgment without reviewing a transcript:

> Rule 63 requires that a successor judge who is hearing a postjudgment motion review that part of the record pertaining to the issues raised in the postjudgment motion. . . . Judge Morgan informed the parties that, before ruling on the wife's postjudgment motion, he had reviewed the clerk's record, which, we note, included the exhibits admitted at trial, but that he had not reviewed a transcript of the trial containing the testimony of the witnesses. Given the nature of the issues raised in the wife's postjudgment motion, Judge Morgan, without the benefit of reviewing the trial transcript, could not have been sufficiently apprised of the facts and circumstances so that he could have judiciously decided the merits of the postjudgment motion.
>
> Because Judge Morgan committed reversible error in granting the wife's postjudgment motion without considering all the relevant evidence in the record, we reverse that order

[8] "If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties." Ala. R. Civ. P. 63.

> and remand the cause for Judge Morgan to reconsider the motion after he has reviewed a transcript of the trial proceedings.

This court vacated Judge Reeves' Order of Expungement without a transcript of the hearing – and in the face of Newsome's contention that the issues raised by Bullock and Seier had been litigated in the expungement:

> Defendant Newsome alleges that his Petition for Expungement was not filed under false pretenses because the existence of a pending civil action was raised by the victim in the prior proceedings. The undersigned was not present for any of the prior proceedings in this matter and has not been provided with the transcript of those proceedings to study (Order, 27).

As the movants, Bullock and Seier were "responsible for supplying the record and transcript" of the prior proceedings. *Trail Pontiac-GMC Truck, Inc. v. Evans*, 540 So. 2d 645, 645-46 (Ala. 1988). They failed to do so. As a matter of law, the court erred in vacating Judge Reeves' order without reviewing a transcript of the proceedings before Judge Reeves.

VIII. SECTION 15-27-7 DOES NOT GRANT A CIRCUIT COURT AUTHORITY TO "VACATE" OR "SET ASIDE" AN EARLIER ORDER OF EXPUNGEMENT.

Section 15-27-5(d) states, "Upon determination by the court that a petition for expungement was filed under false pretenses and was granted, the order of expungement shall be reversed. . . ." In every instance when "shall be reversed" or "shall not be reversed" appears in the Alabama Code concerning a court, "reversed" refers to action taken by a higher court to correct a lower court or agency.

> Ala. Code § 6-6-755 (1975) ("If the circuit court shall enter a judgment refusing to validate and confirm the issuance of the obligations and on appeal such judgment shall be reversed by the Supreme Court . . .")
>
> Ala. Code § 11-51-93 (1975) ("[A] determination by the taxing jurisdiction that reasonable cause does not exist shall be reversed only if that determination was made arbitrarily and capriciously")
>
> Ala. Code § 11-70A-9 (1975) ("A municipality or interested party may, within 42 days following the effective date of the judgment appeal the judgment of the Circuit Court to the Court of Civil Appeals. . . . The order shall not be reversed on the basis of merely technical noncompliance with this section").
>
> Ala. Code § 11-81-224 (1975) ("[I]f the circuit court shall render a judgment refusing to validate and confirm the issuance of the obligations and on appeal such judgment shall be reversed by the Supreme Court. . . .")
>
> Ala. Code § 12-16-173 (1975) ("No criminal case taken by appeal to the Court of Criminal Appeals shall be reversed because of any defect in the administration of the oath to any grand or petit jury, unless . . . some objection was taken in the court below. . . ."
>
> Ala. Code 25-5-81(e) ("In reviewing pure findings of fact, the finding of the circuit court shall not be reversed if that finding is supported by substantial evidence").
>
> Ala. Code § 37-14-14 ("on appeal such judgment shall be reversed by the supreme court . . .")
>
> Ala. Code § 37-14-38(4) ("on appeal such judgment shall be reversed by the Supreme Court . . .")

"Reversed" is never used to describe a circuit court's action in changing its own judgment.

Section 15-27-5(d) of the Expungement Act follows this pattern. It states, "The ruling of the court [on the Petition for Expungement] shall be subject to certiorari review and shall not be

reversed absent a showing of an abuse of discretion." The verb "reversed" refers to action taken by a "review[ing]" court – not by the circuit court itself.

Presumptively, the phrase "shall be reversed" in section 15-27-17 has the same meaning. "Like terms in related statutes are presumed to have the same meaning, unless a different intent is manifest." *Siegelman v. Alabama Ass' n of School Boards*, 819 So.2d 568, 581 (Ala. 2001); *Gordon v. Brunson*, 287 Ala. 535, 253 So. 2d 183 (1971) (The word 'receipts' as used in these statutes should carry the same meaning as the same word has been given in the statute dealing with commissions to which executors and administrators are entitled"); *Winn-Dixie Montgomery, Inc. v. Midfield Park, Inc.*, 290 Ala. 1, 272 So. 2d 575 (Ala. 1973) ("We think that, in using the same words in Section 755, the same meaning is intended").

Notably, neither Seier's Petition nor the court's order uses the term "reversed" except when quoting section 15-27-17. Seier's filing is styled, "Petition to Set Aside Expungement." The court did not "reverse[]" the expungement; instead, "the Court . . . set[] aside the expungement. . . ."

IX. BULLOCK'S MOTION AND SEIER'S PETITION WERE FILED AFTER THE FOUR-MONTH DEADLINE IN RULE 60(B) FOR SETTING ASIDE A JUDGMENT BASED ON FRAUD OR MISREPRESENTATION; CONSEQUENTLY, THE COURT LACKED JURISDICTION OF THE MOTION AND PETITION.

This court vacated Newsome's expungement based on its finding that Newsome made "false representation[s]" in his Petition for Expungement (Order, ¶¶ 22-23). If Alabama law allows a Circuit Court to vacate an expungement on this ground, then any motion or petition for such relief must be filed within four months of the judgment. Neither Bullock's Motion nor Seier's Petition was filed within four months of the expungement. Consequently, this court erred in vacating Newsome's expungement on these grounds.

A. The Only Two Devices for Setting Aside a Judgment More Than Thirty Days after Entry Are a Motion under Rule 60(b) and an Independent Action.

Procedurally, there are only two devices for obtaining relief from a judgment more than thirty days after the judgment: a motion under rule 60(b) and an independent action. Rule 60(b)(6) states, "Any relief from the judgment shall be made [1] by motion as prescribed in these rules or [2] by an independent action." The *Committee Comments* explain, "Rule 60(b) . . . substitutes for the present separate remedies two simple procedures for delayed attack upon a judgment, [1] a motion and [2] an independent proceeding."

T.B. v. T.A.P., 979 So. 2d 80, 91 (Ala. Civ. App. 2007), confirms the plain language of rule 60(b):

> The *only* mechanism recognized by Alabama law whereby a litigant may *collaterally* attack a civil judgment by filing a motion in the same civil action is that set forth in Rule 60(b), Ala. R. Civ. P., which permits the filing of motions for relief from a judgment. Rule 60(b) explicitly provides that various common-law writs permitting reexamination of a civil "judgment "are abolished" and that "the procedure for obtaining any relief from a judgment shall be [1] by motion as prescribed in these rules or [2] by an independent action."

See Ex parte Caremark RX, Inc., 956 So. 2d 1117, 1124 (Ala. 2006) ("The only mechanism available to Lauriello to revive or reopen the claims . . . is the mechanism provided in Rule 60(b)").

B. Neither Bullock nor Seier Filed an Independent Action to Set Aside the Judgment.

"An independent action" is commenced when the litigant pays a filing fee and obtains a new case number. *Moore v. Moore*, 849 So. 2d 969 (Ala. Civ. App. 2002). Neither Bullock nor Seier paid a filing fee or received a new case number (R. 3-4). Consequently, neither Bullock nor Seier filed an independent action.

C. Section 15-27-17 Is Subject to the Time Limits of Rule 60(b).

Section 15-27-17 provides, "Upon determination by the court that a petition for expungement was filed under false pretenses and was granted, the order of expungement shall be reversed. . . ." The court found that this section is not subject to any time limit (Order, ¶ 26).

Even if section 15-27-17 creates a substantive remedy, rule 60(b) necessarily prescribes the time limit for exercising the remedy. "Rule 60(b)" is "[t]he only mechanism . . . [to] collaterally attack a civil judgment." *T.B. v. T.A.P.*, 979 So. 2d 80, 91 (Ala. Civ. App. 2007).

Substantive law and procedural law must be construed together. Section 15-27-5(c) states, "The ruling of the court shall be subject to certiorari review and shall not be reversed absent a showing of an abuse of discretion." This section is parallel to section 15-27-17, and it contains no time limit either. Does a litigant have an unlimited time to file a petition for certiorari?

The Court of Criminal Appeals has answered this question. "The writ shall comply in form and timing with Rule 21(a), Ala. R. App. P." *Bell v. State*, CR-15-0618, slip. op. at 5 (Ala. Crim. App. April 29, 2016). Similarly, in this case, any "motion" or "petition" filed under section 15-27-17 "shall comply in form and timing with Rule [60(b)]."

D. A Motion to Set Aside a Judgment Based on "Fraud" or "Misrepresentation" Must Be Filed within Four Months of the Judgment.

If Alabama law permits an expungement to be vacated by a trial court for "false representation[s]" (Order, ¶ 23), then Rule 60(b)(3) is the procedural mechanism that applies. It authorizes relief from a judgment based on "fraud . . . [or] misrepresentation." "False pretenses" requires proof of an "intent to defraud"; it is a type of fraud. *Lambert v. State*, 55 Ala. App. 242, 314 So. 2d 318, 320 (Ala. Crim. App. 1975). A motion for such relief under rule 60(b)(3) must, however, be filed "not more than four months after the judgment." Ala. R. Civ. P. 60(b)(6).

E. Neither Bullock's Motion nor Seier's Petition Was Filed within Four Months of the Expungement.

Bullock's Motion is stamped "filed" on January 19, 2016; Seier's Petition is stamped "filed" on May 19, 2016. Neither was "filed" within four months of September 10, 2015, when the expungement was granted. As matter of law, both were filed too late.

In *Hall v. Hall*, 587 So. 2d 1198, 1199 (Ala. 1991), Robert and Jessie Hall sought to set aside a default judgment more than four months after it was entered on the ground that "Willie Jane [Hall] had fraudulently represented to the court that she was L.C.'s widow. . . ." Robert and Jessie argued that Willie Jane's perjury was "fraud upon the court" and not subject to the four-month limitation of rule 60(b)(3).

The trial court rejected this argument, and the Alabama Supreme Court affirmed. Perjury is not "fraud upon the court."

> "Fraud on the court" has been defined as "fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." 7 J. Moore, *Moore's Federal Practice* § 60.33 (2nd ed. 1990). Such fraud must be "extrinsic," that is, perpetrated to obtain the judgment, rather than "intrinsic." *Brown v. Kingsberry Mortgage Co.*, 349 So. 2d 564 (Ala. 1977). In discussing "fraud on the court," the Eleventh Circuit Court of Appeals stated:

> "Perjury is an intrinsic fraud which will not support relief from judgment through an independent action. *See United States v. Throckmorton*, 8 Otto 61, 98 U.S. 61, 25 L. Ed. 93 (1878); *see also Great Coastal Express [v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*], 675 F.2d [1349] at 1358 (4th Cir. 1982); *Wood v. McEwen*, 644 F.2d 797 (9th Cir.1981). Under the *Throckmorton* doctrine, for fraud to lay a foundation for an independent action, it must be such that it was not in issue in the former action nor could it have been put in issue by the reasonable diligence of the opposing party. *See Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 425, 43 S. Ct. 458, 465, 67 L. Ed. 719 (1923). Perjury by a party does not meet this standard because the opposing party is not prevented from fully presenting his case and raising the issue of perjury in the original action (brackets in original).

In *McGhee v. Bevill*, 111 So. 3d 132 (Ala. Civ. App. 2012), an ex-wife filed an independent action to set aside her divorce on the ground that her former husband – who was an attorney – had misrepresented his ownership of certain real estate. The trial court found that the attorney had "fraudulently misrepresented and fraudulently concealed his ownership" in a certain parcel of land (111 So. 3d at 134).

The Court of Civil Appeals reversed, holding that the husband's alleged perjury was subject to the four-month limitation of rule 60(b)(3):

> In *Ex parte Third Generation, Inc.*, 820 So. 2d 89, 90 (Ala. 2001), the Alabama Supreme Court observed that "perjury is not a fraud on the Court, . . . but intrinsic fraud, which is a Rule 60(b)(3) [, Ala. R. Civ. P.,] ground." A Rule 60(b)(3) motion must be filed within four months of the entry of the judgment being assailed. *Id.* The former wife cannot rely on any longer limitations period applicable to independent actions based on fraud upon the court. Because the former wife's Rule 60(b)(3) motion was not filed within four months of the entry of the parties' divorce judgment, we conclude that the motion was not timely filed (111 So. 3d at 137) (brackets in original).

Finally, the plaintiff in *Greathouse v. Alfa Financial Corp.*, 732 So. 2d 1013 (Ala. Civ. App. 1999), sought to set aside a default judgment on the ground that Alfa that had"falsely" certified – and sworn – that it had complied with the Mini Code. The court held that Alfa's allegedly false affidavit of compliance was not "fraud upon the court."

> [T]he falsity of Alfa's statements concerning its compliance with the Mini-Code could have been exposed in its collection action against Greathouse. However, like the

> defendants in *Hall*,[9] Greathouse allowed a default judgment to be taken against him rather than defending the action on the merits. Section 5-19-11(a), Ala. Code 1975, formerly provided for abatement of a collection action if a violation of the Mini-Code existed; thus, Alfa's compliance with the licensing provisions of the Mini-Code was directly in issue in its collection action, or at the least could have been put in issue by reasonable diligence on the part of Greathouse. *Hall*, 587 So.2d at 1200. We are aware of no reason, and Greathouse offers none, why Alfa's representation may be classified among the "more egregious forms of subversion of the legal process" that cannot reasonably be expected "to be exposed by the normal adversary process." 587 So.2d at 1201. For these reasons, we cannot conclude that Greathouse's action is cognizable as an independent equitable action to set aside the judgment under Rule 60(b) for fraud upon the court (732 So. 2d at 1016-17).

Greathouse is directly applicable to this case. Just as in *Greathouse*, Newsome was required to provide a statutory "affidavit" of compliance. Just as in *Greathouse*, the statute prohibited relief if the affidavit was false. Finally, just as in *Greathouse*, the truthfulness of the affidavit was directly at issue in the original action. Finally, just as in *Greathouse*, the movants first challenged the affidavit more than four months after the judgment. This was too late.

F. The Court Erred in Finding that Newsome Waived the Timeliness of Bullock's Motion and Seier's Petition.

The court found, "Newsome also alleges the various motions filed in this case are untimely. . . . [D]ue to the lack of any supporting legal authority, the Court finds that any such timeliness or waiver argument has been waived" (Order, ¶ 26). Newsome cited cases in his Response to Bullock's Motion to Use Contents and attached copies of the cases to his brief. He also filed a "Motion to Expunge," where he asked the Court to strike both Bullock's Motion and Seier's Petition as untimely. There is no rule requiring a litigant to cite "supporting legal authority" to the trial court; that requirement appears in rule 28 of the *Rules of Appellate Procedure*.

[9] 587 So. 2d 1198 (Ala. 1991).

In any event, jurisdictional issues cannot be waived. In *Noll v. Noll*, 47 So. 3d 275, 279 (Ala. Civ. App. 2010), the court held,

> A trial court lacks jurisdiction to consider an untimely Rule 60(b) motion. *See Harris v. Cook*, 944 So. 2d 977, 981 (Ala. Civ. App. 2006) (holding that the trial court lacked jurisdiction to entertain a Rule 60(b)(2) motion that had been brought 15 months after the entry of the judgment); *see also Schneider Nat'l Carriers, Inc. v. Tinney*, 776 So. 2d 753, 756 (Ala. 2000) (holding that the trial court was jurisdictionally barred from granting an untimely Rule 60(b) motion), and *McDonald v. Cannon*, 594 So. 2d 128, 129 (Ala. Civ. App. 1991) (holding that the trial court lacked jurisdiction over a Rule 60(b)(1) motion that had been filed more than four months after the entry of the judgment). Accordingly, the trial court lacked jurisdiction to grant the father's March 10, 2008, Rule 60(b) motion and to set aside its May 14, 2007, judgment. A judgment entered without jurisdiction is void. *Riley v. Pate*, 3 So. 3d 835, 838 (Ala. 2008). Therefore, the trial court's July 10, 2008, order purporting to set aside its May 14, 2007, judgment is void.

Accord, McGee v. Bevill, 111 So. 3d 132, 138 (Ala. Civ. App. 2012).

The court in *Noll* reversed the trial court for this jurisdictional defect on its own motion. "Neither party has raised the issue of this court's jurisdiction over this appeal. However, because jurisdictional matters are of such magnitude, this court is permitted to notice a lack of jurisdiction *ex mero motu*." (47 So. 3d at 279). Newsome has not waived the failure of Bullock and Seier to file their Motions and Petitions within four months of the expungement; such a defect may not be waived.

X. THE "DISMISSAL & RELEASE ORDER" IS NOT ENFORCEABLE AND MAY NOT SERVE AS THE BASIS FOR THE COURT'S FINDING THAT NEWSOME FALSELY CERTIFIED THAT HE HAD "SATISFIED" THE REQUIREMENTS OF THE EXPUNGMENT ACT.

A. Bullock and Seier Have Not Carried their Burden of Proving that the "Dismissal & Release Order" Satisfies the Rumery Requirements.

Before *Town of Newton v. Rumery*, 480 U.S. 386 (1987), dismissal-release agreements had been declared void as against public policy by the First Circuit,[10] the Seventh Circuit,[11] the Ninth Circuit,[12] and the D.C. Circuit.[13] The Second Circuit had declared them "inherently suspect."[14]

Part of the rationale for these decisions was that the agreements are unethical.[15] "The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows

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[10] *Rumery v. Town of Newton*, 778 F.2d 66, 71 (1st Cir.1985) ("a covenant not to sue public officials for alleged violations of constitutional rights, negotiated in exchange for a decision not to prosecute the claimant on criminal charges, is void as against public policy").

[11] *Boyd v. Adams*, 513 F.2d 83, 88 (7th Cir. 1975) ("we think that the release is void as against public policy.").

[12] *MacDonald v. Musick*, 425 F.2d 373, 375 (9th Cir. 1970). ("What he [the prosecutor] cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case.").

[13] *Haynesworth v. Miller*, 820 F.2d 1245, 1255 (D.C. 1987) ("dismissal of criminal charges cannot constitutionally be predicated upon the putative defendant's willingness to release civil claims against public servants"); *Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968) ("Courts may not become the 'enforcers' of these odious agreements.").

[14] *Sexton v. Ryan*, 804 F.2d 26, 27 (2nd Cir. 1986) ("A process whereby an arrestee gives a release to law enforcement authorities of his constitutional claims against them in exchange for their dropping criminal charges against him is inherently suspect.").

[15] *See generally* Erin P. Bartholomy, *An Ethical Analysis of the Release-Dismissal Agreement*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 331 (1993).

is not supported by probable cause." ALA. R. PROF. CONDUCT 3.8(1). In such a case, he or she may not ethically extract a release as the cost of a dismissal.[16]

Yet, the threat of continued criminal prosecution is the consideration for the defendant's release of his right to redress. This too is problematic. "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." ALA. R. PROF. CONDUCT 3.10.[17] The threat of continued prosecution not only secures "an advantage" in civil litigation; it induces the defendant to release his right to bring such litigation. Even after *Rumery*, some courts continue to hold that the agreements are unethical.[18]

By a 5-4 vote, *Rumery* held that such agreements are not always illegal. The court did not, however, say that such agreements are always legal – even when signed voluntarily. Instead, the court held that the enforceability of such agreements must be determined on a case-by-case basis.

Four members of the court found that the release in *Rumery* was enforceable because "[1] [the] agreement was voluntary . . . [2] there [was] no evidence of prosecutorial misconduct, and . . . [3] enforcement of [the] agreement would not adversely affect the relevant public interests" (107 S. Ct. at 1195). Justice O'Connor concurred in the opinion and thereby cast the

---

[16] "Assuming him to have been innocent (as he maintains), or the case against him to have been unprovable, the prosecutor was under an ethical obligation to drop the charges without exacting any price for doing so." *Cowles v. Brownell*, 73 N.Y.2d 382, 540 N.Y.S.2d 973 (N.Y. 1989).

[17] "The Canons of Ethics have long prohibited misuse of the criminal process by an attorney to gain advantage for his client in a civil case. ABA Code of Professional Responsibility, 1969, provides in section DR 7-105, p. 88: '(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.' *See Barton v. State Bar of California, supra.* In this respect, we can see no difference between public prosecutors and other lawyers. See ABA Code, supra, EC 7-13, 7-14, pp. 79-80, DR 7-103(A), p. 87." *MacDonald v. Musick*, 425 F.2d 373, 376 (9th Cir. 1970).

[18] *Cowles v. Brownell*, 73 N.Y.2d 382, 540 N.Y.S.2d 973 (N.Y. App. 1989) ("Insulation from civil liability is not the duty of the prosecutor.").

deciding vote. She placed the burden on the proponent of a release to prove the three factors as a condition of enforceability on a case-by-case basis (107 S. Ct. 1196).

Federal courts have uniformly held that *Rumery* places an evidentiary burden on the proponent of a dismissal-release agreement.

> [T]he *Rumery* opinion instructs us that before a court properly may conclude that a particular release-dismissal agreement is enforceable, it must specifically determine that (1) the agreement was voluntary; (2) there was no evidence of prosecutorial misconduct; and (3) enforcement of the agreement will not adversely affect relevant public interests. The burden of proving each of these points falls upon the party . . . who seeks to invoke the agreement as a defense.

Coughlen v. Coots, 5 F.3d 970, 973 (6th Cir. 1993).

The failure to meet this evidentiary burden results in finding that the release is unenforceable. In *Cain v. Borough*, 7 F.3d 377, 383 (3rd Cir. 1993), the Third Circuit reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement on this basis:

> As we have explained, because the District Attorney made no case-specific showing that the public interest was served by obtaining the release, the district court erred by determining that as a matter of law the public interest requirement was satisfied. We will reverse the grant of summary judgment for the defendants . . .

In *Stamps v. Taylor*, 218 Mich. App. 626, 635, 554 N.W.2d 603, 607 (1996), the court reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement:

> In the present case, the trial court did not analyze the relevant factors established by *Rumery*. Instead, the trial court upheld the release simply because it was applicable and unambiguous. Accordingly, we reverse and remand with instructions for the trial court to make the specific evaluations called for by this opinion.

"Under *Rumery*, voluntariness alone is not sufficient to uphold such an agreement." (5 F. 3d 974 n. 2; *accord*, *Cain v. Borough*, 7 F.3d 377, 381 (3d Cir. 1993) ("mere voluntariness is not enough to support enforcement of a release-dismissal agreement"). The proponent of the release must also prove "(2) there was no evidence of prosecutorial misconduct; and (3) enforcement of

the agreement will not adversely affect relevant public interests." Bullock and Seier offered no evidence to meet this burden of proof.

B. The "Dismissal & Release Order" Is Void in Its Entirety because It Released Newsome's Right to Prosecute "Criminal Claims."

Newsome argued, "The 'dismissal & release order' is not enforceable because part of the consideration was Newsome's 'agreement' not to file any 'criminal claims.'" This court held, "[E]ven assuming the validity of Defendant Newsome's argument that one clause of the Agreement (which purports to contain a release of criminal claims) is unenforceable, that clause is not at issue here" (Order, ¶ 25).

This holding is contrary to *Raia v. Goldberg*, 33 Ala. App. 435, 34 So. 2d 620, 623 (1948), and *Baker v. Citizens Bank of Guntersville*, 282 Ala. 33, 208 So. 2d 601 (1968), which Newsome cited in his brief.

In *Raia v. Goldberg*, 33 Ala. App. 435, 34 So. 2d 620, 623 (1948), the court said, "It has long been settled in this State that if an agreement express or implied to suppress a criminal prosecution forms even a part of the consideration of a contract, the transaction is against public policy, and the courts will not enforce it. . . ."

In *Baker v. Citizens Bank of Guntersville*, 282 Ala. 33, 208 So. 2d 601 (1968), the court explained:

> If the consideration for the note and mortgage was in part illegal, it avoided the whole note and mortgage. *Wynne v. Whisenant*, 37 Ala. 46, 48.
>
> That a contract, the consideration of which is in part illegal, is invalid and cannot be enforced at law, is a question too well settled to admit of doubt. *Petit's Adm'r v. Petit's Distributees*, 32 Ala. 288; 1 Brick. Dig. 282, § 116. Neither can it be doubted that a contract based upon a promise or agreement to conceal or keep secret a crime which has been committed is opposed to public policy and offensive to the law. *Clark v. Colbert*, 67 Ala. 92; *Moog v. Strang*, 69 Ala. 98; *U.S. Fidelity & Guar. Co. v. Charles*, 131 Ala. 658, 31 So.

> 558, 57 L.R.A. 212. And it makes no difference if the contract contains an additional consideration that is legal and valuable.

The release of Newsome's right to file "criminal claims" was illegal, and "it avoided the whole [release]."

C. The "Release" in the "Dismissal & Release Order" Is Not Enforceable as a "Contract."

There is no Release apart from the "Dismissal & Release Order." The order recites that the case came before the court on the "AGREEMENT of the parties." "The parties" are listed in the first line of the Order; they are the "State of Alabama" and "Burton Wheeler Newsome." Although Bullock signed the Order as the "complaining witness," he was not a "party." Victims are not "parties" to criminal cases. Consequently, the Release was not a contract between Newsome and Bullock.

Apart from the order, no evidence establishes the "AGREEMENT" between the State and Newsome. Presumably, "the agreement" was simply "the order." "[I]f an agreement is not merged into a judgment, the agreement may be enforced by a civil action but . . . , if an agreement is merged into a judgment, only the judgment may be enforced." *Warren v. Warren*, 94 So. 3d 392, 396 n.6 (Ala. Civ. App. 2012). Because any agreement between the State and Newsome was merged into the Order, then "only the judgment may be enforced" – not the underlying agreement.

D. The "Dismissal & Release Order" Was an Interlocutory Order that Became a Nullity when the Criminal Prosecution Was Dismissed with Prejudice.

"[A]n interlocutory order [is] one that [does] not dispose of all the issues before the court . . ." *Walker v. State*, 127 So. 3d 437, 439 (Ala. Crim. App. 2012). The "dismissal & and release order" was an interlocutory order; it "did not dispose of all the issues before the court. It required Newsome to appear in court again on April 1, 2014, or suffer arrest. The case was then

dismissed with prejudice on April 4, 2014: "Pursuant to earlier written agreement, with no objection by A.D.A. Willingham, this case is DISMISSED with prejudice." (page 64 *infra*).

This Order of Dismissal did not state that the "dismissal & release order" would "survive the dismissal of the case," and it did not contain a release. Consequently, as a matter of law, the "dismissal & release order" "became unenforceable upon the final judgment of dismissal."

> "As a general rule, interlocutory orders become unenforceable upon a final judgment of dismissal." *Ex parte W.L.K.*, 175 So.3d 652, 661 (Ala. Civ. App. 2015) (citing *Maddox v. Maddox*, 276 Ala. 197, 199,160 So.2d 481, 483 (1964) (discussing *Duss v. Duss*, 92 Fla. 1081, 111 So. 382 (1927))). Generally, the dismissal of an action operates to annul previously entered orders, rulings, or judgments. *See Ex parte Sealy, L.L.C.*, 904 So. 2d 1230, 1236 (Ala. 2004) (quoting 27 C.J.S. *Dismissal and Nonsuit* § 39 (1959)) (holding that a voluntary dismissal renders the proceedings a nullity and "'carries down with it previous proceedings and orders in the action'"). . . .
>
> The order of the juvenile court dismissing the action for lack of subject-matter jurisdiction dissolved the orders that are the subject of this appeal.

In *K.L.R. v. K.G.S.*, No. 2140882 (Ala. Civ. App. Jan. 8, 2016).

This rule also applies in criminal cases. In *Ronning v. Yellowstone County*, 360 Mont. 108, 253 P.3d 818 (2011), the court held that a plea agreement did not survive the entry of judgment:

> Upon sentencing, a plea agreement terminates. That is, once each party has fulfilled its obligations under the agreement (each party has performed), the plea agreement has served its purpose and any duties under the contract are discharged. See *Restatement (Second) of Contracts* § 235 (1981). The controlling document becomes the judgment and sentence, which embodies the plea agreement in whatever form the court accepted (360 Mont. at 111, 253 P.3d at 821).

In *State v. Anaya*, 95 Wn. App. 751, 976 P.2d 1251, 1256 (Wash. App. Div. 1, 1999), the court held a no-contact order did not survive dismissal of the prosecution: "[W]e hold that the no-contact order entered at arraignment against Anaya expired upon the dismissal of the underlying domestic violence charge." *See also State v. Feliciano*, 81 P.3d 1184 (Hawaii 2003) (restitution order did not survive expiration of defendant's probation).

As a matter of law, the dismissal of criminal case on April 4, 2014, "annul[led] previously entered orders, rulings, or judgments" – including the "dismissal & release order." Even if the "dismissal & release order" was originally valid, it terminated when the criminal prosecution was dismissed with prejudice.

E. Newsome Has No Obligation to Agree to Reinstatement of the Criminal Charges as a Condition of Avoiding the Illegal "Dismissal & Release Order."

In rejecting Newsome's arguments, the court reasoned, "Defendant Newsome does not volunteer to have his case placed back on the active criminal docket." (Order, ¶ 25). Newsome has no obligation to make such an offer.

In *Coughlen v. Coots*, 5 F.3d 970, 972 (6th Cir. 1993), "[t]he district judge asked plaintiff whether he would consent to reinstatement of the criminal charges against him in exchange for voiding the release." When the "plaintiff declined," "the district court granted the officers' motion for summary judgment . . ." The Sixth Circuit reversed.

When part of the consideration for a contract is illegal, the court leaves the parties where it finds them. *Clark v. Colbert*, 67 Ala. 92 (1980). The United States Supreme Court stated this well-established rule in *General Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1907 (2011):

> "In general, if a court will not, on grounds of public policy, aid a promisee by enforcing the promise, it will not aid him by granting him restitution for performance that he has rendered in return for the unenforceable promise. Neither will it aid the promisor by allowing a claim in restitution for performance that he has rendered under the unenforceable promise. It will simply leave both parties as it finds them, even though this may result in one of them retaining a benefit that he has received as a result of the transaction." 2 Restatement (Second) of Contracts §197, Comment *a*, p. 71 (1979).

As a result of the illegality in the "dismissal & release order," the court must "leave both parties where it finds them." The criminal prosecution has been dismissed with prejudice; it may not be reinstated. The release itself is illegal; it may not be enforced.

VI. CONCLUSION

WHEREFORE, Burton Wheeler Newsome respectfully moves the court to enter an order forthwith

(1) **VACATING** its order dated June 8, 2016, which set aside Newsome's expungement;

(2) **REINSTATING** Newsome's expungement dated September 10, 2015; and

(3) **DISMISSING** Bullock's Motion to Use Contents of Expunged File and Seier's Motion to Set Aside Expungement.

ALTERNATIVELY, Newsome moves the court **TO MARK "FILED"** the documents listed herein as of the dates shown below and **TO DELIVER THE DOCUMENTS** to the Circuit Clerk for inclusion in the record; namely, [a] the "Opposition to Bullock's Motion to Use Contents of Expunged Filed" delivered to the office of Judge Reeves on January 25, 2016; [b] the "Response of Burt W. Newsome to Motion of John Bullock to Use Contents of Expunged Filed" delivered to Bonita Davidson on June 1, 2016; [c] the "Response of Burt W. Newsome to Claiborne Seier's 'Petition to Set Aside Expungement Pursuant to Ala. Code § 15-27-17 and Joinder in Victim's Motion" delivered to Bonita Davidson on June 1, 2016; [d] and the "Motion to Expunge" delivered to Bonita Davidson on June 2, 2016; and **TO FURTHER ENTER AN ORDER**

(1) **SETTING** this motion for a HEARING;

(2) **ORDERING** the Circuit Clerk, Mary Harris, to accept this document for filing in the Office of the Circuit Clerk;

(3) **ORDERING** the Circuit Clerk, Mary Harris, to appear for the hearing on this motion and bring with her all of the records of the Circuit Clerk concerning this case, including but not limited to all documents that have been "filed" and all records of "filing fees" and "court costs" paid in the case;

(4) **ORDERING** the Circuit Clerk, Mary Harris, to permit Burton Wheeler Newsome and his attorney to INSPECT AND COPY the official court "file" in this case forthwith, including the record of court costs and fees paid;

(5) **AND AFTER A HEARING**, to enter an order

(a) **VACATING** the order dated June 8, 2016, which set aside Newsome's expungement;

(b) **REINSTATING** the order of expungement dated September 10, 2015;

(c) **DISMISSING** Bullock's Motion to Use Contents of Expunged File and Seier's Motion to Set Aside Expungement; and

(d) **GRANTING** Newsome such other relief as he may be entitled to receive.

RESPECTFULLY SUBMITTED this the 28th day of June 2016.

Burt W. Newsome, Pro Se

OF COUNSEL:
NEWSOME LAW, LLC
P.O. Box 382753
Birmingham, AL 35238
Telephone: (205) 747-1970
Facsimile: (205) 747-1971
Email: burt@newsomelawllc.com

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June 2016, I have mailed a copy of the above document to the counsel listed below by first-class U.S. mail, postage prepaid:

State of Alabama
A. Gregg Lowery
Assistant District Attorney
P.O. Box 706
Columbiana, AL 35051

James E. Hill, Jr.
Attorney for John W. Bullock
Hill, Weisskopf & Hill, P.C.
P.O. Box 310
Moody, AL 35004

Robert Ronnlund
P. O. Box 380548
Birmingham, AL 35238

BURT W. NEWSOME

NEWSOME'S AFFIDAVIT AND PETITION FOR EXPUNGEMENT WITH EXHIBITS

STATE OF ALABAMA)
SHELBY COUNTY) AFFIDAVIT

AFFIDAVIT OF BURTON W. NEWSOME

BEFORE ME, the undersigned Notary Public for the State of Alabama at Large, personally appeared Burton W. Newsome, who being known to me and being first duly sworn, deposes and says under oath as follows:

1. "My name is Burton W. Newsome, and I am over 19 years of age. I have personal knowledge of the facts stated herein.

2. I never signed any deferred prosecution agreement in connection with Shelby County Case Number CC-2015-000121.

3. I never participated in any deferred prosecution program in connection with Shelby County Case Number CC-2015-000121.

4. I never pled guilty, entered orally any plea of guilty or signed any document whatsoever admitting that I had done anything wrong in connection with Shelby County Case Number CC-2015-000121. This is because the charges against me were false and I had committed no crime.

5. The attached Exhibit "1" is a true and correct copy of my Petition for Expungement. A copy of the Release and Dismissal Agreement that continued my case approximately 3.5 months was attached to my Petition for Expungement when it was filed for Judge Reeves' consideration.

All of the above statements are true and correct and stated as facts."

Burton W. Newsome

Subscribed and sworn to before me, this 27th day of June, 2016.

Notary Public, State at Large
My commission expires: 10/4/2016

Jennifer Cline
Notary Public Alabama State at Large
My Commission Expires October 4, 2016

State of Alabama Unified Judicial System Form CR-65 7/2014	**PETITION FOR EXPUNGEMENT OF RECORDS**	Case No. DC-2013-001434

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA
(Name of County)

☑ **STATE OF ALABAMA** v. BURTON W. NEWSOME,
Defendant/Petitioner

☐ **MUNICIPALITY OF** _____ v. _____,
Defendant/Petitioner *(Name of Municipality)* *(Name)*

CASE NUMBER DC-2013-001434

CHARGE MENACING

(Name or Describe the Offense; Only One Offense per Petition)

I, the above-named Defendant/Petitioner, was charged with the above-named Offense which is

RECEIVED & FILED
FEB 19 2015
MARY H. HARRIS
CIRCUIT & DISTRICT COURT CLERK
SHELBY COUNTY

☑ a misdemeanor criminal offense,

☐ a violation,

☐ a traffic violation,

☐ a municipal ordinance violation,

☐ a non-violent felony,

I hereby file this petition with the circuit court in order to have the records relating to the above charge expunged for one of the following circumstances:

☑ The charge was dismissed with prejudice.

☐ The charge was no billed by a grand jury.

☐ I was found not guilty of the charge.

☐ *(Non-felony only)* The charge was dismissed without prejudice more than two years ago and was not refiled, and I have not been convicted of any other felony or misdemeanor crime, any violation, or any traffic violation, excluding minor traffic violations, during the previous two years.

☐ *(Non-violent Felony only)* The charge was dismissed after successful completion of a drug court program, mental health court program, diversion program, veteran's court, or any court-approved deferred prosecution program after one year from successful completion of the program.

EXHIBIT
1

State of Alabama Unified Judicial System Form CR-65 7/2014	**PETITION FOR EXPUNGEMENT OF RECORDS**	Case No. DC-2013-001434

☐ *(Non-violent Felony only)* The charge was dismissed without prejudice more than five years ago, was not refiled, and I have not been convicted of any other felony or misdemeanor crime, any violation, or any traffic violation, excluding minor traffic violations, during the previous five years.

☐ *(Non-violent Felony only)* Ninety days have passed from the date of dismissal with prejudice, no-bill, acquittal, or nolle prosequi and the charge has not been refiled.

Attached to this petition is a certified record of arrest, disposition, or the case action summary from the appropriate agency for the court record I seek to have expunged, as well as a certified official criminal record obtained from the Alabama Criminal Justice Information Center.

I am providing the following additional information as required by Act # 2014-292 (codified at Ala. Code 1975, § 15-27-1 et seq.):
I was charged with menacing and a warrant was issued for my arrest. On May 2, 2014, I was arrested by a Shelby County Deputy and booked into Shelby County Jail.

(specify what criminal charges from the record are to be considered, further specify the agency or department that made the arrest and any agency or department where the petitioner was booked or was incarcerated or detained pursuant to the arrest or charge sought to be expunged). Further, I have satisfied and paid in full all terms and conditions, including court ordered restitution, including interest, to any victim or the Alabama Crime Victims Compensation Commission, as well as court costs, fines, or statutory fees ordered by the sentencing court to have been paid, absent a finding of indigency by the court.

I swear or affirm, under the penalty of perjury, that I have satisfied the requirements set out in Act # 2014-292 (codified at Ala. Code 1975, § 15-27-1 et seq.) that I ☑ have not ☐ have previously applied for an expungement in any other jurisdiction, specifically

_____ and, if I have applied for an expungement in any other jurisdiction, the expungement was previously ☐ granted ☐ denied.

2/6/2015
Date

Signature of Petitioner

SWORN TO AND SUBSCRIBED BEFORE ME:

2/6/2015
Date

Jennifer Choi
Notary Public Alabama State at Large
My Commission Expires October 4, 2016

Person Authorized to Administer Oaths

ELECTRONICALLY FILED
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58-DC-2013-001434.00
CIRCUIT COURT OF
SHELBY COUNTY, ALABAMA
MARY HARRIS, CLERK

IN THE DISTRICT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: DC-2013-001434.00
	)	
NEWSOME BURTON WHEELER	)	
Defendant.	)	

ORDER

Pursuant to earlier written agreement, with no objection by A.D.A. Willingham, this case is DISMISSED with prejudice. Apply cash bond.

DONE this 4th day of April, 2014.

/s/ RONALD E. JACKSON
DISTRICT JUDGE (amh)

IN THE DISTRICT COURT OF SHELBY COUNTY, ALABAMA DI

STATE OF ALABAMA V. Burton Wheeler Newsome **CASE NO.** DC 2013-1434

This matter comes before the Court by the specific AGREEMENT of the parties. The Defendant is ✓ present, is ✓ represented by counsel and has Not knowingly and voluntarily waived the right to the same. After due consideration and pursuant to said agreement, all of the following as specifically noted below is hereby **ORDERED, ADJUDGED** and **DECREED.**

( ) This matter is **Dismissed** with _____ prejudice.
✓ This matter is **Continued** until 4/01/14 9:00 then to be Dismissed with ✓ prejudice, provided that the defendant avoid no further incidents/arrests
( ) This matter is placed on the Administrative Docket until _____, then to be Dismissed with _____ prejudice, provided that _____
( ) **DEFENDANT MUST APPEAR IN COURT ON THE ABOVE DATE.**

✓ **COURT COSTS ARE TAXED AS FOLLOWS:**

$ _____ in further **Recoupment** to the Fair Trial Tax Fund
$ 368.00 in **Court Costs** including $10.00 Bail Bond Fee
$ 20.00 as **Jail Housing Costs** and all jail **Medical Expenses**
$ 25.00 to the **Crime Victims' Compensation Fund**
$ _____ to the **Forensic Science Trust Fund** (Act No. 93-733 does ____ apply)
$ _____ in **Restitution** to _____
$ _____ as **Worthless Check Cost** (IWC # _____)
✓ $ 413.00 **TOTAL** to be deducted from Cash Bond

PAYMENT MAY BE MADE BY CERTIFIED CHECK, MONEY ORDER, OR IF IN PERSON BY CASH TO COURT CLERK, P.O. BOX 1810, COLUMBIANA, AL. 35051. THE ABOVE CASE NUMBER SHOULD APPEAR ON ALL PAYMENTS NOTE: IF THE DEFENDANT FAILS TO MAKE SUCH PAYMENTS AND FAILS TO APPEAR IN COURT ON THE ABOVE DATES SHOWN, THIS MATTER WILL NOT BE DISMISSED AND AN ARREST WARRANT AND BOND FORFEITURE CAN BE ISSUED FOR THE DEFENDANT.

The Defendant does hereby grant a full, complete and absolute Release of all civil and criminal claims stemming directly or indirectly from this case to the State of Alabama, its agents and employees, including, but not limited to the District Attorney for Shelby County, Alabama, his agents and employees; to Shelby County, Alabama, its agents and employees, including, but not limited to the Sheriff of said County, his agents and employees, to any other law enforcement or investigative agencies, public or private, their agents and employees; to any other complainants, witnesses, associations, corporations, groups, organizations or persons in any way related to this matter, to also include the Office of the Public Defender of Shelby County, Alabama, its agents and employees, from any and all actions arising from the instigation, investigation, prosecution, defense, or any other aspect of this matter. The Defendant freely makes this release knowingly and voluntarily. In exchange for this release, this case will be either dismissed immediately, or pursuant to conditions noted above

ANY FEES OR COSTS NOT SPECIFICALLY TAXED ABOVE ARE HEREBY REMITTED.

The foregoing duly reflects the Agreement of the parties as entered above, and as attested by their signatures below.

Complaining Witness _____ District Attorney _____ Defendant _____ Defendant's Attorney

Done and ordered: 11-12-13

_____
DISTRICT JUDGE (SHELBY COUNTY)

D&BORDER(3-11-05)

Alabama Criminal Justice Information Center
ACJIC
at the center of justice

Maury Mitchell
Director

201 South Union Street, Suite 300
Montgomery, AL 36130
334.517.2400

This is to certify that the attached documents are true and correct copies of the criminal records that appear in the files of the Alabama Criminal Justice Information Center.

Risha Whetstone

Risha Whetstone/staff

Criminal History Staff, ACJIC

SWORN TO AND SUBSCRIBED before me on this the 2nd day of January, 2015

Lakecia Renfroe

Notary Public

My commission expires: 7.14.2018

********** CHRI REQUEST RAPSHEET **********

Provided by the
ALABAMA CRIMINAL JUSTICE INFORMATION CENTER
P.O.Box 300660 201 South Union Street, Suite 300 . Montogomery, Alabama 36130-0660
334.517.2400 phone

****

The information in this rapsheet is subject to the following caveats:

This criminal history record information (CHRI) is confidential and may only be used for the purposes defined by the Code of Federal Regulations or as defined in Section 265-X-2.03 of the Alabama Administrative Code. This rap sheet is based only on the name-based information provided in written request to the Alabama Criminal Justice Information Center (ACJIC), and contains Alabama information only. When explanations of charge or disposition are needed, please communicate directly with the agency that contributed the record information. Because additions or deletions may be made at any time, a new copy should be requested when needed for subsequent use The procedure to make such a request may be found on the ACJIC website, www.acjic.alabama.gov or by calling 334.517.2400

****

Data as of: 01/02/2015

THIS CHRI REQUEST RAPSHEET IS PROVIDED IN RESPONSE TO A SPECIFIC REQUEST BY:

NAME	STATE ID NO.	FBI ID NO.	AIS NO.	REPORT DATE
NEWSOME, BURTON	02610310	483265VD2		01-02-2015

SEX	RACE	BIRTH DATE	HEIGHT	WEIGHT	EYE	HAIR	BIRTH PLACE
M	W	09-04-1966	508	180	BRO	BRO	AL

SOCIAL SECURITY SCARS-MARKS-TATTOOS
255-27-7001

FILE NUMBER	BIRTH DATE	SOCIAL SECURITY	OCCUPATION
02610310			

ARREST-01
DATE OF ARREST - 05-02-2013
AGENCY - SHELBY CO SHERIFFS DEPT ORI - AL0590000
NAME - NEWSOME, BURTON
CHARGE 01 - 7399 PUBLIC ORDER CRIMES-MENACING
DATE OF OFFENSE - 05-02-2013
DISP - DISMISSED DATE OF DISP - 04-04-2014
OFFENSE - 7399 PUBLIC ORDER CRIMES -MENACING

***** END OF RAPSHEET *****

VICTIM'S OBJECTION

TO PETITION FOR EXPUNGEMENT

(Exhibit K to "Response of Burt W. Newsome to Motion of John Bullock to Use Contents of Expunged Filed" delivered to Bonita Davidson on June 1, 2016)

AUG 2 4 2015

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

State of Alabama, Plaintiff, v. Burton Wheeler Newsome, Defendant.	)	CASE NO. CC-2015-000121.00

Victim's Objection to Petition for Expungement of Records

COMES NOW, John F. Bullock, Jr., victim in DC-2013-1434, and objects to Plaintiff's Petition for Expungement of Records pursuant to Ala. Code § 15-27-5.

Mr. Bullock strongly objects to the expungement of Burt Newsome's criminal record. Since the dismissal of the case against Newsome, Newsome has instituted unsuccessful legal action against Mr. Bullock in clear contravention of his agreement. The case against John Bullock, 01-CV-2015-900190.00 – Burt Newsome and Newsome Law, LLC, v. Clark Andrew Cooper, Balch & Bingham, LLP, Clairborne P. Seier, and John Franklin Bullock, Jr., was dismissed on a Rule 12(b) Motion to Dismiss by Judge Carol Smitherman. *See* Exhibit A. Nevertheless, Newsome has filed motion to reinstate and motion to compel discovery even after dismissal, Newsome's actions have caused and continue to cause Mr. Bullock to endure spurious and protracted proceedings and incur unnecessary legal fees. In short, Newsome's bad behavior against Mr. Bullock continues.

WHEREFORE, PREMISES CONSIDERED, John Bullock objects to Plaintiff's

EXHIBIT K

Petition for Expungement of Records and requests that this Court deny the same at the hearing on said Petition.

Respectfully submitted,

/s/ James E. Hill, Jr.
JAMES E. HILL (HIL005),
Attorney for John W. Bullock

OF COUNSEL:

HILL, WEISSKOPF & HILL, P.C.
2603 MOODY PARKWAY, SUITE 200
P.O. BOX 310
MOODY, ALABAMA 35004
(205) 640-2000

I hereby certify that the above statements are to the best of my knowledge accurate and true.

John W. Bullock, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2015, I electronically filed the foregoing with the Clerk of the Court using the AlaFile system which will send notification of such filing to all parties, and I hereby certify that, to the best of my knowledge and belief, there are no non-AlaFile participants to whom the foregoing is due to be mailed by way of the United States Postal Service.

A. Gregg Lowery
Assistant District Attorney

William R. Justice
ELLIS, HEAD, OWENS, & JUSTICE
P.O. Box 587
Columbiana, AL 35051

/s/ James E. Hill, Jr.
OF COUNSEL

2

AFFIDAVIT OF BURT W. NEWSOME

(Exhibit L to "Response of Burt W. Newsome to Motion of John Bullock to Use Contents of Expunged Filed" delivered to Bonita Davidson on June 1, 2016)

STATE OF ALABAMA)
)
SHELBY COUNTY)

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared Burt Newsome, who being known to me and being first duly sworn and under oath, deposes and says as follows:

"My name is Burt W. Newsome and I am a resident of Shelby County, Alabama and over nineteen years of age. On August 31, 2015, I was present at the hearing on my Petition for Expungement before the retired Honorable Judge Dan Reeves. John Bullock and his attorney James Hill were also present at the hearing. Attorney Hill argued on behalf of his client that the expungement should not be granted because I had filed a civil action against Mr. Bullock in Jefferson County, Alabama and also that his client (Bullock) should be able to use the expunged documents in the pending civil case. The Assistant District Attorney who was at the hearing filed a pleading during the hearing that erroneously stated that menacing was not an expungable offense and was a violent crime. Judge Reeves denied my expungement petition initially based on the arguments set out in the Assistant District Attorney's motion. My attorney Bill Justice filed a Motion To Reconsider which pointed out that menacing was a misdemeanor and was an expungable offense under Alabama's new expungement statute, and that the charges against me had been dismissed. Judge Reeves granted the motion to reconsider and my expungement petition. I never pled guilty to any of the criminal charges filed against me by John Bullock as the charges were false.

EXHIBIT
L

Burt W. Newsome

STATE OF ALABAMA)
COUNTY OF SHELBY)

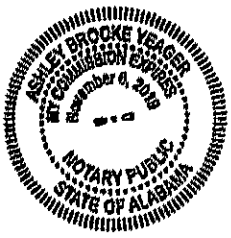
I, the undersigned authority, a Notary Public in and for said County and State, hereby certify that Burt W. Newsome, whose name is signed to the foregoing affidavit, and who is known to me, acknowledged before me on this day, that being informed of the contents of this affidvait, he acknowledged its truthfulness and executed the same voluntarily on the day the same bears

date.

Sworn to and subscribed before me on this the 31st day of May, 2016.

Notary Public

My commission expires: 11/6/19



AFFIDAVIT OF JENNIFER CHOI

STATE OF ALABAMA)
) AFFIDAVIT
SHELBY COUNTY)

AFFIDAVIT OF JENNIFER CHOI

BEFORE ME, the undersigned Notary Public for the State of Alabama at Large, personally appeared Jennifer Choi, who being known to me and being first duly sworn, deposes and says under oath as follows:

1. "My name is Jennifer Choi, and I am over 19 years of age. I have personal knowledge of the facts stated herein.

2. I am the Office Manager of Newsome Law, LLC., and I have held such position continuously since July 5, 2012.

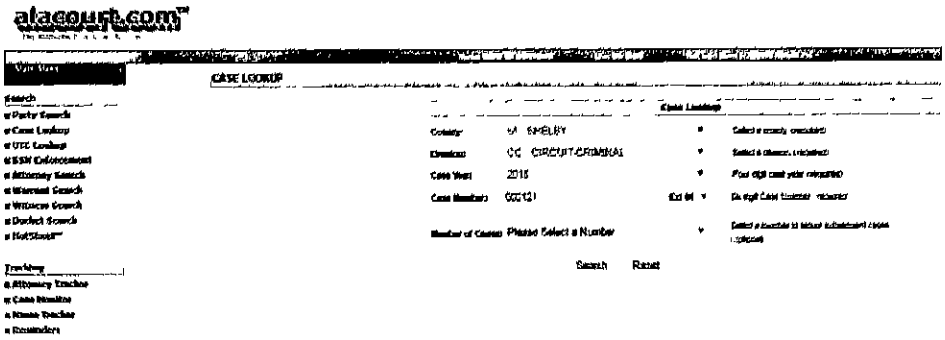
3. As part of my duties, I am personally familiar with the operation of the electronic filing system for courts in Alabama. I view documents on Alacourt.com almost every day.

3. On September 11, 2015, I attempted to access the electronic record in Shelby County Case Number CC-2015-000121 (State of Alabama v. Burt Wheeler Newsome) on Alacourt.com. The case did not appear in the system.

4. On several occasions since September 11, 2015, I have attempted to access Case Number CC-2015-000121 (State of Alabama v. Burt Wheeler Newsome) on Alacourt.com, and I have never been able to access the case or the case number.

5. Most recently, on June 22, 2016, I again attempted to access the electronic record in Shelby County Case Number CC-2015-000121 (State of Alabama v. Burt Wheeler Newsome) on Alacourt.com. The case does not appear in the system

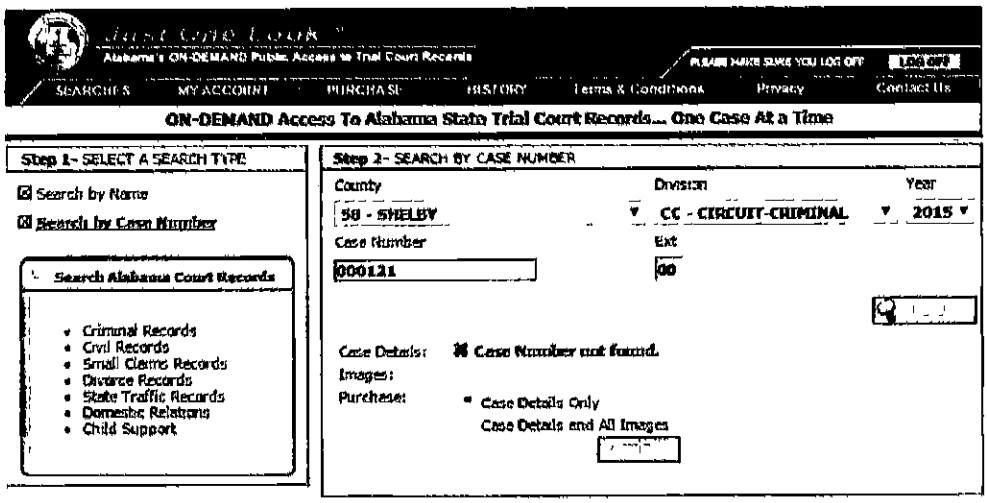
6. A true and correct screen shot of my search on June 22, 2016, appears below



7. A true and correct screen shot of my search research from June 22, 2016, appears below:

No Case Detail available.

8. A search of the parallel State-based service "Just One Look" shows that Shelby County Case Number CC-2015-000121 (State of Alabama v. Burt Wheeler Newsome) does not exist. A true and correct screen shot of my search research on June 22, 2016, appears below:



9 On June 14, 2016, I attempted to obtain copies of the pleadings in person from the Criminal Court Clerk at the Shelby County Courthouse. I was told by the clerk that they did not have the Shelby County Case Number CC-2015-000121 (State of Alabama v. Burt Wheeler Newsome) and that she could not give me anything. When I asked about the pleadings filed in the case after it was expunged, I was told all pleadings were given to the presiding judge and he was keeping them in his office.

All of the above statements are true and correct and stated as facts "

Jennifer Choi

Subscribed and sworn to before me, this 24th day of June, 2016

Notary Public, State at Large

My commission expires: 11/6/19

ASHLEY BROOKE YEAGER
MY COMMISSION EXPIRES
November 6, 2019
NOTARY PUBLIC
STATE OF ALABAMA

EXCERPTS FROM
NEWSOME DISCOVERY RESPONSES
DISCLOSING EXPUNGEMENT PETITION

(Exhibit F to "Response of Burt W. Newsome to Motion of John Bullock to Use Contents of Expunged Filed" delivered to Bonita Davidson on June 1, 2016)

DOCUMENT 123

ELECTRONICALLY FILED
4/21/2015 11:41 AM
01-CV-2015-900190.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

BURT W. NEWSOME; and NEWSOME LAW, LLC,	)	
Plaintiffs,	)	
vs.	)	**CASE NO. CV-2015-900190**
CLARK ANDREW COOPER, *et al.,*	)	
Defendants.	)	

NOTICE OF SERVICE OF DISCOVERY DOCUMENTS

PLEASE TAKE NOTICE that the following discovery documents have been served on the Defendant, Clark Andrew Cooper, by Plaintiff, BURT W. NEWSOME and NEWSOME LAW, LLC.:

( ) Interrogatories
( ) Request for Production of Documents
( ) Request for Admissions
(X) Answers to Interrogatories
(X) Response to Request for Production of Documents
( ) Response to Request for Admissions
( ) Notice of Deposition for Plaintiff/Defendant
( ) Notice of Intent to Serve Subpoena on Non-Party – _____
( ) Other: _____
_____

/s/Robert E. Lusk, Jr.
ROBERT E. LUSK, JR. (LUS005)
Attorney For Plaintiffs BURT W. NEWSOME
and NEWSOME LAW, LLC.

LUSK LAW FIRM, LLC
P. O. Box 1315
Fairhope, AL 36533
251-471-8017
251-478-9601 Fax
rlusk@lusklawfirmllc.com

1

EXHIBIT
F

Certificate of Service

I hereby certify that I have filed electronically and served a copy of the foregoing upon the below listed parties to this action by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 21st day of April, 2015.

S. Allen Baker
Amelia K. Steindorff
Balch & Bingham
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203

James E. Hill, Jr.
Hill, Weisskopf & Hill
Moody Professional Bldg
2603 Moody Parkway
Suite 200
Moody, Alabama 35004

Robert Ronnlund
P.O. Box 380548
Birmingham, AL 35238

/s/ Robert E. Lusk, Jr.
ROBERT E. LUSK, JR. (LUS005)
Attorney For Plaintiffs

DOCUMENT 123

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

BURT W. NEWSOME; and NEWSOME LAW, LLC,	)	
Plaintiffs,	)	
vs.	)	**CASE NO. CV-2015-900190**
CLARK ANDREW COOPER, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S FIRST SET OF CONSOLIDATED DISCOVERY REQUESTS

COMES NOW, the Plaintiffs and submits the following responses to the Defendant's First Set of Consolidated Discovery Requests to the Plaintiffs. The Plaintiffs state:

GENERAL OBJECTIONS

Each of Plaintiffs' responses to the interrogatories and requests below is made subject to the General Objections stated below.

1. Plaintiff objects to each and every interrogatory and request to the extent that they call for information and/or documents protected by the attorney-client privilege, that constitute work product, or that are otherwise privileged or protected from disclosure.

2. Plaintiff objects to each and every request to the extent they purport to impose obligations that differ from or exceed those imposed by the Alabama Rules of Civil Procedure.

3. Plaintiff objects to each and every interrogatory and request to the extent they are not reasonably limited as to time, scope, geography or subject matter, call for confidential and/or trade secret information, and/or call for legal conclusions.

4. Plaintiff objects to each and every interrogatory and every request to the extent they seek information or documents in the public domain, which is as readily available to the Plaintiff as it is to Plaintiff.

5. Plaintiff objects to each and every interrogatory and every request to the extent they seek information from entities or individuals other than Plaintiff.

6. Plaintiff objects to each and every interrogatory and every request to the extent that they are vague, ambiguous, overly broad, unduly burdensome, and/or seek information

DOCUMENT 123

28. State whether Burt Newsome has ever taken any action to have an arrest record removed in Alabama, or any other state, including where the arrest occurred, and the alleged crime,

RESPONSE: Yes, Filed a motion to have Bullock arrest expunged from my record.

29. State whether Burt Newsome has had his driver's license suspended, indicating the reason for suspension and the period of time during which the license was suspended.

RESPONSE: Objection. Overly broad, vague, ambiguous, unduly burdensome and/or seeks information and/or documents that are not relevant to the issues in this litigation and that are not reasonably calculated to lead to the discovery of admissible evidence.

30. State whether Burt Newsome held a gun permit from January 2012 to the present and indicate time periods during which a gun permit was held.

RESPONSE: No, held a gun permit up and until the Bullock matter.

31. Identify every state in which Burt Newsome is, has ever been, or has ever applied to become licensed to practice law, including the number of times Bert Newsome has taken the respective state bar exam for those states listed,

RESPONSE: Alabama - 1

32. List the name and address of each healthcare provider, including but not limited to any physician, nurse practitioner psychiatrist, therapist, or other licensed health professional that Burt Newsome have seen or been treated by in the last 10 years.

RESPONSE: Objection. Overly broad, vague, ambiguous, unduly burdensome and/or seeks information and/or documents that are not relevant to the issues in this litigation and that are not reasonably calculated to lead to the discovery of admissible evidence, and seeks information protected by the Health Insurance Portability and Accountability Act.

RESPONSE: Would not refund money for delayed flight

- Newsome v. Shelby County Board of Equalization and Adjustment, CV-2011000468. Shelby Co.

  RESPONSE: Pursuing the opportunity to lower my property taxes

- Newsome v. All My Sons Moving and Storage of Birmingham, Inc., CV-2012900968, Shelby Co.

  RESPONSE: Moving Company lost connectors to all my furniture during my move

- State of Alabama v. Newsome, DC-2013-001434, Shelby Co.

  RESPONSE: Bullock matter

- Newsome v. Diversified Sales, Inc, d/b/a Don's Carpet One Floor & Home, CV-2014-900721, Shelby Co.

  RESPONSE: Don's Carpet One failed to lay hardwood flooring properly in my home.

Respectfully submitted this the 20th day of April, 2015.

BURT W. NEWSOME

STATE OF ALABAMA)

Before me, a Notary Public in and for said State, hereby certify that the BURT W. NEWSOME, whose name is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that the facts alleged in the foregoing are true and correct to the best of his knowledge, information and belief on this 20th day of April, 2015.

Notary Public

DOCUMENT 123

State of Alabama Unified Judicial System Form CR-63 7/2014	**PETITION FOR EXPUNGEMENT OF RECORDS**	Case No. DC-2013-001434

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA
(Name of County)

☑ STATE OF ALABAMA v. BURTON W. NEWSOME,
Defendant/Petitioner

☐ MUNICIPALITY OF _____ v. _____,
Defendant/Petitioner *(Name of Municipality)* *(Name)*

CASE NUMBER DC-2013-001434

CHARGE MENACING

(Name or Describe the Offense; Only One Offense per Petition)

I, the above-named Defendant/Petitioner, was charged with the above-named Offense which is

☑ a misdemeanor criminal offense,

☐ a violation,

☐ a traffic violation,

☐ a municipal ordinance violation,

☐ a non-violent felony.

I hereby file this petition with the circuit court in order to have the records relating to the above charge expunged for one of the following circumstances:

☑ The charge was dismissed with prejudice.

☐ The charge was no billed by a grand jury.

☐ I was found not guilty of the charge.

☐ *(Non-felony only)* The charge was dismissed without prejudice more than two years ago and was not refiled, and I have not been convicted of any other felony or misdemeanor crime, any violation, or any traffic violation, excluding minor traffic violations, during the previous two years.

☐ *(Non-violent Felony only)* The charge was dismissed after successful completion of a drug court program, mental health court program, diversion program, veteran's court, or any court-approved deferred prosecution program after one year from successful completion of the program.

DOCUMENT 123

State of Alabama Unified Judicial System Form CR-65 7/2014	**PETITION FOR EXPUNGEMENT OF RECORDS**	Case No. DC-2013-001434

☐ *(Non-violent Felony only)* The charge was dismissed without prejudice more than five years ago, was not refiled, and I have not been convicted of any other felony or misdemeanor crime, any violation, or any traffic violation, excluding minor traffic violations, during the previous five years.

☐ *(Non-violent Felony only)* Ninety days have passed from the date of dismissal with prejudice, no-bill, acquittal, or nolle prosequi and the charge has not been refiled.

Attached to this petition is a certified record of arrest, disposition, or the case action summary from the appropriate agency for the court record I seek to have expunged, as well as a certified official criminal record obtained from the Alabama Criminal Justice Information Center.

I am providing the following additional information as required by Act # 2014-292 (codified at Ala. Code 1975, § 15-27-1 et seq.):
I was charged with menacing and a warrant was issued for my arrest. On May 2, 2014, I was arrested by a Shelby County Deputy and booked into Shelby County Jail.

(specify what criminal charges from the record are to be considered, further specify the agency or department that made the arrest and any agency or department where the petitioner was booked or was incarcerated or detained pursuant to the arrest or charge sought to be expunged). Further, I have satisfied and paid in full all terms and conditions, including court ordered restitution, including interest, to any victim or the Alabama Crime Victims Compensation Commission, as well as court costs, fines, or statutory fees ordered by the sentencing court to have been paid, absent a finding of indigency by the court.

I swear or affirm, under the penalty of perjury, that I have satisfied the requirements set out in Act # 2014-292 (codified at Ala. Code 1975, § 15-27-1 et seq.) that I ☑ have not ☐ have previously applied for an expungement in any other jurisdiction, specifically

_____

_____ and, if I have applied for an expungement in any other jurisdiction, the expungement was previously ☐ granted ☐ denied.

_____ _____
Date *Signature of Petitioner*

SWORN TO AND SUBSCRIBED BEFORE ME:

_____ _____
Date *Person Authorized to Administer Oaths*

Appendix C – Chapter 265-X-2

Alabama Criminal Justice Information Center
ACJIC
at the center of justice

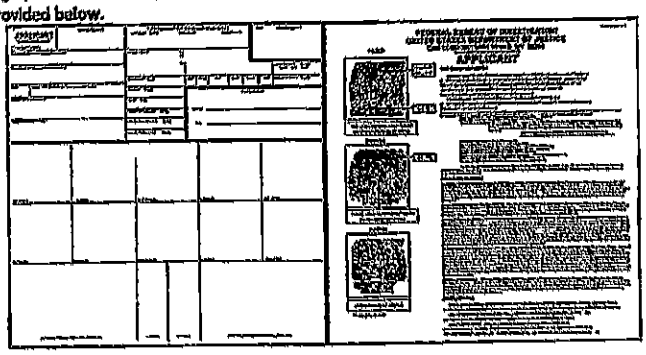
Instructions for Law Enforcement Official taking the applicant's fingerprints on FBI "Applicant" Fingerprint Card FD-258 (Rev 12-10-07)

In accordance with Alabama law and the procedures established in Section 265-X-2 of the *Alabama Administrative Code*, individual citizens may request and may be provided with classifiable sets of their own fingerprints to accompany a request for his/her own Alabama criminal history record information (CHRI) from the Alabama Criminal Justice Information Center (ACJIC).

1. One of the requirements for an individual to request their own criminal history record information is that the individual to provide ACJIC with a classifiable set of his or her own fingerprints (taken by an authorized law enforcement agency with an FBI-issued ORI) with his or her application to Review or Challenge his or her own Alabama criminal history. This permits positive identification and insures that the proper criminal record is reviewed and/or challenged.

1. The individual you are fingerprinting should provide proper identification to your agency upon request.

2. The individual's fingerprints should be taken by law enforcement on an FBI "Applicant" Fingerprint Card (i.e. blue card). Please insure that your agency's name and ORI, AND your name and telephone number, are included on the completed fingerprint card. A sample of the FBI "Applicant" Fingerprint Card FD-258 (Rev 12-10-07) for your reference purposes is provided below.



3. Please return the completed fingerprint card to the applicant, as it is the APPLICANT's responsibility to mail the completed CHRI request form, along with his/her own fingerprint card and the other required documents to:

Alabama Criminal Justice Information Center
P.O. Box 300660
Montgomery, Alabama 36130-0660, ATTN: Director

4. If you have any questions, please call the Crime Statistics and Information Division of the Alabama Criminal Justice Information Center at (334) 517-2450. To request blank FBI APPLICANT cards, your law enforcement agency may contact the FBI's Identification and Investigative Services Section's Customer Service Group at (304) 625-5590 or by e-mail at liaison@leo.gov

Appendix B – Chapter 265-X-2

Alabama Criminal Justice Information Center
ACJIC
at the center of justice

Applicant Instructions

For completing the ACJIC Application to Review or Challenge Alabama Criminal History Record Information

In order for your request to review, challenge or appeal your Alabama criminal history record information to be processed by the Alabama Criminal Justice Information Center (ACJIC), you must complete the *ACJIC Application to Review or Challenge AL Criminal History Record Information* in accordance with the following instructions:

1. Your application must include ONE COPY of at least one of the following forms of your own valid photo identification:
   a. A valid unexpired United States state-issued photo driver license or photo ID (non-driver) card;
   b. A valid unexpired United States Active Duty, Retiree or Reservist military ID card (DD Form 2 or 2A);
   c. A valid unexpired United States Military Dependent ID card (for spouse or children of Active Duty Military personnel);
   d. A valid unexpired United States Citizenship and Immigration Service Documentation, which may include either:
      i. Certificate of Naturalization N-550, N-570, N-578; or
      ii. Certificate of Citizenship N-560, N-561, N-645
   e. A valid unexpired United States Passport; or
   f. A valid unexpired Foreign Passport which meets the following requirements:
      i. A foreign passport must contain a Valid United States Visa or I-94 to be used as a primary proof of identification; or
      ii. A foreign passport, not issued in English, must be translated and accompanied by a Certificate of Accurate Translation. Passports are not acceptable if un-translated into English and/or expired.

2. Your application must include the required $28.00 administrative fee in the form of only a cashier's check or a money order made payable to the "State of Alabama" *(sorry – personal and/or business checks are not accepted)*; *and*

3. Your application must include a classifiable set of your own fingerprints, taken by an authorized law enforcement agency with an FBI-issued Originating Agency Number (ORI).
   a. The fingerprints accompanying your application should be provided to ACJIC on an official FBI-approved "Applicant" fingerprint card or a FBI-approved AFIS printout of an official "Applicant" fingerprint card (i.e., FBI blue card) collected by an approved law enforcement agency with a valid FBI ORI. This permits positive identification and insures that the proper criminal record is reviewed.
   b. Details for the fingerprinting agency may be found in APPENDIX C.

4. If your application includes a CHALLENGE of any part of your CHRI maintained by ACJIC, PART II of the application must include, at a minimum:
   a. The charge and DATE of each specific arrest or disposition being challenged;
   b. The Name of the ARRESTING AGENCY OR COURT for each arrest or disposition being challenged;
   c. A listing of each specific arrest or disposition being challenged;
   d. The details related to why each specific arrest is incorrect or incomplete;
   e. What the applicant believes to be the correct information for each arrest or disposition being challenged;
   f. Where the applicant obtained what he/she believes to be the correct supporting information (if applicable); and
   g. Official documentation from the arresting agency or court (if applicable) to support each arrest or disposition being challenged.

5. Your completed request and all of the required documentation should be mailed to:
   Alabama Criminal Justice Information Center
   P.O. Box 300660
   Montgomery, Alabama 36130-0660
   ATTN: Director

Please allow a minimum of 5-10 business days from the date the application is received by ACJIC for ACJIC to process your request for review. Requests to Challenge CHRI information do NOT fall under this timeframe, as they require additional research, contact and verification with the arresting agencies, etc. If you have any questions concerning this procedure, you may contact the Alabama Criminal Justice Information Center by calling (334) 517-2400.

Appendix A – Chapter 265-X-2

Alabama Criminal Justice Information Center

ACJIC

at the center of justice

ALABAMA CRIMINAL JUSTICE INFORMATION CENTER

Application to Review or Challenge Alabama Criminal History Record Information

PART II: Request to Challenge CHRI maintained by ACJIC

An individual may Challenge or Appeal any portion of his or her own Criminal History Record Information (CHRI) maintained by the Alabama Criminal Justice Information Center that he or she believes to be incomplete or inaccurate. This may be requested by completing the *ACJIC Application to Review or Challenge AL Criminal History Record Information* and returning it along with the required documentation to ACJIC within one calendar year of the date of the ACJIC response to the individual's request to review CHRI.
Please ATTACH IN WRITING to this completed application the following information regarding EACH arrest and/or disposition you wish to challenge:

1. The charge and DATE of each specific arrest or disposition being challenged;
2. The Name of the ARRESTING AGENCY OR COURT for each arrest or disposition being challenged;
3. A listing of each specific arrest or disposition being challenged;
4. The details related to why each specific arrest is incorrect or incomplete;
5. What the applicant believes to be the correct information for each arrest or disposition being challenged;
6. Where the applicant obtained what he/she believes to be the correct supporting information (if applicable); and
7. Official documentation from the arresting agency or court (if applicable) to support each arrest or disposition being challenged.

Please mail your completed application, along with the required documentation to:
Alabama Criminal Justice Information Center
P.O. Box 300660
Montgomery, Alabama 36130-0660
ATTN: Director
The *ACJIC Application to Review or Challenge AL Criminal History Record Information* will be reviewed by an ACJIC official, along with the documentation provided. The applicant will be notified as promptly as possible of the results of the challenge and you may appeal a decision that is unsatisfactory to you according to the procedures established by the ACJIC Commission.

Questions? Contact the Alabama Criminal Justice Information Center's Crime Statistics and Information Division by calling 334-517-2450. ACJIC's normal business hours are Monday through Friday, from 8:00 a.m. until 5:00 p.m. Central Standard Time (CST).

Appendix A – Chapter 265-X-2

Alabama Criminal Justice Information Center

ALABAMA CRIMINAL JUSTICE INFORMATION CENTER

Application to Review or Challenge Alabama Criminal History Record Information

PART I: Applicant Information

Full Name (First, Middle, Last, Suffix): Burton Wheeler Newsome

Applicant Current Address: 7460 Dunnavant Valley Road

City: Leeds State: Alabama Zip Code: 35094

Alias or Nickname(s): _____ Sex/Gender: ☑ Male ☐ Female

Social Security Number: 255-27-7001 Date of Birth: 9/4/1966 *(month/date/year)*

Race: ☑ White ☐ Black ☐ Asian ☐ Indian ☐ Other (please specify) _____

Current Driver's License Number: 9303132 Issuing State: Alabama

Current e-mail address: burt@newsomelawllc.com

Home Phone #: (_____) _____ Cell Phone #: (205) 657-8579

Work Phone #: (205) 747-1972 Extension: _____

1. My request is to *(check all that apply)*:
   - ☑ Review a copy of my CHRI maintained by ACJIC;
   - ☐ Challenge specific items in my CHRI maintained by ACJIC (see requirements in *Part II* of this application).
   - ☑ Receive a Certified Official Criminal Record as required to file a Petition for Expungement of Record.
2. Included with my Application are the following items:
   - ☑ The required copy of my valid photo identification *(see "Appendix A" for application instructions for requirements and for accepted forms of identification)*.
   - ☑ The required $25.00 administrative fee *(must be in the form of a money order or Cashiers checks made payable to the STATE OF ALABAMA)*.
   - ☑ A classifiable copy of my own fingerprints taken by law enforcement as required *(please see "Appendix C" for instructions)*.

I, the above referenced individual, hereby request to Review or Challenge my Alabama criminal history record information (CHRI) maintained by the Alabama Criminal Justice Information Center, Alabama's official criminal history repository. By signing below and submitting this application, I hereby verify that the information listed in my application and in the attached documentation is correct. I also acknowledge that I understand that, in accordance with Section 41-9-601 of the Code of Alabama 1975, that any person who willfully requests, obtains or seeks to obtain criminal offender record information under false pretenses, or who willfully communicates or seeks to communicate criminal offender record information to any agency or person without authorization, may be guilty of a felony, and shall be fined not less than $5,000 nor more than $10,000 or imprisoned in the state penitentiary for not more than five years or both. §41-9-601, Code of Ala. (1975).

Applicant Signature _____ Date 10/8/2014

My Commission expires: Jennifer Choi Notary Public Alabama State at Large My Commission Expires October 4, 2015

/s/ Robert E. Lusk, Jr
ROBERT E. LUSK, JR. (LUS005)
Attorney for Plaintiffs: BURT W. NEWSOME and NEWSOME LAW, LLC.

LUSK LAW FIRM, LLC
P. O. Box 1315
Fairhope, AL 36533
251-471-8017
251-478-9601 Fax
rlusk@lusklawfirmllc.com

Certificate of Service

I hereby certify that I have filed electronically and served a copy of the foregoing upon the below listed parties to this action by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 21st day of April, 2015.

S. Allen Baker
Amelia K. Steindorff
Balch & Bingham
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203

James E. Hill, Jr.
Hill, Weisskopf & Hill
Moody Professional Bldg
2603 Moody Parkway
Suite 200
Moody, Alabama 35004

Robert Ronnlund
P.O. Box 380548
Birmingham, AL 35238

/s/ Robert E. Lusk, Jr.
ROBERT E. LUSK, JR. (LUS005)
Attorney for Plaintiffs

EXCERPTS FROM

NEWSOME RULE 59 MOTION IN CIVIL CASE

(Exhibit S to "Response of Burt W. Newsome to Motion of John Bullock to Use Contents of Expunged Filed" delivered to Bonita Davidson on June 1, 2016)

DOCUMENT 263

ELECTRONICALLY FILED
9/28/2015 4:29 PM
01-CV-2015-900190.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
ANNE-MARIE ADAMS, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

BURT W. NEWSOME and NEWSOME LAW, LLC	)	
Plaintiffs,	)	
v.	)	Case No.: CV 2015- 900190.00
CLARK ANDREW COOPER ET AL	)	
Defendants.	)	

PLAINTIFFS' MOTION TO ALTER, AMEND,
OR VACATE ORDERS OF DISMISSAL,
OR IN THE ALTERNATIVE, TO GRANT A NEW TRIAL

Come now the plaintiffs, Burt W. Newsome and Newsome Law LLC, and move the court pursuant to rule 59 of the *Alabama Rules of Civil Procedure* to alter, amend, or vacate the orders dated August 31, 2015, dismissing all of the plaintiffs' claims against all defendants and denying their motion to reconsider the dismissal of their claims against defendants Bullock and Seier, or in the alternative, to grant them a new trial. This motion is based on all documents of record and the Affidavit of Robert E. Lusk, Jr. (Exhibit 1) and the Affidavit of Burt W. Newsome (Exhibit 2) and the attachments thereto (exhibits A-H), all of which are attached hereto and filed herewith. As grounds for this motion, the plaintiffs show the court the following, separately and severally:

1. The court erred in granting the Motions to Dismiss of the defendants Claiborne P. Seier and John W. Bullock, Jr, and in denying the Plaintiffs' Motions to Reconsider the Dismissals, because the sole basis asserted for dismissal was a "Deferred Prosecution and Release Agreement," and this was not a sufficient ground or basis to dismiss the plaintiffs' claims, for the reasons stated below, separately and severally:

EXHIBIT 8

(a) Count XIII of the Amended Complaint alleges that "the defendants John Bullock and/or Claiborne Seier . . . made false representations to Newsome regarding the true nature of his criminal charges," thereby inducing him to sign the release (Document 69, ¶ 97). "A release obtained by fraud is void." *Taylor v. Dorough*, 547 So. 2d 536, 540 (Ala. 1989).

In ruling on a motion to dismiss, the "court must accept the allegations of the complaint as true." *Ex parte Retirement Systems of Alabama*, S.C. No. 1140170 (Ala. June 12, 2015). The defendants did not file a Motion for Summary Judgment, supported by affidavits or other evidentiary material, rebutting the plaintiffs' claims of fraud. "A summary-judgment movant does not discharge his initial burden to challenge the sufficiency of the evidence of a nonmovant's claim by simply ignoring the claim." *Free v Lasseter*, 31 So. 3d 85, 90 (Ala. 2009). As a result, there was no valid basis for dismissing the plaintiffs' claims.

The court considered an almost identical fact situation in *Underwood v. Allstate Insurance Co.*, 590 So. 2d 258 (Ala. 1991). The plaintiffs sued Allstate for uninsured motorist benefits; Allstate filed a Motion to Dismiss supported by a release; and the plaintiffs alleged that the release was procured by fraud. The trial court dismissed the plaintiffs' case, but the Alabama Supreme Court reversed:

> The plaintiffs, Anthony D. Underwood and Maureen K. Underwood, sued Allstate Insurance Company for uninsured motorist benefits for personal injuries suffered by Mr. Underwood and loss of consortium suffered by Mrs. Underwood.
>
> Allstate filed a motion to dismiss the Underwoods' complaint pursuant to Ala. R. Civ. P., Rule 12(b)(6), and submitted a release of the uninsured motorist benefits signed by the Underwoods and stating on its face that it was a "full and final" settlement of all claims. Allstate claimed it had reimbursed the deductible to the Underwoods and had settled the uninsured motorist claim for personal injury.
>
> The trial court held a hearing on Allstate's motion but took no testimony, and neither party filed any affidavits. In response to Allstate's motion, the Underwoods filed no counter-affidavits, but did obtain permission from the court to amend their complaint to allege that the release was procured by fraud. Subsequently, Allstate filed another motion to dismiss,

> restating the same grounds it had previously stated, and attached to the motion the same draft and release that it had attached to its first motion. Allstate filed no affidavits or other evidence to negative the allegations in the amended complaint that the release was obtained by fraud.
>
> The court conducted another hearing on Allstate's motion. No testimony was taken and no affidavits were filed at this hearing either. The trial court granted Allstate's motion, and the Underwoods appealed.
>
> Because Allstate filed matters outside the pleadings in support of its Rule 12(b)(6) motion, we treat it as a Rule 56 motion for summary judgment. As previously stated, Allstate supported its Rule 12(b)(6) motion only with the settlement draft and the release signed by the Underwoods . . .
>
> Had Allstate in this case filed admissible evidence in support of its motion for summary judgment, as permitted by Rule 56, setting out all of the representations it had made before the execution of the release, and that the evidence negatived the Underwoods' allegations that the release was procured by fraud, then the Underwoods could not have relied upon the mere allegations of their amended complaint. *Cf. Ray v. Midfield Park, Inc.*, *supra*. Allstate did not do this; therefore, it failed to sustain its burden of showing that no genuine issue of fact remained in the case.
>
> Based on the foregoing, the judgment of the trial court is due to be, and it is hereby, reversed, and the cause is remanded (590 So. 2d at 258-59).

Factually, this case is indistinguishable from *Underwood*. The plaintiffs filed a complaint just as in *Underwood*; the defendants filed a motion to dismiss and a release just as in *Underwood*; the plaintiffs amended their complaint and alleged fraud just as in *Underwood*; and the defendants failed to rebut the plaintiffs' fraud claim just as in *Underwood*.

(b) Count XII of the Amended Complaint alleges, "Newsome was unaware of the conspiracy to bring false criminal charges against him at the time he signed the release" (Document 69, ¶ 95). "Although parties may execute an agreement that will release claims or damages not particularly contemplated, the parties' intent to do so must be clearly expressed in the agreement." *Minnifield v. Ashcraft*, 903 So. 2d 818, 827 (Ala. Civ. App. 2004).

The release does not express an intent to release "unknown claims," and the defendants offered no evidence to rebut plaintiffs' allegation that he was unaware of the conspiracy to falsely

charge him with a crime when he signed the release. "A summary-judgment movant does not discharge his initial burden to challenge the sufficiency of the evidence of a nonmovant's claim by simply ignoring the claim." *Free v Lasseter*, 31 So. 3d 85, 90 (Ala. 2009).

(c) The release on which the defendants rely is a "release-dismissal agreement." "In exchange for this release, this case will be either dismissed immediately, or pursuant to conditions noted above." The United States Supreme Court considered the validity of such agreements in *Town of Newton v. Rumery*, 107 S. Ct. 1187 (1987).

The court held that the validity of such agreements must be determined on a case-by-case basis. The plurality opinion found that the particular release in that case was enforceable because three factors were satisfied: "[W]e conclude that [1] this agreement was voluntary, [2] that there is no evidence of prosecutorial misconduct, and [3] that enforcement of this agreement would not adversely affect the relevant public interests" (107 S. Ct. at 1195). The proponent of such a release must "prove" these three factors as a condition of enforcement (107 S. Ct. at 1196). The defendants offered no evidence to meet this burden of proof.

In *Coughlen v. Coots*, 5 F.3d 970, 973 (6th Cir. 1993), the Sixth Circuit reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement. The court held,

> [T]he *Rumery* opinion instructs us that before a court properly may conclude that a particular release-dismissal agreement is enforceable, it must specifically determine that (1) the agreement was voluntary; (2) there was no evidence of prosecutorial misconduct; and (3) enforcement of the agreement will not adversely affect relevant public interests. The burden of proving each of these points falls upon the party in the Sec. 1983 action who seeks to invoke the agreement as a defense.
>
> Here, the district court did not conduct the analysis called for by *Rumery*. Instead, the court concluded that "such releases have been held not to be against public policy in . . . *Rumery*," and, in effect, treated the release as presumptively valid.

In *Patterson v. City of Akron*, No. 13-4321 (6th Cir. July 22, 2015), the Sixth Circuit again reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement:

> *Rumery* requires that, in order for a court to find lack of prosecutorial misconduct, the party invoking a release-dismissal agreement as a defense must present evidence of a legitimate criminal justice reason for conditioning the plea agreement on a release.

In *Cain v. Borough*, 7 F.3d 377, 383 (3rd Cir. 1993), the Third Circuit reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement:

> As we have explained, because the District Attorney made no case-specific showing that the public interest was served by obtaining the release, the district court erred by determining that as a matter of law the public interest requirement was satisfied. We will reverse the grant of summary judgment for the defendants . . .

Finally, in *Stamps v. Taylor*, 218 Mich. App. 626, 635, 554 N.W.2d 603, 607 (1996), the Michigan court reversed the dismissal of a plaintiff's claims based on a release-dismissal agreement:

> In the present case, the trial court did not analyze the relevant factors established by *Rumery*. Instead, the trial court upheld the release simply because it was applicable and unambiguous. Accordingly, we reverse and remand with instructions for the trial court to make the specific evaluations called for by this opinion.

These cases establish that the burden of proof imposed by *Rumery* is an evidentiary burden and that a release itself cannot meet that burden. The defendants must offer evidence. Although *Rumery* was a 1983 action, the plaintiff's claims were similar to those asserted by Newsome. The plaintiff in *Rumery* "alleged that the town and its officers had violated his constitutional rights by arresting him, defaming him, and imprisoning him falsely." Newsome alleges that Bullock and Seier maliciously prosecuted him (count I), abused the legal process for an improper purpose (count II), and caused him to be falsely imprisoned (count III).

This court should apply the *Rumery* analysis to the validity the of release-dismissal agreement just as the Michigan court did in *Stamps*. Here, the defendants offered no evidence to prove compliance with any of the *Rumery* factors. Consequently, the court erred in relying on the release as basis for dismissing the plaintiffs' claims

2. The court erred in dismissing the plaintiffs' claim that the release was obtained by fraud (counts XII-XIII) because no party filed a Motion to Dismiss, Motion for Judgment on the Pleadings, or Motion for Summary asserting any ground or reason that the fraud counts should be dismissed. The court's dismissal of these counts without such a motion denied the plaintiffs due process of law.

In *Moore v. Prudential Residential Services Ltd*, 849 So. 2d 914, 927 (Ala. 2002), the court held, "The trial court violates the rights of the nonmoving party if it enters a summary judgment on its own, without any motion having been filed by a party."

3. Section 15-27-6 of the Alabama Code provides that anyone who "uses" the contents of an expunged file without a court order is guilty of a Class B misdemeanor. The "Deferred Prosecution and Release Agreement" on which the court based its dismissal of the claims against Bullock and Selar is part of the "file" concerning Newsome's arrest, and that file has been expunged. As a matter of the public policy expressed in the expungement statute, "expunged records" are not a lawful basis for dismissing Newsome's claims.

The records and file concerning Newsome's arrest for menacing were expunged by order of the Circuit Court of Shelby County on September 10, 2015, in case number CC 2015-000121.00 **(See Order of Circuit Court of Shelby County, Alabama directing that any and all records of the charge, arrest and incarceration be expunged attached as Exhibit "H" to the Newsome Affidavit).** Section 15-27-6(b) of the Alabama Code states, "After the expungement of records pursuant to subsection (a), the proceedings regarding the charge shall be deemed never to have occurred." Section 15-27-16(a) further provides,

> Notwithstanding any other provision of this chapter, an individual who knows an expungement order was granted pursuant to this chapter and who intentionally and maliciously divulges, makes known, reveals, gives access to, makes public, uses, or

> otherwise discloses the contents of an expunged file without a court order, or pursuant to a provision of this chapter, shall be guilty of a Class B misdemeanor.

"Use" of the "Deferred Prosecution and Release Agreement" is now a criminal offense. The expungement statute expresses a broad, social policy to restore the former, criminal defendant to the condition that would have existed if no criminal charge had ever been filed. Dismissing Newsome's claims arising from an expunged arrest – or permitting the prior dismissal to stand – based on a release that has itself been expunged thwarts the policy of the expungement statute.

4. The court erred in holding that "Deferred Prosecution and Release Agreement" operated to release Claiborne P. Seier because the document applies only to named entities or parties, and Seier is not named in the document as a party or beneficiary.

Section 885(1) of the *Restatement (Second) of Torts* states, "A valid release of one tortfeasor from liability for a harm, given by the injured party, does not discharge others liable for the same harm, unless it is agreed that it will discharge them."[1] The release contains no agreement to discharge Seier.

5. The court erred in holding that "Deferred Prosecution and Release Agreement" operated to release Claiborne P. Seier because the document does not release the "agents and employees" of "complainants [or] witnesses.

Although the release reflects an intent to release the "agents and employees" of "Shelby County," "the Sheriff of said County," "law enforcement or investigative agencies," and "the public defender," the release does not discharge the "agents and employees" of any other entity:

> The Defendant does hereby grant a full, complete and absolute release of all civil and criminal claims stemming directly or indirectly from this case to the State of Alabama, its agents and employees; to Shelby County, Alabama, its agents and employees, including, but not limited to the Sheriff of said County, his agents and employees, to any other law

[1] The Alabama court relied on section 885 of the *Restatement* in *Ex parte Goldsen*, 783 So. 2d 53, 55 (Ala. 2000), and *Lowry v. Garrett*, 792 So. 2d 1119, 1122 (Ala. Civ. App. 2001).

to reinstate all of their claims as to all parties, to grant their motions to compel discovery from Renasant, Bullock, and Gaxiola, and to deny Bullock's motion for award of attorney's fees.

Respectfully submitted this the 28th day of September 2015.

/s/ Robert E. Lusk, Jr.
ROBERT E. LUSK, JR. (LUS005)
Attorney For Plaintiffs BURT W. NEWSOME
AND NEWSOME LAW, LLC

LUSK LAW FIRM, LLC
P. O. Box 1315
Fairhope, AL 36533
251-471-8017
251-478-9601 Fax
rlusk@lusklawfirm.com