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IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Petitioner,

CASE NO. SC16-56
L.T. No. 83-12-CF

v.

JULIE L. JONES, ETC.

Respondents.
_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Respondent, Julie L. Jones, Secretary, Florida Department of Corrections, by and through the undersigned counsel, pursuant to Fla. R. App. P. 9.225, hereby submits the following as supplemental authority:

Ex parte Jerry Bohannon, Case No. 1150640 (Ala. Sept. 30, 2016)

In re: Pressley B. Alston, Case No. 16-15700-P, pp. 15-17 (11th Cir. Sept. 21, 2016) (unpublished order denying application to file a second or successive habeas corpus petition)

The attached cases submitted as supplemental authority are pertinent to the issue addressed in Issue I.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of October, 2016, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal system which will send a notice of electronic filing to the following: William M. Hennis, III, Litigation Director, Martin J. McClain, Special Assistant CCRC-South and Jessica Houston, Staff Attorney, Office of the Capital Collateral Regional Counsel - South, One East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301 (**hennisw@ccsr.state.fl.us, martymcclain@earthlink.net** and **houstonj@ccsr.state.fl.us**); and to Billy H. Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 North Bronough Street, Suite 4200, Tallahassee, Florida 32301 (**billy_nolas@fd.org**).

Respectfully submitted,

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REL: 09/30/2016

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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2016

1150640

Ex parte Jerry Bohannon

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Jerry Bohannon

v.

State of Alabama)

(Mobile Circuit Court, CC-11-2989 and CC-11-2990; Court of Criminal Appeals, CR-13-0498)

STUART, Justice.

This Court granted certiorari review of the judgment of the Court of Criminal Appeals affirming Jerry Bohannon's conviction for capital murder and his sentence of death. We affirm.

Facts and Procedural History

The evidence presented at trial established the following. Around 7:30 a.m. on December 11, 2010, Jerry Bohannon, Anthony Harvey, and Jerry DuBoise were in the parking lot of the Paradise Lounge, a nightclub in Mobile. The security cameras in the parking lot recorded DuBoise and Harvey talking with Bohannon. After DuBoise and Harvey had turned and walked several feet away from him, Bohannon reached for a pistol. Apparently, when they heard Bohannon cock the hammer of the pistol, DuBoise and Harvey turned to look at Bohannon. DuBoise and Harvey then ran; Bohannon pursued them, shooting several times. DuBoise and Harvey ran around the corner of the building and when the reappeared they had guns. A gunfight ensued. Harvey was shot in the upper left chest; DuBoise was shot three times in the abdomen. The testimony indicated that, in addition to shooting DuBoise and Harvey,

Bohannon pistol-whipped them. Both DuBoise and Harvey died of injuries inflicted by Bohannon.

In June 2011, Bohannon was charged with two counts of capital murder in connection with the deaths. The murders were made capital because two or more persons were killed "by one act or pursuant to one scheme or course of conduct." § 13A-5-40(a)(1), Ala. Code 1975. Following a jury trial, Bohannon was convicted of two counts of capital murder. During the penalty phase, the jury recommended by a vote of 11-1 that Bohannon be sentenced to death; the circuit court sentenced Bohannon to death for each capital-murder conviction. Bohannon appealed. The Court of Criminal Appeals affirmed one of Bohannon's capital-murder convictions but remanded the case, in light of a double-jeopardy violation, for the circuit court to set aside one of Bohannon's capital-murder convictions and its sentence. Bohannon v. State, [CR-13-0498, October 23, 2015] ___ So. 3d ___ (Ala. 2015). The circuit court vacated one conviction and sentence, and, on return to remand, the Court of Criminal Appeals affirmed Bohannon's death sentence. Bohannon v. State, [CR-13-0498, December 18, 2015] ___ So. 3d ___ (Ala. 2015). Bohannon

petitioned this Court for certiorari review of the judgment of the Court of Criminal Appeals. This Court granted Bohannon's petition to consider four grounds:

> -- Whether Bohannon's death sentence must be vacated in light of Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616 (2016);
>
> -- Whether the circuit court's characterization of the jury's penalty-phase determination as a recommendation and as advisory conflicts with Hurst;
>
> -- Whether the circuit court committed plain error by allowing the State to question defense character witnesses about Bohannon's alleged acts on the night of the shooting; and
>
> -- Whether the circuit court committed plain error by failing to sua sponte instruct the jury on the victims' intoxication?

Standard of Review

Bohannon's case involves only issues of law and the application of the law to the undisputed facts; therefore, our review is de novo. Ex parte Key, 890 So. 2d 1056, 1059 (Ala. 2003)("This Court reviews pure questions of law in criminal cases de novo."), and State v. Hill, 690 So. 2d 1201, 1203-04 (Ala. 1996).

Discussion

First, Bohannon contends that his death sentence must be vacated in light of the United States Supreme Court's decision in Hurst.

In 2000, in Apprendi v. New Jersey, 530 U.S. 466 (2000), the United States Supreme Court held that the United States Constitution requires that any fact that increases the penalty for a crime above the statutory maximum must be presented to a jury and proven beyond a reasonable doubt. In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court, applying its decision in Apprendi to a capital-murder case, stated that a defendant has a Sixth Amendment right to a "jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. Specifically, the Court held that the right to a jury trial guaranteed by the Sixth Amendment required that a jury "find an aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 585. Thus, Ring held that, in a capital case, the Sixth Amendment right to a jury trial requires that the jury unanimously find beyond a reasonable doubt the existence of at least one aggravating circumstance that would make the defendant eligible for a death sentence.

In Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002), this Court considered the constitutionality of Alabama's capital-sentencing scheme in light of Apprendi and Ring, stating:

> "Waldrop argues that under Alabama law a defendant cannot be sentenced to death unless, after an initial finding that the defendant is guilty of a capital offense, there is a second finding: (1) that at least one statutory aggravating circumstance exists, see Ala. Code 1975, § 13A-5-45(f), and (2) that the aggravating circumstances outweigh the mitigating circumstances, see Ala. Code 1975, § 13A-5-46(e)(3). Those determinations, Waldrop argues, are factual findings that under Ring must be made by the jury and not the trial court. Because, Waldrop argues, the trial judge in his case, and not the jury, found that two aggravating circumstances existed and that those aggravating circumstances outweighed the mitigating circumstances, Waldrop claims that his Sixth Amendment right to a jury trial was violated. We disagree.
>
> "It is true that under Alabama law at least one statutory aggravating circumstance under Ala. Code 1975, § 13A-4-49, must exist in order for a defendant convicted of a capital offense to be sentenced to death. See Ala. Code 1975, § 13A-5-45(f)('Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.'); Johnson v. State, 823 So. 2d 1, 52 (Ala. Crim. App. 2001)(holding that in order to sentence a capital defendant to death, the sentencer '"must determine the existence of at least one of the aggravating circumstances listed in [Ala. Code 1975,] § 13A-5-49"' (quoting Ex parte Woodard, 631 So. 2d 1065, 1070 (Ala. Crim. App. 1993))). Many capital offenses listed in Ala. Code 1975, § 13A-5-40, include conduct that clearly corresponds

to certain aggravating circumstances found in § 13A-5-49:

> "'For example, the capital offenses of intentional murder during a rape, § 13A-5-40(a)(3), intentional murder during a robbery, § 13A-5-40(a)(2), intentional murder during a burglary, § 13A-5-40(a)(4), and intentional murder during a kidnapping, § 13A-5-40(a)(1), parallel the aggravating circumstance that "[t]he capital offense was committed while the defendant was engaged ... [in a] rape, robbery, burglary or kidnapping," § 13A-5-49(4).'

"Ex parte Woodard, 631 So. 2d at 1070-71 (alterations and omission in original).

"Furthermore, when a defendant is found guilty of a capital offense, 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing.' Ala. Code 1975, § 13A-5-45(e); see also Ala. Code 1975, § 13A-5-50 ('The fact that a particular capital offense as defined in Section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in Section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence.'). This is known as 'double-counting' or 'overlap,' and Alabama courts 'have repeatedly upheld death sentences where the only aggravating circumstance supporting the death sentence overlaps with an element of the capital offense.' Ex parte Trawick, 698 So. 2d 162, 178 (Ala. 1997); see also Coral v. State, 628 So. 2d 954, 965 (Ala. Crim. App. 1992).

"Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala. Code 1975, § 13A-5-40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was 'proven beyond a reasonable doubt.' Ala. Code 1975, § 13A-5-45(e); Ala. Code 1975, § 13A-5-50. Only one aggravating circumstance must exist in order to impose a sentence of death. Ala. Code 1975, § 13A-5-45(f). Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the 'aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 609, 122 S.Ct. at 2443. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all Ring and Apprendi require.

"....

"Waldrop also claims that Ring and Apprendi require that the jury, and not the trial court, determine whether the aggravating circumstances outweigh the mitigating circumstances. See Ala. Code 1975, §§ 13A-5-46(e), 13A-5-47(e), and 13A-5-48. Specifically, Waldrop claims that the weighing process is a 'finding of fact' that raises the authorized maximum punishment to the death penalty. Waldrop and several of the amici curiae claim that, after Ring, this determination must be found by the jury to exist beyond a reasonable doubt. Because in the instant case the trial judge, and not the jury, made this determination, Waldrop claims his Sixth Amendment rights were violated.

"Contrary to Waldrop's argument, the weighing process is not a factual determination. In fact, the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof. As the United States Court of

Appeals for the Eleventh Circuit noted, 'While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard ... the relative weight is not.' Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983). This is because weighing the aggravating circumstances and the mitigating circumstances is a process in which 'the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence.' Tuilaepa v. California, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Moreover, the Supreme Court has held that the sentencer in a capital case need not even be instructed as to how to weigh particular facts when making a sentencing decision. See Harris v. Alabama, 513 U.S. 504, 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995)(rejecting 'the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"' (quoting Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)) and holding that 'the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer').

"Thus, the weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum. See California v. Ramos, 463 U.S. 992, 1008, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)('Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.'); Zant v. Stephens, 462 U.S. 862, 902, 103 S.Ct. 2733, 77 L.Ed.2d 235

(1983)(Rehnquist, J., concurring in the judgment)('sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does').

"In Ford v. Strickland, supra, the defendant claimed that 'the crime of capital murder in Florida includes the element of mitigating circumstances not outweighing aggravating circumstances and that the capital sentencing proceeding in Florida involves new findings of fact significantly affecting punishment.' Ford, 696 F.2d at 817. The United States Court of Appeals for the Eleventh Circuit rejected this argument, holding that 'aggravating and mitigating circumstances are not facts or elements of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed.' 696 F.2d at 818. Furthermore, in addressing the defendant's claim that the State must prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, the court stated that the defendant's argument

> "'seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, see State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. [1950], 40 L.Ed.2d 295 (1974), and State v. Johnson, 298 N.C. 47, 257 S.E.2d 597, 617–18 (1979), the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.'

> "696 F.2d at 818. Alabama courts have adopted the Eleventh Circuit's rationale. See Lawhorn v. State, 581 So. 2d 1159, 1171 (Ala. Crim. App. 1990)('while the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party'); see also Melson v. State, 775 So. 2d 857, 900-901 (Ala. Crim. App. 1999); Morrison v. State, 500 So. 2d 36, 45 (Ala. Crim. App. 1985).
>
> "Thus, the determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, Ring and Apprendi do not require that a jury weigh the aggravating circumstances and the mitigating circumstances."

Ex parte Waldrop, 859 So. 2d at 1187-90 (footnotes omitted). This Court concluded that "all [that] Ring and Apprendi require" is that "the jury ... determine[] the existence of the 'aggravating circumstance necessary for imposition of the death penalty.'" 859 So. 2d at 1188 (quoting Ring, 536 U.S. at 609), and upheld Alabama's capital-sentencing scheme as constitutional when a defendant's capital-murder conviction included a finding by the jury of an aggravating circumstance making the defendant eligible for the death sentence.

In Ex parte McNabb, 887 So. 2d 998 (Ala. 2004), this Court further held that the Sixth Amendment right to a trial by jury is satisfied and a death sentence may be imposed if a

jury unanimously finds an aggravating circumstance during the penalty phase or by special-verdict form. McNabb emphasized that a jury, not the judge, must find the existence of at least one aggravating factor for a resulting death sentence to comport with the Sixth Amendment.

The United States Supreme Court in its recent decision in Hurst applied its holding in Ring to Florida's capital-sentencing scheme and held that Florida's capital-sentencing scheme was unconstitutional because, under that scheme, the trial judge, not the jury, made the "findings necessary to impose the death penalty." ___ U.S. at ___, 136 S.Ct. at 622. Specifically, the Court held that Florida's capital-sentencing scheme violated the Sixth Amendment right to a trial by jury because the judge, not the jury, found the existence of the aggravating circumstance that made Hurst death eligible. The Court emphasized that the Sixth Amendment requires that the specific findings authorizing a sentence of death must be made by a jury, stating:

> "Florida concedes that Ring required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it 'necessarily included a finding of an aggravating circumstance.' ... The State contends

> that this finding qualified Hurst for the death penalty under Florida law, thus satisfying Ring. '[T]he additional requirement that a judge also find an aggravator,' Florida concludes, 'only provides the defendant additional protection.' ...
>
> "The State fails to appreciate the central and singular role the judge plays under Florida law. ... [T]he Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.' Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.' § 921.141(3) .... '[T]he jury's function under the Florida death penalty statute is advisory only.' Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires.
>
> "....
>
> "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."

Hurst, ___ U.S. at ___, 136 S.Ct. at 622-24 (final emphasis added).

Bohannon contends that, in light of Hurst, Alabama's capital-sentencing scheme, like Florida's, is unconstitutional because, he says, in Alabama a jury does not make "the

critical findings necessary to impose the death penalty." ___ U.S. at ___, 136 S.Ct. at 622. He maintains that Hurst requires that the jury not only determine the existence of the aggravating circumstance that makes a defendant death-eligible but also determine that the existing aggravating circumstance outweighs any existing mitigating circumstances before a death sentence is constitutional. Bohannon reasons that because in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, the resulting death sentence is unconstitutional. We disagree.

Our reading of Apprendi, Ring, and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury

"find an aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 585. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty -- the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

Moreover, Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in Ex parte Waldrop, holding that that the Sixth Amendment "do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances" because, rather than being "a factual determination," the weighing process is "a moral or

legal judgment that takes into account a theoretically limitless set of facts." 859 So. 2d at 1190, 1189. Hurst focuses on the jury's factual finding of the existence of a aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring; consequently, no reason exists to disturb our decision in Ex parte Waldrop with regard to the weighing process. Furthermore, nothing in our review of Apprendi, Ring, and Hurst leads us to conclude that in Hurst the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. Apprendi expressly stated that trial courts may "exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment within the range prescribed by statute." 530 U.S. at 481. Hurst does not disturb this holding.

Bohannon's argument that the United States Supreme Court's overruling in Hurst of Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989), which

upheld Florida's capital-sentencing scheme against constitutional challenges, impacts the constitutionality of Alabama's capital-sentencing scheme is not persuasive. In Hurst, the United States Supreme Court specifically stated: "The decisions [in Spaziano and Hildwin] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, ___ U.S. at ____, 136 S.Ct. at 624 (emphasis added). Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama's capital-sentencing scheme is not unconstitutional on this basis.

Bohannon's death sentence is consistent with Apprendi, Ring, and Hurst and does not violate the Sixth Amendment. The jury, by its verdict finding Bohannon guilty of murder made capital because "two or more persons [we]re murdered by the defendant by one act or pursuant to one scheme or course of conduct," see § 13A-5-40(a)(10), Ala. Code 1975, also found the existence of the aggravating circumstance, provided in § 13A-5-49(9), Ala. Code 1975, that "[t]he defendant

intentionally caused the death of two or more persons by one act or pursuant to one scheme of course of conduct," which made Bohannon eligible for a sentence of death. See also § 13A-5-45(e), Ala. Code 1975 ("[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing."). Because the jury, not the judge, unanimously found the existence of an aggravating factor -- the intentional causing of the death of two or more persons by one act or pursuant to one scheme of course of conduct -- making Bohannon death-eligible, Bohannon's Sixth Amendment rights were not violated.

Bohannon's argument that the jury's finding of the existence of the aggravating circumstance during the guilt phase of his trial was not an "appropriate finding" for use during the penalty phase is not persuasive. Bohannon reasons that because, he says, the jury was not informed during the guilt phase that a finding of the existence of the aggravating circumstance during the guilt phase would make him eligible

for the death penalty, the jury did not know the consequences of its decision and appreciate its seriousness and gravity.

A review of the record establishes that the members of the venire were "death-qualified" during voir dire. Specifically, the trial court instructed:

> "THE COURT: The defendant was indicted by the Grand Jury of Mobile County during its term in June of 2011. ...
>
> "....
>
> "THE COURT: The case -- and by that I mean the Grand Jury indictment -- is indicted for what is known as capital murder.
>
> "Capital murder is an offense which, if the defendant is convicted, is punishable either by death or by life imprisonment without the possibility of parole.
>
> "The first part of this case that will be presented to the jury is what is known as the guilt phase. The jury will be called upon to determine whether the State has proved that the defendant is guilty beyond a reasonable doubt of the offense, or whether the State has proved the guilt of the defendant beyond a reasonable doubt of anything at all.
>
> "If the jury finds the defendant not guilty, that, of course, ends the matter.
>
> "If the jury finds the defendant guilty of some offense less than capital murder, then it will be incumbent upon the Court -- or me -- to impose the appropriate punishment.

> "If, however, the jury finds the defendant guilty of the offense of capital murder, the jury would be brought back for a second phase, or what we know as the penalty phase of this case. And, at that time, the jury may hear more evidence, will hear legal instructions and argument of counsel. The jury would then make a recommendation as to whether the appropriate punishment is death or life imprisonment without the possibility of parole."

Bohannon's jury was informed during voir dire that, if it returned a verdict of guilty of capital murder, Bohannon was eligible for a sentence of death. Therefore, Bohannon's argument that his jury was not impressed with the seriousness and gravity of its finding of the aggravating circumstance during the guilt phase of his trial is not supported by the record.

Next, Bohannon contends that an instruction to the jury that its sentence is merely advisory conflicts with Hurst because, he says, Hurst establishes that an "advisory recommendation" by the jury is insufficient as the "necessary factual finding that Ring requires." Hurst, ___ U.S. at ___, 136 S.Ct. at 622 (holding that the "advisory" recommendation by the jury in Florida's capital-sentencing scheme was inadequate as the "necessary factual finding that Ring requires"). Bohannon ignores the fact that the finding

required by Hurst to be made by the jury, i.e., the existence of the aggravating factor that makes a defendant death-eligible, is indeed made by the jury, not the judge, in Alabama. Nothing in Apprendi, Ring, or Hurst suggests that, once the jury finds the existence of the aggravating circumstance that establishes the range of punishment to include death, the jury cannot make a recommendation for the judge to consider in determining the appropriate sentence or that the judge cannot evaluate the jury's sentencing recommendation to determine the appropriate sentence within the statutory range. Therefore, the making of a sentencing recommendation by the jury and the judge's use of the jury's recommendation to determine the appropriate sentence does not conflict with Hurst.

Bohannon further contends that the circuit court erred when it failed to limit the State's questioning of defense character witnesses about his alleged acts on the night of the shooting. Because Bohannon made no objection on this basis at trial, we review the issue for plain error.

> "Plain error is
>
> "'error that is so obvious that the failure to notice it would seriously affect the

> fairness or integrity of the judicial proceedings. Ex parte Taylor, 666 So. 2d 73 (Ala. 1995). The plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant. Taylor.'
>
> "Ex parte Trawick, 698 So. 2d [162,] 167 [(Ala. 1997)].

Ex parte Walker, 972 So. 2d 737, 742 (Ala. 2007). See also Ex parte Womack, 435 So. 2d 766, 769 (Ala. 1983).

According to Bohannon, the State's questioning was highly prejudicial in light of the facts that his state of mind was a central issue for the jury's determination and that his defense depended on persuading the jury that it should view the surveillance tape and other evidence through the lens of his law-abiding character. He further argues that the prejudice was compounded by the State's argument that each of his character witnesses admitted that a person who beats and shoots somebody is not a law-abiding, peaceful person. Accordingly, he maintains that his conviction should be reversed as a result of the circuit court's failure to limit the State's cross-examination of his character witnesses.

Our review of the record establishes that the State's questioning of Bohannon's character witnesses about his

conduct immediately before and during the offense as reflected in the surveillance tape "'did not seriously affect the fairness or integrity of the judicial proceedings.'" Ex parte Walker, 972 So. 2d at 742 (quoting Ex parte Trawick, 698 So. 2d 162, 167 (Ala. 1997)). The record establishes that the State asked three of Bohannon's witnesses whether the content of the tape was consistent with Bohannon's reputation for good behavior. For example, the State asked a witness: "[Y]ou saw what happened out there at the Paradise Lounge ... [T]hat's not consistent with having a good reputation." The State's questions were about a surveillance tape that had already been admitted into evidence and had been viewed by the jury. Because the jury was free to draw its own conclusions about Bohannon's state of mind from its viewing of the tape, no probability exists that the alleged improper questioning substantially prejudiced Bohannon or affected the integrity of his trial. Plain error does not exist in this regard.

Lastly, Bohannon contends that the circuit court also committed plain error by failing sua sponte to instruct the jury on the victims' intoxication. Specifically, he argues that because the evidence supported a reasonable inference of

self-defense, the circuit court should have instructed the jury that the victims' intoxication at the time of the offense may have made them aggressive. See Stevenson v. State, 794 So. 2d 453, 455 (Ala. Crim. App. 2001)(recognizing that "'[a] defendant is permitted to demonstrate, under a theory of self-defense, that the victim was under the influence of alcohol at the time of the fatal altercation'" and that "a defendant should be allowed a jury instruction [when requested] regarding the intoxication of the deceased, to show tendencies towards aggression, when the evidence would support a reasonable inference of self-defense"(quoting Quinlivan v. State, 555 So. 2d 802, 805 (Ala. Crim. App. 1989))).

In Ex parte Martin, 931 So. 2d 759 (Ala. 2004), this Court, when addressing whether the trial court's failure to give, sua sponte, instructions to the jury explaining the scope of the victim's statements constituted plain error, recognized:

> "'"To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations."' Ex parte Bryant, 951 So. 2d 724, 727 (Ala. 2002)(quoting Hyde v. State, 778 So. 2d 199, 209 (Ala. Crim. App. 1998)). In United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d

1 (1985), the United States Supreme Court, construing the federal plain-error rule, stated:

> "'The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," United States v. Frady, 456 U.S. 152, 163 (1982), those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," United States v. Atkinson, 297 U.S. [157], at 160 [(1936)]. In other words, the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." United States v. Frady, 456 U.S., at 163, n. 14.'
>
> "See also Ex parte Hodges, 856 So. 2d 936, 947-48 (Ala. 2003)(recognizing that plain error exists only if failure to recognize the error would 'seriously affect the fairness or integrity of the judicial proceedings,' and that the plain-error doctrine is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result' (internal quotation marks omitted))."

931 So. 2d at 767-68.

This Court has required a trial court to instruct the jury sua sponte "only [in] those instances where evidence of prior convictions [were] offered for impeachment purposes." Johnson v. State, 120 So. 3d 1119, 1128 (Ala. 2006)(citing Ex parte Martin, 931 So. 2d at 769). In such cases, the trial court has been required to issue a sua sponte instruction because, in light of the facts in those particular cases, an

instruction was considered necessary to protect the defendant from the misuse of "presumptively prejudicial" information that could be considered by the jury for a limited purpose. Ex parte Minor, 780 So. 2d 796, 804 (Ala. 2000).

The record in this case simply does not support a conclusion that the circuit court's failure to issue a sua sponte instruction on the victims' intoxication constituted plain error. The evidence at issue is not "presumptively prejudicial" to Bohannon, and, because the jury was instructed to consider all the evidence, Bohannon was not substantially prejudiced by the circuit court's failure to issue such an instruction. The record establishes that Bohannon's counsel argued in his opening statement that one of the victims pushed Bohannon a couple of times during the altercation and that the victims were high on methamphetamine and that that drug makes individuals aggressive. The record also establishes that evidence was admitted indicating that the victims were intoxicated and that the jury, when it viewed the surveillance tape, was able to observe the confrontation between Bohannon and the victims. Therefore, the jury was free to consider all the evidence Bohannon presented, which included evidence of

the victims' intoxication and Bohannon's argument that the victims' intoxication made them act aggressively. Because the jury was instructed to consider all the evidence, the failure to sua sponte give an instruction on the victims' intoxication did not seriously affect the fairness or integrity of Bohannon's trial or substantially prejudice Bohannon. Ex parte Martin, supra; and Ex parte Henderson, 583 So. 2d 305, 306 (Ala. 1991). After considering the evidence and the totality of the circuit court's jury instruction, we conclude that the circuit court's failure to give sua sponte an instruction about the proper use of the victims' intoxication did not constitute plain error.

Conclusion

Based on the foregoing, the judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

Bolin, Parker, Shaw, Main, Wise, and Bryan, JJ., concur.

Murdock, J., concurs in the result.

IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Petitioner,

CASE NO. SC16-56
L.T. No. 83-12-CF

v.

JULIE L. JONES, ETC.

Respondents.
_____/

In re: Pressley B. Alston,
Case No. 16-15700-P (11th Cir. Sept. 21, 2016)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-15700-P

IN RE: PRESSLEY B. ALSTON,

Petitioner.

Application for Leave to File a Second or Successive
Habeas Corpus Petition, 28 U.S.C. § 2244(b)

Before: HULL, WILLIAM PRYOR and JILL PRYOR, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Pressley B. Alston has filed an application seeking an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus. Such authorization may be granted only if:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that our determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In the instant *pro se* application, Alston asserts that the prosecutor was "involved in what happened to" the victim, and "no reasonable fact[-]finder would have found [him] guilty because of [the prosecutor's] involvement." He alleges that his claim relies on newly discovered evidence. Specifically, he asserts that, when the prosecutor went to the "[J]ax, FL city council to bully it[s] president . . . media put on the open tv screen the news words: ('[the prosecutor] **bully** and he's a bully')." He further notes that, "as a person asking for his fbi employment record, [*Alston v. FBI*,] 747 F. Supp. 2d 28 [(D.D.C. 2010)], [he] wants to introduce them both to seek relief in the federal court." He concedes that he previously raised this claim in his second 28 U.S.C. § 2254 petition.

In his attachment, Alston appears to present several additional claims. First, he requests that we "nullify" his prior waiver of his right to pursue state post-conviction relief, given that: (1) he only waived his state post-conviction rights in an effort to seek federal habeas relief; (2) he objected to the three psychiatric evaluations that "allowed the court prosecutors and [his post-conviction counsel] to stream him into the 'waivers' court"; and (3) the state court judge who conducted the hearing regarding his waiver of his state post-conviction rights was incompetent. Second, he asserts that Florida's death penalty statute, Fla. Stat. Ann. § 921.141, is unconstitutional in light of the Supreme Court's recent decision in *Hurst v. Florida*,

577 U.S. ___, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016). Next, he argues that his procedural due process rights were violated when the prosecutor referred to O. J. Simpson during *voir dire*. He also contends that he has been on death row from 2004 to 2016, but the state "hasn't executed a warrant on him to get him executed," which is both cruel and unconstitutional. Finally, he requests that we "remove the [PLRA] '3' strikes off him." In support of his application, he attaches numerous news articles, court filings, excerpts from two Florida state court cases, and excerpts from his *voir dire* transcript.

I. Factual Background and Procedural History

A. Facts of the Crime and Trial Proceedings

In its opinion affirming Alston's conviction and sentence, the Florida Supreme Court set forth the following relevant facts. The victim, James Coon, was last seen at the University Medical Center in Jacksonville, Florida, on January 22, 1995. *Alston v. State*, 723 So. 2d 148, 150 (Fla. 1998) ("*Alston I*"). His car, a red Honda Civic, was found abandoned the next day behind a convenience store. *Id.* at 150-51.

Gwenetta McIntyre testified that, on January 19, 1995, Alston was living at her home in Jacksonville. *See id.* at 151. McIntyre left town for several days and returned on January 23, 1995. *Id.* While she was parked at a convenience store, Alston and his half-brother, Dee Ellison, drove up in a red Honda Civic, then drove the Civic around the back of the store and abandoned it. *Id.* When McIntyre asked about the Honda, Alston replied that it was stolen. *Id.* McIntyre noticed that Alston was carrying her .32 caliber revolver, which she kept at her home. *Id.* She later became suspicious of Alston and went to the police. *Id.* When police searched her home, they found her .32 caliber revolver. *Id.* Police then arrested Alston and Ellison. *Id.*

After he was read his rights and signed a waiver form, Alston confessed orally and in writing to his involvement in the crime. *Id.* He stated that, on January 22, 1995, he and Ellison saw Coon leave a hospital in his red Honda Civic. *Id.* When Coon pulled up to them, Alston and Ellison got in the car. *Id.* A short while later, Ellison pointed a revolver at Coon and took his watch. *Id.* Ellison later took his wallet and split the cash with Alston. *Id.* According to Alston, they then drove to another location, where he and Ellison shot Coon. *Id.* at 152.

After confessing, Alston agreed to show detectives the location of Coon's body. *Id.* During the evening search, which proved unsuccessful, Alston stated, "We had robbed somebody and taken him in [the] woods and I shot him twice in the head." *Id.* (alteration in original). On the way back from the search, they went to Alston's mother's house, where Alston again admitted to killing Coon. *Id.* On the walk back from the police station to the jail, which was recorded on videotape, Alston also made inculpatory remarks to reporters. *Id.*

Later, police took Alston back to the woods and again advised him of his constitutional rights. *Id.* Alston waived his rights and directed the police to the area they had searched the previous night. *Id.* Police found skeletal remains, as well as three bullets. *Id.* One bullet was found in the skull, and another was found where the skull would have been if it had not been moved, apparently by animals. *Id.* The final bullet was discovered inside Coon's shirt. *Id.* At trial, a medical expert identified the remains as Coon's by using dental records and testified that the cause of death was three gunshot wounds. *Id.* A firearms expert also testified that the bullets were .32 caliber, and there was a 99 percent probability that the bullet found in Coon's skull came from McIntyre's revolver. *Id.*

On the day that Coon's body was found, Alston initially told a detective that Ellison and a person named Kurt killed Coon, but later indicated that he had lied about Kurt. *Id.* at 153.

Alston then admitted that he shot Coon twice in the head, while Ellison shot him once in the body. *Id.* Several days later, Alston gave another written statement, in which he stated that Ellison and Kurt initially kidnapped Coon, then sought Alston out to ask what to do with him. *Id.* When Alston opened the trunk, where Coon was being kept, Alston told Ellison that "the boy will have to be dealt with, meaning kill[ed]." *Id.* (alteration in original). Kurt left, and Alston and Ellison drove away. *Id.* They took Coon into the woods, where Ellison shot him once, and Alston shot him twice. *Id.*

The jury found Alston guilty of first-degree murder, armed robbery, and armed kidnapping, and recommended the death penalty by a vote of nine to three. *Id.* The trial court found five aggravating factors and five non-statutory mitigating factors. *Id.* On January 12, 1996, it sentenced Alston to death as to the murder charge and imposed consecutive life sentences as to the remaining charges. *Id.* Alston appealed to the Florida Supreme Court, which affirmed his convictions and death sentence. *Alston I*, 723 So. 2d at 162-63. Alston did not petition the Supreme Court for *certiorari*. *Alston v. State*, 894 So. 2d 46, 48 (Fla. 2004) ("*Alston II*").

B. *State Post-Conviction Proceedings*

In June 1999, Capital Collateral Regional Counsel ("CCRC") was appointed to represent Alston in his post-conviction proceedings. *Id.* Before CCRC filed a post-conviction motion, Alston sent a letter to the state trial court expressing his desire to represent himself. *Id.* A few months later, in November 1999, CCRC filed "an unverified 'shell' motion for post[-]conviction relief." *Id.* CCRC also filed two motions to withdraw as counsel, which the state trial court denied. *Id.* In May 2000, the trial court conducted a hearing regarding Alston's request to proceed *pro se* and thereafter directed CCRC to continue representing him. *Id.*

In July 2000, CCRC filed a motion for a competency determination. *Id.* The district court granted the motion and appointed three experts—Drs. Umesh Mhatre, Wade Myers, and Robert Berland—who examined Alston and filed reports. *Id.* Dr. Myers and Dr. Berland concluded that Alston was incompetent to proceed, while Dr. Mhatre concluded that he was competent. *Id.* at 49. In October 2001, after reviewing the reports, the state trial court found Alston incompetent to proceed, ordered the Department of Corrections to file periodic reports with the court concerning Alston, and directed that he be periodically re-evaluated. *Id.* at 48.

While he was declared incompetent, Alston filed numerous *pro se* petitions in the Florida Supreme Court, one of which requested a writ of mandamus ordering the state trial court to conduct a *Durocher*[1] hearing "to waive all further appeals and the post[-]conviction appeals procedure." *Id.* The Florida Supreme Court denied most of the petitions, but, in December 2002, it ordered the state trial court to conduct a *Durocher* hearing if the court determined that Alston wished to waive all further appeals. *Id.* at 48-49.

Prior to the issuance of the Florida Supreme Court's order, Drs. Mhatre, Myers, and Berland re-evaluated Alston and filed reports with the state trial court. *Id.* at 49. Their conclusions did not change upon re-evaluation. *Id.* at 50. In March 2003, the state trial court conducted an evidentiary hearing to determine Alston's competence, at which the court-appointed experts and staff from Alston's prison testified. *Id.* at 49. At the hearing, over his counsel's objection, Alston requested that the court find him competent to proceed and asked the court to schedule a *Durocher* hearing. *Id.* at 55. The court found Alston competent, and, in June 2003, it held a *Durocher* hearing. *Id.* at 49. Following the hearing, the court found that

[1] *Durocher v. Singletary*, 623 So. 2d 482, 484-85 (Fla. 1993) (holding that a capital defendant may waive his right to post-conviction counsel and proceedings following a hearing to determine if the defendant understands the consequences of his decision).

Alston's decision to waive his post-conviction rights was knowing, intelligent, and voluntary. *Id.* It discharged CCRC and ordered all pending motions or petitions for post-conviction relief dismissed with prejudice. *Id.* "Unsure how to proceed from there, the circuit court, by letter dated June 12, 2003, informed [the Florida Supreme Court] of its order, forwarding a copy of it and a transcript of the *Durocher* hearing to [the Florida Supreme Court] 'for whatever action the justices may deem appropriate.'" *Id.*

A few weeks later, Alston filed a *pro se* pleading with the Florida Supreme Court, arguing that his testimony at the *Durocher* hearing established that an assistant state attorney fabricated the case against him. *Id.* The Florida Supreme Court struck the filing as an unauthorized *pro se* pleading. *Id.* In August 2003, Alston filed a second *pro se* pleading to "appeal" the order striking his prior pleading. *Id.* The Florida Supreme Court also struck that pleading, but requested that the state and CCRC file briefs regarding the state trial court's competency determination and the validity of Alston's waiver. *Id.* In October 2004, the Florida Supreme Court held that the state trial court did not abuse its discretion in finding Alston competent to proceed or in finding that he knowingly, intelligently, and voluntarily waived his rights to post-conviction counsel and proceedings. *Id.* at 59.

C. *Federal Post-Conviction Proceedings*

In April 2000, while his November 1999 motion for state post-conviction relief was pending, Alston filed a § 2254 petition, alleging, *inter alia*, that the prosecutor fabricated evidence, maliciously prosecuted him, and committed *Brady*[2] and *Giglio*[3] violations. In May

2 *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

3 *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

2000, the district court dismissed the § 2254 petition without prejudice because Alston had a motion for post-conviction relief pending in state court.

In March 2004, while the Florida Supreme Court was reviewing the state trial court's competency determination and findings from the *Durocher* hearing, Alston filed a second § 2254 petition, which he amended in October 2004, after the Florida Supreme Court affirmed the state court's findings that he was competent and that his waiver was knowing, intelligent, and voluntary. In his amended § 2254 petition, he argued that the state committed a crime in obtaining his convictions, and the prosecutor "violate[d] [his] civil and constitutional rights to seek the death penalty and to administer the death penalty as weaponry and as a weapon upon [Alston] for/because of totally separate and different criminal investigations in 1995 one that involves political campaigns in '95."

After the district court appointed counsel to represent Alston, counsel filed a second amended § 2254 petition and memorandum in support, alleging, in relevant part, that: (1) Alston was incompetent to waive his state post-conviction rights, and his waiver was not knowing, intelligent, and voluntary; and (2) Alston's due process rights were violated when he was tried while incompetent. Counsel also requested that the district court allow Alston to "re-litigate the claims introduced" in his October 2004 amended § 2254 petition.

The district court summarily denied the claims raised in the October 2004 amended § 2254 petition. It also denied the claims raised in his counseled second amended § 2254 petition, but granted a certificate of appealability as to the issue of whether it erred in concluding that the state court's ruling—that Alston was competent to waive his post-conviction proceedings, and his waiver was knowing, intelligent, and voluntary—was neither an unreasonable application of clearly established federal law, nor based on an unreasonable

determination of the facts in light of the evidence presented during the state court proceedings. *Alston III*, 610 F.3d at 1324-25.

On July 8, 2010, we affirmed the district court's denial of Alston's § 2254 petition, concluding that his challenge to the Florida Supreme Court's decision upholding the state trial court's competency and waiver-validity findings was not a cognizable claim. *Id.* at 1325-26. Even if it were cognizable, it would fail on the merits, as Alston failed to demonstrate by clear and convincing evidence that the state court's competency and waiver-validity findings were not fairly supported by the record. *Id.* at 1326. The Supreme Court denied Alston's subsequent petition for *certiorari*. *Alston v. McNeil*, 562 U.S. 1113, 131 S. Ct. 829, 178 L. Ed. 2d 564 (2010).

II. Discussion

Under § 2244(b)(1)'s threshold requirement, "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). A prisoner's previous § 2254 petition is a "prior application" for purposes of § 2244(b)(1). *In re Lambrix*, 624 F.3d 1355, 1362 (11th Cir. 2010). A "claim" is "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez v. Crosby*, 545 U.S. 524, 530, 125 S. Ct. 2641, 2647, 162 L. Ed. 2d 480 (2005). New supporting evidence and new legal arguments in support of a prior claim are insufficient to create a new claim. *In re Hill*, 715 F.3d 284, 293 (11th Cir. 2013). The claim remains the same so long as "[t]he basic thrust or gravamen of [the applicant's] legal argument is the same." *Id.* at 294 (citation omitted).

An applicant seeking permission to file a second or successive § 2254 petition based on newly discovered facts must show, first, that the facts at issue would not have been uncovered

through a reasonable investigation undertaken before the initial § 2254 petition was litigated. *In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997). Second, he or she must allege newly discovered facts that, when taken as true, establish a constitutional error. *Id.* at 1541. Finally, we evaluate these facts in light of the evidence as a whole to determine whether, had the applicant known these facts at the time of his or her trial, the application "clearly proves that the applicant could not have been convicted." *Id.* Thus, we will deny the application if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

An applicant may obtain permission to file a second or successive § 2254 petition based upon a new rule of constitutional law only if that rule was previously unavailable and has been made retroactive to cases on collateral review by the Supreme Court. 28 U.S.C. § 2244(b)(2)(A). It is not enough for the applicant to show that we have applied a new rule of constitutional law retroactively, or that the rule satisfies the criteria for retroactive application set forth in *Teague v. Lane*, 489 U.S. 288, 311-13, 109 S. Ct. 1060, 1075-77, 103 L. Ed. 2d 334 (1989) (plurality opinion) (stating that a new rule of criminal procedure may apply retroactively if it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or it is a "watershed rule[ ] of criminal procedure" that "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty" (omission in original) (quotations omitted)). *Tyler v. Cain*, 533 U.S. 656, 663, 665-66, 121 S. Ct. 2478, 2482-84, 150 L. Ed. 2d 632 (2001). Instead, the applicant must establish that the Supreme Court has held that the new rule of constitutional law applies retroactively on collateral review. *Id.* at 662, 121 S. Ct. at 2482. Multiple cases can, together, make a rule retroactive, but "only if the holdings in those cases necessarily dictate retroactivity of the new rule." *Id.* at 666, 121 S. Ct. at 2484.

A. ***Prosecutor's Alleged Involvement with the Victim***

In his first claim, Alston asserts that the prosecutor was "involved in what happened" to Coon. Specifically, he states that, without telling the court, his employees, or his office, the prosecutor "axxxed [Coon] because he became intolerable to him." According to Alston, "no reasonable fact[-]finder would have found [him] guilty because of [the prosecutor's] involvement." Liberally construing this claim, it appears that he intends to assert that the prosecutor's alleged involvement in the crime makes Alston himself actually innocent of murdering Coon. Alston alleges that his claim relies on newly discovered evidence—the fact that, when the prosecutor went to the "Jax, FL" city council to bully the city council president, "media put on the open tv screen the news words: ('[the prosecutor] **bully** and he's a bully')." He also notes that, "as a person asking for his fbi employment record . . . [P]ressley [A]. wants to introduce them both to seek relief in the federal court." In support of his application, he attaches numerous news articles, court filings, and excerpts of the *voir dire* transcript, none of which concern the prosecutor's alleged involvement with Coon.

As an initial matter, Alston concedes that he previously raised this claim in his second § 2254 petition, which was denied on the merits. Although his allegations in his October 2004 amended § 2254 petition were unclear, he appeared to argue that the state committed a crime in obtaining his convictions, and the prosecutor violated his constitutional rights by using the death penalty as a weapon against him because of separate criminal investigations that involved political campaigns. Here, the "basic thrust or gravamen" of Alston's instant claim may not be the same as that of his prior claim. *See Hill*, 715 F.3d at 294. While the instant application appears to raise a claim of actual innocence, the crux of his prior claim appears to be an

allegation of prosecutorial misconduct. Thus, the instant claim arguably is a new, separate claim for purposes of § 2244(b)(1). *See id.*

Assuming *arguendo* that the instant claim is a new claim and that we are not bound by Alston's concession to the contrary, he has not made a *prima facie* showing that his actual-innocence claim meets the requirements of § 2244(b)(2). *See* 28 U.S.C. § 2244(b)(3)(C). Because he does not assert that his claim relies on a new, previously unavailable rule of constitutional law, he may not proceed under § 2244(b)(2)(A). *See id.* § 2244(b)(2)(A). He also has not shown that he meets the requirements of § 2244(b)(2)(B). Alston does not explain when he discovered that the prosecutor allegedly went to bully a city councilman or when he found out that the prosecutor was called a bully on television, and he does not argue, much less demonstrate, that he could not have discovered this evidence earlier through a reasonable investigation. *See Boshears*, 110 F.3d at 1540. Moreover, Alston's alleged new evidence has no bearing on whether he himself is factually innocent. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). Even if the prosecutor bullied a city councilman and the media called him a bully, this information does not suggest, much less establish by clear and convincing evidence, that Alston in fact did not shoot Coon. *See id.* Likewise, whether Alston is or was employed by the Federal Bureau of Investigation ("FBI") has no bearing on whether he shot Coon. *See id.*

Finally, Alston has not alleged facts or presented evidence that, when taken as true, establish a constitutional violation. *See Boshears*, 110 F.3d at 1541. Under the plain language of the statute, § 2244(b)(2)(B)(ii) requires *both* clear and convincing evidence of actual innocence and a constitutional violation, which we have referred to as the "actual innocence plus" standard. *In re Davis*, 565 F.3d 810, 823 (11th Cir. 2009). Unlike a "typical constitutional claim," such as one arising under *Brady*, 373 U.S. 83, 83 S. Ct. 1194, *Giglio*, 405 U.S. 150, 92 S. Ct. 763, or

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), "the statutory language does not readily accommodate" a freestanding claim of actual innocence. *Id.* Although Alston states that the prosecutor was "involved in what happened to" Coon, he has not clearly identified any underlying constitutional violation, such as the prosecutor knowingly presenting false testimony. *See id.* Accordingly, he has not shown that this claim meets the requirements of § 2244(b)(2)(B). *See* 28 U.S.C. § 2244(b)(2)(B).

B. Waiver of State Post-Conviction Rights

In his attachment to his application, Alston requests that we "nullify" his waiver of his state post-conviction rights because he only waived these rights in an effort to have his case reviewed in federal court. He also asserts that he objected to "the '3' crazy evals. tests that allowed the court prosecutors and the CCRC attorneys to stream him into the 'waivers' court that dismissed the appeals." Finally, he alleges that the state court judge was incompetent to conduct the *Durocher* hearing, as evidenced by the fact that the judge "didn't know what i.o.p[.] procedures to use to forward and process the case 'waivers' mail in to the [ ] Florida Supreme Court."

As a preliminary matter, to the extent that Alston intends to attack the knowing, voluntary, and intelligent nature of his waiver of his state post-conviction rights, his claim is barred under § 2244(b)(1), as he previously raised this claim in his second amended § 2254 petition, which the district court denied on the merits. *See id.* § 2244(b)(1). On appeal, we rejected the claim, concluding that, even if the claim were cognizable in a federal habeas proceeding, Alston failed to demonstrate by clear and convincing evidence that the state court's competency and waiver-validity findings were not fairly supported by the record. *Alston III*,

610 F.3d at 1326. Under § 2244(b)(1), he is barred from attempting to relitigate the knowing, voluntary, and intelligent nature of his waiver. *See* 28 U.S.C. § 2244(b)(1).

To the extent that Alston intends to challenge his waiver on the basis of any error in overruling his objection to "the '3' crazy evals. tests" or in permitting an "incompetent" judge to conduct the hearing, he arguably raises a new claim, as these assertions do not appear to attack the knowing, voluntary, and intelligent nature of his waiver. *See Hill*, 715 F.3d at 294. Nevertheless, even if this claim were cognizable, Alston has not made the requisite *prima facie* showing that his claim meets the criteria of § 2244(b)(2). *See* 28 U.S.C. § 2244(b)(3)(C). He does not allege, and the record does not reflect, that his claim relies on a new, previously unavailable rule of constitutional law. *See id.* § 2244(b)(2)(A). Alston also does not present any new evidence in support of his claim, and the record reflects that the facts underlying his claim were previously available. *See id.* § 2244(b)(2)(B)(i). The factual predicate for his claim arose in 2003, at the time that he underwent psychiatric evaluations and participated in the *Durocher* hearing. *See Alston II*, 894 So. 2d at 49. Because he did not file his second § 2254 petition until more than one year later, the factual predicate for his claim could have been discovered through a reasonable investigation prior to the litigation of his second § 2254 petition. *See Boshears*, 110 F.3d at 1540. In any event, Alston cannot show that no reasonable fact-finder would have found him guilty of first-degree murder in light of evidence that he objected to psychiatric evaluations or that the state trial court judge was unsure how to proceed after finding that Alston's waiver was valid. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). Accordingly, Alston has not made a *prima facie* showing that his claim meets the requirements of § 2244(b)(2). *See id.* § 2244(b)(3)(C).

C. *Constitutionality of Florida's Death Penalty Statute*

Alston further appears to allege that, in light of the Supreme Court's recent decision in *Hurst*, Florida's death penalty statute is unconstitutional. He requests that we "allow [him] to do a second or successive habeas action that can ask for the court's governance regarding Florida death case impediment," and states that he wishes to "ask the trial court for a new trial" due to the ruling in *Hurst*. In support of this claim, he attaches three news articles discussing Florida's death penalty procedure and the holding in *Hurst*.

In 2012, when the defendant in *Hurst* was resentenced, Florida law provided that, if a defendant was convicted of a capital felony, the trial court would hold a hearing before the jury, in which both parties could present evidence relevant to the nature of the crime and character of the defendant.[4] Fla. Stat. Ann. § 921.141(1) (2012); *Hurst*, 577 U.S. at ___, 136 S. Ct. at 620. The jury would then render an advisory sentence without specifying the factual basis for its recommendation. Fla. Stat. Ann. § 921.141(2) (2012); *Hurst*, 577 U.S. at ___, 136 S. Ct. at 620. Finally, the trial judge would enter a sentence, and, if it imposed the death sentence, set forth its relevant findings in writing. Fla. Stat. Ann. § 921.141(3) (2012). Although the judge was required to give the jury's recommendation "great weight," the sentencing order was required to reflect the judge's independent judgment about the existence of aggravating and mitigating factors. *Hurst*, 577 U.S. at ___, 136 S. Ct. at 620. The Supreme Court in *Hurst* held that this scheme violated defendants' Sixth Amendment right to have each element of an offense submitted to a jury and proved beyond a reasonable doubt. *Hurst*, 577 U.S. at ___, 136 S. Ct. at 621-22.

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[4] The relevant portions of Florida's death penalty statute in 2012 were identical to the provisions in place in January 1996, when Alston was sentenced to death. *Compare* Fla. Stat. Ann. § 921.141 (2012), *with* Fla. Stat. Ann. § 921.141 (1996).

Alston has not made a *prima facie* showing that his *Hurst* claim meets the requirements of § 2244(b)(2). *See* 28 U.S.C. § 2244(b)(3)(C). First, none of the evidence that he submits is relevant to his guilt or innocence, as none of the articles are about his own case, and they are not probative of the factual issue of whether he shot Coon. Accordingly, he has not satisfied the criteria of § 2244(b)(2)(B). *See id.* § 2244(b)(2)(B)(ii). He also has not demonstrated that his claim relies on a new, previously unavailable rule of constitutional law that has been made retroactive on collateral review by the Supreme Court. The Supreme Court has not issued any decisions holding that *Hurst* applies retroactively to cases on collateral review, and *Hurst* itself was decided on direct appeal from the defendant's resentencing. *See Hurst*, 577 U.S. at ___, 136 S. Ct. at 620-21; *Tyler*, 533 U.S. at 662-63, 121 S. Ct. at 2482.

Likewise, no combination of cases necessarily dictates that the rule in *Hurst* is retroactively applicable to cases on collateral review. *See Tyler*, 533 U.S. at 666, 121 S. Ct. at 2484. The Supreme Court first recognized the Sixth Amendment right at issue in *Hurst* in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435 (2000) (holding that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt). In *Ring v. Arizona*, 536 U.S. 584, 592-93, 609, 122 S. Ct. 2428, 2434-35, 2443, 153 L. Ed. 2d 556 (2002), the Supreme Court applied *Apprendi* in the capital punishment context and held that Arizona's death penalty scheme was unconstitutional because it required a judge, rather than a jury, to find whether there was an aggravating circumstance, which was a statutory prerequisite to the imposition of the death penalty. The *Hurst* Court explicitly relied on its prior holding in *Ring* in concluding that Florida's death penalty statute was unconstitutional. *Hurst*, 577 U.S. at ___, 136 S. Ct. at 621-22 ("The analysis the *Ring* Court applied to Arizona's

sentencing scheme applies equally to Florida's. . . . In light of *Ring*, we hold that [the defendant's] sentence violates the Sixth Amendment."). The Supreme Court has not held or suggested that *Apprendi* is retroactively applicable, and it has held that *Ring* does not apply retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S. Ct. 2519, 2526, 159 L. Ed. 2d 442 (2004). Given the Court's holding in *Schriro*, Supreme Court precedent does not suggest, much less dictate, that *Hurst* applies retroactively. Accordingly, Alston cannot make a *prima facie* showing that that he meets the requirements of § 2244(b)(2)(A). *See* 28 U.S.C. § 2244(b)(2)(A).

D. *Prosecutor's Remarks Regarding O. J. Simpson*

Alston next argues that his procedural due process rights were violated when the prosecutor made a reference to O. J. Simpson during *voir dire*. He appears to indicate that the prosecutor's remark warrants a new trial. In support of his claim, he attaches excerpts from his *voir dire* transcript, pictures of Simpson, news articles about Simpson's case, and an excerpt from *Redish v. State*, 525 So. 2d 928 (Fla. 1st Dist. Ct. App. 1988), a Florida case discussing a prosecutor's improper remarks.

The transcript demonstrates that, during *voir dire*, the prosecutor stated, "I guess we can talk about the O. J. Simpson case, and I don't want to make light of it by any means. Have any of you, as a result of the O. J. Simpson[ ] case or anything you have seen on television, developed a feeling or attitude that is adverse to the government or law enforcement?" None of the prospective jurors responded. The prosecutor then said, "Let me assure you, and I tried cases with these gentlemen and this Judge, this case will be nothing like the O. J. Simpson case, but it is important that you understand that in this case things are done differently than apparently were done in that case." One of Alston's attorneys later stated:

> Okay, the comment was made earlier, and I guess it's accurate, that this is not – this case is not like the O. J. Simpson case. And it's true in a sense and not in a sense. You know, it's not going to last that long, fortunately for all of us there was a lot more to do in that case as far as publicity and many other things, but it is the same in that we have a citizen of our community who is charged with a very very serious offense, and in this case, as in that case, the State is trying to prove beyond a reasonable doubt to your satisfaction that he is guilty.

Alston has not made a *prima facie* showing that his claim meets the requirements of § 2244(b)(2). *See* 28 U.S.C. § 2244(b)(3)(C). He does not allege that his claim relies on a new, previously unavailable rule of constitutional law that has been made retroactive on collateral review. *See id.* § 2244(b)(2)(A). Assuming that he intends to rely on the holding in *Redish* as a new rule of constitutional law, his claim does not meet the statutory criteria, as *Redish* is a Florida state court case, not a U.S. Supreme Court case, such that it did not establish a new rule of constitutional law. *See id.* § 2244(b)(2)(A); *Redish*, 525 So. 2d 928. To the extent that Alston relies on the *voir dire* transcript as newly discovered evidence, he has not alleged when he obtained it. In any event, because he was present at *voir dire*, and, thus, gained firsthand knowledge of the events underlying his claim prior to trial, he could have raised this claim in a previous § 2254 petition. *See Boshears*, 110 F.3d at 1540. Moreover, the attorneys' remarks have no bearing on whether Alston, as a factual matter, committed the charged first-degree murder. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). The pictures of Simpson and the news article about Simpson's case also are factually irrelevant to whether Alston shot Coon. *See id.* Accordingly, Alston has not satisfied the criteria to proceed under § 2244(b)(2)(B). *See id.* § 2244(b)(2).

E. *Extended Stay on Death Row*

Alston further asserts that the state "hasn't executed a warrant on him to get him executed." According to Alston, waiting on death row from 2004 to 2016 "without a warrant" is both cruel and unconstitutional. He urges us to "consider the 'inordinate length of time' that [he]

has been on death row without his execution to authorize . . . him to file something successive," and contends that Florida "bears the responsibility for the delays in [H]urst." In support of his claim, he submits an excerpt from *Carroll v. State*, 114 So. 3d 883 (Fla. 2013), in which the Florida Supreme Court affirmed the state trial court's denial of a prisoner's claim that his extended stay on death row violated the Eighth Amendment.

Alston has not made a *prima facie* showing that he meets the requirements of § 2244(b)(2). *See* 28 U.S.C. § 2244(b)(3)(C). He has not identified any new rule of constitutional law that would support his claim, and a review of recent Supreme Court cases does not reveal any such new rule. *See id.* § 2244(b)(2)(A). Although Supreme Court justices have discussed the possibility that an overly lengthy stay on death row prior to execution might implicate the Eighth Amendment, the Supreme Court has not yet ruled on the issue. *See, e.g.*, *Smith v. Arizona*, 552 U.S. 985, 128 S. Ct. 2997, 169 L. Ed. 2d 326 (2007) (Breyer, J., dissenting from denial of *certiorari*); *Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1421, 131 L. Ed. 2d 304 (1995) (Stevens, J., respecting denial of *certiorari*). To the extent that Alston relies on *Carroll* as establishing a new rule of constitutional law, his reliance is misplaced, as *Carroll* is a state court case, rather than a U.S. Supreme Court case, and, thus, did not establish any new rule of constitutional law. Accordingly, Alston cannot show that his claim meets the requirements of § 2244(b)(2)(A). *See* 28 U.S.C. § 2244(b)(2)(A). Because the duration of his term of imprisonment on death row and whether the state has executed a death warrant have no bearing on whether he shot Coon, he also cannot demonstrate that the facts underlying his claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for a constitutional error, no reasonable fact-finder would have found him guilty. *See id.* § 2244(b)(2)(B)(ii).

F. Three-Strikes Designation

Finally, Alston requests that we "return [him] to his pro se filing 1st status and remove the [PLRA] '3' strikes off him" because he "claims to be a[n] (fbi[ ])." He appears to assert that there was an FBI investigation into the Jacksonville Sheriff's Office, but a district court "didn't take notice of [his] 'filings' as entries and as [FBI] work." He contends that he "was pro se 'tipping' off the federal prosecutors to notice that he was a[n] fbi watching the stuff," and that his filings "could help the U.S. attorney (nab) the [ ] [J]acksonville Sheriff's Office for . . . police corruption."

Even if this claim were cognizable on federal habeas review, Alston could not make a *prima facie* showing that it satisfies the criteria of § 2244(b)(2). *See* 28 U.S.C. § 2244(b)(3)(C). His claim does not rely on any new rule of constitutional law, and any evidence that he could present in support his claim—such as proof that he has only filed two or fewer suits or appeals that were dismissed on the basis that they were frivolous, malicious, or failed to state a claim—would be irrelevant to his guilt or innocence of first-degree murder. Thus, his claim could not proceed under either § 2244(b)(2)(A) or (B). *See id.* § 2244(b)(2)(A), (B).

III. Conclusion

Alston has not raised any claims that meet the statutory criteria. Thus, his application for leave to file a second or successive habeas petition is DENIED.