No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JARROD TAYLOR, Petitioner,

v.

JEFFERSON S. DUNN, Commissioner,
Alabama Department of Corrections, Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Pursuant to Supreme Court Rules 13 and 30, Petitioner Jarrod Taylor respectfully requests a 60-day extension of time to file his petition for certiorari in this Court:

1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

2. On October 5, 2018, a single judge of the United States Court of Appeals for the Eleventh Circuit denied Mr. Taylor's motion for a certificate of appealability. *Taylor v. Dunn*, No. 18-11523 (11th Cir. Oct. 5, 2018) (attached at Exhibit A). Mr. Taylor timely filed a motion for panel reconsideration of that decision. Mr. Taylor's motion for reconsideration is pending.

3. Mr. Taylor's time to file a petition for certiorari in this Court currently expires on January 3, 2019. This application is being filed more than 10 days before that date.

4. Mr. Taylor is an inmate under a sentence of death, and his case raises serious constitutional issues that require careful consideration and presentation in his petition for certiorari.

5. Mr. Taylor requests an extension for two reasons. *First*, because Mr. Taylor has a motion for reconsideration pending before the Eleventh Circuit, an extension would serve the interests of judicial and party efficiency and might avoid unnecessary administrative complications. Should the Eleventh Circuit grant

Mr. Taylor's motion and award a certificate of appealability, it might not be necessary for Mr. Taylor to petition for certiorari. Should the Eleventh Circuit deny Mr. Taylor's motion with a written opinion, the Circuit Court's opinion might affect Mr. Taylor's decision as to which, if any, issues he presents to this Court in a petition for certiorari.

6. *Second*, counsel responsible for preparing Mr. Taylor's petition for certiorari have numerous upcoming personal and professional obligations. Given the holiday season, counsel have various family commitments and scheduled vacations. Counsel also have significant professional obligations on other cases, including numerous upcoming depositions and filing deadlines for dispositive motions and other court submissions. The time-consuming nature of these commitments will require considerable attention from counsel.

7. For the above reasons, Mr. Taylor respectfully requests that an order be entered extending his time to file a petition for certiorari by 60 days, to and including, March 4, 2019.

Dated: December 7, 2018

Respectfully submitted,

Theodore V. Wells, Jr.

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Exhibit A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11523-P

JARROD TAYLOR,

Petitioner-Appellant,

versus

ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

ORDER:

Petitioner is an Alabama prisoner. A jury convicted him of four counts of capital murder, and the trial judge sentenced him to death. Petitioner filed this 28 U.S.C. § 2254 petition for writ of habeas corpus and raised twenty-six grounds for post-conviction relief. The District Court denied the entire petition and also denied a certificate of appealability ("COA"). Petitioner now asks this Court for a COA on six claims. The Court will consider each claim separately.

I.

This Court may grant the COA only if Petitioner makes a substantial showing that he was denied a constitutional right. 18 U.S.C. § 2253(c)(2). When a district court denies a constitutional claim on the merits, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000). When a district court denies a constitutional claim on procedural grounds, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478, 120 S. Ct. at 1600–01.

II.

A.

In Claim One, Petitioner argues that his constitutional rights to due process, a fair trial, and an impartial jury were violated when "the State knowingly secreted to the jury evidence of [his] prior criminal history." After Petitioner was arrested, he allowed police to search the hotel room where he was staying. During the search, police seized a duffel bag that contained several documents, and some of these documents were related to Petitioner's criminal history. At trial—without objection—the State introduced the full bag. Now, Petitioner claims his due

process right to a fair trial was violated because the State "secreted" his own stuff into evidence. Of course, Petitioner knew what documents were in the bag, and he knew the bag was admitted into evidence in the same condition as when the police seized it. There was no secret, and Petitioner has not shown that reasonable jurists would debate whether Claim One states a valid due process claim.[1]

B.

In Claim Two, Petitioner argues his trial counsel provided ineffective assistance of counsel when they failed to adequately review the State's intended trial exhibits and when they failed to challenge the admission of documents related to his criminal history. Petitioner tried adding this claim late in the collateral proceedings. The Alabama Circuit Court had already dismissed the entire petition, and the Alabama Court of Criminal Appeals had remanded with instructions for the Circuit Court to consider specific claims. Thus, the Circuit Court denied this proposed claim as exceeding the remand scope and did not address it on the merits. In turn, the District Court found that Claim Two was procedurally defaulted, and it concluded Petitioner could not show cause to excuse the default.

Petitioner argues that the Circuit Court should have allowed the proposed claim because it was based on newly discovered evidence. That is, Petitioner's

[1] The District Court found that this claim was procedurally defaulted. Petitioner has not shown reasonable jurists would debate whether the District Court's procedural ruling was correct because he cannot show cause to excuse the procedural default. The factual basis for this claim was available to Petitioner the moment the bag was offered into evidence. It was his bag with his documents.

Rule 32 counsel say they were unaware that trial counsel were ineffective until they reviewed the trial exhibits and discovered documents that related to Petitioner's criminal history. Petitioner's Rule 32 counsel claim they "repeatedly sought access" to the exhibits, but the Circuit Court did not grant access until after the case was remanded. The Circuit Court's failure to grant access, Petitioner argues, is an external impediment that prevented him from raising this claim sooner. Thus, Petitioner says he can show cause to excuse the procedural default. *See McCleskey v. Zant*, 499 U.S. 467, 493–94, 111 S. Ct. 1454, 1470 (1991) ("Objective factors that constitute cause include 'interference by officials' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.'" (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986))).

The trial exhibits (the factual basis for this claim) were reasonably available to counsel well before the case was remanded to the Rule 32 court from the Court of Criminal Appeals. They were available to trial counsel before Petitioner filed a motion for new trial. Indeed, as one of the grounds for relief in the motion for new trial, trial counsel alleged that the jury viewed documents related to Petitioner's criminal history. But after deciding juror testimony on the issue would be inadmissible, trial counsel decided not to interview any jurors about the allegedly improper evidence.

The exhibits were also available before Petitioner appealed his convictions and death sentence. His appellate counsel even challenged the admission of a different document that was in the bag. *Taylor v. State*, 808 So. 2d 1148, 1164–65 (Ala. Crim. App. 2000), *aff'd sub nom. Ex parte Taylor*, 808 So. 2d 1215 (Ala. 2001). They were available in the Rule 32 court when Petitioner first filed his Rule 32 petition, and they were even available in the Court of Criminal Appeals while the appeal of the Rule 32 court's order denying collateral relief was pending. Rule 32 counsel say they tried reviewing the trial exhibits for nearly two years at the Circuit Court Clerk's office. The Clerk told counsel they needed an order from the Rule 32 court to review the trial exhibits. Rather than filing a motion to get that order, counsel wrote to the Rule 32 court and informed it that Petitioner's discovery motion was still pending, a motion entirely unrelated to the trial exhibits.

Put simply, Petitioner's counsel did not know about the factual basis for this ineffective assistance claim because they did not look. And there were hints that they should have looked going all the way back to the motion for new trial. Finally, even after they were told to get an order from the Rule 32 court, counsel did not file a motion asking for one. Petitioner has not shown that reasonable jurists would debate whether the District Court's procedural ruling was correct.

C.

In Claim Three, Petitioner argues that his right to due process was denied when the State (a) coerced Petitioner's alleged accomplice, Kenyatta McMillan, to provide false and inflammatory testimony; (b) gave McMillan a written document reflecting the false testimony; and (c) concealed its coercion and the document, in violation of *Brady*, *Giglio*, and other disclosure obligations. Petitioner claims the State procured two pieces of false testimony from McMillan. First, McMillan testified at trial that one of the victims begged for her life by saying no one would care for her kids the way she did. At the Rule 32 hearing, McMillan testified that he did not remember the victim saying anything at all.[2] Second, McMillan testified at trial that a different victim got down on his knees as if he was praying. At the Rule 32 hearing, McMillan testified that the victim was on his knees, but the "praying-like position" language was given to him by the State.

Petitioner tried adding this claim after the case was remanded, and the Rule 32 court refused to hear it on the merits. Thus, the District Court found that Claim Three was procedurally defaulted, and it concluded Petitioner could not show prejudice to excuse the default.

[2] Although, just four days after the murders, McMillan told police that this victim was begging Petitioner not to shoot her.

Given the similarity of McMillan's testimony at trial and in the Rule 32 proceeding, Petitioner cannot show prejudice—a reasonable probability that the result of the trial would have been different, *Spencer v. Sec'y, Dep't of Corrs.*, 609 F.3d 1170, 1180 (11th Cir. 2010)—to excuse the default. Petitioner has not shown that reasonable jurists would debate whether the District Court's procedural ruling was correct.

D.

In Claim Four, Petitioner argues that trial counsel were ineffective when they failed to even try to interview a potential alibi witness who would have placed Petitioner miles from the murders at the time they occurred. At trial, one of the State's witnesses testified that Petitioner and McMillan arrived at her apartment complex around 6:00 p.m. on the evening of the murder. The witness said Petitioner arrived first, and McMillan arrived five or ten minutes later. McMillan also testified at trial that he and Petitioner arrived at the apartment complex at the same time after the murders.

At the Rule 32 hearing, the alibi witness testified that Petitioner arrived at the apartment complex "[s]hortly after 7:00" p.m. The alibi witness claimed that he talked to Petitioner for thirty or forty-five minutes, and McMillan was not around during this time. Petitioner argues this testimony would have shown that he was not at the place of the murders—a car dealership—when they occurred.

The Rule 32 court found that Petitioner could not show prejudice under *Strickland* because the alibi witness was, at best, a "mixed bag" in terms of supporting Petitioner's version of the events.[3] The Court of Criminal Appeals affirmed, and the District Court found that the state courts did not err in applying *Strickland*.[4]

One of the State's witnesses testified at trial that he heard shots around the automobile dealership at 6:50 p.m. The apartment complex was only a six- or seven-minute drive from the dealership. So, Petitioner still could have pulled the trigger at 6:50 p.m. and arrived at the apartment complex "shortly after" 7:00 p.m. Even if trial counsel failed to contact the witness (which Petitioner did not prove to the Rule 32 court) and were thus ineffective, Petitioner cannot show prejudice under *Strickland*. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984). The alibi witness's version of events was not inconsistent with the State's theory that the murders happened around 6:50 p.m. Thus, Petitioner has not shown that reasonable jurists would debate whether the District Court's assessment was debatable or wrong.

[3] The Rule 32 court also found that Petitioner failed to prove that no one from the defense contacted the alibi witness before trial. That is, Petitioner failed to prove trial counsel were ineffective as alleged. The Court of Criminal Appeals affirmed that finding of fact.

[4] This was an alternative holding; the District Court first found that this claim was not exhausted.

E.

In Claim Five, Petitioner argues that his Eighth and Fourteenth Amendment rights were violated because the trial court, when sentencing him, considered the opinions of the victims' family members that the appropriate sentence for Petitioner was death.

Petitioner raised this claim on direct appeal, and the Court of Criminal Appeals denied it: "We find absolutely no evidence that the family members' sentence recommendations were considered by the trial court at sentencing." *Taylor*, 808 So. 2d at 1168. The District Court found no error is that ruling.

Petitioner argues that the victims' family members gave statements during the sentencing phase of the trial that death was the appropriate sentence. He also points to the Presentence Investigation Report, which included as victim impact information, a statement that a family member asked that Petitioner be sentenced to death. That said, there is no evidence that the Circuit Court actually considered the family members' recommendations. It never mentioned these recommendations during the sentencing hearing or in the sentencing order. Petitioner has not shown that reasonable jurists would debate whether the District Court's assessment of this claim is debatable or wrong.

F.

In Claim Six, Petitioner argues that Alabama's capital sentencing statute is unconstitutional. He claims the statute violates *Ring*[5] and *Apprendi*[6] because it "required the judge, in imposing a death sentence, to make his own factual findings . . . that an aggravating circumstance was proved beyond a reasonable doubt and that the aggravating circumstances outweighed any mitigating circumstances." He also claims the statute violates *Hurst*[7] because the judge, not the jury, made the ultimate decision to impose death.

Petitioner raised this claim in the Rule 32 petition, and the Rule 32 court denied it. The Court of Criminal Appeals affirmed, explaining that *Ring*, which announced a procedural rule rather than a substantive one, does not apply retroactively to post-conviction cases. *Taylor v. State*, 157 So. 3d 131, 145 (Ala. Crim. App. 2010). Because Petitioner's conviction became final before *Ring* was decided, the court found that Petitioner could not rely it. *Id.* Alternatively, the court found that Alabama's capital sentencing statute does comply with *Ring* and *Apprendi*. *Id.* The District Court agreed on both grounds.

Neither *Ring* nor *Hurst* applies here. The Supreme Court has made clear that "*Ring* announced a new procedural rule that does not apply retroactively to

[5] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002).
[6] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000).
[7] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S. Ct. 2519, 2526 (2004). Petitioner's case became final on direct review on January 7, 2002, while *Ring* was handed down more than five months later on June 24, 2002. *See Ring*, 536 U.S. 584, 122 S. Ct. 2428 (decided June 24, 2002). Applying *Ring*, *Hurst* answered the question "whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*." *Hurst*, 136 S. Ct. at 621. As such, "*Hurst*, like *Ring*, is not retroactively applicable on collateral review." *Lambrix v. Sec'y, Fla. Dep't of Corrs.*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017), *cert. denied sub nom. Lambrix v. Jones*, 138 S. Ct. 217 (2017). So *Hurst* does not apply for the same reason *Ring* does not.

Finally, as a way around the retroactive problem, Petitioner argues that *Hurst* applied the rule set out in *Apprendi*, and *Apprendi* was decided before Petitioner's case became final on direct review. But *Hurst* made clear that it was applying *Ring*, *see Hurst*, 136 S. Ct. at 621, and *Ring* announced a new procedural rule, *see Schriro*, 542 U.S. at 358, 124 S. Ct. at 2526.

Petitioner has not shown that reasonable jurists would debate whether the District Court's assessment of this claim is debatable or wrong.[8]

III.

Petitioner's motion for a COA is denied.

MOTION DENIED.

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

[8] It is worth noting that this Circuit has also rejected Petitioner's *Apprendi-Ring-Hurst* arguments on the merits in cases like this one—cases where Alabama juries necessarily found that a death-qualifying aggravating factor existed when they returned guilty verdicts. *Lee v. Comm'r, Ala. Dep't of Corrs.*, 726 F.3d 1172, 1198 (11th Cir. 2013) (explaining the trial judge may override a jury's recommendation of life by using "an aggravating circumstance implicit in a jury's verdict" because "[n]othing in *Ring*—or any other Supreme Court decision—forbids" doing so); *id.* ("*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances."); *Waldrop v. Comm'r, Ala. Dep't of Corrs.*, 711 F. App'x 900, 923–24 (11th Cir. 2017) (per curiam) (noting the Alabama Supreme Court's conclusion—"that the Sixth Amendment is satisfied under *Ring* if a jury finds a qualifying aggravating factor at the guilt phase"—"is also consistent with the rationale of *Hurst*"), *petition for cert. filed* (U.S. May 14, 2018) (No.17-9132).

Certificate of Service

I, Andrew J. Ehrlich, counsel for Jarrod Taylor, hereby certify that, on December 10, 2018, I caused a true and correct copy of the foregoing to be served by first-class mail, postage prepaid, and by electronic mail to the address listed below. Pursuant to Rule 29.5 of the Rules of this Court, I further certify that all parties required to be served have been served.

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