CAPITAL CASE

Case No. _____

October Term, 2019

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE MELVIN BONNELL, PETITIONER,

VS.

TIM SHOOP, WARDEN, RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS

APPENDIX

No. 17-3886

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: MELVIN BONNELL,

Movant.

O R D E R

Before: BATCHELDER, SUTTON, and WHITE, Circuit Judges.

Melvin Bonnell, an Ohio prisoner under sentence of death, filed a petition for habeas corpus relief under 28 U.S.C. § 2254 in April 2017. The district court transferred the case to this court as a second or successive petition by opinion and order entered August 25, 2017. Bonnell now moves to remand the case to the district court or, in the alternative, for additional briefing. The warden has filed a response opposing Bonnell's motion.

In 1988, Bonnell was convicted of one count of aggravated burglary, one count of aggravated (felony) murder, and one count of aggravated murder for purposely, and with prior calculation and design, causing Robert Bunner's death. He was also found guilty of one death penalty specification associated with each count of aggravated murder. The trial judge followed the jury's recommendation and sentenced Bonnell to death on each count of aggravated murder, and sentenced him to ten to twenty years of imprisonment for aggravated burglary. After exhausting his state court remedies, Bonnell filed a petition for a writ of habeas corpus in the district court in March 2000. The district court denied the petition in 2004. We affirmed. *Bonnell v. Mitchell*, 212 F. App'x 517 (6th Cir. 2007).

Bonnell filed a second habeas petition in April 2017, raising two claims: (1) he is entitled to habeas relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016); and (2) his rights to equal protection and due process were violated when the state trial court did not issue a final

appealable order in the judgment of conviction, which resulted in a jurisdictional defect. The district court found that Bonnell's petition was successive and transferred the case to this court pursuant to 28 U.S.C. § 1631.

To be entitled to an order authorizing the district court to consider a second or successive habeas corpus petition, the applicant must make a prima facie showing of: (1) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, or (2) newly discovered evidence which could not have been discovered previously through the exercise of due diligence and which would be sufficient to establish, by clear and convincing evidence, that no reasonable factfinder would have found the applicant guilty. *See* 28 U.S.C. § 2244(b)(2), (b)(3)(C); *Magwood v. Patterson*, 561 U.S. 320, 330 (2010). A numerically second petition is "second" when it raises a claim that could have been raised in the first petition. *McCleskey v. Zant*, 499 U.S. 467, 489 (1991); *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006). An application that presents a claim that would have been unripe if it had been presented in an earlier application, but ripened after an earlier habeas petition had been rejected, is not second or successive. *See Panetti v. Quarterman*, 551 U.S. 930, 945 (2007).

Bonnell's *Hurst* claim makes his proposed petition second or successive. Whether or not *Hurst* could apply to Bonnell's case, the Supreme Court has not made *Hurst* retroactive to cases on collateral review as required by 28 U.S.C. § 2244(b)(2). *See In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (citing *Tyler v. Cain*, 533 U.S. 656, 662-63 (2001)). Bonnell's argument that his *Hurst* claim ripened when the Supreme Court of Ohio applied *Hurst* retroactively is inapposite. "[T]he [United States] Supreme Court is the only entity that can 'ma[k]e' a new rule retroactive." *Tyler*, 533 U.S. at 663. And in any event, the ripeness exception is inapplicable to changes in law. *In re Coley*, 871 F.3d at 457.

Bonnell also requests that this court remand the case to evaluate the Ohio Supreme Court's application of *Hurst* under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). He argues that remand is needed because interpreting 28 U.S.C. § 2244(b) to prevent retroactive application of *Hurst* would abrogate *Teague v. Lane*, 489 U.S. 288 (1989),

and would suspend the writ of habeas corpus. But "*Teague* is not controlling for collateral cases under AEDPA," *In re Clemmons*, 259 F.3d 489, 492 (6th Cir. 2001) (citing *Tyler*, 533 U.S. at 665-66), and the Supreme Court has expressly held that § 2244(b)'s restrictions do not suspend the writ. *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

Bonnell's due process and equal protection claim also makes his proposed petition second or successive. Bonnell argues that because the trial court's 1988 sentencing opinion omitted the aggravated burglary conviction, the court failed to issue a final, appealable order that complied with Ohio Crim. R. 32(C). Bonnell contends that because the original sentencing opinion was deficient, Ohio state courts never had jurisdiction over his direct appeal. In 2011, the Ohio Court of Appeals directed the trial court to issue a nunc pro tunc entry that included the fact and manner of conviction on Bonnell's aggravated burglary charge, but held that the corrected judgment entry would not be a new final order from which a new appeal could be taken because Bonnell had already appealed his conviction and sentence. *State v. Bonnell*, No. 96368 2011 WL 5506071 at *4 (Ohio Ct. App. Nov. 10, 2011); *see also State v. Bonnell*, No. 102630 2015 WL 6797870, at *5 (Ohio Ct. App. Nov. 5, 2015).

Bonnell's present challenge to the nunc pro tunc order would raise a claim or claims that could have been raised in his first habeas petition. *See McCleskey*, 499 U.S. at 489; *Bowen*, 436 F.3d at 704. Although Bonnell argues that this claim did not become ripe until the trial court issued the nunc pro tunc entry revising the original judgment in 2015, this challenge has been available to Bonnell since the time of his conviction and sentence in 1988 under Ohio Crim. R. 32(C). *See Bonnell*, 2011 WL 5506071 at *4; *see also State v. Lester*, 958 N.E.2d 142, 146–47 (Ohio 2011). "[T]he phrase 'second or successive' must be interpreted with respect to the judgment challenged." *Magwood*, 561 U.S. at 333. The Ohio Court of Appeals ruled that the nunc pro tunc order merely corrected a technical defect in the original judgment. Therefore, Bonnell's current application does not fall within an exception to the rule against second or successive petitions. *See Panetti*, 551 U.S. at 945.

For the foregoing reasons, we **DENY** Bonnell's motion to remand and for additional briefing and **DENY** permission to file a second or successive habeas petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 17-3886

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 27, 2019
DEBORAH S. HUNT, Clerk

IN RE: MELVIN BONNELL,

Movant.

ORDER

BEFORE: BATCHELDER, SUTTON, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MELVIN BONNELL, Petitioner, v. CHARLOTTE JENKINS, Warden, Respondent.	)	CASE NO. 1:17-cv-787 JUDGE SARA LIOI **MEMORANDUM OPINION AND ORDER**

This matter is before the Court on the motion of respondent Charlotte Jenkins ("respondent" or "Jenkins") to transfer the petition of Melvin Bonnell ("petitioner" or "Bonnell") for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. No. 1 ["Pet."]) to the United States Court of Appeals for the Sixth Circuit for authorization to proceed because the petition is barred as a "second or successive" petition under § 2244(b) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(b). (Doc. No. 7 ["Mot."].) Bonnell, a state prisoner, was convicted and sentenced to death in 1988. In the petition, Bonnell claims that: (1) his death sentence is unconstitutional under *Hurst v. Florida*, – U.S. – , 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) (Pet. at 25-36[1]); and (2) his equal protection and due process rights were violated when the state trial court failed to issue a final, appealable order in the judgment of conviction (*Id.* at 36-38).

[1]All references to page numbers are to the page identification numbers generated by the Court's electronic docketing system.

Petitioner opposed the motion (Doc. No. 9 ["Opp'n"]), and respondent replied (Doc. No. 10 ["Reply"]).[2] For the reasons that follow, respondent's motion to transfer is granted.

I. BACKGROUND

A. Conviction, Sentence, and State Court Appeals

In 1988, an Ohio jury convicted Bonnell of one count of aggravated burglary and two counts of aggravated murder of Robert Eugene Bunner. Following the jury's recommendation, the trial judge imposed a sentence of death. Bonnell extensively litigated issues related to his conviction and sentence in the Ohio courts, which affirmed his convictions and sentence on direct appeal and post-conviction review. *See State v. Bonnell*, 573 N.E.2d 1082 (Ohio 1991) (direct appeal); *State v. Bonnell*, 644 N.E.2d 1031 (Table) (Ohio 1995) (affirming denial of application to reopen direct appeal); *State v. Bonnell*, 704 N.E.2d 578 (Table) (Ohio 1999) (declining to exercise jurisdiction). The United States Supreme Court denied Bonnell's petition for a writ of certiorari. *Bonnell v. Ohio*, 528 U.S. 842, 120 S. Ct. 111, 134 L. Ed. 2d 94 (1999).

B. Bonnell's First § 2254 Habeas Petition

Bonnell first sought federal habeas corpus relief pursuant to § 2254 in this Court in 2000, raising twenty claims. *See Bonnell v. Mitchel[l]*, 301 F. Supp. 2d 698, 718-20 (N.D. Ohio 2004). His petition was denied on February 4, 2004 (*id.* at 765), and the Sixth Circuit affirmed that decision on January 8, 2007 (*Bonnell v. Mitchell*, 212 F. App'x. 517 (6th Cir. 2007)). The United

[2] After the briefing was complete, petitioner filed a request (Doc. No. 11) that the Court take notice of Ohio Supreme Court docket in *State v. Kirkland*, Case No. 2010-0854, which respondent opposed (Doc. No. 12). Bonnell also requested that the Court take notice of *Jenkins v. Hutton*, 137 S. Ct. 1769 (2017). (Doc. No. 13.) Jenkins filed a response (Doc. No. 14), and Bonnell filed a reply (Doc. No. 15). The Court reviewed both requests, but concludes that they are not relevant to the Court's analysis of whether the instant petition is second or successive, and do not change the outcome of that analysis.

States Supreme Court denied Bonnell's petition for writ of certiorari on December 3, 2007. *Bonnell v. Ishee*, 552 U.S. 1064, 128 S. Ct. 710, 169 L. Ed. 558 (2007).

C. Bonnell's Second § 2254 Habeas Petition

Bonnell again seeks federal habeas relief in this Court. Petitioner contends that the two claims set forth in his second petition could not have been raised in his first habeas petition because those claims did not exist at the time of his first petition and, thus, were not ripe at that time. (*See* Pet. at 19-20.)

1. Claim based on *Hurst*

The first claim is grounded in *Hurst*, *supra*, wherein the United States Supreme Court held that Florida's capital sentencing scheme was unconstitutional because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." (Pet. at 27, quoting *Hurst*, 136 S. Ct. at 619.) Bonnell argues that *Hurst* is a "watershed procedural rule," and the first claim in his second petition did not ripen until the Ohio Supreme Court applied *Hurst* retroactively in *State v. Kirkland*, Case No. 1995-0042, Entry dated May 4, 2016, *rehearing denied* entry dated Nov. 9, 2016. (*Id*. at 18.) Bonnell claims that, under *Hurst*, two aspects of his

conviction and sentence are unconstitutional: (1) appellate reweighing of two merged murder counts;[3] and (2) appellate fact finding increasing his sentence from life in prison to death.[4]

2. Due process jurisdictional claim

For his second claim, petitioner asserts that the trial court never issued a lawful judgment pursuant to Ohio Criminal Rule 32(C) and, thus, the Ohio appellate courts never had jurisdiction over his appeals, violating his due process and equal protection rights. (Pet. at 36-38.) After Bonnell's first § 2254 habeas petition was concluded, the Ohio Supreme Court issued an opinion regarding the requirements of Rule 32(C), holding that a judgment of conviction "must include the

[3] Relevant to the instant petition, Bonnell argued on direct appeal that he was improperly sentenced by the trial court because it did not merge the two murder charges arising from a single homicide pursuant to Ohio's allied offense statute, Ohio Rev. Code § 2941.25, which prohibits conviction for two allied offenses of similar import. *State v. Bonnell*, No. 55927, 1989 WL 117828, at *14 (Ohio Ct. App. Oct. 5, 1989), *aff'd* 573 N.E.2d 1082 (1991). The appellate court agreed that the trial court erred, and merged the two murder counts. *Id*. The Ohio court of appeals concluded, however, that the trial court's failure to merge the two murder counts was a harmless procedural error. The Ohio Supreme Court agreed and found that the trial court's error was sufficiently corrected by the court of appeals' declaration that the two offenses were merged. *Bonnell*, 573 N.E.2d at 1086. As he argued in his state court appeals, Bonnell contends in the instant habeas petition that Ohio law requires the felony murder and aggravated murder charges in his case to be merged for sentencing, and requires that a jury arrive at an appropriate sentence by determining whether aggravating circumstances outweigh the mitigating factors in order to impose a sentence of death. Because the trial court did not merge the murder charges, he argues that both were improperly considered by the jury during the penalty phase. Bonnell reasons that, when the appellate court merged his two murder charges to correct the trial court's error, the appellate court improperly reweighed aggravating circumstances against mitigating factors, and unconstitutionally substituted its judgment for the judgment of the jury in violation of Ohio Rev. Code § 2929.03(D)(2) and *Hurst's* constitutional mandate. (Pet. at 26-33.)

[4] Under Ohio law, the imposition of the death penalty for aggravated murder is precluded unless at least one if the factors listed in Ohio Rev. Code § 2929.04(A) is specified in the indictment and proved beyond a reasonable doubt. On direct appeal, Bonnell argued that "the trial court erred by failing to instruct the jury that [Bonnell] must be found to be the principal offender of the aggravated murder offense in order for appellant to be found guilty of the R.C. 2929.04(A)(7) death penalty specification. Additionally, . . . because the verdict forms do not indicate that the jury found appellant to be the principal offender, the state failed to prove an essential element of its case." *Bonnell*, 573 N.E.2d at 1087. But the Ohio court of appeals and Ohio Supreme Court found no reversible error because "[t]he evidence in this case does not reasonably suggest that Bunner's murder was committed by more than one offender. . . . We conclude that, under these circumstances, any error in failing to instruct the jury on the principal offender issue was not outcome determinative." *Id*. In his petition, Bonnell argues that the appellate court's fact-finding on the issue of whether Bonnell was a principal offender cannot, under *Hurst*, be substituted for a proper jury determination of that issue beyond a reasonable doubt as required by Ohio law to be eligible for the death penalty. (Pet. at 33-35, citing *Bonnell*, 573 N.E.2d at 1090 (Brown, J., concurring in part and dissenting in part).)

sentence and the means of conviction, whether by plea, verdict, or finding by the court, to be a final appealable order under R.C. 2505.02." *State v. Baker*, 893 N.E.2d, 163, 167 (Ohio 2008).

After *Baker* was issued, Bonnell filed a motion with the trial court for resentencing and to issue a final appealable order because the trial court's judgment did not set forth his conviction for aggravated burglary and, therefore, was not a final appealable order under Ohio law. *See State v. Bonnell*, No. 96368, 2011 WL 5506071, at *1 (Ohio Ct. App. Nov. 10, 2011). The trial court denied the motion and Bonnell appealed. *Id*. The Ohio court of appeals agreed that the trial court's sentencing opinion and judgment entries did not comply with Rule 32(C) or *Baker*, but disagreed that the remedy was for the trial court to issue a new final appealable order so that Bonnell could again invoke jurisdiction to appeal his judgment of conviction. *Id*. at *2. Instead, the appellate court found that the trial court's technical failure to conform to Rule 32(C) "does not render the judgment a nullity[,]" and that the proper remedy was to issue a corrected nunc pro tunc entry. *Id*. at *3-4 (citing *State ex rel. DeWine v. Burge*, 943 N.E.2d 535, 539-40 (Ohio 2011)). Upon remand and as instructed by the appellate court, the trial court entered a nunc pro tunc judgment entry.[5] Against that background, Bonnell argues that his jurisdictional claim did not ripen until the trial court improperly added the fact of his burglary conviction in a nunc pro tunc order. (Opp'n at 81.)

D. Respondent's Motion to Transfer

Respondent contends that Bonnell's second-in-time § 2254 habeas petition is a "second or successive petition" under 28 U.S.C. § 2244(b) and, pursuant to 28 U.S.C. § 2244(b)(3) and § 1631, the Court must transfer the case to the Sixth Circuit for authorization to consider the petition.

[5] Bonnell challenged the nunc pro tunc entry on appeal, arguing that entry was illegal because a Rule 32 final appealable order had never been filed in the first instance. *State v. Bonnell*, No. 102630, 2015 WL 6797870, at *2 (Ohio Ct. App. Nov. 5, 2015) (*Bonnell* 2015). The court of appeals disagreed, *id*. at *5, and the Ohio Supreme Court declined to hear Bonnell's appeal. *State v. Bonnell*, 71 N.E.3d 297 (Table) (Ohio March 15, 2017).

Respondent argues that the trial court's nunc pro tunc entry is not a new judgment from which petitioner may seek relief, and the instant second-in-time petition attacks the same state court judgment as Bonnell's first petition. As to petitioner's claim based on *Hurst*, respondent maintains that *Hurst* does not present a new rule of constitutional law and, even if it did, the Sixth Circuit would still be required to authorize the petition. (Mot. at 69-70.) In response, Bonnell contends that the "second or successive" analysis of § 2244(b) does not apply to his instant petition because neither claim ripened until after Bonnell exhausted his first habeas proceeding and could not have been brought earlier. (*See* Opp'n at 78-81; *see also* Pet. at 20.)

II. DISCUSSION

A. Second Petitions for Habeas Corpus Relief

1. 28 U.S.C. § 2244(b)—"second or successive" habeas petitions

Under the gatekeeping provisions of 28 U.S.C. § 2244(b)(1), claims presented in a second or successive § 2254 habeas petition that were presented in a prior habeas petition must be dismissed. Even if claims in a second habeas petition were not presented in a prior petition, those claims "also must be dismissed unless they rely either on a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence." *Sneed v. Jenkins*, No. 5:17 CV 83, 2017 WL 564821, at *2 (N.D. Ohio Feb. 13, 2017) (citing 28 U.S.C. § 2244(b)(2)).

Section 2244(b)(3)(A) requires that before a second or successive petition is filed in the district court, "the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." A district court lacks jurisdiction to review a "second or successive" petition under § 2244(b) without authorization from the court of appeals. *In re Smith*, 690 F.3d 809, 809-10 (6th Cir. 2012) (citations omitted); *see also Moreland v. Robinson*,

813 F.3d 315, 322 (6th Cir. 2016) (district court lacks jurisdiction to review second or successive petitions for habeas corpus relief without permission from the Sixth Circuit) (citations omitted).

But when a petitioner does not file a motion with the court of appeals, the district court has jurisdiction to determine whether a second-in-time petition is a second or successive petition that requires authorization. *In re Smith*, 690 F.3d at 809-10. That determination is a threshold issue that must be resolved by the district court before it undertakes any analysis of the application pursuant to 28 U.S.C. § 2244(b)(1) or (2). If the district court determines that the second-in-time petition is a second or successive petition, then the district court must transfer the petition to the court of appeals pursuant to 28 U.S.C. § 1631 for authorization to further consider the petition. *Id.*; *Sneed*, 2017 WL 564821, at *2 (same) (citing *In re Smith*, 690 F.3d at 809). If the second-in-time petition is not second or successive, the district court may consider the petition pursuant to § 2244(b)(1) and (2) without authorization from the Sixth Circuit. *See In re Smith*, 690 F.3d at 810.

2. Unripe claims are not second or successive under § 2244(b)

Every second-in-time habeas petition is not a "second or successive" petition within the meaning of § 2244(b). *Storey v. Vasbinder*, 657 F.3d 372, 376 (6th Cir. 2011).

> The phrase ["second or successive"] is instead "a 'term of art' that is 'given substance' by the Supreme Court's habeas cases." *In re Salem*, 631 F.3d 809, 812 (6th Cir. 2011) (quoting *Slack v. McDaniel*, 529 U.S. 473, 486, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)). Accordingly, in a number of cases, the Court has held that an application was not second or successive even though the petitioner had filed an earlier one. In *Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S. Ct. 1618, 140 L. Ed. 2d 849 (1998), the petitioner filed a second petition that presented a claim identical to one that had been included in an earlier petition. The claim had been unripe when presented in the earlier petition. The Court treated the two petitions as "only one application for habeas relief[.]" *Id.* at 643, 118 S. Ct. 1618. In *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007), the Court held that an application that presented a claim that had *not* been presented in an earlier application, but that would have been unripe if it had been presented then, was not second or successive. *Id.* at 945, 127 S. Ct. 2842. In *Magwood v. Patterson*, [561 U.S. 320], 130 S. Ct. 2788, 177 L. Ed. 2d 592 (2010), the Court made clear that an application challenging an earlier criminal judgment did not

> count for purposes of determining whether a later application challenging a new judgment in the same case was second or successive. *Id.* at 2797–98.

Id. at 376-77.

In *Martinez-Villareal*, and later in *Panetti*, the Supreme Court held that the statutory bar on "second or successive" applications does not apply to claims raised under *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) (prohibiting the execution of insane prisoners) filed after the state has obtained an execution warrant. That exception, based on the ripeness doctrine, permits a petitioner to file what is functionally a first petition as to a claim that ripens only when execution is imminent because an individual's competency to be executed cannot properly be assessed until that time. *See Martinez-Villareal*, 523 U.S. at 645 ("Respondent brought his claim in a timely fashion, and it has not been ripe for resolution until now."); *Panetti*, 551 U.S. at 945 ("We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe."). Thus, a second-in-time petition may be "functionally a first petition as to a previously unripe claim[.]" *Sneed*, 2017 WL 564821, at *3 (citing *Martinez-Villareal*, 523 U.S. at 654 and *Panetti*, 551 U.S. at 945).

B. Analysis

Although the briefing on both sides strays into the merits of the petition and other matters, the issue before the Court is very narrow. That is, do the claims in petitioner's second-in-time petition require authorization from the Sixth Circuit to be considered further under § 2244(b). The Court concludes that both claims require authorization in order to proceed.

1. Claim based on *Hurst* is second or successive

Petitioner relies on the ripeness theory in *Panetti* and *Martinez-Villareal* to support his argument that the instant habeas petition is not successive and, therefore, not subject to § 2244(b)'s authorization requirement. (*See* Opp'n at 79-80.) Bonnell argues that his claim based on *Hurst* did not accrue until the Ohio Supreme Court retroactively applied *Hurst* to a capital case in *State v. Kirkland* (Case No. 1995-0042), a ruling that became final in November 2016. (*Id*. at 84.)

Courts have applied the *Panetti/Martinez-Villareal* ripeness exception to the statutory bar on successive habeas petitions outside the context of *Ford* claims. In *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010), for example, the Sixth Circuit found that a claim asserted in a second habeas petition was not successive because it challenged the cumulative effect of amendments to Michigan's parole system, the last of which took effect two years after the petitioner filed his original habeas petition.[6] *Id*. at 605-606 (collecting cases); *see also Leal Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009) ("[L]ater habeas petitions attacking distinct judgments, administration of an inmate's sentence, a defective habeas proceeding itself, or some other species of legal error–when the error arises after the underlying conviction–tend to be deemed non-successive.") (footnotes omitted) (collecting cases); *Phillips v. Robinson*, No. 5:12cv2323, 2013 WL 3990756, at *11 (N.D. Ohio Aug. 2, 2013) (holding petitioner's second habeas petition was not successive because his method-of-execution claim was based on Ohio's new execution protocol adopted after his original federal habeas proceedings).

[6] The Sixth Circuit concluded that Jones' jury selection claim, however, was not an exception to the ripeness doctrine because it challenged events that occurred at his trial and, thus, was squarely within the scope of § 2244(b). *In re Jones*, 652 F.3d at 606.

Bonnell does not argue that events occurring after his first petition make the claims in the second petition functionally a first petition because they were not ripe at the time of his earlier petition. Rather, petitioner contends that *Hurst* represents a change in the law that, retroactively applied, rendered his conviction and sentence unconstitutional.[7]

But courts generally have refused to apply the *Panetti/Martinez-Villareal* ripeness exception to second petitions asserting claims based on a change in the law. *See Sneed*, 2017 WL 564821, at *3-4 ("Moreover, Petitioner cannot rely on *Panetti's* and *Martinez-Villareal's* ripeness theory [with respect to his *Hurst* claim]. The *Ford* claims at issue in those cases were based on the petitioners' mental condition, involving facts that can change significantly over time and, therefore, became ripe only close to execution when those facts could properly be assessed. Here, Petitioner argues his new claims just became ripe not because of new facts—the claims relate to his state-court trial and appeals—but because of a 'clarification' of a legal rule that was established many years ago. This extends *Panetti* and *Martinez-Villareal* too far."); *see also Fears v. Jenkins*, No. 2:17-CV-029, 2017 WL 1177609, at *3 (S.D. Ohio Mar. 30, 2017) ("Fears' claims under *Hurst* do not escape the second-or-successive classifications [under the ripeness doctrine] by being based on newly-arising facts as in *Panetti*[.]"); *Sheppard v. Warden, Pickaway Corr. Inst.*, No. 1:15-cv-543, 2016 WL 4471679, at *4 (S.D. Ohio Feb. 5, 2016) ("[C]ourts have uniformly concluded that claims based on a subsequent change in the law do not pose ripeness concerns and instead require authorization from the circuit courts before they may be raised in a second federal habeas petition."); *United States v. Claycomb*, 577 F. App'x. 804, 805 (10th Cir. 2014) ("[W]hat makes a claim unripe is that the factual predicate has not matured, not that the law was unsettled.");

[7] Bonnell contends that *Hurst* represents both a substantive and procedural change in the law. (*See* Opp'n at 84 and Pet. at 18.)

Johnson v. Wynder, 408 F. App'x. 616, 619 (3d Cir. 2010) (finding later habeas petition alleging an actual innocence claim based on a change in state law, which the petitioner argued should be applied retroactively to him, was a "second or successive" petition); *Lucero v. Cullen*, No. 2:12cv0957-MCE-EFB P, 2014 WL 4546055, at *9 (E.D. Cal. Sept. 12, 2014) (holding that, in light of the "compelling evidence" provided by "the statutory language of § 2244," petitioner's second-in-time federal habeas petition raising a claim based on an intervening change in state law was successive).

One reason that a change in the law does not trigger the ripeness exception that renders a second-in-time petition non-successive may be found in the language of § 2244(b)(2) itself. Section 2244(b)(2)(A) provides that claims presented in "second and successive" petitions that rely on new and retroactive rules of constitutional law require authorization, demonstrating that such claims, while previously unavailable to the petitioner, are nonetheless successive. The Fifth Circuit addressed this issue in *Leal Garcia*, explaining that:

> [the petitioner asks] us to hold that a petition is non-successive if it rests on a rule of constitutional law decided after the petitioner's first habeas proceedings because such a claim would not have been previously available. . . . Newly available claims based on new rules of constitutional law (made retroactive by the Supreme Court) are *successive* under § 2244(b)(2)(A): Indeed, this is the reason why authorization is needed to obtain review of a successive petition. [The petitioner's argument] would permit an end-run around § 2244. The new rule of constitutional law would be non-successive because it was previously unavailable, so no authorization would be required. Were [the petitioner] correct, § 2244(b)(2) would be rendered surplusage.

Leal Garcia, 573 F.3d at 221 (emphasis original, footnote omitted). The Fifth Circuit observed that it is the "repeated attacks on an underlying judgment," which "often take on new forms as the legal landscape shifts, that are evil against which AEDPA is directed[.]" *Id*. at 222. In determining whether a later petition is successive or not, the court concluded, courts must "consider the defect

that the later petition attacks and when that defect arose." *Id*. at 224 (petitioner's second habeas petition was not successive, because it did not "rely on some novel legal basis to again attack his conviction," but instead "allege[d] a defect that arose . . . after his conviction[.]") (footnote omitted).

Bonnell's first claim is successive. This claim based on *Hurst* challenges the same judgment of conviction and sentence that he challenged in his prior petition, and does not attack a defect that arose after his first petition was decided and denied. Rather, he seeks to use "a novel legal basis to again attack his conviction . . . ." *See Leal Garcia*, 573 F.3d at 224. The *Panetti/Martinez-Villareal* ripeness exception to the bar on successive petitions does not apply to claims relying on changes in the law. It is for the Sixth Circuit to now determine whether Bonnell may proceed with this claim under § 2244(b)(2)(A).

2. Due process jurisdictional claim is second or successive

Petitioner's jurisdictional claim states that his equal protection and due process rights were violated because the state trial court failed to issue a final, appealable order in the judgment of conviction. (Pet. at 36-38.) Bonnell contends that the jurisdictional defect claim is not successive because it did not become ripe until January 20, 2015, when the trial court issued the nunc pro tunc entry revising the original judgment of conviction to include his conviction for aggravated burglary which, Bonnell argues, violated *State v. Lester*, 958 N.E.2d 142 (Ohio 2011). Citing *Lester*, petitioner asserts that "Ohio law does not permit a nunc pro tunc entry to cure jurisdictional errors of this magnitude." (Opp'n. at 83.)[8]

[8] Bonnell exhausted this claim in state-court post-conviction proceedings that ended on March 15, 2017. *State v. Bonnell*, 148 Ohio St. 3d 1425 (Ohio 2017).

The *Panetti/Martinez-Villareal* ripeness exception does not apply to this claim because the claim has been available to petitioner from the time of his conviction and sentence in 1988, and *Lester* does not support petitioner's ripeness argument. The "jurisdictional error" of which petitioner complains lies in the trial court's failure to state his conviction for aggravated burglary in the initial judgment of conviction, which petitioner argues was not a final appealable order in the first instance and cannot be corrected by a nunc pro tunc entry. As Bonnell notes, "it is undisputed that the fact of a conviction was not included in the journal entry, sentencing opinion or oral pronouncement of sentence." (*Id.* at 82.)

But at the time of Bonnell's conviction, Rule 32(C) provided that a "judgment of conviction shall set forth the plea, the verdict, or findings upon which each conviction is based, and the sentence." *Bonnell*, 2011 WL 5506071, at *4 (quoting Rule 32(C)).[9] The Ohio Supreme Court stated that this Rule 32(C) language

> clearly specifies the substantive requirements that must be included within a judgment entry of conviction to make it final for purposes of appeal and that the rule states that those requirements "shall" be included in the judgment entry of conviction. These requirements are the *fact* of the conviction, the sentence, the judge's signature, and the entry on the journal by the clerk. All of these requirements relate to the essence of the act of entering a judgment of conviction and are a matter of substance, and their inclusion in the judgment entry of conviction is therefore required. Without these substantive provisions, the judgment entry of conviction cannot be a final order subject to appeal under R.C. 2505.02. A judgment entry of conviction that includes the substantive provisions places a defendant on notice that a final judgment has been entered and the time for the filing of any appeal has begun.

Lester, 958 N.E.2d at 146-47 (emphasis in the original).

[9] Rule 32(C), amended effective July 1, 2013, now states in pertinent part: "A judgment of conviction shall set forth the fact of conviction and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. . . ." Ohio R. Crim. P. 32(C).

The language of Rule 32(C) in effect at the time Bonnell's judgment was originally entered by the trial court "clearly specifies" that the fact of conviction must be included in a judgment entry. *Id.* at 146 ("In *State v. Baker*, we confirmed that a judgment entry of conviction must contain the Crim. R. 32(C) elements to be final and subject to appeal[.]"). Thus, Bonnell's due process claim that his judgment of conviction was defective because it failed to include the burglary conviction as required by Rule 32(C) was available to him when the original judgment was entered in 1988.[10] Bonnell's argument that Ohio law does not permit a nunc pro tunc entry to cure such a defect, which he claims ripened in 2015, is beside the point.

Moreover, the omission of the fact of conviction was not the issue before the Ohio Supreme Court in either *Baker* or *Lester*.[11] *Baker* and *Lester* concerned the manner of conviction, the effect of excluding the manner of conviction on the finality of the judgment, and the effect of a nunc pro tunc entry to correct the omission of the manner of conviction in a judgment—issues that have no bearing on Bonnell's claim. Those cases did not change the law regarding Rule 32(C)'s requirement at the time of petitioner's conviction (and at all times relevant here) that a trial court's judgment entry must include the *fact* of each conviction in the judgment entry of conviction. Although Bonnell's claim that his judgment of conviction did not comply with Rule 32(C) was available to him at the time of his conviction in 1988, he asserts that claim for the first

[10] "[T]he purpose of Crim. R. 32(C) is to ensure that a defendant is on notice concerning when a final judgment has been entered and the time for filing an appeal has begun to run." *Lester*, 958 N.E.2d at 146-47 (citing *State v. Tripodo*, 363 N.E.2d 719 (Ohio 1977); App. R. 4(A)). Although a separate issue from the Court's analysis of whether this claim is second or successive, the Ohio Court of Appeals noted that Bonnell had notice of his burglary conviction and exhausted his appeals. *Bonnell*, 2011 WL 5506081, at *3.

[11] In *Baker*, the Ohio Supreme Court addressed the question of "whether the term 'the plea' in Crim R. 32(C) means a plea entered by the defendant at arraignment or a plea that is the basis of a conviction." *Id.* at 147 ("Our specific holding was that the term 'the plea' in Crim.R. 32(C) means a plea of guilty upon which the court bases the conviction and not the plea at arraignment that is not a basis for the defendant's conviction.") (citing *Baker*, 893 N.E.2d at 167). The Ohio Supreme Court recognized in *Lester* that *Baker* had "created confusion and generated litigation regarding whether a trial court's inadvertent omission of a defendant's 'manner of conviction' affects the finality of a judgment entry of conviction." *Id.* at 146.

time now in a second petition. Thus, this claim is also successive and must be transferred to the Sixth Circuit for authorization to proceed.

III. CONCLUSION

For all of the foregoing reasons, the Court finds that both claims in Bonnell's Petition for Writ of Habeas Corpus are "second or successive," and require authorization from the Sixth Circuit pursuant to AEDPA's § 2244(b)(3)(A). Respondent's motion to transfer is granted. The Clerk is hereby ordered to transfer the case to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 for a determination as to whether Bonnell may proceed with the claims in his second successive petition for a writ of habeas corpus pursuant to § 2254.

IT IS SO ORDERED.

Dated: August 25, 2017

HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE