No.

In the
Supreme Court of the United States

WILLIE LEE CONNER,
Petitioner,
v.

SHARON FOLKS, WARDEN,
LOXLEY COMMUNITY WORK CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Do Rule 9 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and its corollary, 28 U.S.C § 2244, which prohibit inmates from filing second or successive habeas corpus petitions without permission from the federal circuit court of appeals, of which approval is almost routinely denied, violate the guarantee of the United States Constitution, Article I, Section 9, which provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"?

Do Rule 9 of AEDPA and USC § 2244 violate the guarantee of habeas corpus as applied to an indigent defendant whose first petition was pro se and handwritten and which addressed a very different issue from those raised in his second petition?

Do Rule 9 of AEDPA and USC § 2244 violate the guarantee of habeas corpus where § 2244(b)(2)(E) declares "the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari," thereby completely suspending the "the Great Writ" of habeas corpus?

PARTIES TO THE PROCEEDING

The Petitioner is Willie Lee Conner, a 56-year-old Alabama black male who, for the last eight and a half years, has been serving a sentence of life imprisonment for having shoplifted a nail gun priced at $249.00. The Respondent is Sharon Folks, Warden of the Loxley (Alabama) Community Work Center where Mr. Conner is currently incarcerated.

RELATED PROCEEDINGS

State v. Willie Lee Conner, No. CC12-1861.62, Baldwin County Circuit Court, Alabama. Judgment entered June 18, 2019.

Conner v. Dunn, No. 1:20-cv-511, U.S. District Court for the Southern District of Alabama. Judgment entered August 18, 2021.

In re Willie Conner, No. 21-12911-E, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered September 2, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Willie Lee Conner requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, directing that court to grant Petitioner's petition for a writ of habeas corpus, for the following reasons.

In the decision below, the Eleventh Circuit held that the District Court had correctly denied Conner's habeas petition because it was a second or successive petition and Conner had failed to satisfy the Rule 9 criteria for subsequent petitions. Conner contends in this petition that Rule 9 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and its corollary, U.S.C § 2244, violate the constitutional guarantee of Article I Section 9 that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Whatever special concerns terrorism raises for the criminal justice system, it does not require a statute that is in effect a suspension of the writ of habeas corpus for an elderly man whose offense is shoplifting a roof nailer. Using a statute like the AEDPA that effectively eliminates a second habeas proceeding is an overbroad approach to terrorism. It is like responding to shoplifting by launching a cruise missile.

This Court should grant certiorari to reestablish the central fact that the writ of habeas corpus is a most cherished right, the right of last resort, for those who have been wronged by the criminal justice system and who have no other remedy.

DECISIONS BELOW

The Eleventh Circuit's unpublished and unreported decision denying approval for a second or successive petition for writ of habeas corpus with the district court is reprinted at App.1a—6a.

The District Court's order adopting the magistrate judge's report and recommendation is reported at 2021 WL 3667121, and reprinted at App. 7a. The magistrate judge's report and recommendation is reported at 2021 WL 3673853, and reprinted at App. 9a.

JURISDICTION

The Eleventh Circuit entered judgment on September 2, 2021. The deadline to file a petition for a writ of certiorari is December 1, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

28 U.S.C. § 2403(a) may apply because the constitutionality of an Act of Congress is drawn into question, and neither the United States, nor any federal department, office, agency, or employee is a party.

Petitioner has provided a Notice of Constitutional Question to the Eleventh Circuit Court of Appeals pursuant to Federal Rule of Civil Procedure 5.1 and requested that the Eleventh Circuit certify to the Attorney General of the United States that there is a constitutional question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States, Article I Section 9, previously quoted, protects the right to file a writ of habeas corpus.

This constitutional right is substantially infringed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Rule 9 and U.S.C § 2244.

INTRODUCTION

Willie Conner is serving a sentence of life imprisonment for the crime of shoplifting a nail gun – the Alabama Criminal Justice System has failed him. Despite the clear evidence showing that Willie did not have a deadly weapon at the commission of the crime, he was charged and ultimately convicted of first-degree robbery and sentenced to life imprisonment because of his habitual offender status. He has now served over 8 years for shoplifting and has no chance of even a parole hearing until 2023.

Willie has exhausted all appeals in Alabama. In 2018, through present counsel, he filed a petition for writ of habeas corpus in the U.S. District Court for the Southern District of Alabama on October 16, 2020. The District Court refused to hear Willie's petition because, unbeknownst to Willie's counsel, Willie had filed a previous habeas corpus petition on June 7, 2016. This previous petition was pro se, handwritten, prepared by another inmate, summarily denied, and ultimately forgotten by Willie in the almost 5 year interim.

Under the Antiterrorism and Effective Death Penalty Act of 1996, "second or successive" habeas petitions are barred unless permission is granted by the United States Circuit Court of Appeal over the jurisdiction. On August 24, 2021, Conner filed an Application for Leave to File a Second or Successive Habeas Corpus Petition with the Eleventh Circuit, but the Eleventh Circuit denied his request on September 2, 2021, because it was not based on new law or new evidence under the Eleventh Circuits interpretation of AEDPA and USC § 2244. Actual Innocence, the cornerstone of habeas corpus, and which Conner has shown by the complete lack of the essential elements of First Degree Robbery was not even discussed. Therefore, the Eleventh Circuit, under the banner of the AEDPA and USC § 2244, has suspended Willie Connor's right to habeas corpus guaranteed in the United States Constitution.

Not only this, but AEDPA and USC § 2244 then attempt to enshrine this infringement of the right to petition for the writ of habeas corpus by stating that any denial is neither appealable nor subject to rehearing or a writ of certiorari to this Court.

The writ of habeas corpus is a prisoner's only remaining plea after all other legal recourse has failed. The AEDPA and USC § 2244 infringe on this fundamental right in a way that has not merely caused federal circuit courts of appeal splits but has eroded a right which the Founders understood to be a cornerstone of the Republic.

STATEMENT OF THE CASE

I. Facts of Initial Incident

On July 5, 2012, Mr. Conner shoplifted a nail gun by stuffing it in his pants, walked out of the store, and was confronted by Lowe's employees. He then peacefully came with the employees back to the store; however, when the nail gun began to dig into his leg, he stumbled and grabbed at it because it was painful. Knowing he had been caught with the roof nailer, in an unfortunate choice of words, Mr. Conner said "I have a gun" referring to the nail gun, whereupon the Lowe's employees wrestled him to the ground and found the nail gun but no deadly weapon, to wit, a firearm.

Although it is commonly called a "nail gun" or "gun," by no stretch of the imagination could a roof nailer be considered a weapon. One cannot use a roof nailer to fire nails at another person. One cannot even use a roof nailer to drive nails into a roof unless it is hooked up to an air compressor, and Mr. Conner did not have an air compressor.

II. Lower Court Proceedings

Conner was charged with first-degree robbery, as well as the lesser-included offenses of third-degree robbery and third-degree theft of property. He pleaded not guilty to all charges. Conner was tried by the jury before the Baldwin Circuit Court in Bay Minette. The prosecution called Alan Barnard, a loss prevention employee, and Andy Forsythe, the investigating officer, as witnesses. When the prosecution rested, Conner moved for a judgment of acquittal, which was immediately denied. Mr.

Conner was then convicted of Robbery I and sentenced to life imprisonment because of his habitual offender status.

After exhausting his appeals in the Alabama courts to no avail, several years later Conner through counsel filed a petition for writ of habeas corpus with the U.S. District Court for the Southern District of Alabama on October 16, 2020. The District Court refused to hear Conner's petition because, unbeknownst to Conner's counsel, Conner had filed the previous habeas corpus petition on June 7, 2016, which was pro se, handwritten, prepared by another inmate, summarily denied, and ultimately forgotten by Conner.

Rule 9 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Rule Governing Section 2254 and 2255 cases, provides that "*Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4).*" On August 24, 2021, Conner filed an Application for Leave to File a Second or Successive Habeas Corpus Petition with the Eleventh Circuit, but the Eleventh Circuit denied his request on September 2, 2021.

REASONS FOR GRANTING THE WRIT

Action from this court is necessary both to abate a grave injustice against Willie Lee Conner and to preserve the cherished foundational right of habeas corpus for all Americans. Willie Lee Conner has served over 8.5 years of a sentence of life

imprisonment for the crime of shoplifting a roof nailer that retails for $249. The Alabama Criminal Justice System has failed him through clear mistakes of fact and mistakes of law, which at this stage, only this Court can correct.

In correcting this injustice, this Court has the opportunity to clarify the extent to which the constitutional right of habeas corpus can be restricted, and also to clarify the meaning of armed robbery.

I. Rule 9 of the Antiterrorism and Effective Death Penalty Act and USC § 2244 requiring permission Federal Circuit Court of Appeals to file a second or successive habeas corpus petition is unconstitutional, both on its face and as applied.

A. Unconstitutional on its face.

The United States Constitution, Article I, Section 9, provides in pertinent part:

> *The Privilege of the Writ of Habeas Corpus shall not be suspended unless in Cases of Rebellion or Invasion the public safety requires it.*

There is no suggestion of rebellion or invasion in this case. Therefore, for purposes of this case, the provision simply states, "The Privilege of the Writ of Habeas corpus shall not be suspended...."

Merriam-Webster defines suspend as "to debar temporarily especially from a privilege, office, or

function."[1] *The Cambridge English Dictionary* offers a similar definition: "to stop something from being active, either temporarily or permanently."[2] *The Law Dictionary* defines suspend as "To interrupt; to cause to cease for a time; to stay, delay, or hinder; to discontinue temporarily, but with an expectation or purpose of resumption."[3] *Black's Law Dictionary* defines suspend as "1. To interrupt; postpone; defer . . . . 2. To temporarily keep (a person) from performing a function, occupying an office, holding a job, or exercising a right or privilege . . . ."[4]

Rule 9 of the AEDPA and USC § 2244 effectively authorize the federal circuit courts of appeal to suspend a person's privilege of habeas corpus and thus violate the Constitution, Article I Section 9.

The writ of habeas corpus was a central feature of Anglo-American law. Sir William Blackstone referred to it as the "Great Writ" and called it "the glory of the English law."[5] The writ of habeas corpus was the vehicle a confined person could use under all circumstances in which other remedies had been exhausted or no other remedies were available. Blackstone considered the writ an essential protection against government abuse, which, he

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[1] Suspend, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/suspend

[2] Suspend, The Cambridge English Dictionary https://dictionary.cambridge.org/dictionary/english/suspend

[3] Suspend, The Law Dictionary, thelawdictionary.org/suspend/

[4] *Suspend*, Black's Law Dictionary, (11th ed. 2019).

[5] Sir William Blackstone, quoted by Prof. Jonathan Turley, "Habeas Corpus," *The Heritage Guide to the Constitution,* ed. Edwin Meese III, (Regnery 2005) 152.

said, "does not always arise from the ill-nature, but sometimes from the mere inattention, of government."[6]

As the Framers considered the habeas corpus provision, some were reluctant to limit it at all. Luther Martin of Maryland said the power to suspend the writ would be "an engine of oppression" that could be used to declare any state opposition to federal power an act of rebellion.[7]

However, the delegates decided that there could be extreme conditions in which the writ had to be suspended, such as in war or other national emergencies. Since the Civil War, the writ has been suspended only three times: In South Carolina in 1871 to deal with the Klan, in the Philippines in 1905 to deal with a local revolt, and in Hawaii during World War II. None of those extreme circumstances are even remotely present in this case.

Alexander Hamilton explained in *Federalist No. 84:*

> ...the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: "To bereave a man of life, says he, or by violence to confiscate his estate, without

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[6] *Id.*

[7] Luther Martin, 1787; quoted in *Id.*

> accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore A MORE DANGEROUS ENGINE of arbitrary government.'" And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the habeas-corpus act, which in one place he [Blackstone] calls "the BULWARK of the British Constitution."[8]

The Framers viewed the writ of habeas corpus as the last guarantee of freedom, the remedy a wrongly-imprisoned person could pursue when no other remedy is available. As such, it should be limited only in war or national emergency, and even then, as Francis Dana of Massachusetts observed, the suspension should automatically cease when the invasion or rebellion ceases.[9]

The word "suspension" implies a temporary limitation. If the writ of habeas corpus may not be even temporarily suspended except in case of invasion or rebellion, then *a fortiori, it cannot* be

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[8] Alexander Hamilton, *Federalist No. 84,* 1787-88.

[9] Francis Dana, cited in Elliot, Jonathan, ed. *The Debates in the Several State Conventions on the Adoption of the Federal Constitution,* 5 vols. (Philadelphia: Lippincott, 1901) 2:108.

permanently prohibited.

But that is precisely what Rule 9 does. It prohibits an imprisoned person from seeking release through a second writ of habeas corpus unless the court of appeals authorizes a second writ. In other words, it effectively authorizes the courts of appeals to prohibit second writs of habeas corpus, and the implication is that if they don't permit the writ, the writ is prohibited. USC § 2244 then goes even further by barring a petition for a writ of certiorari.

And this is precisely what the constitutional guarantee of the right to habeas corpus was designed to prohibit.

As Megan Volin further observes in the University of Chicago Law Review, ". . .when a petitioner files a habeas petition for the second time, it will generally be dismissed."[10]

Likewise, the Habeas Institute observes that "A person seeking to file a second or third petition for writ of habeas corpus in the federal court must ask and receive permission to do so. The federal courts are loath to grant this permission."[11]

In other words, Rule 9 not only places a high hurdle for those seeking second habeas relief, but it also places what for most prisoners is an insurmountable hurdle.

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[10] Megan Volin, *"Defining 'Second or Successive' Habeas Petitions after Magwood,"* University of Chicago Law Review, 85:1545 at 1545.

[11] "Frequently Asked Questions About the National Habeas Institute," https://habeasinstitute.org/faq

Let us compare the right to petition for habeas corpus to the right to trial by jury. Arguably, the Framers valued habeas corpus even more than they valued trial by jury, because they placed the right to petition for habeas corpus in Article I Section 9 of the Constitution but did not even mention trial by jury until later when they adopted the Bill of Rights.

Suppose Congress were to pass a law prohibiting trial by jury in federal district courts, unless the circuit court of appeals approved a request for trial by jury. They might justify this on the ground that trial by jury needs to be limited because juries require much in terms of costs, time, and manpower. Surely, this Court would strike down the law as a violation of the Sixth Amendment right to trial by jury.

Likewise, Rule 9 of AEDPA and USC § 2244 are equally violations of the Article I Section 9 right to petition for habeas corpus.

B. Unconstitutional as applied.

Even if there could be circumstances in which Rule 9 of AEDPA and USC § 2244 could be constitutional, it is clearly unconstitutional as applied in this case, for the following reasons.

First, Willie Conner filed his first petition on June 7, 2016, four years before his attorney filed the second petition. A second petition four years later hardly seems like burdening the courts with endless repetitive petitions. In fact, Conner did not even mention the first petition to his attorney in 2020, either because he didn't remember it or because he didn't think it was relevant.

Second, Conner's first petition was *pro se*, largely with the help of a fellow inmate. Conner didn't remember having filed it, and certainly did not realize that filing that *pro se* habeas petition would forever bar him from filing another one. He did not mention this to his present attorneys when they filed the second habeas petition, because he either did not understand its significance and its relevance or had simply forgotten. It is handwritten, in some instances difficult to read, and should not have the effect of forever barring Conner from again asserting his constitutional right to file a habeas corpus petition. As the Eleventh Circuit has recognized in *Bellzia v. Florida Dept. of Corrections*, 614 F.3d 1326, 1329 (11th Cir. 2010), as a general rule pleading requirements should be construed less strictly against *pro se* litigants. Furthermore, the Eleventh Circuit has ruled in *Patterson v. Secretary, Florida Dept. of Corrections,* 849 F.3d 1321, 1324 (11th Cir. 2017) that the question whether a petition for writ of habeas corpus is second or successive is reviewed *de novo.*

Third, Conner's second petition addresses different issues from the first. The first alleges ineffective assistance of counsel. The second focuses on other issues, primarily cruel and unusual punishment under the Eighth Amendment and actual innocence, issues Conner pro se could not reasonably be expected to have foreseen.

Should Conner's pro se handwritten 2016 petition forever bar him from filing another habeas corpus petition years in the future, even on issues Conner could never have considered in 2016? That

hardly seems consistent with the broad purposes of the Great Writ, "the glory of the English law." In fact, the underlying purpose of the Great Writ of habeas corpus was to address situations in which no other remedy was available. The writ should not be burdened with rules that make it impossible to obtain.

II. The lower courts are split as to what constitutes a "second or successive" habeas corpus petition.

As noted earlier, Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts, provides that:

> Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4).

But what constitutes a "second or successive petition"? The circuit courts are divided on this question, and they are looking to this Court to resolve the issue.

In *Magwood v. Patterson,* 561 U.S. 320 (2010), this Court held that the prohibition against second habeas petitions did not bar a habeas petition that challenged a resentencing that resulted from the partial grant of a first habeas petition. But the Court in *Magwood* expressly reserved a ruling on whether its holding applies to petitioners who, rather than challenging their resentencing, challenged instead

an aspect of their original conviction or original sentence that remains unchanged by the first habeas petition and judgment resulting therefrom. In addressing this reserved question, the circuits have been split.

Some circuits have held that Rule 9 does not prohibit habeas challenges to portions of a conviction or sentence that remain undisturbed by the order resulting from the previous habeas petition. For example, the Second Circuit held in *Johnson v. United States,* 623 F.3d 41 (2d Cir. 2010), that a judgment of conviction includes both the verdict and the sentence, and when a new judgment resulting from the first habeas petition results in a new verdict or sentence, Rule 9 does not bar the filing of a new habeas petition, regardless of whether it challenges the conviction, the sentence, or both.

The Ninth Circuit followed the Second Circuit's reasoning in *Wentzell v. Neven,* 674 F.3d 1124 (9th Cir. 2012); as did the Eleventh Circuit in *Insignares v. Secretary, Florida Dept. of Corrections,* 755 F.3d 1273 (11th Cir. 2012); the Third Circuit in *In re Brown,* 594 Fed Appx 726 (3rd Cir. 2014); and the Fourth Circuit in *In re Gray,* 850 F.3d 139 (4th Cir. 2017).

The Sixth Circuit partially followed the Second Circuit's reasoning in *King v. Morgan,* 807 F.3d 154 (6th Cir. 2015); however, King's case differed from the others in that, after King's first habeas petition was dismissed, he filed a motion in state court to vacate his sentence; the motion was granted but the new sentence was harsher than the first. The Sixth Circuit held that this new sentence was a new

judgment and therefore not subject to Rule 9. In a subsequent case, *Crangle v. Kelly,* 838 F.3d 674 (6th Cir. 2016), the Sixth Circuit limited the *King* holding to "worse than before" sentences.

In contrast, other circuits have held that Rule 9 does prohibit second or successive habeas challenges even to those portions of a conviction or sentence that remain undisturbed. In *Suggs v. United States,* 705 F.3d 279 (7th Cir. 2013), the Seventh Circuit held that Suggs's subsequent habeas petition was second or successive even though the first habeas petition had led to a resentencing.

The court concluded that if the subsequent petition raises essentially the same facts and arguments as the first, it will be treated as second or successive. The Seventh Circuit reached similar results in *Turner v. Brown,* 845 F.3d 294 (7th Cir. 2017). This Court's position is that each individual conviction and sentence constitutes a separate judgment, and if a habeas petition results in a different conviction or sentence, that doesn't change the unaffected conviction or sentence, and therefore subsequent habeas petitions challenging the unaffected conviction or sentence are second or successive under Rule 9. Likewise, the Tenth Circuit in *Burks v. Raemisch,* 680 Fed Appx 686 (10th Cir. 2017), essentially adopted the Seventh Circuit's position in *Turner.*

We, therefore, see a clear split in the interpretation of Rule 9 as applied in *Magwood,* the Second, Third, Fourth, and Ninth Circuits taking one position, the Seventh and Tenth Circuits taking a more restrictive position, and the Sixth Circuit

somewhere in between.

Still another unresolved issue concerning Rule 9 is whether a habeas petition is second or successive if the inmate had a "legitimate excuse for failing to raise" certain issues in his first habeas petition; see *McClesky v. Zant,* 499 U.S. 467 (1991); *Burton v. Stewart,* 549 U.S. 147, 153 (2007). The Ninth Circuit had ruled that a petition is not second or successive if the inmate had a legitimate excuse, and this Court assumed for purposes of that case, without deciding, that the Ninth Circuit's approach was correct.

The Foundation and Willie Conner are taking still another position: that Rule 9, however it is interpreted, constitutes an unconstitutional suspension of the Great Writ, the right to petition for habeas corpus. This is especially the case when an indigent prisoner not trained in the law files a petition without understanding its significance or its relevance to Rule 9 of the Anti-Terrorism and Extremism Death Penalty Act, and his claim of habeas corpus is based on complete "actual innocence," i.e., the alleged offense lacks two essential elements of the crime. How can we as a justice system founded in the common law tolerate a total suspension of his right to petition for habeas corpus? Rule 9 is part of a statute adopted by Congress, but a statute cannot violate the Constitution. As this Court stated in *Marbury v. Madison,* 5 U.S. 137 at 1 Cranch 177 (1803), "...a legislative act contrary to the constitution is not law."

III. This Federal Circuit Court of Appeals split affects the lives and liberties of many persons.

When a person is serving a lengthy prison term, as in this case for a conviction of Robbery 1st degree lacking any basis in the law, the writ of habeas corpus may be his only hope for life or liberty. That hope may turn on how Rule 9 is interpreted and applied.

As Volin notes in the University of Chicago Law Review,

> More than thirty-seven hundred applications seeking leave to file a second or successive habeas petition were filed in the courts of appeals in 2016, making up 67 percent of their original jurisdiction cases. The prevalence of this issue in the federal judicial system necessitates a resolution – it is important that prisoners in all jurisdictions be able to properly bring their claims related to unlawful detention in court.[12]

The circuits are split, and thousands of defendants are affected annually in ways that can literally mean life or death, liberty or confinement. This clearly is an issue this Court needs to address.

IV. Conner has raised important legal and constitutional issues as to the appropriateness of life imprisonment for

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[12] Megan Volin, *"Defining 'Second or Successive' Habeas Petitions after Magwood,"* University of Chicago Law Review, 85:1545 at 1550.

shoplifting a nail gun.

A. Denied the opportunity to raise issues at trial and post-trial stages.

(1) The trial

Conner was charged with first-degree robbery, as well as the lesser-included offenses of third-degree robbery and third-degree theft of property. He pleaded not guilty to all charges. Conner was tried by the jury before the Baldwin Circuit Court in Bay Minette. The prosecution called Alan Barnard, a loss prevention employee, and Andy Forsythe, the investigating law enforcement officer, as witnesses.

When the prosecution rested, Conner moved for a judgment of acquittal, which was immediately denied. Specifically, the following exchange occurred:

> MR. LOWELL: Your Honor, I make a motion for acquittal at this time. We'll not be presenting ---
>
> THE COURT: I'm going to deny your motion at this time.

(R. at trial, 96.) Due to the trial court's refusal to let Conner's counsel explain the grounds for his motion, Conner was not allowed to argue that the first-degree robbery charge against him was due to be dismissed because the undisputed evidence showed that he was not armed with a deadly weapon, to wit, a firearm.

The defense rested without calling any witnesses, including Conner. Although a small pocket knife was found in Mr. Conner's pocket, the knife displayed or referred to by anyone. Whereas the indictment did charge Conner with being "armed with a deadly weapon or dangerous instrument, to wit: a knife and/or a gun...," when the court was instructing the jury, it recognized that only a gun was the fact in dispute and instructed the following regarding first-degree robbery:

> And the law says that a person commits the crime of Robbery in the First Degree, if in the course of committing a theft, he uses or threatens imminent use of force against the owner of the property, or any other person present, with the intent to overcome that person's physical resistance or physical power of resistance, and in so doing, he is armed with a deadly weapon.
>
> Therefore, in this case, to sustain a conviction for Robbery in the First Degree, the State must prove beyond a reasonable doubt each of the following elements of the Robbery in the First Degree:
>
> First, that the Defendant, Willie Conner, committed, or attempted to commit the theft of a nail gun;
>
> Secondly, that in the course of committing, or attempting to commit the theft, or in the immediate flight after the attempt or

> commission, the Defendant either used force against the person, the person of the owner of the property, or another person present, that being Jennifer Byars or Alan Barnard, with intent to compel acquiescence to the taking of, or escaping with the property;
> And thirdly, that the *Defendant was armed with a deadly weapon.*
>
> A deadly weapon is a firearm, or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious physical injury. And a deadly weapon includes but is not limited to a pistol.
>
> I will tell you that Robbery in the First Degree does not require that actual force be used to commit the theft. Evidence of threatened or imminent force is sufficient. The proper inquiry is how the victim reacted to and perceived the threat. Robbery in the First Degree does not require proof of an actual taking of the property to support a conviction.

(2020 Habeas Petition App.121-24.)

The jury found Conner guilty of first-degree robbery. (*Id.* 142-44.) On August 29, 2013, Conner appeared for sentencing. Conner had three prior felonies (Class C), all of which were for theft of property in the second degree. (*Id.* 167-68.) Because first-degree robbery was a Class A felony, the trial court was constrained to sentence Conner to either life imprisonment or life imprisonment without the possibility of parole. The State recommended life

without parole. (*Id.* 168.) However, the trial court chose to sentence him to life imprisonment. (*Id.* 170.)

(2) Appeals

Conner appealed, raising two arguments: first, that the reference to a gun occurred after the theft was completed, and therefore his theft could not be converted into a robbery; second, he did not represent that he was armed because he was referring to the nail gun, not a firearm when he said he was armed. There is no evidence that he used force to escape with the property. Nevertheless, the Alabama Court of Criminal Appeals affirmed Conner's conviction and sentence in an unpublished memorandum opinion. *Conner v. State* (No. CR-12-2005, Jan. 31, 2014), 177 So.3d 1201 (Ala. Crim. App. 2014) (table). The court reasoned that, under controlling precedent, Conner's statement that he had a gun was part of a continuous course of conduct. The court also reasoned that viewing the evidence in the light most favorable to the State, Conner's statement that he had a gun was sufficient to satisfy the armed-with-a-deadly-weapon element of first-degree robbery.

Conner filed a pro se petition for a writ of certiorari with the Alabama Supreme Court, arguing only that he could not have been convicted because his verbal statement that he had a gun occurred after the theft was completed. The Alabama Supreme Court denied his petition in a 6-3 vote. *Ex parte Conner*, 165 So. 3d 556 (Ala. Sep. 26, 2014). Chief Justice Moore, who now represents

Willie Conner, an indigent inmate, through the Foundation for Moral Law, dissented from the denial of certiorari, arguing that Conner could not have been convicted of first-degree robbery because the statute creates a presumption that a person is armed when he says so, but that presumption is rebutted if he is apprehended at the scene and is found not to be armed as he claimed. *See id.* at 558-63 (Moore, C.J., dissenting). Justice Murdock also dissented, expressing similar concern to Chief Justice Moore's. *See id.* at 563-64 (Murdock, J., dissenting). Then Justice Parker also dissented but did not write an opinion.

(3) Conner's First Petition for Post-Conviction Relief

Conner immediately filed a Rule 32, Ala. R. Crim. P., petition, arguing that his counsel was ineffective for failing to preserve for appeal the argument that he could not have been convicted for first-degree robbery because he did not have a gun. The trial court denied Conner's petition on January 27, 2015. Conner appealed to the Alabama Court of Criminal Appeals, which affirmed the trial court's dismissal in an unpublished memorandum opinion. *Conner v. State* (No. CR-14-0703, Dec. 16, 2015), 222 So. 3d 400 (Ala. Crim. App. 2015) (table). In affirming the trial court's decision, the Court of Criminal Appeals essentially repeated its analysis from Conner's first appeal.

Conner again petitioned the Alabama Supreme Court for certiorari, which was again denied. *Ex parte Conner*, 203 So. 3d 62 (Ala. 2016). Chief Justice Moore again dissented, arguing that Conner's sentence was illegal because he could not have been convicted of first-degree robbery and unjust because he received a life sentence for stealing a nail gun, a grossly disproportionate penalty to the crime he committed. *See id.* at 62-66 (Moore, C.J., dissenting). The Alabama Supreme Court's denial of Conner's petition caught both local and national media attention. *See, e.g.*, Associated Press, *Alabama Man Serving Life for Stealing a Tool: Roy Moore Calls Sentence Unjust*, AL.com, goo.gl/TbvMJM (last updated Mar. 25, 2016); Associated Press, *Alabama Court Refuses Appeal of Man Serving Life for Stealing Tool*, New York Daily News, goo.gl/pR7RhN (Mar. 25, 2016); Associated Press & CBS, *Court Refuses Appeal of Man Serving Life for Stealing Tool*, CBS News (March 25, 2016), https://www.cbsnews.com/news/ court-refuses-appeal-of-man-serving-life-for-stealing-tool

(4) Conner's Second Petition for Post-Conviction Relief

On February 23, 2017, Conner filed a second Rule 32 Petition, claiming that he was unlawfully arrested, that newly discovered evidence showed he never said he had a gun, and that he was denied effective assistance of counsel. The trial court dismissed this petition on August 4, 2017. Conner did not appeal.

(5) Final Petition for Post-Conviction Relief

On October 19, 2018, Conner filed yet another Rule 32 petition, claiming that his sentence exceeded the maximum allowed by law because the Eighth Amendment prohibited such a grossly disproportionate penalty to the crime he actually committed, which was a theft of property in the fourth degree. The trial court directed the State to respond. In its response, the State argued that Conner's claim was really another attempt to challenge the sufficiency of the evidence, and consequently, it was time-barred, successive, and without merit.

The trial court dismissed Conner's petition on June 18, 2019. A copy of the trial court's order is attached. App. 19a. Conner timely appealed to the Alabama Court of Criminal Appeals, which affirmed the trial court's dismissal in a memorandum opinion dated May 22, 2020. *Conner v. State* (No. CR-18-1029), ___ So. 3d ___ (Ala. Crim. App. May 22, 2020) (table). Conner timely filed an application for rehearing, which was overruled on June 12, 2020. Conner timely petitioned the Alabama Supreme Court for a writ of certiorari, which it denied on August 21, 2020.

Conner has therefore exhausted his state remedies in pursuit of this claim. Conner has been in prison since February 20, 2013, for over eight and a half years.

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

When a state court does not issue a decision on the merits of the petitioner's federal claim, such as by dismissing the claim on state procedural grounds, then the petitioner is entitled to *de novo* review. *Cone v. Bell*, 556 U.S. 449, 472 (2009). Consequently, the Alabama courts' decision to reject Conner's Eighth Amendment claim is due no deference at all.

B. Eighth Amendment Cruel and Unusual Punishment Claim

The Eighth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The Cruel and Unusual Punishment Clause prohibits "extreme sentences that are grossly disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 60 (2010) (citations and quotation marks omitted).

The Supreme Court established the following framework in *Graham* for determining whether a sentence is grossly disproportionate: "A court must begin by comparing the gravity of the offense and the severity of the sentence... In the rare case in which this threshold comparison leads to an inference of gross disproportionality[,] the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions... If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual." *Graham*, 560 U.S. at 60 (citations, internal quotation marks, and alterations omitted).

The portion of *Graham* quoted above does not apply solely to juvenile offenders, but restates the Supreme Court's jurisprudence in evaluating whether a sentence for a term of years is grossly

disproportionate to the offense committed. *See, e.g.*, *United States v. Merchant*, 506 Fed. App'x 959, 960 & n.1 (11th Cir. 2013) (citing this portion of *Graham* for an Eighth Amendment analysis of imprisonment for a term of years). It is clear that a sentence for a term of life can likewise be found grossly disproportionate to the offense committed.

Conner was guilty of the offense of theft of property in the fourth degree, a violation of § 13A-8-5, Ala. Code 1975, because he did not take the property from the presence of another and because the value of the nail gun did not exceed $500. Conner could not have been convicted of first-degree robbery, a violation of § 13A-8-41, Ala. Code 1975, because the evidence showed he did not have a deadly weapon, to wit, a firearm.

Section 13A-8-41, Ala. Code 1975, provides:

> (a) A person commits the crime of robbery in the first degree if he violates Section 13A-8-43 and he:
>
> (1) Is armed with a deadly weapon or dangerous instrument; or
>
> (2) Causes serious physical injury to another.
>
> (b) Possession then and there of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument, or any verbal or other

> representation by the defendant that he is then and there so armed, is *prima facie evidence* under subsection (a) of this section that he was so armed.
>
> (c) Robbery in the first degree is a Class A felony.

(Emphasis added).

This crime requires a person to be armed in order to be convicted. As subsection (b) of § 13A-8-41 says, a verbal representation by a defendant that he is so armed with a deadly weapon is only *prima facie* evidence that he is so armed. In evidentiary terms, therefore, a defendant's statement that he is armed with a deadly weapon creates a *rebuttable* presumption that he is so armed. As stated in the Commentary to §§ 13A-8-40 through 13A-8-44,

> The basic theory of this article is to protect the citizen from fear for his or another's health and safety. This should be aggravated only when there is actual serious physical injury inflicted or when the robber possesses an instrument that is readily capable of inflicting such injuries. However, it is sometimes difficult to prove that defendant actually was armed with a dangerous weapon, unless he is apprehended at the scene.

The *res gestae* (Latin for "things done") of a crime of theft includes not only the actual act of stealing but words and actions afterward until the suspect has left the scene of the crime and arrived at a place

of relative safety. If Conner had made the statement "I have a gun" before he was apprehended and before he surrendered to the authorities, the statement might be considered part of the *res gestae.* As the trial court instructed the jury, a defendant is guilty of armed robbery "if, in the course of committing a theft, he uses, or threatens imminent use of force."

But he did not make the statement "in the course of committing a theft;" he did not make the statement until after the authorities had stopped him after he had surrendered to them, and after he had walked with them back toward the office. By this time the crime of shoplifting had been completed, so his statement "I have a gun" (meaning roof nailer) could not have been part of the *res gestae* of the crime of shoplifting and could not have the effect of raising the shoplifting offense to armed robbery. *United States v. Rouse,* 452 F.2d 311 (5th Cir. 1971). The statement "I have a gun" may possibly be admissible to prove Conner knew he had the nail gun and intentionally stole it, but it cannot be used to raise the shoplifting charge to armed robbery.

Furthermore, as noted above, the statement "I have a gun" is under Alabama law at most only *prima facie* evidence creating a rebuttable presumption that he was armed. As soon as he made the statement, the security officers immediately seized him, took him down, searched him, and found the nail gun and no other firearm. This immediate search therefore conclusively rebutted any rebuttable presumption that he was armed, thus

overcoming any *prima facie* evidence that he was armed.

The offense of fourth degree theft of property is a Class A misdemeanor and carries a maximum sentence of one-year imprisonment. But Conner received a life sentence. The sentence is grossly disproportionate to the offense committed.

Alabama does not authorize a life sentence for fourth-degree theft of property. § 13A-8- 5(b), Ala. Code 1975 (designating fourth-degree theft of property as a Class A misdemeanor); § 13A-5-7(a)(1), Ala. Code 1975 (limiting the sentence of a Class A misdemeanor to no more than one year in jail). No jurisdiction in the United States authorizes a life sentence for shoplifting. *See* Exhibit 3 (attached) (listing shoplifting penalties in every other state). The comparison of Conner's case to the maximum penalty authorized by statute in Alabama and other jurisdictions meets *Graham*'s requirements of validating the inference of gross disproportionality. Thus, Conner's sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.

C. Sufficiency of the Evidence

During the state court proceedings, the trial court and the Alabama Court of Criminal Appeals rejected Conner's claim partly because they believed it was really a challenge to the sufficiency of the evidence, which had been rejected in his first Rule 32 petition. Consequently, the state courts

concluded that Conner was procedurally barred from raising the same matter again. Conner maintained and continues to maintain that reframing the issue as a challenge to the sufficiency of the evidence rather than a constitutional challenge is a way of dodging the question presented.

Out of an abundance of caution, if this Court disagrees and believes that this is really a challenge to the sufficiency of the evidence, then Conner maintains under 28 U.S.C. § 2254(e)&(f) that he can establish by clear and convincing evidence that the jury's factual determination that he was armed with a gun is incorrect. The undisputed evidence shows that he was not armed with a deadly weapon, to wit, a firearm. Therefore, if the Court believes that this is a challenge to the sufficiency of the evidence, Conner maintains that he has met his burden of proof.

D. Actual Innocence

Under the AEDPA, a petitioner must file his habeas petition within a year of when the judgment becomes final. 28 U.S.C. § 2244(d). However, the Supreme Court has recognized an "actual innocence" exception to AEDPA's statute of limitations. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). This has also been called the "miscarriage of justice exception," and the Supreme Court has held that it survived AEDPA's passage. *Id.* at 393. "[A] prisoner's proof of actual innocence may provide a gateway for federal habeas review of

a procedurally defaulted claim of constitutional error." *Id.* "A showing of actual innocence provides an exception to the time-bar under AEDPA." *Mims v. United States*, 758 Fed. Appx. 890, 892 (11th Cir. 2019).

Yet, even though AEDPA has an actual innocence exception to its statute of limitations, the restriction on second or successive habeas petitions contains no acknowledgement of actual innocence.

In this case, as explained above, Conner is actually innocent of robbery in the first degree. The jury's conviction of Conner was based upon a misreading of the first-degree robbery statute. The undisputed evidence shows that he was not armed with a gun at the scene, and therefore the *prima facie* evidence that he was "so armed" was rebutted when he was apprehended at the scene without a firearm. Because he could not have been convicted of first-degree robbery as a matter of law, he is actually innocent of that crime.

CONCLUSION

The story is told that Justice Oliver Wendell Holmes dined with Judge Learned Hand. As he left, Hand admonished Holmes, "Do justice, Sir, do justice!" Holmes responded, "That is not my job. It is my job to apply the law."[13]

---

[13] Michael Herz,*"'Do Justice!': Variations of a Thrice-Told*

Justice and procedure are both important. Justice is like water, and the procedure is like a bucket. Without a bucket, water dissipates and evaporates. Without water, an empty bucket is no good to anyone.

This case presents a portrait of a judiciary that is so obsessed with the procedure that it has forgotten justice. The system is satisfied with noting that every *i* has been dotted and every *t* has been crossed, that every rule has been fully complied with, and therefore we can rest well.

As Michael Herz wrote, "Law schools are famous for insisting on such a separation, and lawyers and nonlawyers alike easily accept the concept of an 'unjust law' or a judicial decision that is 'unfair' (or unjust) but 'correct as a matter of law.' The distinction is perhaps more often celebrated within the legal profession and more often lamented outside it."[14]

But in this case, the Alabama and Federal Justice Systems have forgotten one thing: a man is serving life imprisonment for shoplifting.

That's not justice.

It isn't even law.

Tale" Virginia Law Review 82:1 (Feb. 1996) 111-161.

[14] *Id.*

With this case, this Court has an opportunity to clarify the law of habeas corpus, resolve a split in the circuits, and do justice for Willie Conner.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2021

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-12911-E

IN RE: WILLIE CONNER,

Petitioner.

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

(Filed Sept. 2, 2021) Before: WILSON, MARTIN, and JILL PRYOR, Circuit Judges. B Y T H E P A N E L: Pursuant to 28 U.S.C. § 2244(b)(3)(A), Willie Conner 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 2 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 this Court's determination that an applicant has made a prima facie showing that the statutory criteria have been met is simply a threshold determination). Conner is an Alabama prisoner serving a life sentence for first-degree robbery. In 2016, Conner filed his original pro se § 2254 petition, which the district court denied with prejudice. In that petition, Conner argued that his counsel was ineffective for failing to argue that the evidence was insufficient to convict him of first-degree robbery because he was not armed. In his petition, Conner stated that he "knew the difference between an unarmed misdemeanor theft (shoplifting), and an armed felonious robbery." In his present counseled application, Conner indicates that he wishes to raise two claims in a second or successive § 2254 petition. First, he asserts that his life sentence violates the Eighth Amendment because his conviction for first-degree robbery was unlawful since he did not have a firearm in his possession when he was apprehended. Conner states that he shoplifted a nail gun from Lowe's by stuffing it into his pants and when he was confronted by Lowe's employees, he stumbled and

grabbed the nail gun to keep it from stabbing him. He notes that his statement, "I have a gun," referred to the nail gun. Conner concedes that his claim does not rely on a new rule of constitutional law or on newly discovered evidence. He argues, however, that § 2244(b) does not require newly discovered evidence "per se," but only requires that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." He argues that his first habeas application was a pro se filing and that he could not have discovered the factual predicate for his Eighth Amendment claim without the assistance of legal counsel. He 3 argues that he did not have the knowledge to articulate a claim that the fact that he did not possess a gun "made his conviction for Robbery I an unlawful sentence under the Eighth Amendment's prohibition of cruel and unusual punishment." Second, Conner argues that all of the circumstances in his case demonstrate a clear violation of the notion of fundamental fairness under the Due Process Clause. He again concedes that his claim does not rely on a new rule of constitutional law or on newly discovered evidence and reiterates his argument that § 2244 does not require newly discovered evidence. He argues that he could not have discovered the factual predicate for his due process claim without the assistance of counsel and that he did not have the knowledge to articulate his claim that "the fact that he did not possess a gun made his conviction for Robbery I an unlawful sentence" under the Due Process Clause's fundamental notions of fairness.

Conner attached to his application a brief in support of his Eighth Amendment claim, arguing that the evidence was insufficient to sustain his conviction, and asserting that he was actually innocent of first-degree robbery. Here, Conner has not made a prima facie showing that he meets the requirements of § 2244(b)(2) as to either his Eighth Amendment or due process claims. *See* 28 U.S.C. § 2244(b)(3)(C). He concedes that his claims do not rely on a new rule of constitutional law or on newly discovered evidence. And although Conner asserts that the statute itself does not require newly discovered evidence but only requires that the factual predicate for his claims could not be discovered through due diligence, he does not assert any new or previously undiscoverable factual predicate. *See* 28 U.S.C. § 2244(b)(2)(B)(i). The factual predicate for his claims is that he possessed a nail gun rather than a firearm, which he knew at the time he filed his original § 2254 4 petition because he argued that counsel should have challenged the sufficiency of the evidence to convict him because he was not armed with a gun. While Conner claims that he did not appreciate the full legal significance of this factual predicate at the time he filed his pro se original § 2254 petition, the underlying factual predicate itself is not new. 28 U.S.C. § 2244(b)(2)(B)(i). Moreover, Conner's argument that he could not have reasonably discovered the significance of this factual predicate before he filed his original § 2254 petition because he was uncounseled likewise fails. *See In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997)

(noting that the applicant's own ignorance of the factual predicate for the newly proposed claim is insufficient). The relevant inquiry under the statutory criteria is whether the factual predicate could have been discovered through a "reasonable investigation," not whether the specific applicant could or should have discovered it. See 28 U.S.C. § 2244(b)(2)(B)(i); *Boshears*, 110 F.3d at 1540 (stating that authorization will not be granted for a claim predicated on facts that would have been uncovered through a "reasonable investigation" undertaken before the initial § 2254 petition was litigated). Conner has not stated what, if any, investigation he undertook to discover the factual predicate for his claims. And his original § 2254 petition reflects that he was aware of the factual predicate and the legal significance of it because he argued that counsel should have challenged the sufficiency of the evidence on the basis that he did not possess a firearm. In addition, both of Conner's claims appear to attack the constitutionality of his sentence, but the newly discovered evidence exception does not apply to claims of sentencing error. *In re Hill*, 715 F.3d 284, 297-298 (11th Cir. 2013). Lastly, Conner's Eighth Amendment and due process claims do not relate to his factual innocence, much less establish by clear and convincing evidence that no reasonable factfinder would have found Conner guilty of his crime of conviction. *See* 28 U.S.C. § 2244(b)(2)(B)(ii); *Boshears*, 110 F.3d at 1541; *In re Everett*, 797 F.3d 1282, 1290 (11th Cir. 2015). Thus, he does not raise a cognizable claim under either prong of §

2244(b)(2). Accordingly, because Conner has failed to make a prima facie showing of the existence of either of the grounds set forth in § 2244(b)(2), his application for leave to file a second or successive petition is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILLIE LEE CONNER, #247934, Petitioner,	)	CIVIL ACTION NO. 20-0511-WS-MU
v.	)	
KENNETH PETERS, Respondent.	)	

ORDER

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a *de novo* determination of those portions of the Recommendation to which objection is made, the Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) is **ADOPTED** as the opinion of this Court.

DONE this 18th day of August, 2021.

s/William H. Steele
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILLIE LEE CONNER, #247934, Petitioner,	)	
v.	)	CIVIL ACTION NO. 20-0511-WS-MU
KENNETH PETERS, Respondent.	)	

JUDGMENT

In accordance with the order entered on this date, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that Petitioner's Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C § 2254, (Doc. 1) be **DISMISSED** without prejudice for lack of jurisdiction due to his failure to comply with 28 U.S.C. § 2244(b)(3)(A). Petitioner is not entitled to a certificate of appealability and, therefore, he is not entitled to appeal *in forma pauperis*.

DONE this 18th day of August, 2021.

s/William H. Steele
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILLIE LEE CONNER, #247934,	)	
Petitioner,	)	
	)	CIVIL ACTION NO.
	)	20-0511-WS-MU
v.	)	
KENNETH PETERS, Respondent.	)	

REPORT AND RECOMMENDATION

(Filed July 26, 2021) Willie Lee Conner, an Alabama state prison inmate in the custody of Respondent, has petitioned this Court for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. (Doc. 1). This action has been referred to the undersigned Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), S.D. Ala. GenLR 72(a)(2)(R), and Rule 8(b) of the Rules Governing Section 2254 Cases. In the instant petition, Conner again seeks to challenge his August 30, 2013, conviction for first degree robbery and his resulting sentence of life imprisonment as an habitual felony offender. (Doc. 1 at p. 2). Having carefully considered Conner's petition, Respondent's answer, the exhibits thereto, and the records of this Court,1 the undersigned

RECOMMENDS that Conner's habeas corpus petition be DISMISSED without prejudice for lack of jurisdiction due to Conner's failure to comply with 28 U.S.C. § 2244(b)(3)(A).

BACKGROUND

As reflected above, Conner was convicted, after trial by jury, of first degree robbery in the Baldwin Count Circuit Court on April 9, 2013, and was sentenced to life in prison under the state habitual offender laws (Doc. 1 at p. 2). Conner appealed his conviction to the Alabama Court of Criminal Appeals arguing that the evidence was not sufficient to convict him of robbery because his reference to a gun occurred after the theft was completed and because he did not represent that he was armed because he was referring to the nail gun he had stolen, not a firearm, when he told store employees who were questioning him that he had a gun. (*Id.* at p. 8). The Court of Criminal Appeals affirmed the conviction and sentence. (*Id.*; *see Conner v. State*, 177 So. 2d 1201 (Table) (Ala. Crim. App. Jan. 31, 2014)) (unpublished). The Alabama Supreme Court denied Conner's petition for writ of certiorari. *Ex parte Conner*, 165 So.3d 556 (Ala. 2014).

On October 28, 2014, Conner filed a State Rule 32 petition asserting ineffectiveness of counsel for failing to preserve the argument that he could not have been convicted for first-degree robbery because he did not have a gun. (Doc. 1 at p. 9). That petition was denied by the trial court on January 27, 2015. (*Id.*). The Alabama Court of Criminal Appeals denied Petitioner's appeal. (*Id.*). The Alabama

Supreme Court again denied certiorari (*Id.*; *see Ex parte Conner*, 203 So. 3d 62 (Ala. 2016)).

Conner, proceeding pro se, filed a federal habeas petition with this Court on June 7, 2016, claiming that his trial attorney rendered ineffective assistance. *Conner v. Stewart*, No. 1:16-cv-00273-WS-M (S.D. Ala. 2016). More specifically, Conner asserted that his trial attorney rendered ineffective assistance in that he (1) did not challenge the sufficiency of the evidence in his first degree robbery conviction and (2) denied him the right to confront his accuser. (*Id.* at Doc. 7, p. 2). After considering the merits of Conner's arguments, the Magistrate Judge recommended that his habeas petiton be denied. (*Id.* at Doc. 7, p. 14). The District Judge adopted that recommendation and entered judgment in favor of the respondent on September 28, 2016. (*Id.* at Docs. 10, 11). Conner filed a notice of appeal and moved for a certificate of appealability, but the Eleventh Circuit denied his motion for a certificate of appealability on November 1, 2016. (*Id.* at Docs. 12, 13, 16). Conner filed a second notice of appeal on February 27, 2017, which was subsequently dismissed for failure to pay the filing fee on July 12, 2017. (*Id.* at Docs. 26, 30).

On February 23, 2017, Conner filed his second pro se Rule 32 postconviction petition challenging his conviction in state court. (Doc. 10-27). In that petition, Conner claimed that 1) he was falsely arrested to cover up the fact that the Lowe's employees used excessive force, 2) newly discovered evidence revealed that he did not represent that he had a gun during the robbery, and 3) trial counsel was ineffective for not fully investigating whether he

represented that he was armed during the robbery. (*Id.*). On August 4, 2017, the trial court disposed of the petition on the grounds that it was successive and time-barred. (Doc. 10-28). On October 19, 2018, counsel for Conner filed a third Rule 32 petition challenging his conviction. (Doc. 10-19). In that petition, Conner argued that his habitual offender life sentence is cruel and unusual punishment because he was actually guilty of fourth-degree theft of property, not first-degree robbery. (*Id.* at pp. 9-11). The trial court, concluding that this claim actually was one that attacked the sufficiency of the evidence supporting his robbery conviction, denied the petition as successive and time-barred. (*Id.* at pp. 46-47). The Court of Criminal Appeals affirmed and denied his application for a rehearing, noting that "Conner notably does not allege that a sentence of life imprisonment was excessive for a habitual offender who is subsequently convicted of a Class A felony, as he was." (Doc. 10-23 at p. 4). The Alabama Supreme Court denied his petition for a writ of certiorari. (Doc. 10-18). This action became final on August 21, 2020, when the Alabama Supreme Court issued a certificate of judgment. (Id.)

On October 16, 2020, Conner, now represented by counsel, filed the instant petition in this Court again seeking federal habeas corpus relief from his 2013 conviction and sentence. (Doc. 1). In the instant federal habeas petition, Conner argues that his sentence violates the Eight Amendment because he is actually guilty of fourth-degree theft of property, rather than first-degree robbery, and Alabama law does not authorize a life sentence for fourth-degree theft of property. (Doc.1). In his

answer, Respondent contends that this Court lacks jurisdiction to rule on Conner's habeas petition because it is a "second or successive" petition pursuant to 28 U.S.C. § 2244(b) and Conner did not obtain an order from the Eleventh Circuit Court of Appeals authorizing the district court to consider it. (Doc. 10). For the reasons set forth below, the Court finds that Conner's instant § 2254 habeas petition is due to be dismissed without prejudice for lack of jurisdiction because it is a successive petition and Conner did not comply with 28 U.S.C. § 2244(b)(3)(A) prior to filing the petition.

DISCUSSION

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a prisoner "in custody pursuant to the judgment of a State court," 28 U.S.C. § 2254(a), "shall move in the appropriate court of appeals for an order authorizing the district court to consider" a "second or successive" federal habeas petition. 28 U.S.C. § 2244(b)(3)(A); *Burton v. Stewart*, 549 U.S. 147, 152-53 (2007); see also Rule 9 of the Rules Governing Section 2254 Cases ("Before presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition as required by 28 U.S.C. § 2244(b)(3) and (4)."). "A three-judge panel of the court of appeals may authorize the filing of the second or successive application only if it presents a claim not previously raised that satisfies one of the two grounds articulated in § 2244(b)(2)." *Burton*, 549 U.S. at 153 (citations omitted).

"[T]he petitioner first must obtain an order from the court of appeals authorizing the district court to consider" a second or successive petition because "[w]ithout authorization, the district court lacks jurisdiction to consider [such] second or successive petition." *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) (per curiam) (emphasis added); *see also Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1259 (11th Cir. 2009) (per curiam) ("Section 2244(b)(3)(A) requires a district court to dismiss for lack of jurisdiction a second or successive petition for a writ of habeas corpus unless the petitioner has obtained an order authorizing the district court to consider it."); *Morales v. Fla. Dep't of Corr.*, 346 F. App'x 539, 540 (11th Cir. 2009) (per curiam) ("In order to file a second or successive § 2254 petition, the petitioner must first obtain an order from the court of appeals authorizing the district court to consider it.... Absent authorization, the district court lacks jurisdiction to consider a second or successive petition.").

The AEDPA does not define the phrase "second or successive." *Magwood v. Patterson*, 561 U.S. 320, 331 (2010). However, based on the AEDPA's language and context, the Supreme Court has concluded that courts must look to the judgment challenged to determine whether a petition is second or successive. *See id.* at 332-33; *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273, 1279 (11th Cir. 2014) (per curiam) ("[T]he judgment is the center of the analysis, 'both § 2254(b)'s text and the relief it provides indicate that the phrase "second or successive" must be interpreted with respect to the judgment challenged.' ") (*quoting Magwood*, 561

U.S. at 332-33). The Eleventh Circuit has explained that "there is only one judgment, and it is comprised of both the sentence and the conviction." *Id.* at 1281; *see also Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286, 1292 (11th Cir. 2007) ("[T]he judgment to which AEDPA refers is the underlying conviction and most recent sentence that authorizes the petitioner's current detention.").

This Court's records reflect that Conner previously filed a habeas corpus petition pursuant to the provisions of 28 U.S.C. § 2254, challenging the same 2013 conviction and sentence that he seeks to challenge in the instant petition. *See Conner v. Stewart*, No. 1:16-cv-00273-WS-M (S.D. Ala. 2016). In Conner v. Stewart, after considering the merits of Conner's arguments, the Magistrate Judge recommended that his habeas petiton be denied. (*Id.* at Doc. 7, p. 14). The District Judge adopted the Magistrate Judge's recommendation and entered judgment in favor of the respondent. (*Id.* at Docs. 10, 11).

Based on the foregoing, the Court finds that Conner's instant petition is a successive petition for the purposes of § 2244(b) because it challenges the same 2013 conviction and sentence that he previously challenged in this Court. As noted above, this Court denied Conner's request for habeas relief in his first petition on the merits; thus, that petition qualifies as a first petition for determining successor status under § 2244(b). *See Dunn v. Singletary*, 168 F.3d 440, 442 (11th Cir. 1999). Conner admits that he did not seek, much less obtain, permission from the Eleventh Circuit Court of Appeals before filing the instant successive petition. (Doc. 12). Conner's

argument that his actual innocence permits a second or successive federal habeas petition must be presented to the Eleventh Circuit for consideration. *See Jeremiah v. Terry*, 322 F. App'x 842 (11th Cir. 2009) (per curiam) (holding that petitioner was required to seek Eleventh Circuit's permission to file successive § 2254 petition raising claim of newly discovered evidence of actual innocence, so the district court properly dismissed for lack of jurisdiction); *Tompkins*, 557 F.3d at 1260 (stating that "the proper procedure" for a petitioner seeking "to assert a claim in a second habeas petition because of newly discovered facts about events that occurred before the filing of the first petition" would be to "obtain from [the Eleventh Circuit] an order authorizing the district court to consider the second or successive petition"). In addition, the fact that Conner's first petition was filed pro se and the instant petition was filed through counsel does not affect the necessity of seeking permission from the Eleventh Circuit to a file a successive petition. *See Lindsey v. Dunn*, Civ. A. No. 20-00238-WS-B, 2020 WL 5248554, at *2-3 (S.D. Ala. Aug. 7, 2020).

Accordingly, the undersigned recommends that Conner's present habeas petition be dismissed without prejudice for lack of jurisdiction based on Conner's failure to comply with 28 U.S.C. § 2244(b)(3)(A). *See Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997) (per curiam); *Tompkins*, 557 F.3d at 1259.

CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing § 2254 Cases, "[t]he district court must issue or deny

a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing 2254 Cases. The habeas corpus statute makes clear that an applicant is entitled to appeal a district court's denial of his habeas corpus petition only where a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." Id. at § 2253(c)(2).

Where, as here, a habeas petition is dismissed on procedural grounds without reaching the merits of any underlying constitutional claim, "a COA should issue [only] when the prisoner shows, at least, 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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("Under the controlling standard, a petitioner must 'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." ' ") (*quoting Slack*, 529 U.S. at 484).

In the instant action, Conner has not demonstrated that he applied to and received permission from the Eleventh Circuit to file his successive federal habeas petition; thus, this Court is without jurisdiction to consider the instant petition. *See Hill*, 112 F.3d at 1089. Under the facts of this case, a reasonable jurist could not conclude

either that this Court is in error in dismissing the instant petition or that Conner should be allowed to proceed further. *See Slack*, 529 U.S. at 484 ("Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further."). Accordingly, the undersigned submits that no reasonable jurist could find it debatable whether Conner's petition should be dismissed. As a result, Conner is not entitled to a certificate of appealability and should not be permitted to proceed in forma pauperis on appeal.

CONCLUSION

For the reasons set forth above, the undersigned RECOMMENDS that Petitioner Willie Lee Conner's petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, be DISMISSED without prejudice for lack of jurisdiction due to Conner's failure to comply with 28 U.S.C. § 2244(b)(3)(A). The undersigned also submits that Conner is not entitled to a certificate of appealability and is further not entitled to proceed in forma pauperis on appeal.

NOTICE OF RIGHT TO FILE OBJECTIONS

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the

Clerk of this Court. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); S.D. Ala. GenLR 72(c). The parties should note that under Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice." 11th Cir. R. 3-1. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing done by the Magistrate Judge is not specific.

DONE this the **26th** day of **July**, 2021.

s/P. BRADLEY MURRAY
UNITED STATES MAGISTRATE JUDGE

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
	)	
	)	Case No.:
	)	CC-2012-001861.62
	)	
v.	)	
	)	
CONNER WILLIE LEE,	)	
Defendant.	)	

Order Granting State's Motion to Dismiss Defendant's Rule 32 Petition for Relief from Conviction or Sentence

(Filed June 18, 2019) Having considered the allegations in the petition and the response of the State, this Honorable Court GRANTS the State's Motion to Dismiss Petitioner's Third Rule 32 Petition based upon the following:

1. Petitioner's allegation that this sentence exceeds the maximum authorized by law, or is otherwise not authorized by law, is due to be summarily dismissed because the claim is without merit.

   This claim is precluded pursuant to Alabama Rule of Criminal Procedure 32.2(b) because it is a successive petition. Petitioner's claim of an illegal sentence is actually a claim challenging the sufficiency of the evidence,

which Petitioner has previously raised. This claim is further precluded pursuant to Alabama Rule of Criminal Procedure 32.2(c) because the Petition was filed outside the time limitations set forth in Rule 32.2(c). While a claim alleging an illegal sentence would be a jurisdictional claim which would not have been time-barred, in this instance Petitioner is not raising a valid claim regarding the legality of the sentence. Petitioner raised no legitimate jurisdictional claims, and Petitioner did not raise any claims that would qualify under the doctrine of equitable tolling. Petitioner is substantively raising a claim challenging the sufficiency of the evidence supporting the allegation Petitioner was armed at the time of the offense. Petitioner raised this issue at trial, on appeal, and in previous Rule 32 Petitions for Relief from Conviction or Sentence. For those reasons, the Petitioner's claim is precluded and Petition is due to be summarily dismissed.

This claim is without merit. Petitioner alleges he should have been charged with Theft of Property in the Fourth Degree, which is a misdemeanor, and thus his sentence exceeds the maximum allowed by law. In fact, Petitioner was charged with Robbery in the First Degree, a Class A Felony, and was convicted of such charge at trial. The trial court based its sentence upon the gravity of the offense as well as the fact Petitioner had three prior felony convictions. A life sentence

is not grossly disproportionate for a Class A Felony for a habitual offender, and does not exceed the maximum authorized for a Class A Felony. Therefore, Petitioner's alleged ground for relief is without merit and therefore is due to be dismissed.

DONE this 18th day of June, 2019.

/s/ C. JOSEPH NORTON
CIRCUIT JUDGE

No. __

In the Supreme Court of the United States

Willie Lee Conner,
Petitioner,

v.

Sharon Folks, Warden,
Loxley Community Work Center
Respondent.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari contains [7705] words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 2021.

s/John A. Eidsmoe*
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