No. ________

IN THE

Supreme Court of the United States

MARK ALLEN JENKINS,
Petitioner,

v.

JEFFERSON DUNN,
COMMISSIONER OF THE ALABAMA
DEPARTMENT OF CORRECTIONS,
Respondent.

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

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Supreme Court Rule 39, Petitioner Mark Jenkins requests leave to file the accompanying Petition for a Writ of Certiorari without payment of fees and to proceed *in forma pauperis*.

Petitioner was previously granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 2254(h) and 18 U.S.C. § 3006A in the United States District Court for the Northern District of Alabama and in the United States Court of Appeals for the Eleventh Circuit. The order of the United States District Court finding Petitioner indigent and appointing counsel is attached hereto.

Respectfully submitted this 25th day of January, 2021.

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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

MARK ALLEN JENKINS,	]	
	]	
Petitioner,	]	
	]	
v.	]	4:08-cv-00869-VEH-PWG
	]	
RICHARD F. ALLEN, Commissioner, Alabama Department of Corrections,	]	
	]	
Respondent.	]	

ORDER

On May 16, 2008, Mark Allen Jenkins, petitioner, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. #1). The petition was filed on behalf of Mr. Jenkins by Joseph T. Flood. The Motion to Proceed *In Forma Pauperis* (doc. #5) is GRANTED as Mr. Jenkins is indigent. The Motion for Appointment of Counsel (doc. #3) is GRANTED pursuant to 28 U.S.C. § 2254(h) and 18 U.S.C. § 3006A. Joseph T. Flood is APPOINTED to represent Mr. Jenkins. Mr. Flood's Motion to Appear *Pro Hac Vice* (doc. # 4) is GRANTED pursuant to Local Rule 83.1 .

The motion of Michael A. Nunnelley seeking to withdraw as counsel for respondent (doc. #7) is GRANTED as he no longer represents the State in capital murder cases.

On October 2, 2008, Jenkins filed a Motion to Stay and Hold in Abeyance (doc. #14) this federal habeas action while he pursues a second state Rule 32 petition based on the recent Alabama Supreme Court case of *Ex Parte Burgess*, 2008 WL 4097586 (Ala. September 5, 2008). Respondent filed a Motion in Opposition to the Motion to Stay and Hold in Abeyance (doc. #16) and a Motion to Supplement his Motion in Opposition to Petitioner Jenkins's Motion to Stay and Hold his Amended Habeas Petition in Abeyance (doc. #24) . Respondent's Motion to Supplement his Motion in Opposition to Petitioner Jenkins's Motion to Stay and Hold his Amended Habeas Petition in Abeyance (doc. #24) is GRANTED. Petitioner's Request to file Reply to Respondent's Opposition to Mr. Jenkins' Motion to Stay and Hold in Abeyance (doc. #17) is GRANTED. The reply (doc. #18) was considered in preparing this order.

Petitioner complains that juror Leona Voss failed to respond accurately to questions during voir dire when she was asked whether she or any close family members had been the victim of a violent crime. This precise claim was raised during the first Rule 32 proceedings. Citing *Alabama Rules of Criminal Procedure*, Rule 32.2(a)(3) and (5), the circuit court found the juror misconduct claim to be barred from review because it could have been raised at trial or on appeal but was not. (R-77, p. 5-16). The Alabama Court of Criminal Appeals held that the circuit court's ruling was supported by the record. *Jenkins v. State of Alabama*, 972 So.2d 165, 168 (Ala. Cr. App. 2006). The Court of Criminal Appeals stated:

> The Alabama Supreme Court in *Ex parte Pierce*, 851 So.2d 606 (Ala.2000), recognized that a juror-misconduct claim may be procedurally barred in a Rule 32 petition. The Supreme Court stated: "Although Rule 32.1(e) [newly discovered evidence] does not preclude [the petitioner's] claim, Rule 32.2(a)(3) and (5) would preclude [the petitioner's] claim if it could have been raised at trial or on appeal." 851 So.2d at 614.
>
> Here, the State asserted that this claim was procedurally barred based on Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P. Rule 32.3, Ala.R.Crim.P., states:

"The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."

(Emphasis added.) "Preponderance of the evidence" is defined as:

"The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."

Black's Law Dictionary 1220 (8th ed.2004).

Jenkins submitted no evidence indicating why this claim was raised in the Rule 32 petition and not in earlier proceedings. Jenkins's attorney offered no explanation at the Rule 32 hearing. The only reference in the record concerning the lateness of raising this claim is the following statement contained in a response filed by Jenkins: "After filing his petition for postconviction relief but prior to the evidentiary hearing in this case, Mr. Jenkins obtained new evidence suggesting that [L.V.] had a close relative who had been murdered." (Supplemental record, vol. III, p. 402.) The Alabama Supreme Court in *Pierce*, stated that in order for a juror-misconduct claim to be cognizable in a Rule 32 proceeding the petitioner must establish "that the information was not known, and could not reasonably have been discovered, at trial or in time to raise the issue in a motion for new trial or on appeal." *Pierce*, 851 So.2d at 616. Jenkins failed to meet his burden under Rule 32.3, Ala.R.Crim.P.

This Court has held that the procedural default grounds contained in Rule 32 apply to all cases, even to those in which the death penalty has been imposed. See *Burgess v. State*, 962 So.2d 272 (Ala. Crim. App. 2005); *Hooks v. State*, 822 So.2d 476 (Ala. Crim. App.2000); *Brownlee v. State*, 666 So.2d 91 (Ala. Crim. App.1995); *State v. Tarver*, 629 So.2d 14 (Ala. Crim. App.1993). We have previously barred juror-misconduct claims in Rule 32 petitions attacking a capital-murder conviction and death sentence. *See Duncan v. State*, 925 So.2d 245 (Ala. Crim. App.2005); *Woods v. State*, 957 So.2d 492

> (Ala. Crim. App.2004). *Compare McGahee v. State*, 885 So.2d 191, 203 (Ala. Crim. App.2003) (held that claim of juror misconduct was not procedurally barred because "[t]rial counsel testified at the Rule 32 hearing that the trial court had denied his request for funds to hire an investigator, and that, if he had been able to hire an investigator, he would have been able to obtain information on the veniremembers. Counsel stated that obtaining information on the venire 'was virtually an impossibility to do....' ").

Jenkins v. State, 972 So.2d 165, 167 -168 (Ala. Crim. App. 2005). The Alabama Supreme Court denied the petition for writ of certiorari on May 18, 2007.

Approximately 16 months later, on September 5, 2008, the Alabama Supreme Court decided *Ex Parte Burgess*, 2008 WL 4097586 (Ala. September 5, 2008) in which the Court indicated that claims of juror misconduct are more appropriate in the Rule 32 context rather than at trial or on direct appeal:

> The Court of Criminal Appeals improperly concluded that Burgess's juror-misconduct claims are precluded by Rule 32.2(a)(3) and (a)(5); Burgess showed, in the trial court, that he could not have reasonably discovered the alleged juror misconduct in time to raise the claims in a motion or a new trial or on appeal. See *Ex parte Pierce*, 851 So.2d at 616. In opposition to the State's motion to dismiss his Rule 32 petition, Burgess asserted that he had "discovered only recently that during voir dire at his trial, many of the jurors failed to accurately answer questions." Additionally, after the Court of Criminal Appeals remanded the cause to the trial court for a determination of whether the claims of juror misconduct could have been raised in Burgess's motion for a new trial, Burgess informed the trial court that his "failure-to-disclose claims were discovered by undersigned counsel in [a] postconviction investigation." Burgess's statement in response to the trial court's order on remand at 7. Burgess further informed the trial court that the "claims were not raised at trial or on direct appeal because counsel had no information that such misconduct had occurred and therefore was under no obligation to raise the claims." Id. Thus, as was the case with the petitioner in *DeBruce*, who first learned of the juror misconduct five years after his trial and properly raised claims of juror misconduct in a Rule 32 petition, Burgess first

> learned of the juror misconduct years after his trial. *See DeBruce*, 890 So.2d at 1077.
>
> Burgess reasonably expected that potential jurors answered accurately the questions posed to them during the voir dire examination. It is unreasonable to hold that a defendant must uncover any and all juror misconduct in the form of inaccurate responses to voir dire examination in time to raise such claims in a motion for a new trial or on appeal. Requiring a defendant to raise such claims of juror misconduct during the interval between the voir dire examination and the filing of posttrial motions places an impracticable burden on defendants. In this case, there is no evidence before us indicating that Burgess suspected or should have suspected that any jurors did not accurately answer a question during the voir dire examination. Burgess particularly did not have any reason to suspect that a juror allegedly had a personal relationship with the district attorney because before trial his counsel had moved for the district attorney to disclose any relationships he had with potential jurors.
>
> The trial court, in finding that Burgess's claims were procedurally barred by Rule 32.2(a)(3) and (a)(5), found "that the information obtained from the jurors was available to newly appointed appellate counsel and could have been raised in [Burgess's] Motion for New Trial. All counsel had to do was to interview the jurors in post-trial interviews just as was done by petitioner's counsel herein." However, it is unreasonable to require that a defendant, unaware of any failure to answer correctly questions posed during the voir dire examination, must contact each juror and ask whether he or she accurately and truthfully answered such questions. Jury service is sufficiently disruptive of a citizen's regular activities without this Court announcing a rule that would routinely subject jurors to potentially insulting postverdict interrogation concerning their veracity. Absent any evidence that a telephone call to some or all the jurors would have been nothing more than a mere fishing expedition, we cannot hold on this record that Burgess's claims are precluded.

Ex parte Burgess, 2008 WL 4097586, 7 -8 (Ala. 2008).

Because petitioner raised the same juror misconduct claim in his first Rule 32 petition and the Court of Criminal Appeals recognized that Jenkins indicated that he did not learn of the misconduct until after he filed his Rule 32 petition, the Court concludes that the state courts should have the opportunity to revisit the juror misconduct claim before this court addresses it.

Petitioner's Motion to Stay and Hold in Abeyance (doc. #14) is GRANTED only for the time period that the Rule 32 petition and any appeal therefrom remain pending in state court. It is ORDERED that no later than 45 days upon completion of the Rule 32 proceedings in state court the parties shall provide the court with copies of rulings by all state courts to address the juror misconduct issue in the context of the second Rule 32 petition. Because a petition for writ of certiorari to the United States Supreme Court does not toll the running of the limitations period under 28 U.S.C. § 2244(d)(2), *Lawrence v. Florida*, 549 U.S.327 (2007), and has no effect on whether a petitioner has exhausted the remedies available in state court, petitioner should not file a petition for writ of certiorari in the United States Supreme Court upon completion of his second Rule 32 proceedings in state court as to do so would unnecessarily prolong the habeas proceedings in this court. The Motion in Opposition to the Motion to Stay and Hold in Abeyance is OVERRULED.

Respondent's October 17, 2008, Motion to Toll the Time for Filing his Answer to Petitioner Jenkins' Amended Petition (doc. #19) is MOOT as the Answer was filed on October 29, 2008. Respondent will be ALLOWED an opportunity to submit a short response to the juror misconduct claim upon completion of the current Rule 32 proceedings.

Mr. Jenkins's Motion for Ruling on Prior Motions (doc. #23) is MOOT in light of the rulings set forth above.

As to the foregoing it is SO ORDERED this the 12th day of November, 2008.

PAUL W. GREENE
CHIEF MAGISTRATE JUDGE