Rel: January 11, 2019

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1171025

Ex parte Aaron Cody Smith

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama

v.

Aaron Cody Smith)

(Montgomery Circuit Court, CC-16-1397)

BOLIN, Justice.

Aaron Cody Smith, a police officer employed by the City of Montgomery Police Department, petitions this Court for a writ of mandamus directing the Montgomery Circuit Court to

vacate its order denying Smith immunity pursuant to § 13A-3-23(d), Ala. Code 1975, and to enter an order granting Smith immunity under that statute. In the alternative, Smith petitions this Court for a writ of mandamus directing Montgomery County Circuit Judge Gregory O. Griffin, Sr., to enter an order recusing himself from the case. He also asks this Court to order the trial court to transfer this case to a venue other than Montgomery County based on pretrial publicity.

Facts and Procedural History

On February 25, 2016, Smith, a third-shift patrol officer, was on patrol in the Mobile Drive area of Montgomery when he encountered Gregory Gunn walking in the early morning hours. Smith decided to execute a Terry v. Ohio, 392 U.S. 1 (1968), stop. During the Terry stop an altercation occurred between Smith and Gunn, which resulted in Smith shooting Gunn with his service weapon. Gunn died of his wounds.

On March 2, 2016, Smith was arrested and charged with murder. On November 18, 2016, Smith was indicted for murder by the Montgomery County Grand Jury. The case was assigned to Circuit Judge Gregory O. Griffin, Sr. Public discourse and

community protests followed the shooting of Gunn and the subsequent arrest and indictment of Smith. Local political figures participated in the protests and public discourse, and those events received frequent and widespread media coverage, including coverage of the racial aspects of the case (Gunn was black; Smith is white). On December 2, 2016, Smith moved the trial court for a change of venue, asserting that the case had received extensive media coverage and had been "enmeshed with racial undertones by citizens and political figures within the Montgomery County community." On May 15, 2017, Smith moved Judge Griffin to recuse himself from the case following an incident in which Judge Griffin, who is black, was stopped by the Montgomery Police Department while walking in his neighborhood and then indicated his frustration with the stop by making a comment about it on social media. Specifically, Judge Griffin posted the following to his Facebook page:

> "[I]t was aggravating to be detained when the only thing I was guilty of was being a black man walking down the street in his neighborhood with a stick in his hand who just happened to be a Montgomery County Circuit Judge in Montgomery, Alabama -- Lord Have Mercy!!!!!"

Judge Griffin's Facebook post garnered over 200 comments from the public and the post was "shared" over 3,000 times. Smith

argued that the stop of Gunn in this case was similar to the stop of Judge Griffin and that to avoid the appearance of impropriety it was necessary for Judge Griffin to recuse himself from the proceedings. Following a hearing on the motion to recuse, in which a particularly contentious debate occurred between Judge Griffin and Smith's counsel, Judge Griffin, on May 10, 2017, entered an order denying the motion to recuse.[1] The trial court then, on June 13, 2017, entered an order denying the motion for a change of venue. Smith petitioned the Court of Criminal Appeals for a writ of mandamus as to the recusal issue. On August 14, 2017, the Court of Criminal Appeals denied Smith's petition for a writ of mandamus, without an opinion. Ex parte Smith (No. CR-16-0850, August 14, 2017), __ So. 3d __ (Ala. Crim App. 2017)(table). Smith then petitioned this Court for a writ of mandamus on the recusal issue. On February 23, 2018, this Court entered an order denying the petition. Ex parte Smith (No. 1161024, Feb. 23, 2018), ___ So. 3d ___ (Ala. 2018)(table).

[1]Judge Griffin stated during that hearing that the situation involving him and the Montgomery Police Department regarding his being briefly detained had been resolved to his satisfaction.

On August 14, 2017, Smith moved the trial court for immunity from prosecution pursuant to § 13A-3-23, Ala. Code 1975, arguing that at the time of the shooting he was acting in his official capacity as a policeman for the City of Montgomery and acting "in self defense and/or in the reasonable defense of others." Smith requested an evidentiary hearing on the matter. Following a hearing, the trial court, on July 26, 2018, entered an order denying Smith's motion for immunity from prosecution. At the close of the hearing, and with the media present in the courtroom, the trial court stated the following in open court:

> "Often at probation revocation hearings, I have police officers from the Montgomery Police Department to testify, and it's their word against the defendant's word, and I look at the credibility of the officer. Okay. And, quite often, the officer is credible.
>
> "But I have to admit to you that I did not find the officer's testimony today to be credible, and, therefore, I do not feel that you have met your burden of proof that he's entitled to immunity, and this trial will proceed on August 13."

On July 28, 2018, Smith again moved Judge Griffin to recuse himself and for a change of venue, asserting that the trial court had invited representatives of the media into the courtroom for the immunity hearing and then proclaimed at the

close of that hearing that Judge Griffin did not find Smith's testimony to be credible. Smith contended that that statement in front of the media representatives, which then published the statement, evidenced a bias on behalf of Judge Griffin and had the effect of tainting the public's perception of Smith, thereby tainting the eventual jury pool. Thus, Smith argued that Judge Griffin should recuse himself and that the venue of the case should be changed. On July 31, 2018, the trial court entered an order denying the motions to recuse and for a change of venue. Smith petitioned the Court of Criminal Appeals for a writ of mandamus asking that court to enter an order finding Smith immune from prosecution pursuant to § 13A-3-23, Ala. Code 1975, and dismissing the charge against him or, in the alternative, to direct the trial court to set aside its order denying the motions for recusal and change of venue and to enter an order granting those motions. The Court of Criminal Appeals denied the petition for a writ of mandamus, without an opinion. Ex parte Smith (CR-17-1042, August 3, 2018), __ So. 3d __ (Ala. Crim. App. 2018)(table). This petition followed.

Standard of Review

> "'Our review of a decision of the Court of Criminal Appeals on an original petition for a writ of mandamus is de novo. Rule 21(e)(1), Ala. R. App. P.; Ex parte Sharp, 893 So. 2d 571, 573 (Ala. 2003). The standard for issuance of a writ of mandamus is well settled:
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> > "'"A writ of mandamus is an extraordinary remedy, and is appropriate when the petitioner can show (1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court."
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> "'Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001) (citing Ex parte Inverness Constr. Co., 775 So. 2d 153, 156 (Ala. 2000)).'
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> "Ex parte McCormick, 932 So. 2d 124, 127-28 (Ala. 2005)."

State v. Jones, 13 So. 3d 915, 919 (Ala. 2008).

Discussion

I. Immunity

Smith argues that he is immune from prosecution pursuant to § 13A-3-23, Ala. Code 1975.[2] Section 13A-3-23 provides, in part:

> "(a) A person is justified in using physical force upon another person in order to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he or she may use a degree of force which he or she reasonably believes to be necessary for the purpose. A person may use deadly physical force ... if the person reasonably believes that another person is:
>
> > "(1) Using or about to use unlawful deadly physical force.
> >
> > "....
> >
> > "(3)Committing or about to commit ... assault in the first or second degree ....
> >
> > "....
>
> "(b) A person who is justified under subsection (a) in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground.

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[2]Smith also cites § 13A-3-27(b)(2), Ala. Code 1975, and argues that, as a peace officer, he is justified in using deadly physical force upon another person when he believes such force is necessary to defend himself, or another person, from what he reasonably believes to be the use or imminent use of deadly physical force. It does not appear from the materials before this Court that Smith presented this argument to the trial court.

"....

"(d)(1) A person who uses force, including deadly physical force, as justified and permitted in this section is immune from criminal prosecution and civil action for the use of such force, unless the force was determined to be unlawful.

"(2) Prior to the commencement of a trial in a case in which a defense is claimed under this section, the court having jurisdiction over the case, upon motion of the defendant, shall conduct a pretrial hearing to determine whether force, including deadly force, used by the defendant was justified or whether it was unlawful under this section. During any pretrial hearing to determine immunity, the defendant must show by a preponderance of the evidence that he or she is immune from criminal prosecution.

"(3) If, after a pretrial hearing under subdivision (2), the court concludes that the defendant has proven by a preponderance of the evidence that force, including deadly force, was justified, the court shall enter an order finding the defendant immune from criminal prosecution and dismissing the criminal charges.

"(4) If the defendant does not meet his or her burden of proving immunity at the pre-trial hearing, he or she may continue to pursue the defense of self-defense or defense of another person at trial. Once the issue of self-defense or defense of another person has been raised by the defendant, the state continues to bear the burden of proving beyond a

> reasonable doubt all of the elements of the charged conduct."

The ore tenus rule is applicable to review of a trial court's decision regarding a motion filed pursuant to § 13A-3-23(d). State v. Watson, 221 So. 3d 497 (Ala. Crim. App. 2016).

> "'When evidence is presented ore tenus to the trial court, the court's findings of fact based on that evidence are presumed to be correct,' Ex parte Perkins, 646 So. 2d 46, 47 (Ala.1994); '[w]e indulge a presumption that the trial court properly ruled on the weight and probative force of the evidence,' Bradley v. State, 494 So. 2d 750, 761 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 772 (Ala. 1986); and we make '"all the reasonable inferences and credibility choices supportive of the decision of the trial court."' Kennedy v. State, 640 So. 2d 22, 26 (Ala. Crim. App. 1993), quoting Bradley, 494 So. 2d at 761."

State v. Hargett, 935 So. 2d 1200, 1203 (Ala. Crim. App. 2005).

The evidence presented at the immunity hearing indicated the following: Smith was a third-shift patrol officer assigned to District 14 in the Mobile Drive area of Montgomery. In the weeks preceding the events giving rise to this case, District 14 had experienced an increased number of residential and vehicle burglaries. Those burglaries were primarily occurring between 1 a.m. and 5 a.m. Smith testified that he had been

told by a superior to "stop anything and everything that moves" in that district and that Smith had to "get a hold of the burglary problem" in District 14.

On February 25, 2016, at approximately 3 a.m., Smith was on patrol when he turned his police vehicle onto McElvy Street and saw Gregory Gunn walking on the sidewalk. Gunn was wearing a dark hoodie and was walking in the opposite direction and on the other side of the street from Smith. Smith testified that the clothing Gunn was wearing matched the description of the clothing worn by an individual who had dropped a stolen laptop while running from Smith the previous week. Smith explained that because of the "high-crime" neighborhood, the time of the morning, and Gunn's clothing, he decided to execute a Terry stop on Gunn.

Smith testified that he angled his vehicle toward Gunn and illuminated him with the lights of the vehicle. Smith stated that, at that time, Gunn put his hands in the pockets of the hoodie and starting walking at a quicker pace. Smith got out of the vehicle and instructed Gunn to take his hands out of his pockets and to place them on the hood of the vehicle. Gunn complied and placed his hands on the hood of

Smith's vehicle. Smith testified that Gunn became agitated as Smith began patting him down. Smith stated that as he moved his hand to the front of Gunn's waistband he felt a "hard object" that "felt like a gun." Smith testified that Gunn slapped his hand away and stuck his hands back into the pockets of his hoodie. Smith unholstered his Taser and threatened to use it on Gunn if he did not put his hands back on the hood of the vehicle. Smith stated that Gunn complied and put his hands back on the hood of the vehicle. At that point Smith reholstered his Taser and called for backup on his handheld radio.

Smith testified that, once he called for backup, Gunn started "side stepping" toward the front bumper of the vehicle, shoved Smith with his elbow, and ran away. As Smith chased Gunn he yelled for Gunn to show his hands and to get on the ground. Smith stated that he saw Gunn move his hands toward the front of his waistband. Smith stated that he feared that Gunn was reaching for a weapon so he unholstered his Taser and fired a Taser cartridge into Gunn's back. Gunn fell face first and landed on his stomach. Smith testified that he ordered Gunn to put his hands behind his back and that Gunn

refused to comply. Smith stated that at that point Gunn "jutted" his hands under his body and toward his waistband. Smith re-energized the Taser and shocked Gunn again. Smith testified that Gunn ripped the prongs attached to the Taser cartridge out of his back and got up and ran away. Smith testified that he gave chase and that when Gunn continued to refuse to comply with Smith's orders to stop he fired a second Taser cartridge into Gunn. Smith stated that the second Taser cartridge had no effect on Gunn and that Gunn stated, "f__k your Taser, bitch" and continued running. Smith continued to chase Gunn and got close enough to attempt to "drive stun"[3] him with the Taser. Smith stated that he contacted Gunn on the right shoulder with the Taser and that Gunn grimaced as if he were in pain, jerked his shoulder away, and kept running. Smith testified that at that point the Taser was useless.

Smith continued to chase Gunn ordering him to stop running, which Gunn refused to do. At that point the two men were moving up a driveway toward a house.[4] Smith then

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[3]A "drive stun" occurs when the Taser contacts directly to the body without the use of the electrodes and conductive wire.

[4]This house was later determined to be Gunn's neighbor's house.

deployed his baton -- a telescoping metal baton -- and struck Gunn on his arms and legs. Smith testified that the baton strikes had no effect on Gunn. Smith testified that Gunn exclaimed, "[A]ll right, police," in a threatening manner and then retreated to a dark area on the porch of the house. Smith stated that Gunn then armed himself with a steel painting pole that was located on the porch. Smith testified that he heard a "metallic clanging" sound and in a "split second" saw a yellow pole. Smith stated that he backed up and hit "something that blocked" him and prevented him from leaving the porch. Smith testified that he felt trapped on the porch and that he feared for his life. Smith stated that at that point he "ditched" his baton, drew his service weapon, and fired it at Gunn. Smith stated that after he fired his weapon Gunn stumbled off the porch and fell in the yard face up. Gunn was hit with multiple rounds and died from his wounds. Smith testified that other responding officers arrived to the scene within seconds of the shooting. Smith testified that immediately after the shooting he was exhausted and felt nauseated and faint. Smith stated that he lay on the ground, unbuttoned his shirt, and loosened his protective vest to get

some air. An autopsy performed on Gunn indicated that he had cocaine in his system and that there were paint chips in his right hand.

Joe DiNunzio, a special agent employed by the Alabama Law Enforcement Agency and assigned to the State Bureau of Investigation, investigated the shooting. DiNunzio testified that he interviewed Smith on two occasions following the shooting and that Smith gave different versions of the events leading up to the shooting. DiNunzio initially interviewed Smith at 7 a.m. on the morning of the shooting. Smith stated in that interview that, after he used the Taser on Gunn the first time and Gunn fell to the ground, he went to the ground with Gunn and the two fought before Gunn regained his footing and continued to flee. Smith also stated in that initial interview that, while he and Gunn were on the porch, Gunn swung the paint pole at him and that he ducked before drawing his service weapon and firing at Gunn. In the subsequent interview with DiNunzio, conducted in the presence of Smith's counsel several days after the initial interview, Smith did not mention that he fought with Gunn on the ground or that Gunn swung the paint pole at him. Smith also did not testify

as to those two occurrences at the immunity hearing. Further, as mentioned above, Smith testified at the hearing that, after Gunn slapped his hand away as he was patting Gunn down, he unholstered his Taser and commanded Gunn to place his hands back on the hood of the vehicle and that Gunn complied with the command. Smith failed to mention that fact in either interview with DiNunzio. Smith also testified at the immunity hearing that Gunn shoved Smith with his elbow just before fleeing from the initial contact with Smith at the vehicle. Smith also failed to mention that fact in either interview with DiNunzio.

At the close of the hearing, the trial court stated, in part, in open court:

> "I did not find the officer's testimony today to be credible, and, therefore, I do not feel that you have met your burden of proof that he's entitled to immunity, and this trial will proceed on August 13."

"Under the ore tenus rule, the trial court's findings of fact are presumed correct and will not be disturbed on appeal unless these findings are 'plainly or palpably wrong or against the preponderance of the evidence.'" Shealy v. Golden, 897 So. 2d 268, 271 (Ala. 2004)(quoting Ex parte Cater, 772 So. 2d 1117, 1119 (Ala. 2000)). "Absent [an excess] of

discretion, a trial court's resolution of [conflicts in the testimony or credibility of witnesses] should not be reversed on appeal." Sheely v. State, 629 So. 2d 23, 29 (Ala. Crim. App. 1993). The materials before us indicate that Smith gave inconsistent accounts of the events that led to the shooting of Gunn and that the trial court made the express finding that it did not find Smith to be credible. Based on the foregoing, we conclude that Smith has failed to demonstrate a clear right to the relief sought. Because Smith has failed to demonstrate a clear right to the relief sought, the petition is due to be denied as to the immunity-from-prosecution issue.

II. Recusal

Smith next contends that the trial court's pronouncement that it did not find Smith credible -- made in open court and in the presence of representatives of the media -- creates a reasonable basis for questioning Judge Griffin's impartiality and requires that Judge Griffin recuse himself.

> "'A mandamus petition is a proper method by which to seek review of a trial court's denial of a motion to recuse. However, the writ of mandamus is a drastic and extraordinary remedy and should be issued only upon a clear showing that the trial court has [exceeded] its discretion by exercising it in an arbitrary or capricious manner.'"

Ex parte City of Dothan Pers. Bd., 831 So. 2d 1, 5 (Ala. 2002) (quoting Ex parte Cotton, 638 So. 2d 870, 872 (Ala. 1994)).

Canon 3C(1), Alabama Canons of Judicial Ethics, requires a recusal when "'"'facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.'"'" Ex parte Monsanto Co., 862 So. 2d 595, 604-05 (Ala. 2003) (quoting Ex parte City of Dothan Pers. Bd., 831 So. 2d at 5, quoting other cases).

> "It is well established that '[t]he burden of proof is on the party seeking recusal.' Ex parte Cotton, 638 So. 2d 870, 872 (Ala. 1994), abrogated on other grounds, Ex parte Crawford, 686 So. 2d 196 (Ala. 1996). Further,
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> > "'[t]he standard for recusal is an objective one: whether a reasonable person knowing everything that the judge knows would have a "reasonable basis for questioning the judge's impartiality." [Ex parte] Cotton, 638 So. 2d [870,] 872 [(Ala. 1994)]. The focus of our inquiry, therefore, is not whether a particular judge is or is not biased toward the petitioner; the focus is instead on whether a reasonable person would perceive potential bias or a lack of impartiality on the part of the judge in question.'
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> "Ex parte Bryant, 682 So. 2d 39, 41 (Ala. 1996)."

Ex parte Adams, 211 So. 3d 780, 788 (Ala. 2016). "The test is whether '"facts are shown which make it reasonable for members

of the public or a party, or counsel opposed to question the impartiality of the judge."'" Ex parte George, 962 So. 2d 789, 791 (Ala. 2006) (quoting In re Sheffield, 465 So. 2d 350, 355–56 (Ala. 1984), quoting in turn Acromag–Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982)). "[A]ctual bias is not necessary for a judge to recuse -- only a reasonable appearance of bias or impropriety." Crowell v. May, 676 So. 2d 941, 944 (Ala. Civ. App. 1996). "'"The necessity for recusal is evaluated by the 'totality of the facts' and circumstances in each case."'" Ex parte Adams, 211 So. 3d at 789 (quoting Ex parte Bank of America, N.A., 39 So. 3d 113, 119-20 (Ala. 2009), quoting in turn Ex parte City of Dothan Pers. Bd., 831 So. 2d at 2).

> "'"The law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea."' Ex parte Balogun, 516 So. 2d 606, 609 (Ala. 1987) (quoting Fulton v. Longshore, 156 Ala. 611, 613, 46 So. 989, 990 (1908))."

Ex parte Bank of America, N.A., 39 So. 3d at 120.

We note that the shooting of Gunn and Smith's subsequent arrest and indictment have elicited an emotional response in the Montgomery community, resulting in protests and public

discourse that have been the subject of frequent and intense media coverage. A number of local political figures have commented to representatives of the media regarding the case. The media coverage has also included the racial aspects of the case, and the case itself has given rise to hotly contested issues that have also been the subject of media coverage. This Court has previously entertained a petition for a writ of mandamus arising from the denial of a motion for Judge Griffin to recuse himself following a contentious hearing between Smith’s counsel and Judge Griffin. In that motion to recuse, Smith sought Judge Griffin's recusal after Judge Griffin posted on his Facebook page his aggravation with being detained by an officer with the Montgomery Police Department while he was walking in his neighborhood. Judge Griffin’s post was widely shared on social-media platforms.

It is against this emotionally charged background that the trial court held Smith's pretrial immunity hearing with a large contingent of the media present in the courtroom. At the close of the testimony, and in the presence of members of the media who were in the courtroom, Judge Griffin denied Smith's immunity motion, announcing that he did not find Smith's

testimony to be credible. The exhibits appended to Smith's petition indicate that the statement made by Judge Griffin regarding Smith's lack of credibility was then widely reported throughout the coverage area of the local media. News that the trial judge himself found Smith not to be credible carries more weight than would the typical news report surrounding a notable case. Importantly, the very issue of Smith's credibility may arise during the trial. "'If a defendant cannot meet his burden of proving immunity prior to trial, he may nonetheless pursue an affirmative defense at trial, even though these affirmative defenses may be based on the same statutory provisions underlying a prior immunity motion.'" Harrison v. State, 203 So. 3d 126, 131 (Ala. Crim. App. 2015) (quoting Bunn v. State, 284 Ga. 410, 413, 667 S.E.2d 605, 608 (2008)). Thus, it is possible that Smith, potentially the only witness to the homicide, may testify at trial in support of a claim of self-defense. However, the trial judge who will preside at Smith's trial has already stated that he does not find Smith to be credible on the issue, and that statement was widely reported. The trial judge's statement carries the weight that comes with a judicial decision, and it undoubtedly

provides a "'"reasonable basis for questioning [Judge Griffin's] impartiality"'" moving forward to the trial of this case. Ex parte Adams, 211 So. 3d at 788 (quoting Ex parte Bryant, 682 So. 2d 39, 41 (Ala. 1996), quoting in turn Ex parte Cotton, 638 So. 2d at 872).

Taking into consideration the "'"'totality of the facts'"'" and "'"circumstances in each case,"'" as we are required to do, Ex parte Adams, 211 So. 3d at 789 (quoting Ex parte Bank of America, N.A., 39 So. 3d at 119, quoting other cases), we conclude that for Judge Griffin to declare in open court and in the presence of the media that he did not find Smith's testimony credible, during this emotional and hotly contested proceeding, provides a "'"reasonable basis for questioning [Judge Griffin's] impartiality."'" Ex parte Adams, 211 So. 3d at 788 (quoting other cases). Further, to make such a public statement regarding Smith's credibility under the circumstances in which it was made touches upon a reasonable appearance of bias or impropriety that, moving forward, might contravene certain constitutional and due-process rights guaranteed to Smith. "'A fair and impartial judge is the cornerstone of the integrity of the judicial

system. Even the appearance of partiality can erode the public's confidence in the integrity of the judiciary.'" State v. Moore, 988 So. 2d 597, 601 (Ala. Crim. App. 2007) (quoting In re Judicial Disciplinary Proceedings Against Laatsch, 299 Wis. 2d 144, 150, 727 N.W.2d 488, 491 (Wis. 2007) (emphasis added)).

The State relies upon Ex parte Monsanto, 862 So. 2d 595 (Ala. 2003), and argues that remarks made by the trial judge that express strong views about a party will not call for a judge's recusal "'so long as those views are based on his own observations during the performance of his judicial duties.'" Ex parte Monsanto, 862 So. 2d at 631-32 (quoting United States v. Barry, 961 F.2d 260, 263 (D.C. Cir. 1992)). In Ex parte Monsanto, the defendant, Monsanto Company, moved the trial judge to recuse himself based, in part, on some statements made by the trial judge to the press. Monsanto challenged the remarks as follows:

> "Monsanto quotes Judge Laird from a purported March 13, 2002, WBRC-TV news broadcast, as saying: 'When you have a jury that's already found one party liable in a case, well, that ought to give that party incentive to try to settle.' (Petition at 28.) Monsanto quotes Judge Laird from what it states to be a later point in the same WBRC news story:

"'I simply said that I expect you to negotiate in good faith and if I find that you are not making an attempt to even negotiate in good faith, then that is contempt and you may go to jail. But I never said that they would go to jail if they didn't settle this case.'

"(Petition at 28-29.) Monsanto quotes Judge Laird from a purported WCFT news story that it states aired on March 14, 2002:

"'No, I never once told anybody that I would send them to jail if they did not settle this case. But I did tell them that I will use my contempt powers and possibly send someone to jail if they did not make a good-faith effort to comply with my order and try to work this case out.'

"(Petition at 29.) Monsanto quotes a segment from a news package it states ran on WVTM–TV on March 26, 2002:

"'Reporter: Now the short-term cleanup has already begun in Anniston. Right now Solutia is cleaning up property that has the highest levels of PCBs in the soil, but some residents say a lot more work still needs to be done. The judge says this new motion could jeopardize part of the cleanup process.

"'Judge Laird: The defendants are asserting that I should just turn it over to [the United States Environmental Protection Agency] and not compete with EPA. So, really that's just something I have to weigh and look at all the caselaw and weigh what I should do or am required to do in this case.'

"(Petition at 30.) Monsanto also quotes from a news package it states aired on WCFT on March 28, 2002:

> "'Judge Laird: I have that motion under advisement at this time.
>
> "'Reporter: Even Judge Joel Laird has accused Solutia's lawyers of using underhanded tactics during the trial. He's refusing to let the EPA's decision affect this case.
>
> "'Judge Laird: I'm moving forward until someone tells me I need to stop, or until we finish this one.'

"(Petition at 30.)

"Monsanto also quotes material from newspaper articles to support its claim that Judge Laird appears biased. In its 'Petitioner's Notice of Filing of Ruling,' Monsanto argues:

> "'The [Wall Street Journal] article concludes with Judge Laird's indication, which obviously took place during an ex parte media interview, that he was actually referring to petitioners in his remarks: "Was he really talking about Solutia, he [Judge Laird] is asked later. He nods yes."'

"(Petitioner's Notice at 5.) In its petition, Monsanto states that in an article that appeared in the St. Louis Post-Dispatch on March 15, 2002, Judge Laird said: 'I wish I had handled it differently. But what's a frustrated father to do when he can't get an unruly teenager to cooperate?'(Petition at 33.)"

Ex parte Monsanto, 862 So. 2d at 629-30 (footnote omitted). This Court denied the petition for a writ of mandamus seeking Judge Laird's recusal, finding that his comments to the press either "explained factual or procedural aspects of the case or were based on what Judge Laird had observed in court during the course of [the] litigation." Ex parte Monsanto, 862 So. 2d at 631. Indeed, a review of the comments made by Judge Laird in Ex parte Monsanto indicate that he was trying to explain the factual or procedural aspects of the out-of-court negotiations in that case, based on his observations during the course of the litigation. Comments regarding the factual or procedural aspects of a case differ greatly from comments made by a trial judge in open court during a pretrial hearing, declaring the defendant in a criminal proceeding to be not credible. We further note that Ex parte Monsanto was a civil action that did not necessarily involve certain constitutional and due-process rights that Smith, a criminal defendant, is guaranteed moving forward to trial. Thus, the trial judge’s comments in the civil case of Ex parte Monsanto are distinguishable from those of Judge Griffin in the criminal

proceeding presently before this Court by way of this petition for the writ of mandamus.

Based on the totality of the facts and the circumstances presented in this particular case, we conclude that Smith has satisfied his burden of showing that the comment made by Judge Griffin provides a reasonable basis for questioning Judge Griffin's impartiality. Ex parte Adams, 211 So. 3d at 788. Because Smith has demonstrated a clear legal right to the relief sought, we grant the petition as to the recusal issue.

III. Change of Venue

Smith has also asked this Court to direct the trial court to transfer this case out of Montgomery County. Under Ex parte Fowler, 574 So. 2d 745 (Ala. 1990), and its progeny, the issue whether a change of venue should be granted in a criminal case as a result of pretrial publicity is not reviewable by a mandamus petition. In Ex parte Gold Kist, Inc., 491 So. 2d 869 (Ala. 1985), this Court considered, by mandamus petitions, whether a trial court had erred by not ordering a change of venue on the basis of pretrial publicity in a civil case; this Court ultimately denied the petitions. Fowler, a criminal case, dose not cite Gold Kist, a civil

case. Fowler dose cite § 15-2-20, Ala. Code 1975, which provides that a trial court's refusal to transfer a case when a defendant argues that the defendant cannot receive a fair and impartial trial in the forum venue may be appealed "after final judgment." The Fowler Court concluded that § 15-2-20 provides an adequate remedy for the denial of a request for a change of venue. Venue questions in civil cases may be entertained both on appeal and by a petition for a writ of mandamus. This is so despite the fact that § 6-8-101, Ala. Code 1975, specifically allows for an appeal on the issue of improper venue in civil cases. In that regard, § 6-8-101 is comparable to § 15-2-20 in that they both specifically allow for the appeal of venue issues; the first statute concerns civil cases; the second statute, cited in Fowler, concerns criminal cases. Although this Court has not been called upon to overrule Fowler and its progeny, we question the continued practice of allowing venue challenges based on pretrial publicity in civil cases to be reviewable by mandamus petition, while not allowing mandamus review of venue challenges based on pretrial publicity in criminal cases. Here, because of the question of the continued viability of

Fowler and additionally because the issue of Judge Griffin's recusal decided above is so intertwined with whether a change of venue should be granted based on pretrial publicity, we are compelled to address the latter issue on mandamus review as well. Given the closeness of the issues presented here, as well as the fact that the totality of the facts and the circumstances set out above affect both of Smith's requests for the writ of mandamus, this Court's consideration of the pretrial-publicity venue issue now, when it is before this Court prior to trial, is the least time-consuming, least expensive, and most efficient option.

> "'In connection with pretrial publicity, there are two situations which mandate a change of venue: 1) when the accused has demonstrated "actual prejudice" against him on the part of the jurors; 2) when there is "presumed prejudice" resulting from community saturation with such prejudicial pretrial publicity that no impartial jury can be selected. Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Rideau [v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963)]; Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); Ex parte Grayson, 479 So. 2d 76, 80 (Ala.), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985); Coleman v. Zant, 708 F. 2d 541 (11th Cir. 1983).'

> "Hunt v. State, 642 So. 2d 999, 1042-43 (Ala. Crim. App. 1993), aff'd, 642 So. 2d 1060 (Ala. 1994)."

Brown v. State, 74 So. 3d 984, 1031 (Ala. Crim. App. 2010). Clearly, here we are concerned with whether there is presumed prejudice.

Typically, pretrial publicity will not constitute a ground for changing venue. See generally Luong v. State, 199 So. 3d 139 (Ala. 2014) (noting that it is rare to presume prejudice on the basis of pretrial publicity). However, given the unique facts presented here, this case is one of those rare cases where prejudice from pretrial publicity may be presumed, thus requiring a change of venue.

As discussed above, this case had been widely reported in the community and has elicited an emotional response from the public, resulting in protests, public discourse, and local political figures weighing in on the case in the media. In that climate, Judge Griffin, following Smith's pretrial immunity hearing, declared in open court and before the members of the media who were present, that he did not find Smith's testimony to be credible. Judge Griffin's finding regarding Smith's credibility was widely reported in the news media in Montgomery County. The fact that the trial judge

assigned to try the case has stated publicly -- in open court -- that he does not find the defendant to be credible, combined with that statement being widely reported in the media, sets this case apart from others. As discussed relative to the recusal issue above, a news report that the trial judge himself finds Smith not to be credible carries more weight than the typical news report involving a notable case. The trial judge's statement equates to a judicial decision, and it could undoubtedly negatively influence potential jurors' opinions of Smith, and potentially cast a negative pall over the presumption of innocence that should be accorded Smith. The issue of Smith's credibility may arise at trial because he appears to be the only witness to the incident, and he may be called to testify at trial in support of a defense of self-defense. The risk of prejudice under these circumstances is evident where the trial judge has already stated that he does not find Smith to be credible and that statement has been widely reported in the local community from which the jury pool would be drawn. Judge Griffin's comments were made and reported approximately six moths ago, in late July 2018. There is no dispute that this case has generated much attention in

Montgomery County, and it seems likely to generate continued attention moving forward. It is reasonable to assume that Judge Griffin's comments regarding Smith's credibility will continue to be dispersed in the local media.

Based on the foregoing, we conclude that Smith cannot have his case decided by a fair and impartial jury in Montgomery County. Because Smith has demonstrated a clear legal right to the relief sought, we grant the petition as to the change-of-venue issue and direct that this case be transferred to another venue.

Conclusion

We hereby grant the petition in part and direct the trial court to grant Smith's motions for recusal and for a change of venue. We deny the petition in all other regards.

PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

Stuart, C.J., and Bryan and Sellers, JJ., concur.

Main, J., concurs in the result.

Mendheim, J., concurs in part and dissents in part.

Parker, Shaw, and Wise, JJ., recuse themselves.

MENDHEIM, Justice (concurring in part and dissenting in part).

I concur as to Part I of the main opinion, which addresses the immunity issue. I respectfully dissent as to Parts II and III of the main opinion, which address the trial judge's recusal and the change-of-venue issue, respectively.

As to Part II, I note that the legislature's amendment to § 13A-3-23(d), Ala. Code 1975, in 2016 created a new procedure in the criminal law.[5] That section now gives a criminal defendant the right to a pretrial hearing as to the applicability of an immunity defense in the use of deadly force. See Ala. Code 1975, § 13A-3-23(d)(2). The procedures created by the legislature require the trial judge to make legal and factual determinations in deciding whether immunity precludes prosecution. Id. ("During any pretrial hearing to determine immunity, the defendant must show by a preponderance

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[5]The nearest analogy is a criminal defendant's right to a pre-admission hearing to determine whether his or her purported confession was voluntary and, if the trial court rules adversely to the defendant on that issue, the right to submit the issue of voluntariness of the confession to the jury. See Ex parte Jackson, 836 So. 2d 973, 974-76 (Ala. 2001); Ex parte Singleton, 465 So. 2d 443, 445-46 (Ala. 1985). However, that procedure was judicially created.

of the evidence that he or she is immune from criminal prosecution."). If the trial judge determines that "the defendant [has] not [met] his or her burden of proving immunity at the pre-trial hearing," the defendant "may continue to pursue the defense of self-defense or defense of another person at trial." Ala. Code 1975, § 13A-3-23(d)(4).

In the present case, upon the request of Aaron Cody Smith, the defendant, Judge Griffin became, as required by the legislature, the fact-finder at the immunity hearing in order to rule on the credibility of Smith's testimony, which Judge Griffin did. The main opinion affirms his decision in that regard. Nevertheless, in the context of recusal, the main opinion concludes that a reasonable person could question Judge Griffin's impartiality because he made the determination he was required by the legislature to make as to Smith's credibility.[6] The fact that Judge Griffin issued a legal ruling -- and a correct ruling in my opinion -- does not "'"make it reasonable for members of the public or a party, or

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[6]I note that it is common for trial judges to make factual and credibility determinations before trial in criminal proceedings, such as, for example, for purposes of suppression hearings, search-and-seizure warrants, bond proceedings, and preliminary hearings.

counsel opposed to question the impartiality of the judge."'" Ex parte George, 962 So. 2d 789, 791 (Ala. 2006) (quoting In re Sheffield, 465 So. 2d 350, 355-56 (Ala. 1984), quoting in turn Acromag-Viking v. Blalock, 420 So. 2d 60, 61 (Ala. 1982)). As Justice Scalia explained in the main opinion in Liteky v. United States, 510 U.S. 540 (1994):

> "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in Berger v. United States, 255 U.S. 22 (1921), a World War I espionage case against German-American defendants: 'One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans' because their 'hearts are reeking with disloyalty.' Id., at 28 (internal quotation marks omitted). Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration -- even a stern and

> short-tempered judge's ordinary efforts at courtroom administration -- remain immune.
>
> "....
>
> "All of [the alleged] grounds [of bias] are inadequate under the principles we have described above: They consist of judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses. All occurred in the course of judicial proceedings, and neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible."

510 U.S. at 555-56 (emphasis omitted).

The Court of Criminal Appeals unanimously rejected Smith's argument as to the recusal of Judge Griffin, without an opinion, stating in its order:

> "Smith also asks this Court to direct Judge Griffin to recuse from presiding in this matter due to Judge Griffin's statement in open court on July 26, 2018, that he did not find Smith's testimony credible. Smith argues that this was a prejudicial statement made in open court with numerous representatives of the media present and his comments were disseminated by the media. Smith argues that this shows a bias by Judge Griffin.
>
> "All judges are presumed to be impartial and unbiased. <u>Cotton v. Brown</u>, 638 So. 2d 870 (Ala. 1994). The burden is on the party seeking recusal. <u>Ex parte Melof</u>, 553 So. 2d 554, 557 (Ala. 1989). 'The question is not whether the judge was impartial in fact, but whether another person, knowing all the circumstances, might reasonably question the judge's impartiality -- whether there is an appearance of

> impropriety.' Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994). 'Adverse rulings during the course of proceedings are not by themselves sufficient to establish bias and prejudice.' Hartman v. Board of Trustees of the University of Alabama, 436 So. 2d 837, 841 (Ala. 1983). At the conclusion of the July 26, 2018, hearing, Judge Griffin, in explaining his reason for denying Smith's motion for immunity from prosecution, stated that he did not find Smith's testimony to be credible. This statement was clearly a judicial statement. In order to mandate the disqualification of Judge Griffin, Smith must show this statement was made with personal bias. See Thomas v. State, 611 So. 2d 416 (Ala. 1992). He has not done so. Smith has therefore failed to meet his heavy burden of establishing the prerequisites for the issuance of a writ of mandamus regarding the recusal of Judge Griffin."

I believe the Court of Criminal Appeals correctly analyzed the issue of Judge Griffin's recusal under well established principles of law. Smith's asserted basis for recusal is Judge Griffin's legal ruling at the immunity hearing, which was made on Smith's motion and which the main opinion concedes was a correct legal ruling based on the evidence presented at the immunity hearing. ___ So. 3d at ___ ("The materials before us indicate that Smith gave inconsistent accounts of the events that led to the shooting of Gunn and that the trial court made the express finding that it did not find Smith to be credible. Based on the foregoing, we conclude that Smith has failed to demonstrate a clear right

to the relief sought."). As stated by the Court of Criminal Appeals, because the reason for Smith's recusal motion is an adverse legal ruling by the trial judge, Smith has the heavy burden of establishing additionally that the ruling was made as a result of personal bias on Judge Griffin's part against Smith. See, e.g., Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994) ("[F]or Duncan to demonstrate a clear right to the relief sought by the mandamus petition [recusal of the trial judge], he must show the appearance of impropriety by showing that the alleged bias, hostility, or prejudice is 'personal' rather than 'judicial.' ... The trial judge's statements arose out of a judicial proceeding, not from an extrajudicial source; and although the trial judge's expressed opinions may have been better left unsaid, in our opinion the remarks he made do not show bias, hostility, or prejudice against Duncan arising from a 'personal,' i.e., extrajudicial, source.").

I have reviewed the entirety of the materials submitted in support of Smith's petition, including the transcript of the immunity hearing. Those materials are void of any evidence that would support an inference of bias, much less

personal bias, on the part of Judge Griffin against Smith.[7] Further, Smith points to nothing in the submitted materials that would support a finding of such bias.[8]

Smith offers numerous news articles about his case, including reports from the immunity hearing and Judge Griffin's statement as to Smith's credibility. None of this remotely creates evidence of personal bias on Judge Griffin's part against Smith, particularly because there is no evidence indicating that Judge Griffin formed his opinion as to the credibility of Smith's testimony based on any reports made before the immunity hearing or that his ruling was influenced by reports made after that hearing. Again, a legal statement or ruling by a trial judge does not require the judge's

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[7]For instance, Judge Griffin never cut the parties off during their arguments or put them on unreasonable time limits. Instead, it appears that he provided the parties with whatever time and opportunity they needed to present their arguments and to respond to the arguments of the opposing party. Likewise, the record provides no basis for even concluding that Judge Griffin was disrespectful to Smith or his counsel, much less that he acted in a manner that reflected "deep-seated and unequivocal antagonism that would render fair judgment impossible." Liteky, 510 U.S. at 556.

[8]Notably, Smith's attorneys did not object or voice any concern of bias when Judge Griffin made the statement as to Smith's credibility they now claim requires Judge Griffin's recusal.

recusal absent some additional evidence of personal bias by the trial judge against the party.

Smith further submits Facebook social-media posts by Judge Griffin regarding what Judge Griffin perceived was improper contact of him by Montgomery police officers when he was walking in his neighborhood. This Court and the Court of Criminal Appeals have previously rejected Smith's efforts to require Judge Griffin's recusal based on those Facebook posts. Ex parte Smith (Ms. 1161024, Feb. 23, 2018), ___ So. 3d ___ (Ala. 2018) (table); Ex parte Smith (Ms. CR-16-0850, Aug. 14, 2017), ___ So. 3d ___ (Ala. Crim. App. 2017) (table) (The Court of Criminal Appeals stated in its unpublished order: "The mere fact that Judge Griffin posted on social media about an incident that happened to him that was later resolved, an incident that had only minimal similarity to the incident that is the basis of the case over which he is presiding, is not enough to show that he should recuse from the case."). I agree, as a general principle of law, that facts rejected as a basis for a judge's recusal may nonetheless, when cumulatively coupled with new or additional facts, require a judge's recusal. But that is not the case here. Smith has provided no link between the Facebook posts, which concerned

Judge Griffin's interaction with a Montgomery Police Officer other than Smith, and Judge Griffin's statement regarding Smith's credibility that might establish "personal bias" by Judge Griffin against Smith. If anything, Judge Griffin's comments as to Smith's credibility support the contrary conclusion, namely that Judge Griffin had no bias against Smith based on the interactions that led to his Facebook posts:

> "Often at probation revocation hearings, I have police officers from the Montgomery Police Department to testify, and it's their word against the defendant's word, and I look at the credibility of the officer. Okay. <u>And, quite often, the officer is credible.</u>
>
> "<u>But I have to admit to you that I did not find the officer's testimony today to be credible</u>, and, therefore, I do not feel that you have met your burden of proof that he's entitled to immunity, and this trial will proceed on August 13."

(Emphasis added.)

In addition to Smith's failure to establish personal bias on the part of Judge Griffin, Smith also failed to establish "an appearance of impropriety" as viewed by a reasonable person who is fully aware of the applicable law and facts. See, e.g., <u>Duncan</u>, 638 So. 2d at 1334 ("the question is ... whether another person, knowing all of the circumstances,

might reasonably question the judge's impartiality ...."). In a vacuum, with no reference to the pretrial procedures in § 13-3-23(d) for an immunity-from-prosecution claim, a trial judge publicly announcing in advance of a jury trial that he does not believe a defendant to be credible might create an appearance of bias. But the law requires us to assume that a reasonable person hearing the statement understands that the legislature requires the trial judge to make such a credibility determination, for himself or herself as judge, as part of his or her duties at the pretrial hearing on immunity. In other words, in applying the reasonable-person standard, we must assume that the reasonable person fully understands the applicable law and the duties of the judge. When viewed from this standpoint, Smith has failed to establish that a reasonable person would conclude that Judge Griffin is biased against Smith.

Based on the foregoing, I respectfully dissent from the portion of the main opinion directing Judge Griffin to recuse himself from this case.

Likewise, I respectfully dissent from the portion of the main opinion granting a change of venue in this case from Montgomery County, i.e., Part III. First, Smith has not asked

us to overrule the precedent establishing that a denial of a motion for a change of venue in a criminal case is reviewable only on direct appeal. See, e.g., Ex parte Fowler, 574 So. 2d 745 (Ala. 1990). Consequently, the State has not had the opportunity to brief the issue and to present its argument for consideration. The attorney general represents the State of Alabama in all criminal appeals, and, before we question the viability of a well established appellate procedure, I believe we would benefit greatly from arguments from the State.[9]

In the absence of a request to overrule precedent, my respect for stare decisis generally compels me to recognize and follow existing precedent. See Nettles v. Rumberger, Kirk & Caldwell, P.C., [Ms. 1170162, Aug. 31, 2018] ___ So. 3d ___,

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[9]This Court has held that review of a change-of-venue challenge in a criminal proceeding is not available through mandamus but must be pursued through direct appeal. Ex parte Fowler, 574 So. 2d 745 (Ala. 1990). As to the main opinion's concern with the distinction between the use of the writ of mandamus in civil cases and criminal cases, I note that the trend of "liberal enlargement of the use of the writ [of mandamus]" was used to justify the use of the writ to address the issue of venue in civil cases. Ex parte Weissinger, 247 Ala. 113, 118, 22 So. 2d 510, 515 (1945). This Court did not follow that trend for criminal cases in Ex parte Fowler. Based on the distinctions between venue in civil cases and criminal cases as hereinafter discussed, and the lack of any argument from the parties as to the reasons for ignoring those distinctions, I am unwilling to question the viability of Ex parte Fowler.

___ (Ala. 2018) (Mendheim, J., dissenting); see also, e.g., American Bankers Ins. Co. of Fla. v. Tellis, 192 So. 3d 386, 392 n.3 (Ala. 2015). In my review of this matter and our existing caselaw, I cannot find any reason, "[e]ven if we would be amenable to such a request, ... to abandon precedent without a specific invitation to do so." Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893, 898 (Ala. 2006).

Second, I respectfully disagree with the analysis and conclusion in the main opinion that, because both mandamus review and direct appeal of venue issues are available in civil cases, mandamus review should be extended to a venue ruling in a criminal case. I disagree with the main opinion's conclusion that "§ 6-8-101[, Ala. Code 1975,] is comparable to § 15-2-20[, Ala. Code 1975]." ___ So. 3d at ___. Section 6-8-101 provides that "[a] party may raise the defense[] of ... improper venue, ... and, losing thereon proceed to litigate on the merits; and losing on the merits, the party may appeal and, on appeal, attack the judgment both on the merits and on [the] ground[] [of improper venue]." Section 15-2-20 provides:

"(a) Any person charged with an indictable offense may have his trial moved to another county, on making application to the court, setting forth specifically the reasons why he cannot have a fair and impartial trial in the county in which the indictment is found. The application must be sworn to by him and must be made as early as practicable before the trial, or it may be made after conviction upon a new trial being granted.

"(b) The refusal of such application may, after final judgment, be reviewed and revised on appeal, and the Supreme Court or the Court of Criminal Appeals shall reverse and remand or enter such judgment on the application as it may deem right without any presumption in favor of the judgment or ruling of the lower court on such application."

I read these two statutes as concerning two different concepts: (1) the concept of changing venue (whether in a civil case or a criminal case) to a county free from prejudice but where venue would not otherwise be proper and (2) the concept of changing venue to a county where venue is otherwise proper. Section 6-8-101 uses the term "improper venue." The term improper venue means venue is not proper in the county where the case is pending, but is proper in some other venue. Admittedly, our long-standing caselaw permits review by direct appeal and by petition for a writ of mandamus as to the issue of improper venue in civil cases. In contrast, § 15-2-20 only concerns changing venue when a defendant cannot get a fair trial in the county where venue is proper; that section

provides that, in that event, the trial will be moved to a county where venue generally would otherwise be improper. See Ex parte Bell, 978 So. 2d 33, 34 (Ala. 2007) ("Venue ... limits the territory in which the case can be tried. Section 15–2–2, Ala. Code 1975, provides: 'Unless otherwise provided by law, the venue of all public offenses is in the county in which the offense was committed.'"); see also Ala. Const. 1901, § 6.

Along the same lines, I disagree with the main opinion's conclusion that because we permit review by petition for a writ of mandamus as to the issue of a change of venue in civil cases, we likewise should now permit mandamus review for change of venue in criminal cases. A requirement for issuance of a writ of mandamus is lack of another adequate remedy, and § 15-2-20 clearly dictates an adequate remedy of direct appeal. See Ex parte Fowler, 574 So. 2d at 747 ("Section 15–2–20 affords [the criminal defendant] an adequate remedy by appeal; therefore, a writ of mandamus is not an appropriate means of reviewing the trial judge's order in this case."). By enacting § 15-2-20, the legislature has directed the Supreme Court and the Court of Criminal Appeals to review a venue ruling on direct appeal. If the legislature intended

for a pretrial review for venue issues, it could have so directed. Further, as already noted, venue in criminal cases is more limited than venue in civil cases. Proper venue in a criminal case is in the county where the crime allegedly occurred.[10] Rarely is proper venue an issue in a criminal case, and rarely is venue proper in more than one county. Even where venue is proper is more than one county, venue is generally based on the occurrence of some events concerning the crime in those counties.[11] However, venue in a civil case often is proper in multiple counties, and often in counties in which no events giving rise to the action occurred. Although

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[10]See Ala. Const. 1901, § 6; see also Ala. Code 1975, § 15-2-2 ("Unless otherwise provided by law, the venue of all public offenses is in the county in which the offense was committed.").

[11]See Ala. Code 1975, § 15-2-6 ("When an offense is committed partly in one county and partly in another or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, venue is in either county."); Ala. Code 1975, § 15-2-7 ("When an offense is committed on the boundary of two or more counties or within a quarter of a mile thereof or when it is committed so near the boundary of two counties as to render it doubtful in which the offense was committed, venue is in either county."); and Ala. Code 1975, § 15-2-8 (providing that, for a few specified crimes, such as kidnapping, "venue is in the county in which the offense was committed or in any other county into or through which the person upon whom it was committed may have been carried in the commission of the offense").

the county of the location of the event causing the lawsuit is always proper, other venues typically are proper as well, depending on variables such as the county of the plaintiff's residence, the county of the defendant's residence, or the county in which a corporation maintains its principal office or does business by agent. See, e.g., Ala. Code 1975, §§ 6-3-2(a)(3) and 6-3-7. Likewise, the doctrine of forum non conveniens applies to civil cases; that doctrine does not apply in criminal cases. See Ala. Code 1975, § 6-3-21.1. Accordingly, because of the differences between our civil venue rules and the constitutional and statutory provisions limiting venue in a criminal case to the county of the location of the alleged crime, I disagree with extending mandamus review to rulings on a change of venue in criminal cases based on the comparison between the two types of cases.

Finally, even reviewing Judge Griffin's denial of Smith's request for a change of venue based upon the information before us, I do not believe that Smith has met his high burden of establishing that he cannot receive a fair trial in Montgomery County. Smith has established that there is widespread public interest in this case (as is expected in a case where a police officer is charged with murder in shooting

an unarmed person in the line of duty) and that there have been news media reports of the case. Under our existing law, neither cumulatively nor individually do these facts support a conclusion that Smith cannot receive a fair trial in Montgomery County.

First, Smith must establish that the pretrial publicity has saturated Montgomery County. Again, the mere existence of news media coverage is insufficient to establish that fact. See, e.g., Powell v. State, 796 So. 2d 404, 417 (Ala. Crim. App. 1999) ("'"'[A] change of venue must be granted only when it can be shown that the pretrial publicity has so "pervasively saturated" the community as to make "the court proceedings nothing more than a 'hollow formality'" ... or when actual prejudice can be demonstrated. The burden of showing this saturation of the community or actual prejudice lies with the appellant.'"'" (quoting Boyd v. State, 715 So. 2d 825, 848 (Ala. Crim. App. 1997), quoting in turn George v. State, 717 So. 2d 827, 833 (Ala. Crim. App. 1996), quoting in turn Oryang v. State, 642 So. 2d 979, 983 (Ala. Crim. App. 1993))), aff'd, 796 So. 2d 434, 435 (Ala. 2001) ("In his brief to the Court of Criminal Appeals, Powell raised seven issues, several of which had subparts. The Court of Criminal Appeals

thoroughly addressed and properly decided each of these issues."). Many of the prior cases from the Supreme Court and the Court of Criminal Appeals cite surveys of potential jurors to gauge their knowledge of the case and the effect, if any, of the news reports. See, e.g., Creque v. State, [Ms. CR-13-0780, Feb. 9, 2018] ___ So. 3d ___, ___ (Ala. Crim. App. 2018). See also Kuenzel v. State, 577 So. 2d 474, 483 (Ala. Crim. App. 1990) ("'Newspaper articles or widespread publicity, without more, are insufficient to grant a motion for change of venue.' [Ex parte Grayson, 479 So. 2d 76, 80 (Ala. 1985).] 'The standard of fairness does not require jurors to be totally ignorant of the facts and issues involved.' Id. 'The relevant question is not whether the community remembered the case, but whether the jurors at [the defendant's] trial had such fixed opinions that they could not judge impartially the guilt of the defendant.' Patton v. Yount, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 2891, 81 L. Ed. 2d 847 (1984)."), aff'd, 577 So. 2d 531, 531 (Ala. 1991) ("[Kuenzel] raises the same 27 issues before this Court as he raised before the Court of Criminal Appeals. ... We have carefully studied each of the 27 issues in this case. Having read and considered the record, together with the briefs and

arguments of counsel, this Court has concluded that the judgment of the Court of Criminal Appeals ... must be affirmed."). Smith presents no evidence of such saturation.

Second, under our law, courts look at the content of the reporting to see if the content is inflammatory or editorializing. See Gray v. State, 319 So. 2d 750 (Ala. Crim. App. 1975). Smith points to no news reporting that is inflammatory or that editorializes or to any evidence of how the actual reporting has prejudiced his ability to receive a fair trial in Montgomery County. Accordingly, I believe the main opinion is accepting Smith's speculation as to why he might not receive a fair trial in Montgomery County, without the benefit of actual evidence Smith could have obtained for the pretrial hearing or that he might be able to establish for purposes of a direct appeal. Were we to apply Ex parte Fowler and wait to address the issue of venue on direct appeal, we likely would have the benefit of the questions posed to the jury venire by the trial court, the prosecution, and the defense and the various potential jurors' answers to those questions. As it stands, neither the trial court nor this court had the benefit of such questioning.

I further note that our caselaw classifies two types of prejudice justifying a change of venue based on a criminal defendant's inability to receive a fair trial in the county where the crime allegedly occurred: presumed prejudice and actual prejudice. Cherry v. State, 933 So. 2d 377 (Ala. Crim. App. 2004). Presumed prejudice is where pretrial publicity has so saturated the community that an impartial jury could never be seated. Actual prejudice is where the jurors are prejudiced against the criminal defendant. Because we are considering this matter based on a mandamus petition filed before the venire has been assembled, we may consider only the issue of presumed prejudice. The defendant in a presumed-prejudice case carries a heavy burden of proof. The publicity must rise to a saturation level, and it must be inflammatory. It has been observed that "'[t]he presumptive prejudice standard is "rarely" applicable, and is reserved only for "extreme situations."'" Carruth v. State, 927 So. 2d 866 (Ala. Crim. App. 2005)(quoting Hunt v. State, 642 So. 2d 999, 1043 (Ala. Crim. App. 1993), quoting in turn Coleman v. Kemp, 778 F.2d 1497, 1537 (11th Cir. 1985)).

In Luong v. State, 199 So. 3d 139 (Ala. 2014), this Court analyzed the issue of presumed prejudice in light of the

United States Supreme Court's decision in Skilling v. United States, 561 U.S. 358 (2010). In line with Skilling, this Court considered the following factors as to the issue of such prejudice: (1) "the size and characteristics of the community where the offenses occurred" and the case was to be tried, 199 So. 3d at 147; (2) "the content of the media coverage," id.; (3) "the timing of the coverage in relation to the trial," id.; (4) "the media interference with the trial or its influence on the verdict," id.; and (5) whether the community had been closely involved in the case in a manner that indicated bias or prejudice, id. at 148-49.

Because we are considering a change of venue by way of a petition for a writ of mandamus, and without the benefit of jury selection or a trial, we can consider only factors (1), (2), and (5). As to those factors, Smith has failed to include any demographic information about Montgomery County necessary to analyze factor (1). We can take judicial notice that Montgomery County is one of the largest counties in our State, which is of no benefit to Smith. We do not know the number of citizens eligible for jury service or the racial makeup of the county. Smith has not told us the method the Montgomery Circuit Court has chosen for summoning citizens to

jury service.[12] Indeed, Smith failed to offer any evidence as to this factor, which is his responsibility. As to factor (2), Smith has provided us with the news articles he provided to the trial court. However, he has not pointed to any inaccurate reporting or editorializing. One online article from alabamanews.net has a headline reading: "Greg Gunn Family Speaks Out After Officer Indicted for Murder." The article is an interview with the family of Gregory Gunn, the man shot and killed by Smith. In the article the family members only ask for "justice." Another article from the Montgomery Advertiser has the following headline: "Protesters demand answers in Gunn's death." The article details local political officeholders' frustration at the pace of the investigation. Another online article printed from al.com has the following headline: "White Montgomery Police Officer Indicted for Murder of Unarmed Black Man." The first part of the article contains quotations from Smith's lawyer, Mickey

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[12]See, e.g., Ala. Code 1975, § 12-16-57 (providing that county master list of potential jurors "may include all registered voters, persons holding drivers' licenses and registering motor vehicles, and may include other lists, such as lists of utility customers and persons listing property for ad valorem taxation"); Ala. Code 1975, § 12-16-145 (providing a procedure for judges of a circuit to adopt an "alternate juror selection and qualification plan").

McDermott, to the effect that Smith is innocent and that Smith acted properly and lawfully and that the "law enforcement community" supports Smith. It also contains quotations from the Montgomery County district attorney Daryl Bailey that "[a] jury will determine [Smith's] guilt or innocence." The remaining portion of the article simply retells general information about the case. Smith also attaches what appears to be Twitter social-media posts by news outlets about the case. Notably, Smith offered no evidence of the circulation numbers of those news outlets or the number of people who have read the online articles. I believe that, in the context of a mandamus petition, Smith has not carried his burden of establishing the type of "saturation" or "inflammatory" media coverage that would support a change of venue without any jurors ever having been summoned. Likewise, Smith has failed to present evidence to satisfy his burden as to factor (5). In sum, this Court's decision in Luong requires Smith to establish presumed prejudice; he has not done so. Compare Irvin v. Dowd, 366 U.S. 717, 725-27 (1961) (seminal case discussing juror prejudice resulting from pretrial publicity); see also id. at 722-23 ("In these days of swift, widespread and diverse methods of communication, an important case can be

expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.").