

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

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June 14, 2006

Frank Wilson Myers, Sr.
Attorney at Law
308 HALL AVE
BAY MINETTE AL 36507-4416

Appeal Number: 06-12851-G
Case Style: In Re: Ronald Patrick Swiney
District Court Number:

The enclosed order has been entered. No further action will be taken in this matter.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Walter Pollard (404) 335-6186

Encl.

Ronald P. Swiney (154406)
Donaldson CF
100 WARRIOR LN
BESSEMER AL 35023-7228

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TO: Frank Wilson Myers, Sr.
CC: Ronald P. Swiney (154406)
CC: Troy King
CC: Administrative File

CC: VANDERKAM, JIM

CC: JIM KING

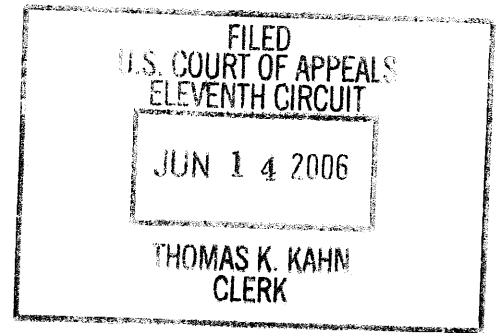
CC: RONALD P. SWINEY (154406)

TO: FRANK WILSON MYERS, SR.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-12851-G



IN RE: RONALD SWINEY,

Petitioner.

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

Before ANDERSON, BIRCH and DUBINA, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Ronald Swiney 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 application

satisfies the requirements of this subsection.” Id. § 2244(b)(3)(C).

In his application, Swiney raises four grounds. First, Swiney alleges that the state of Alabama deliberately convicted him despite his innocence, in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments. In support of his claim, he alleges that newly-discovered evidence of his innocence surfaced in 2003, but his subsequent state habeas petition was dismissed without an evidentiary hearing. In particular, Swiney contends that a “prominent forensic scientist in Washington State discovered that under the conditions present in the subject crime, gun shot residue (GSR) tests conducted upon [Swiney were] positively exculpatory.” He further asserts that this evidence could not have been discovered previously through the exercise of due diligence, because the evidence relies upon a “new scientific discovery that occurred in 2003.”

Second, Swiney contends, the Alabama courts allowed the state of Alabama to withhold exculpatory evidence, in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and the Fifth and Fourteenth Amendments. In support of this claim, Swiney contends that the State withheld a disclaimer about the GSR report, an exculpatory blood report, and other exculpatory evidence. He contends that the State had a “duty to uncover the underlying facts and subject those facts to scrutiny,” and he further alleges that the trial court did not consider “overwhelming scientific evidence of [his] actual innocence.” Swiney asserts that this claim relies upon newly-discovered evidence, citing the state of Alabama’s 2003 motion to dismiss his habeas petition, in which a witness on behalf of the State allegedly (1) revealed that there was additional exculpatory material and (2) disclosed that the State had engaged in prosecutorial misconduct. Swiney explained that he could not have known of the existence of this evidence until the State filed the 2003 motion.

Third, Swiney alleged that the state court abused its discretion when it: (1) refused to admit testimony from his expert witnesses; (2) admitted unreliable testimony offered by the State, in violation of his Fifth, Sixth, and Fourteenth Amendments; and (3) ruled against him without holding an evidentiary hearing or oral arguments. Swiney contends that this claim also relies upon the newly-discovered evidence cited in his first two claims.

Fourth, Swiney asserts that the State could not reproduce the trial record, which violated his due process rights under the Fifth and Fourteenth Amendments. In particular, he contended that the State had lost or destroyed the GSR hand swabs admitted at trial, and withheld other physical evidence and laboratory reports throughout his appeals. Swiney contends that this claim relies upon newly-discovered evidence, asserting that a witness on behalf of the State divulged the destruction of evidence in the State's 2003 motion to dismiss his habeas petition.

Swiney is not entitled to relief. His first claim does not meet the statutory criteria because, under § 2254, the newly-discovered facts, taken as true, must establish a constitutional error. In re Boshears, 110 F.3d 1538, 1541 (11th Cir. 1997). Here, Swiney alleges that a scientific development in 2003 resulted in evidence that exonerated him, but he does not allege how, prior to this discovery, his constitutional rights were violated in 1989 when he was convicted of the offense. Swiney's second claim does not meet the statutory criteria, because he does not present "clear and convincing" evidence that, but for a constitutional error, no reasonable factfinder would have found him guilty. See 28 U.S.C. § 2244(b)(2)(B)(ii); see also In re Boshears, 110 F.3d at 1541. Swiney alleges that he recently discovered that the State violated his constitutional rights by withholding a GSR report disclaimer and other exculpatory evidence, but his claim is vague, and he does not elaborate or explain how, in light of this evidence, "no reasonable factfinder would have found [him] guilty of

the underlying offense.” See 28 U.S.C. § 2244(b)(2)(B)(ii).

Finally, Swiney’s third and fourth claims do not meet the statutory criteria, because neither claim relates to his guilt or innocence of the underlying offense. See In re Medina, 109 F.3d 1556 1565 (11th Cir. 1997) (holding that challenges to a state sentence do not meet the § 2254 standard when they have “nothing to do with [petitioner’s] guilt or innocence of the underlying offense.”). Swiney’s third claim, which references the state court’s refusal to grant him an evidentiary hearing or oral argument, apparently relates to the state court’s treatment of his most recent state habeas petition, not to his original conviction. Swiney’s fourth claim relates to the State’s treatment of physical evidence and laboratory reports.

Accordingly, because Swiney 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.