

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-13071-E

IN RE: ANTHONY W. BROOM,

Petitioner.

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

Before HULL, WILSON and MARTIN, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Anthony W. Broom 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, Broom indicates that he wishes to raise several new claims in a second or successive § 2254 petition, all of which, however, are rooted in what he describes as a single item of newly discovered evidence establishing his actual innocence of the murder conviction.¹ Specifically, Broom asserts that he recently discovered a 1981 “Death Investigation Report” (the “Report”), prepared by a law-enforcement investigator and containing false information pointing towards his guilt, which was used by the State to obtain a grand jury indictment, but evidently was not presented at trial. According to Broom, the Report incorrectly placed him in a hotel room with the victim at the time the shooting death occurred. Broom maintains that his trial counsel was ineffective for not having uncovered the Report earlier, for failing to use the Report to rebut the State’s evidence, and for not filing a state habeas petition based on the Report. He also asserts violations of his 4th Amendment, 8th Amendment, and due process rights.

In an attached affidavit, Diane Heisler, who Broom refers to as an advocate for the wrongfully convicted, attests that, in 2012, she personally made a public records request regarding Broom’s state criminal case to the records supervisor at the Winter Haven Police Department in

¹ Broom has attached additional pages to his application, which violates Instruction 5 on the application form: “Additional pages are not permitted except with respect to additional grounds for relief and facts which you rely upon to support those grounds. DO NOT SUBMIT SEPARATE PETITIONS, MOTIONS, BRIEFS, ARGUMENTS, ETC., EXCEPT IN CAPITAL CASES.” These pages also violate Instruction 2, which requires that all questions “must be answered concisely in the proper space on the form.” This Court, therefore, is not obliged to review the additional pages. Nevertheless, a review of the pages reveals no statutory basis to support the application.

Winter Haven, Florida. In response, the records supervisor mailed the Report, among other documents. According to Broom, Heisler had made numerous, unsuccessful written requests sometime earlier, although he does not specify when the requests were made.

Broom's new-evidence-based claims do not merit authorization to proceed, because he has failed to meet either of the criteria set forth under § 2244(b)(2)(B). To begin, he has failed to demonstrate that the facts underlying his claims could not have been discovered through due diligence, as is required by § 2244(b)(2)(B)(i). See *In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997). In appraising the petitioner's diligence in this regard, this Court inquires "whether a reasonable investigation undertaken before the initial habeas motion was litigated would have uncovered the facts the applicant alleges are 'newly discovered.'" *Id.* Broom appears to contend that the State concealed the report following his indictment, thus preventing its discovery. Critically, however, Broom has failed to detail either any efforts he undertook that might have led him to the Report sooner, or any obstructions that might have prevented such discovery. See generally *id.* Broom's claims, therefore, fail at the first prong. See *In re Boshears*, 110 F.3d at 1540; 28 U.S.C. § 2244(b)(2)(B)(i).

Next, in any event, Broom's claims independently fall short under the second prong, because the facts he relies on do not clearly prove that he is factually innocent of the crimes. See *In re Boshears*, 110 F.3d at 1541. Under § 2244(b)(2)(B)(ii), an application must be denied if, notwithstanding any newly discovered evidence, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quotations omitted). Contrary to Broom's urging, even when taken as true, his allegations would not clearly and convincingly preclude a jury from convicting him of the crimes. Records indicate that the State introduced evidence at Broom's trial which placed him at the scene of the crime shortly after the murder took

place, kneeling next to the victim with a firearm nearby. Importantly, Broom does not claim that the Report was used to convict him at trial, but only claims that it was used in the context of the grand jury proceedings. Moreover, while the Report tended to support his guilt, even if it were assumed to be fraudulent, as he insists, its negation would not prove the opposite. In other words, Broom has not presented any exculpatory facts, only allegations of State misconduct which, set alongside evidence placing him at the crime scene with a firearm, do not alone clearly and convincingly establish his actual innocence of the murder conviction. 28 U.S.C. § 2244(b)(2)(B)(ii).

Accordingly, because Broom 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.