

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Feb copy

Thomas K. Kahn
Clerk

404-335-6100

May 12, 2006

Mr. Frank Wilson Myers, Sr.
Attorney at Law
308 Hall Avenue
Bay Minette, AL 36507-1704

RE: Request for Authorization to Submit Second Petition for Writ of Habeas Corpus

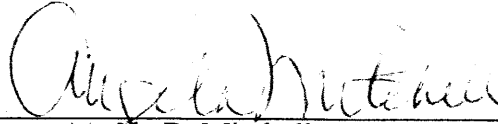
Dear Mr. Myers:

We are required to return unfiled, your Application for Leave to File a Second or Successive Habeas Under 28 U.S.C. Section 2244, that you tendered to this court. The court has adopted the enclosed form which must be used for filing a Motion for Leave to file A Second or Successive Habeas Petition. Enclosed are 4 blank copies of the form for your use.

Sincerely,

Thomas K. Kahn, Clerk

By



Angela B. Mitchell
Deputy Clerk

:abm

encls.

*RECEIVED BY FRANK WILSON MYERS ON 5-15-06.
SUBMITTED ON FORM AND RETURNED TO
CLERK OF THE COURT
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
BY OVERNIGHT EXPRESS MAIL
ON 5-16-06*

**UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT**

**APPLICATION FOR LEAVE TO FILE A SECOND OR
SUCCESSIVE HABEAS CORPUS PETITION
28 U.S.C. § 2244(b)
BY A PRISONER IN STATE CUSTODY**

Name _____ Ronald Patrick Swiney _____ Prisoner Number _____ 154406 _____
Institution _____ Donaldson Correctional Facility _____
Street Address _____ 100 Warrior Lane _____
City _____ Bessemer _____ State _____ Alabama _____ Zip Code _____ 35023 _____

INSTRUCTIONS--READ CAREFULLY

- (1) This application must be legibly handwritten or typewritten and signed by the applicant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.
- (2) All questions must be answered concisely in the proper space on the form.
- (3) The Judicial Conference of the United States has adopted the 8 x 11 inch paper size for use throughout the federal judiciary and directed the elimination of the use of legal size paper. All pleadings must be on 8 x 11 inch paper, otherwise we cannot accept them.
- (4) All applicants seeking leave to file a second or successive petition are required to use this form, **except in capital cases. In capital cases only**, the use of this form is optional.
- (5) 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.**

(6) In accordance with the "Antiterrorism and Effective Death Penalty Act of 1996," as codified at 28 U.S.C. § 2244(b), effective April 24, 1996, before leave to file a second or successive petition can be granted by the United States Court of Appeals, it is the applicant's burden to make a prima facie showing that he satisfies either of the two conditions stated below and in 28 U.S.C. § 2244(b).

(b)(1) a claim presented in a second or successive habeas corpus application under [28 U.S. C.] section 2254 that was presented in a prior application shall be dismissed.

(2) a claim presented in a second or successive habeas corpus application under [28 U.S.C.] section 2254 that was not presented in a prior application shall be dismissed unless.

(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.

(7) When this application is fully completed, the original and three copies must be mailed to:

**Clerk of Court
United States Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303**

APPLICATION

1. (a) Name and location of court which entered the judgment of conviction under attack **Shelby County, Alabama**

(b) Case number Shelby **Circuit Court: CC88-077.61**

2. Date of judgment of conviction **June 12, 1989**

3. Length of sentence **Life Without Parole** Sentencing Judge **John Rochester**

4. Nature of offense or offenses for which you were convicted: **Capital Murder**

5. Have you ever filed a post-conviction petition, application, or motion for collateral relief in any federal court related to this conviction and sentence?

Yes (X) No () If "yes", how many times? **Once**

(a) Name of court **Northern District of Alabama, Southern Division**

(b) Case number **Civil Action No. 96-P-2823-9-S**

(c) Nature of proceeding **28 USC 2254 Petition**

(d) Grounds raised (list all grounds; use extra pages if necessary)

Ground 1: Petitioner was denied effective assistance of counsel to which he was and is constitutionally entitled under the Sixth and Fourteenth Amendment to the United States Constitution, Laws or Treaties.

Ground 2: Trial Court's actions rendered Petitioner's trial fundamentally unfair, thus violating Petitioner's right to fair trial.

Ground 3: Petitioner was denied his right to fair trial by the prosecutor's improper conduct/remarks during closing arguments.

Ground 4: Petitioner was denied effective assistance of counsel during the sentencing phase.

(e) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes (X) No ()

(f) Result **Denied**

(g) Date of result **June 23, 1998**

6. As to any second federal petition, application, or motion, give the same information: **Not Applicable**

7. As to any third federal petition, application, or motion, give the same information:
Not Applicable

8. Did you appeal the result of any action taken on your federal petition, application, or motion? (Use extra pages to reflect additional petitions if necessary)

(1) First petition, etc. No () **Yes (X)** Appeal No. **98-7003-D**

(2) Second petition, etc. **Not applicable**

(3) Third petition, etc. **Not applicable**

9. If you did not appeal from the adverse action on any petition, application, or motion, explain briefly why you did not: **Not applicable**

Note regarding this Application Submittal: Petitioner filed a Motion for Request to File Second or Successive § 2254 Habeas Petition which arrived and was stamped as received by the Clerk of the Court, United States Court of Appeals for the Eleventh Circuit on May 11, 2006. Petitioner elected not to use the form herein because the form clearly states: "All applicants seeking leave to file a second or successive petition are required to use this form, except in capital cases. In capital cases only, the use of this form is optional."

Petitioner was convicted of capital murder. He assumed this was a capital case until the Clerk of the Court returned his motion with instructions to complete the form herein on May 15, 2006. The AEDPA deadline for filing in Federal District Court is June 9, 2006. Petitioner prays this honorable Court will consider this in its decision.

10. State concisely every ground on which you now claim that you are being held unlawfully. Summarize briefly the facts supporting ground.

A. **GROUND ONE:** The State has engaged in deliberate attempts to convict and maintain the conviction of an innocent man in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

Supporting FACTS (tell your story without citing cases or law)

The State stood on procedural bars throughout collateral appeals. Newly-discovered evidence of Petitioner's innocence emerged in 2003 wherein Petitioner filed a state habeas corpus petition in compliance with Alabama's Rule 32. Petitioner's expert witness showed that this newly-discovered evidence created a false reliance that has prejudiced Petitioner at trial and in appeals. The newly-discovered evidence is of a scientific, technical nature that proves that exculpatory evidence was withheld from the jury. Again, the State stood on procedural bars claiming that this evidence is not newly-discovered. The trial court did not subject expert witnesses to qualification, did not understand the technical and scientific evidence, and DISMISSED the petition without an evidentiary hearing or oral arguments. During state habeas proceedings, additional exculpatory evidence and proof of evidence tampering were revealed by State witness testimony.

Was this claim raised in a prior federal petition, application, or motion?

Yes () No (X)

Does this claim rely on a "new rule of law?" Yes () No (X)

If "yes", state the new rule of law (give case name and citation): Not Applicable

Does this claim rely on "newly discovered evidence?" Yes (X) No ()

If "yes" briefly state the newly discovered evidence, and why it was not previously available to you.

A prominent forensic scientist in Washington State discovered that under the conditions present in the subject crime, gun shot residue (GSR) tests conducted upon Petitioner are positively exculpatory. This evidence could not have been discovered previously through the exercise of due diligence because this evidence relies upon a new scientific discovery that occurred in 2003 and could not have occurred prior to that time.

B. GROUND TWO: The Courts allowed the State to withhold Brady material in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Supporting FACTS (tell your story without citing cases or law)

The subject GSR report disclaimer, an exculpatory blood report, and additional exculpatory evidence, supporting conclusions of the newly-discovered evidence, are being withheld by the State. The courts have a duty to uncover the underlying facts and subject those facts to scrutiny. The trial court relied upon absurd State witness testimony in the face of overwhelming scientific evidence of Petitioner's actual innocence and clear and convincing evidence that the State continues to withhold exculpatory evidence.

Was this claim raised in a prior federal petition, application, or motion?
Yes () No (X)

Does this claim rely on a "new rule of law?" Yes () No (X)

If "yes", state the new rule of law (give case name and citation): Not Applicable

Does this claim rely on "newly discovered evidence?" Yes (X) No ()

If "yes" briefly state the newly discovered evidence, and why it was not previously available to you.

The State's witness divulged the existence of additional exculpatory material and prosecutorial misconduct in the State's 2003 MOTION TO DISMISS PETITIONER'S RULE 32. This evidence supports the newly-discovered, exculpatory evidence (see GROUND ONE). Petitioner could not have known this new evidence existed until the State revealed it in 2003.

C. GROUND THREE: The Court abused its discretion when it refused to hear expert witnesses for the Petitioner and admitted unreliable testimony from the State in violation of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

Supporting FACTS (tell your story without citing cases or law)

The State trial court abused its discretion when it ruled against Petitioner without an evidentiary hearing or oral arguments, relying only upon a patently ridiculous refutation of the newly-discovered evidence by a State witness. Had the courts subjected all expert witnesses to qualification under either *Daubert* or *Frey*,

Petitioner would have proved with certainty that he would not have been convicted absent withheld exculpatory evidence and prosecutorial misconduct.

Was this claim raised in a prior federal petition, application, or motion?

Yes () **No (X)**

Does this claim rely on a “new rule of law?” Yes () **No (X)**

If “yes”, state the new rule of law (give case name and citation): **Not Applicable**

Does this claim rely on “newly discovered evidence?” **Yes (X)** No ()

If “yes” briefly state the newly discovered evidence, and why it was not previously available to you.

Newly-discovered evidence cited in GROUND ONE and GROUND TWO were not subjected to judicial scrutiny, thereby resulting in a violation of clearly-established federal law.

D **GROUND FOUR:** State cannot reproduce the trial record; the trial record is a fundamental component of the due process provision guaranteed under the Fifth and Fourteenth Amendment of the U.S. Constitution.

Supporting FACTS (tell your story without citing cases or law)

The State has withheld exculpatory evidence and committed prosecutorial misconduct in this case since 1989. The newly-discovered evidence proves that the State procured Petitioner’s conviction by withholding exculpatory evidence. The State’s witness alleged, and the trial court agreed, that no newly-discovered evidence is possible in this case due to the fact that the State has lost or destroyed trial evidence (GSR hand swabs), thereby procedurally barring Petitioner. This reasoning sanctions the State’s violation of due process and prosecutorial misconduct and violates the State of Alabama Unified Judicial System on Records Retention (evidence must be retained for “75 years from the final disposition”). The State has consistently withheld physical evidence and laboratory reports and methods throughout direct and collateral appeals. State agents have alternately claimed that the evidence is “retained,” “lost,” and “destroyed.” The trial court should have, at a minimum, extracted a definitive status of the physical evidence given the inconsistencies of State agent assertions and revelation by the State that a key piece of physical evidence was destroyed. The trial court did not ascertain the existence of laboratory reports even in the face of absurd State witness testimony.

Was this claim raised in a prior federal petition, application, or motion?
Yes () No (X)

Does this claim rely on a “new rule of law?” Yes () No (X)

If “yes”, state the new rule of law (give case name and citation): Not Applicable

Does this claim rely on “newly discovered evidence?” Yes (X) No ()

If “yes” briefly state the newly discovered evidence, and why it was not previously available to you.

The State’s witness divulged the destruction of evidence in the State’s 2003 MOTION TO DISMISS PETITIONER’S RULE 32. This evidence is loosely related to the newly-discovered, exculpatory evidence (see GROUND ONE). Petitioner could not have known with certainty that this evidence was destroyed until the State revealed it in 2003.

11. Do you have any motion or appeal now pending in any court as to the judgment now under attack? Yes () No (X)
If yes, name of court Not applicable. Case Number Not Applicable.

Wherefore, applicant prays that the United States Court of Appeals for the Eleventh Circuit grant an Order Authorizing the District Court to Consider Applicant's Second or Successive Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254.

FWL SR
Applicant's Signature
A Heney

I declare under Penalty of Perjury that my answers to all the questions in this Application are true and correct.

Executed on 5-16-06
[date]

FWL SR
Applicant's Signature

PROOF OF SERVICE

Applicant must send a copy of this application and all attachments to the attorney general of the state in which applicant was convicted.

I certify that on 5-16-06, I mailed a copy of this Application* and all attachments to THE PARTIES LISTED BELOW
[date]

at the following address:

TRCY KING, ALABAMA ATTORNEY GENERAL
11 SOUTH UNION STREET, 3RD FLOOR
MONTGOMERY, AL 36130

KENNETH L. JONES, WARDEN
100 WARRIOR LANE
BESSEMER, AL 35023

FWL SR
Applicant's Signature
FRANK WILSON MYERS, SR.
308 HALL AVE.
BAY MINETTE, AL 36507-1704

* Pursuant to Fed.R.App.P. 25(a), "Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day of filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid."