

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

RONALD PATRICK SWINEY,)	
)	
Petitioner,)	
)	
v.)	CIVIL ACTION NO. 06-B-1133-S
)	
KENNETH L. JONES, WARDEN; ATTORNEY)	
GENERAL FOR THE STATE OF ALABAMA,)	
)	
Respondents.)	

ORDER

Ronald Patrick Swiney, hereinafter referred to as the petitioner, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his 1989 capital murder conviction in the Circuit Court of Shelby County, Alabama. This same conviction was the subject of a previous petition for writ of habeas corpus in this court. (See CV 96-P-2823-S).

Title 28 U.S.C. § 2244(b)(3)(A) provides:

Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

In *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir.), *cert. denied*, 520 U.S. 1203 (1997) the Court of Appeals for the Eleventh Circuit held that where the petitioner had not applied to it for permission to file a second habeas petition the district court lacked jurisdiction under 28 U.S.C. § 2244(b)(3)(A) to consider petitioner's request for relief.

While petitioner in this case filed a Motion for Application for Leave to File a Second or Successive Habeas Corpus Petition in the Eleventh Circuit Court of Appeals, this motion was dismissed on Wednesday, June 14, 2006.

On June 27, 2006, petitioner filed a Motion to Amend Pleadings (doc. #2) arguing that the § 2244(b)(3)(A) gatekeeping mechanism did not apply to this petition and that he did not require permission from the Eleventh Circuit Court of Appeals in order to proceed with this petition. He argues that this petition is not a second or successive petition, citing cases that are inapposite. The cases cited by petitioner stand for the proposition that a second petition is not a “second or successive petition” within the meaning of 28 U.S. C. § 2244 under the following circumstances:

- (1) when the first petition was dismissed as a mixed petition, *Slack v. McDaniel*, 529 U.S. 473 (2000);
- (2) when the first petition was dismissed as premature, *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); see also, *Singleton v. Norris*, 319 F.3d 1018 (8th Cir. 2003), *cert. denied*, 540 U.S. 832 (2003);
- (3) when the subsequent petition challenged the administration of the sentence and the claim had not arisen at the time of the prior petition, *Benchoff v. Collieran*, 404 F.3d 812 (3rd Cir. 2005) (parole procedure challenge); *Crouch v. Norris*, 251 F.3d 720 (8th Cir. 2001) (challenge to denial of parole); *James v. Walsh*, 308 F.3d 162 (2^d Cir. 2002) (incorrect calculation of conditional release date); *Hill v. Alaska*, 297 F.3d 895 (9th Cir. 2002) (challenge to calculation of mandatory parole date); *In re Cain*, 137 F.3d 234 (5th Cir. 1998) (challenge to prison disciplinary proceeding that resulted in loss of good time but which occurred after earlier habeas petition attacking conviction); but see, *Crone v. Cockrell*, 324 F.3d 833 (5th Cir. 2003) (petition was “second or successive petition” because jail credit claim could have been raised in first petition); and

- (4) when the subsequent petition presented an ineffective assistance of counsel claim arising from representation during an out of time appeal which was granted as a result of the first habeas petition, *United States v. Orozco-Ramirez*, 211 F.3d 862 (5th Cir. 2000).

Petitioner's first federal habeas petition was adjudicated on the merits. The claims raised in this petition are based on facts known when petitioner filed his first federal habeas petition. What was unknown when the first petition was filed involved technology as opposed to facts. In any event, the court concludes that this is a second or successive petition which requires prior authorization by the Eleventh Circuit Court of Appeals.

Without authorization this court lacks jurisdiction to consider a second or successive motion. *Hill v. Hopper, supra*. Accordingly, it is **ORDERED** that the petition for writ of habeas corpus is hereby **DISMISSED**.

As to the foregoing it is SO ORDERED this the 31st day of July, 2006.


SHARON LOVELACE BLACKBURN
UNITED STATES DISTRICT JUDGE