

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

RONALD PATRICK SWINEY,)	
)	
Appellant,)	
)	
- vs -)	Appeal Number: 06-14865-F
)	
KENNETH L. JONES, Warden,)	District Court Case: 06-CV-01133
Donaldson Correctional Facility;)	
TROY KING, Attorney General,)	
State of Alabama,)	
)	
Respondents.)	
)	

MOTION TO RECONSIDER, VACATE OR MODIFY AN ORDER

INTRODUCTION

In its Order dated January 16, 2007 this honorable Court held that “[t]o merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues he seeks to raise.” Citing, 28 U.S.C § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct 1595, 1600-01 (2000). It then went on to conclude that the District Court lacked jurisdiction to entertain Appellant’s successive § 2254 application and that he therefore he failed to satisfy the second prong of *Slack*. Your Appellant respectfully submits that the facts of the case bear otherwise to the extent that he followed all applicable procedural guidelines given the sequence of factual developments, and that moreover, his proof of actual innocence – delayed from prior availability by reason of the

state's own conduct – undeniably requires judicial consideration never before afforded the evidence in order to satisfy the very concept of justice; thus his instant application for reconsideration and vacatur of this Court's recent Order pursuant to 11th Cir. R. 27-2.

QUESTIONS PRESENTED

1. Does the Appellant's instant *habeas corpus* petition raise issues not presented in his prior application for relief under 28 U.S.C. § 2254 ?

2. If not, based on the chronology of factual developments in the case, was it impossible for the Appellant to discover and advance such issues in his prior application through the exercise of due diligence within the meaning of § 2244(b)(1)(B)(i) ?

3. If answering both preceding questions in the affirmative, did the District Court below therefore then commit error in concluding the instant petition to be a second or successive petition requiring permission of this Court under § 2244(b)(3)(A) ?

4. Is the Appellant's conviction for the crime of "Capital Murder" under Alabama Criminal Code § 13A-5-40(a)(10) a "capital case" for which he could have been sentenced either to death or life imprisonment without parole ?

5. Does the fact that he was sentenced to life without parole instead of death make his conviction for Capital Murder a non capital case in this Court's view ?

6. Does the application form mandated by this Court for use by Appellant for requesting leave to file a second or successive § 2254 application fail to define what it considers a "capital case" ?

7. Does such mandated form unfairly prejudice *habeas* litigants convicted of capital crimes who are not on death row to the extent that it prohibits only them from briefing their arguments, thereby serving to violate their 14th Amendment equal protection rights ?

8. Does such form then satisfy the statutory intent of the Antiterrorism Effective Death Penalty Act of 2006 (“AEDPA”) provisions for capital cases ?

9. Did this Court err in finding Appellant failed to meet the *prima facie* showing requirements set forth in 28 U.S.C. § 2244(b)(2) when considering the limitations imposed by such required form ?

10. Does the proven intentional destruction and withholding of exculpatory evidence by the State, and/or its fabrication of evidence used to convict, constitute violations of a criminal defendant’s 5th and 14th Constitutional Amendments rights to due process of law and his or her right to present a defense ?

11. Does Appellant’s underlying *habeas corpus* petition and subsequent § 2254 application sufficiently allege and show the intentional destruction and withholding of exculpatory evidence by the State and/or its fabrication of evidence used to convict ?

12. Does it not follow that he has indeed made a *prima facie* showing of the denial of his 5th, 6th and 14th federal Constitutional rights sufficient to satisfy both his bad faith burdens under *Arizona v. Youngblood*, 488 U.S. 51 (1988) ?

13. Does not his petition further allege and show that the newly-discovered evidence of actual innocence on which his instant petition rests first emerged years after his conviction and the resolution of his first petition ?

14. Does it not then follow that Appellant has also met his totality of the circumstances burdens under *Lowenfield v. Phelps*, 484 U.S. 231 (1988) ?

15. If concluded is that Appellant suffered federal Constitutional rights violations at the hands of the State, and that by reason of the State's actions he could not have procured the newly-discovered evidence of his actual innocence until after his first application for relief under § 2254 was finally decided, does it not naturally follow then that he has also shown to have complied with all applicable state and federal procedural guidelines sufficient to satisfy both prongs of the *Slack* test ?

16. Even if the Court were to conclude that one or more of the restrictions created under AEDPA serves as a bar to Appellant's most recent petition, will notions of fair play and substantial justice suffer Appellant being estopped from proving his actual innocence for the remainder of his natural life pursuant to a mere technical statutory imprimatur, and moreover, will justice suffer that being so irrespective of the number of years Appellant has already suffered unjust imprisonment ?

17. Alternatively, if this honorable Court were to determine that the Appellant's newly-discovered evidence is properly subject to a second or successive petition and does not conclusively prove his innocence, will notions of fair play and substantial justice justify his continued imprisonment by reason of a judicial remedy

being denied him by a mere statute when indisputable evidence of flagrant police and prosecutorial misconduct violative of his Federal Constitutional rights *in extremis* actually deprived him from receiving any semblance of a fair trial ?

18. Moreover, given that the overt acts by state agents were willful and wanton, and continue on to date thus as an open and notorious criminal conspiracy against the Appellant in gross violation of his civil rights otherwise vouchsafe pursuant to 18 U.S.C. §§ 241, 242, accordingly and for good cause shown, should this honorable Court, in the exercise of its inherent and equitable supervisory jurisdiction, and/or acting *sua sponte*, enjoin the State of Alabama from further violations thereof and decree that the Appellant be released forthwith to thereby enforce compliance as an adjunct to an injunctive decree in order to effect swift and complete rather than truncated justice as an appropriate remedy within the remedial discretion which is the hallmark of 'equity' so as to mold each decree to the necessities of this particular case and eschew rigid absolutes ?

ARGUMENTS

POINT I: THE FEDERAL DISTRICT COURT ERRED IN DETERMINING THE PETITION SUBJECT OF THE INSTANT APPLICATION TO BE A SECOND OR SUCCESSIVE PETITION REQUIRING LEAVE OF THIS COURT FOR CONSIDERATION PURSUANT TO § 2244(a)(3)(A) SINCE THE FACTUAL PREDICATE FOR THE PETITION COULD NOT HAVE BEEN DISCOVERED THROUGH THE EXERCISE OF DUE DILIGENCE PRIOR TO THE FILING OF HIS FIRST PETITION UNDER § 2254, AND WHEN THE FACTS UNDERLYING THE SECOND PETITION, IF PROVEN AND VIEWED IN LIGHT OF THE EVIDENCE AS A WHOLE, ARE SUFFICIENT TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT, BUT FOR THE CONSTITUTIONAL ERRORS ATTENDANT TO THE STATE'S INTENTIONAL DESTRUCTION AND WITHHOLDING OF EXCULPATORY EVIDENCE, NO REASONABLE FACTFINDER WOULD HAVE FOUND APPELLANT GUILTY.

28 U.S.C. § 2244(b)(2) provides that a second or successive petition for relief under § 2254 advancing arguments not raised in a prior application shall be dismissed, unless: the applicant shows that the factual predicate for the claims could not have been discovered previously through the exercise of due diligence (§ 2244[b][2][B][i]), and the facts underlying the new claims, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that if not but for constitutional errors below, no reasonable factfinder would have found the applicant guilty (§ 2244[b][2][B][ii]).

In the present case it has been shown that Appellant's first application for relief under § 2254 was filed on October 22, 1996, and finally decided by order dated June 23, 1998.¹ And also shown is first, that the newly-discovered evidence serving as the factual basis for his second petition was not discovered until after the filing of the State's answer to the first petition, and secondly that his ability to develop that evidence to the point of being able to show such as proof of actual innocence was necessarily dependent upon a protracted scientific testing process extending past the date on which his first petition was denied. And even more compelling yet is that the record of this case is replete with facts showing the intentional destruction and withholding of exculpatory evidence from the defense, together with the fabrication of evidence upon which Appellant was found guilty that have heretofore been wholly ignored by the State in its effort to conceal the truth in this case that they convicted the wrong man.²

¹ This Court thereafter denied Appellant's application for a Certificate of Probability on October 14, 1998.

² In each rebuttal to Appellant's applications for relief, the State merely regurgitated the circumstantial evidence they presented at trial which was solely the product of withheld or destroyed exculpatory and fabricated evidence, rather than addressing the issues presented.