IN THE

UNITED STATES SUPREME COURT

In re LARRY BRINSON, PETITIONER

Vs.

MARK S. INCH, SECT. FL.D.O.C., et al, RESPONDENTS

ORDER DENYING AUTHORIZATION TO FILE SUCCESSIVE HABEAS CORPUS

APPENDIX- A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10901-H

IN RE: LARRY BRINSON,

Petitioner.

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

Before: WILSON, ROSENBAUM and JULIE CARNES, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Larry Brinson 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); *see also Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that our determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In his application, Brinson indicates that he wishes to raise three claims in a second or successive § 2254 petition. Brinson, who was convicted of sexual battery, claims that: (1) his trial counsel was ineffective for failing to investigate the victim's criminal background and prepare Brinson's defense that the victim had agreed to have sex with him in exchange for crack cocaine; (2) the prosecutor knowingly used perjured testimony by soliciting, and not correcting, the victim's testimony that she had not used crack; and (3) the prosecutor willfully suppressed material exculpatory evidence that the victim had a prior drug arrest. Specifically, Brinson contends that his defense at trial was that the victim had agreed to have sex with him in exchange for crack cocaine, and after they had sex and Brinson was unable to provide her with any crack, she claimed he had raped her. The victim denied the sex-for-crack agreement and denied having smoked any crack cocaine. New evidence revealed, however, that the victim had been arrested on September 22, 2005, for possession of drug paraphernalia and crack cocaine. Brinson argues that this evidence, which should have been discovered by his trial counsel and was suppressed by the prosecution, would have shown the victim "perjured herself on the question of her using crack cocaine," would have changed the jury's consideration of the victim's credibility, and would have created a reasonable likelihood of a different result.

Brinson asserts that his claims rely upon newly discovered evidence. Namely, Brinson seeks to rely upon: (1) an arrest record showing that the victim was arrested for possession of a crack pipe on September 22, 2005; (2) a "narcotics and dangerous drug field test form" indicating

that the substance found on the victim on September 22, 2005 tested positive for cocaine; and (3) trial transcripts showing that the victim testified that she did not have a sex-for-drugs agreement with Brinson or otherwise consent to anal sex with him. The trial transcripts that Brinson cites do not indicate that the prosecutor asked whether the victim used crack. Brinson also attaches the information in his case, which charged him with sexually battering the victim on July 4, 2006.

Brinson fails to meet the statutory criteria for filing a successive § 2254 petition. First, Brinson does not explain in his application why the evidence he now seeks to rely upon could not have been uncovered through a "reasonable investigation" undertaken before he litigated his initial § 2254 petition. 28 U.S.C. § 2244(b)(2)(B)(i); *In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997). Second, the fact that the victim had a prior crack cocaine arrest more than nine months before the alleged sexual battery does not establish by clear and convincing evidence that no reasonable factfinder would have found Brinson guilty of sexual battery. 28 U.S.C. § 2244(b)(2)(B)(ii).

Accordingly, because Brinson 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.

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MOTION FOR AUTHORIZATION TO FILE SUCCESSIVE HABEAS CORPUS PETITION

APPENDIX -B

Additional material from this filing is available in the Clerk's Office.