

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

David J. Smith  
Clerk of Court

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October 09, 2019

Augustus Larry Lundy  
Limestone CF - Inmate Legal Mail  
28779 NICK DAVIS RD  
HARVEST, AL 35749-0000

Appeal Number: 19-13574-A  
Case Style: In re: Augustus Lundy  
District Court Docket No: 2:10-cv-00357-LSC

The enclosed order has been entered. No further action will be taken in this matter.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Denise E. O'Guin, A  
Phone #: (404) 335-6188

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

\_\_\_\_\_  
No. 19-13574-A  
\_\_\_\_\_

IN RE: AUGUSTUS LUNDY,

Petitioner.

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

Before: TJOFAT, WILLIAM PRYOR and JORDAN, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Augustus Lundy 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 Corrs.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

A claim presented in a prior § 2254 petition or application for leave to file a second or successive § 2254 petition "shall be dismissed." *See* 28 U.S.C. § 2244(b)(1) (providing that a claim presented in a second or successive application under § 2254 must be dismissed if it was filed in a prior "application"); *In re Hill*, 777 F.3d 1214, 1222 (11th Cir. 2015) (interpreting "application" within the meaning of § 2244(b)(1) to include the original § 2254 petition). A claim is the same, for purposes of § 2244(b)(1), when the basic gravamen of the legal argument is the same. *See In re Everett*, 797 F.3d 1282, 1288 (11th Cir. 2015). Section 2244(b)(1)'s requirement that a repetitious claim be dismissed is jurisdictional. *See In re Bradford*, 830 F.3d 1273, 1277-78 (11th Cir. 2016).

In his application, Lundy indicates that he wishes to raise two claims in a second or successive § 2254 petition. Both claims appear to be related to each other. In his first claim, Lundy argues that he was denied effective assistance of counsel because the state court deprived him of the only defense he had by (1) denying his request for jury instructions on mental disease or defect and on the lesser included offense of manslaughter and (2) compelling him to plead guilty. In his second claim, Lundy argues that he was denied a fair trial because the state court deprived him of the only defense he had by (1) denying his request for a jury instruction on mental disease or defect and (2) compelling him to plead guilty. Lundy also states that he did not raise

either claim in a prior petition or application for a second or successive petition, but he concedes that neither of his claims rely on a new rule of constitutional law or new evidence.

Here, Lundy's claims are barred by § 2244(b)(1) because, despite claiming otherwise, he raises substantially the same claims in his instant application that were raised and rejected in his original § 2254 petition. See 28 U.S.C. § 2244(b)(1); *In re Hill*, 777 F.3d at 1222; *In re Everett*, 797 F.3d at 1288; (see CM/ECF for U.S. Dist. Ct. for N.D. Ala., case no. 2:10-cv-00357-LSC, doc. 1 at 4-5, 15-27; *id.*, doc. 17). Accordingly, we lack jurisdiction to consider these claims on the merits. See 28 U.S.C. § 2244(b)(1); *In re Bradford*, 830 F.3d at 1277.

Even if we were to consider the merits, Lundy's claims fail to meet the statutory criteria because he concedes that neither of his claims are based on a new rule of constitutional law or newly discovered evidence. See 28 U.S.C. § 2244(b)(2)(A), (B).

Accordingly, Lundy's application for leave to file a second or successive petition is hereby DISMISSED.

# IN THE SUPREME COURT OF ALABAMA



August 9, 2019

1180720

Ex parte Augustus Larry Lundy. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Augustus Larry Lundy v. State of Alabama) (Jefferson Circuit Court: CC-05-3627.61; Criminal Appeals : CR-18-0360).

## CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on August 9, 2019:

**Writ Denied. No Opinion.** Mendheim, J. - Parker, C.J., and Shaw, Bryan, and Mitchell, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 9th day of August, 2019.

A handwritten signature in cursive script that reads "Julia Jordan Weller".

Clerk, Supreme Court of Alabama

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