IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11985-A

IN RE: EDWARD DONALD OBERWISE,

Petitioner.

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

Before: HULL, MARCUS and ROSENBAUM, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Edward Donald Oberwise 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).

Moreover, under 28 U.S.C. § 2244(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." 28 U.S.C. § 2244(b)(1). In *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016), we held that a later request of a prisoner who has previously filed a request for authorization to file a second or successive petition based on the same claim must be dismissed, because § 2244(b)(1) prohibited us from considering such a successive request. *Id.* at 1339-40. *Baptiste*, and other cases, have also recognized that the law-of-the-case doctrine may similarly preclude a prisoner from seeking relief on a ground already presented to this Court. *See id.* at 1340-41; *In re Lambrix*, 776 F.3d 789, 793–94 (11th Cir. 2015) (quotation omitted).

In his application, Oberwise indicates that he wishes to raise a single claim in a second or successive § 2254 petition. Oberwise alleges that the state trial court erred when it listened to recordings of phone calls while in chambers and outside of his presence, and that the transcripts of the phone calls, which contained statements that were not on the recordings, were not admitted into evidence. Although Oberwise concedes that he has previously raised this claim, he asserts in his application that his claim relies on a "new rule of constitutional law," citing several Supreme Court cases that were decided between 1963 and 2007.

Oberwise's claim fails to meet the statutory criteria. Because he unsuccessfully sought, on two prior occasions, our leave to file the same claim, we must dismiss his application. *See Baptiste*, 828 F.3d at 1339-40.[1]

Accordingly, Oberwise's application is DISMISSED.

[1] We also note that Oberwise previously raised his proposed claim in his initial § 2254 petition from 2011, which the district court dismissed based on procedural default. Accordingly, even if Oberwise had not previously sought our leave to file his claim, we would still deny his application. 28 U.S.C. § 2244(b)(1); *see also In re Mills*, 101 F.3d 1369, 1371 (11th Cir. 1996). Moreover, although Oberwise has cited to several Supreme Court cases and alleged that they created a "new rule of constitutional law," they were all issued between 1963 and 2007 and were therefore available at the time of Oberwise's first § 2254 petition. Thus, they were not "previously unavailable" at the time of his petition and cannot now serve as a "new rule of constitutional law." *See* 18 U.S.C. § 2244(b)(2)(A).

ROSENBAUM, Circuit Judge, concurring:

I agree that *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016), requires us to dismiss Edward Oberwise's request for authorization to file a second or successive collateral claim. I write separately because I continue to believe that *Baptiste*'s interpretation of 28 U.S.C. § 2244(b)(1) to prohibit us from considering a successive request for authorization to file a second or successive collateral claim where a prior request for authorization raising the same claim was denied, is incorrect as a matter of law. *See In re Jones*, 830 F.3d 1295 (11th Cir. 2016) (Rosenbaum and Jill Pryor, JJ., concurring). Section 2244(b)(1) simply contains no such limitation. *See id.* As for § 2244(b)(3)(E), it likewise says nothing about successive requests for authorization. And where we know that, as a matter of law, we have incorrectly denied a prior request for authorization under the abbreviated 30-day gatekeeping procedure required by AEDPA, we should be able to correct our error and provide the petitioner with a real opportunity to have his case considered on the merits. Anything less flirts with violating the Suspension Clause.

Nevertheless, even in the absence of *Baptiste*, I would deny Oberwise's pending request for authorization under the law-of-the-case doctrine. Under the law-of-the-case doctrine, a court may issue decisions in conflict with its prior rulings in the case only "where (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior appellate decision was clearly erroneous and would work manifest injustice." *In re Lambrix*, 776 F.3d 789, 793-94 (11th Cir. 2015) (quotation omitted). Here, Oberwise has not shown that any exception applies. As a result, even without *Baptiste*, I would find that his successive request for authorization must be denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14593-J

IN RE: EDWARD DONALD OBERWISE,

Petitioner.

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

Before: WILLIAM PRYOR, NEWSOM and BRANCH, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Edward Donald Oberwise 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
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> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
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> (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).

Section 2244(b)(1) of Title 28, however, provides that "a claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). A "claim" remains the same so long as "[t]he basic thrust or gravamen of [the applicant's] legal argument is the same." *In re Hill*, 715 F.3d 284, 294 (11th Cir. 2013). For applications requesting authorization to file a second or successive petition pursuant to § 2254, this Court has consistently applied § 2244(b)(1) to prohibit the filing of a claim that is the same as one presented in a petitioner's initial habeas petition before the district court. *See In re Everett*, 797 F.3d 1282, 1291 (11th Cir. 2015); *In re Lambrix*, 776 F.3d 789, 795-97 (11th Cir. 2015). Moreover, we have denied an application where a state prisoner sought leave to raise a claim he "presented in a prior petition," albeit with new supporting evidence. *See In re Mills*, 101 F.3d 1369 (11th Cir. 1996); *see also In In re Baptiste*, 828 F.3d 1337, 1339-40 (11th Cir. 2016). Similarly, "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application . . . shall not be the subject of a petition for rehearing . . . ." 28 U.S.C. § 2244(b)(3)(E).

In his application, Oberwise wishes to raise two claims in a second or successive § 2254 motion. First, he alleges his actual innocence because the state prosecutor withheld the prior testimony of a witness who testified during his criminal proceedings. According to Oberwise, the

prior testimony would have affected the witness's credibility, and the factfinder was prevented from determining the witness's credibility. He asserts that this claim relies on both a new rule of law and newly discovered evidence. As to the new rule of law prong, Oberwise relies on *Teague v. Lane*, 489 U.S. 288 (1989). As to the newly discovered evidence prong, he states that the prosecutor withheld "exculpatory testimony in a particular transcript to a pre-text phone call," and the transcript was unavailable to the defense in discovery, during trial, and during appellate review. (*Id.*).

Second, Oberwise alleges manifest injustice because without one of the witness's complete testimony he was never convicted beyond a reasonable doubt, thereby resulting in a manifest injustice. He asserts that this claim relies on newly discovered evidence because the state prosecutor presented perjured testimony by suppressing prior testimony from a key witness that would have shown nothing sexual had occurred between the witness and him.

We lack jurisdiction to consider Oberwise's application because he raised the same claims in several prior applications that were denied or dismissed. *See In re Everett*, 797 F.3d at 1291; *In re Hill*, 715 F.3d at 294. Specifically, his arguments that the state failed to disclose a transcript, a witness's testimony was inconsistent with her statements in that transcript, and that the state presented false, or perjured, testimony are the same as those he presented in his 2017 and 2018 applications. Further, Oberwise has previously relied on *Teague* in his August 2018 application, which we dismissed. Although Oberwise's current application attempts to state his prior claims in a different manner, the basic gravamen of the claims is the same. *In re Hill*, 715 F.3d at 294.