IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11237-H

IN RE: DONALD J. MACK,

Petitioner.

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

Before: JORDAN, LUCK, and LAGOA, Circuit Judges.

BY THE PANEL:

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

Mack is a Florida prisoner serving a total 30-year sentence for conducting an enterprise through a pattern of racketeering ("RICO") and 3 counts of sale or delivery of controlled substances. He filed his original 28 U.S.C. § 2254 petition for a writ of habeas corpus in 2016, which was denied.

In his application, Mack indicates that he would like to raise one claim. He alleges that, under *Riggins v. Nevada*, 504 U.S. 127, 139 (1992), the state trial court erred in allowing him to be tried even though he was not competent to stand trial. He argues that, during post-conviction proceedings in Florida, the state court incorrectly found that he was competent to stand trial, but was temporarily incompetent to proceed with sentencing, even though multiple mental health experts opined that he was incompetent for both. He also argues that he was found incompetent to stand trial six months earlier in a different case before a Broward County court. He asserts that the state court's decision to ignore the Broward court's determination that he was not competent was an unreasonable application of clearly established law as determined by the Supreme Court and deprived him of his right to a fair trial. Mack argues that, according to *Ford v. Wainwright*, 477 U.S. 399, 424 (1986), due process requires that he have an opportunity to be heard, which was violated by the state post-conviction court because it determined that he was competent based solely on examining court files and the evidence used to convict him.

Mack indicates that he would like us to grant his application to file a second petition for

habeas corpus to allow the district court to review the state court's determination of competency *nunc pro tunc*. He states that he did not bring this up in his initial petition for habeas corpus because he was proceeding *pro se*. He asserts that, in the initial petition, he had mistakenly stated his claim as ineffective assistance of counsel for not discovering the Broward County incompetency determination, rather than a claim of ineffective assistance of counsel for not objecting to the district court's determination, despite medical evidence to the contrary, that he was competent. He argues that, under *Martinez v. Ryan*, 566 U.S. 1 (2012), his procedural default should be excused to allow this issue to be addressed on the merits in his second habeas petition. In his application, Mack indicates that his proposed claim does not rely on either a new rule of constitutional law or on newly discovered evidence.

Here, given Mack's express concession that his proposed claim does not rely on either a new rule of constitutional law or newly discovered evidence, it cannot meet the statutory criteria in § 2244(b)(2). *See* 28 U.S.C. § 2244(b)(2)(A), (B). Inasmuch as he relies on the Supreme Court cases that he cited as new rules of constitutional law, his application still fails because none of the cases were newly decided since his initial habeas petition in 2016.[1] Additionally, he does not allege that his lack of competency to stand trial was based on a newly discovered "factual predicate," but instead, relies on statements from mental health experts made during his state post-conviction proceedings and the determination of the Broward county court that he was incompetent, both of which were available prior to the filing of his initial § 2254 petition. *See id.* § 2244(b)(2)(B). Finally, his argument that his application should be granted because of *Martinez*

[1] In addition to the three Supreme Court cases identified above, Mack cites a number of other Supreme Court cases, as well as other circuit authority and Florida law, in discussing the legal framework for his claim. However, all of the Supreme Court cases that he cites predate his original § 2254 petition, and cases from courts other than the Supreme Court do not satisfy the statutory criteria. *See* 28 U.S.C. § 2244(b)(2)(A).

v. Ryan fails because, not only does that case predate his initial § 2254 petition, and therefore is not new, we have held that *Martinez* did not announce a new rule of constitutional law that would permit the filing of a successive habeas petition. *See id.*; *Chavez v. Sec'y, Fla. Dep't of Corr.*, 742 F.3d 940, 946 (11th Cir. 2014).

Accordingly, because Mack 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.

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