In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-12683

In re: MATTHEW LEO FAISON, JR.,
a.k.a. Maestro Matthew Faison,

Petitioner.

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

Before JILL PRYOR, BRANCH, and GRANT, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Maestro Faison 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:

APPENDIX A/B/(C).

> (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).

Faison is a Florida prisoner serving a 297-year total imprisonment sentence for kidnapping, sexual battery, and burglary.

In 2001, Faison filed his original § 2254 petition, which the district court dismissed with prejudice as time-barred.

In his application, he seeks to raise one claim that his mandatory minimum sentences under Florida's habitual violent offender classification, Fla. Stat. § 775.084, for sexual battery and burglary exceeded the minimum terms authorized by statute. He states that his claim relies on a new rule of constitutional law established in *Erlinger v. United States*, 144 S. Ct. 1840 (2024), which he argues applies to both federal and state cases and requires a finding that prior crimes were committed on separate occasions. Faison also states that this claim relies on newly discovered evidence in that he recently discovered that the sentencing judge filed a motion at the time of sentencing retaining jurisdiction over his parole eligibility.

The Armed Career Criminal Act ("ACCA") requires that any person who violates 18 U.S.C. § 922(g) serve a mandatory minimum imprisonment sentence of 15 years when the defendant has 3 prior convictions for violent felonies or serious drug offenses, or both, "committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

In *Erlinger*, the Supreme Court held that the Fifth and Sixth Amendments require that a unanimous jury, not a judge, find beyond a reasonable doubt that a defendant's prior offenses were committed on different occasions for the ACCA enhancement to apply. *Erlinger*, 144 S. Ct. at 1852-53. The Supreme Court stated that it had explained in its recent decision in *Wooden v. United States*, 595 U.S. 360 (2022), that the different occasions inquiry is inherently fact intensive. *Id.* at 1851. The Supreme Court concluded

that under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), the different occasions finding must be made by a jury because it has the effect of increasing a defendant's minimum and maximum sentence. *Id.* at 1851-52. The Supreme Court explained that "this case is as nearly on all fours with *Apprendi* and *Alleyne* as any we might imagine." *Id.* at 1852.

For a new rule to be retroactive under § 2255(h)(2), the Supreme Court itself must expressly hold that the new rule is retroactively applicable to cases on collateral review, or the Supreme Court's holdings in multiple cases can, together, "necessarily dictate retroactivity of the new rule." *Tyler v. Cain*, 533 U.S. 656, 662-64, 666 (2001).

The Supreme Court did not address whether *Erlinger* is retroactively applicable to cases on collateral review, and we have not yet addressed the issue of retroactivity in a published opinion. But we have held that *Apprendi* did not satisfy the criteria in § 2255(h)(2) because the Supreme Court had not declared that it be applied retroactively to cases on collateral review or applied it in a case on collateral review. *In re Joshua*, 224 F.3d 1281, 1283 (11th Cir. 2000). We later held that *Alleyne* did not apply retroactively on collateral review because the Supreme Court had not held that it was retroactive and had stated that its holding was an application of the rule established in *Apprendi*, which we had held did not apply retroactively on collateral review. *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014). We explained that "[i]f *Apprendi*'s rule

is not retroactive on collateral review, then neither is a decision applying its rule." *Id.*

Here, Faison fails to make a *prima facie* showing that his claim satisfies the statutory criteria for a new rule of constitutional law. 28 U.S.C. § 2244(b)(2)(A). Faison's reliance on *Erlinger* is misplaced because it applies to enhanced sentences under the ACCA rather than Florida's habitual violent offender statute under which Faison was sentenced. Accordingly, Faison cannot show that he would benefit from the holding in *Erlinger*. *See In re Henry*, 757 F.3d 1151, 1162 (11th Cir. 2014) (explaining that an applicant also must show "a reasonable likelihood that he would benefit from the new rule he seeks to invoke" in a successive collateral attack).

Even if he could, and even assuming the Supreme Court did articulate a new rule of constitutional law in *Erlinger*, *Erlinger* is not retroactively applicable to cases on collateral review. The Supreme Court did not expressly hold that *Erlinger* applies retroactively on collateral review. *See Tyler*, 533 U.S. at 662-64; *In re Joshua*, 224 F.3d at 1283; *Jeanty*, 757 F.3d at 1285. There is also no argument that multiple Supreme Court cases, considered together, dictate that its holding is retroactive. *Tyler*, 533 U.S. at 666. To the contrary, we have held that *Apprendi* and *Alleyne*—the cases on which *Erlinger* said it was "nearly on all fours," *Erlinger*, 144 S. Ct. at 1852—are not retroactive to cases on collateral review for purposes of permitting a second or successive § 2255 motion, *see In re Joshua*, 224 F.3d at 1283; *Jeanty*, 757 F.3d at 1285. As we have explained, if *Apprendi*'s and *Alleyne*'s rules are not retroactive on collateral review, then

neither is a decision applying their rules like *Erlinger*. *See Jeanty*, 757 F.3d at 1285. Therefore, this claim fails to meet the statutory criteria for a new rule of constitutional law. 28 U.S.C. § 2244(b)(2)(A).

Faison also fails to make a *prima facie* showing that this claim satisfies the statutory criteria for newly discovered evidence. 28 U.S.C. § 2244(b)(2)(B). The newly discovered evidence exception applies only to challenges to an applicant's underlying conviction and cannot be used to assert sentencing error. *In re Hill*, 715 F.3d 296-97 (11th Cir. 2013).

Accordingly, because Faison 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.