

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 17-12105-B

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DARRYL MONTGOMERY, JR.,

Petitioner-Appellant,

versus

SECERTARY, FLORIDA DEPARTMENT OF CORRECTIONS,  
ATTORNEY GENERAL FOR THE STATE OF FLORIDA,

Respondents-Appellees.

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Appeal from the United States District Court  
for the Middle District of Florida

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ORDER:

Darryl Montgomery, Jr. moves for a certificate of appealability ("COA") and leave to proceed in forma pauperis ("IFP") in order to appeal the denial of his 28 U.S.C. § 2254 habeas corpus petition.

Mr. Montgomery is a Florida prisoner serving a ten-year sentence after being convicted of sale of cocaine and accessory after the fact to robbery with a firearm. Mr. Montgomery directly appealed his conviction and sentence, alleging that the trial court committed fundamental error by questioning and admonishing

him regarding his decision not to testify. In his appellate brief, Mr. Montgomery did not cite to any federal constitutional rights or case law, nor did he use the word “federal” in regard to his fundamental error argument. Instead, his argument exclusively relied on Florida law.

In September 2013, the Florida Fifth District Court of Appeal issued an opinion affirming Mr. Montgomery’s conviction and sentence. That court determined that the trial court had erred when it failed to remove the jury before questioning Mr. Montgomery about his decision not to testify, but this error was not fundamental error. The state appellate court noted that the jury instructions reminded the jurors that Mr. Montgomery chose not to testify and instructed them not to view his exercise of his Fifth Amendment right as an admission of guilt. Further, the court stated that the evidence of Mr. Montgomery’s guilt was overwhelming and it therefore could not be said that the guilty verdict could not have been obtained without the assistance of the error.

Mr. Montgomery filed a motion for “rehearing and/or clarification” to that same Florida appellate court, essentially reiterating his fundamental error claim. The state court denied Mr. Montgomery’s motion for rehearing, and mandate was issued on November 8, 2013. Mr. Montgomery filed a pro se notice to invoke discretionary jurisdiction in the Florida Supreme Court. In May 2014 the Florida Supreme Court declined to take jurisdiction over his case.

Mr. Montgomery then filed the instant 28 U.S.C. § 2254 petition, alleging that: (1) the trial court violated his Fifth and Fourteenth Amendment rights by questioning and admonishing him about his decision not to testify in the presence of the jury; and (2) the prosecution knowingly allowed false testimony to be introduced at trial. The District Court entered an order asking Mr. Montgomery to show cause as to why his § 2254 petition should not be dismissed based on his failure to exhaust his claims in state court. Mr. Montgomery then filed an amended § 2254 petition that merely reiterated his claims.

The government filed a response, arguing that Mr. Montgomery's § 2254 petition should be dismissed because he failed to exhaust his claims in state court. Subsequently, the District Court dismissed Mr. Montgomery's § 2254 petition, noting that although Mr. Montgomery raised his first claim on direct appeal, he based that claim on Florida law and not federal constitutional law. As a result, the District Court found, Mr. Montgomery's claims were unexhausted and procedurally defaulted. Moreover, the court noted, Mr. Montgomery failed to allege cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default. The District Court denied Mr. Montgomery's amended § 2254 petition and denied a COA.

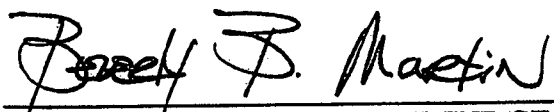
To obtain a COA, a person must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the District Court has

denied a habeas motion in part on procedural grounds, the petitioner must show that jurists of reason would find debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the District Court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000).

Before bringing a habeas action in federal court, a state prisoner must exhaust all available state court remedies for challenging his conviction, either on direct appeal or in a state post-conviction motion. 28 U.S.C. § 2254(b)(1); O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 1731 (1999). To exhaust state remedies, the state prisoner must "properly raise[]" any federal constitutional claims in state courts before seeking review of those claims in federal court. Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001). The state prisoner "must make the state court aware that the claims asserted present federal constitutional issues." Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998).

The District Court correctly found that Mr. Montgomery's claims were unexhausted and therefore procedurally defaulted. Although he raised his first claim regarding fundamental error on direct appeal, he did not state a federal constitutional basis for that claim. See Snowden, 135 F.3d at 735. And Mr. Montgomery did not raise his second claim at all on direct appeal or in other state court collateral proceeding. See O'Sullivan, 526 U.S. at 842, 119 S. Ct. at 1731.

Moreover, Mr. Montgomery did not present the District Court with an excuse for this procedural default. Reasonable jurists would not find the District Court's denial of Mr. Montgomery's § 2254 petition debatable. Slack, 529 U.S. at 484, 120 S. Ct. at 1603. Mr. Montgomery's motion for a COA is therefore **DENIED** and his motion for IFP status is **DENIED AS MOOT**.

  
UNITED STATES CIRCUIT JUDGE

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Appeal from the United States District Court  
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Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Darryl Montgomery Jr. has filed *pro se* a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's October 23, 2017, order denying his motions a certificate of appealability and leave to proceed *in forma pauperis* to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. Upon review, Montgomery's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief. *See* Fed.R.App.P. 40(a)(2).