IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13231-B

D.C. Docket No. 8:08-cv-01198

IN RE:

ANTHONY W. BROOM,

Petitioner.

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

Before: TJOFLAT, HULL and PRYOR, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Anthony W. Broom 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).

In his application, Broom indicates that he wishes to raise five claims in a second or successive § 2254 petition. First, Broom claims that he is actually, factually innocent of his murder conviction, as shown by physical evidence that the government's expert witness presented at Broom's trial. Although Broom alleges that new evidence establishes his actual, factual innocence, Broom only points to testimony that was presented at his trial. Broom's trial transcript would have been available at the time of Broom's original § 2254 motion. *In re Anderson,* 396 F.3d 1336, 1338 (11th Cir. 2005) (stating that the applicant's recent discovery of alleged indictment defects, overlooked previously by counsel, did not constitute "newly discovered evidence" under § 2255(h), because it did not center on evidence discovered since his trial). Accordingly, this claim fails to satisfy the statutory criteria.

For Broom's second claim, Broom asserts that, to obtain Broom's indictment on the murder charge, the government knowingly used perjured testimony from the lead detective in Broom's case. Relatedly, for Broom's third claim, Broom argues that the trial court did not have jurisdiction to hear his case because the government obtained Broom's indictment by perjured testimony. Although Broom's argument is not clearly supported by any evidence that he provides, Broom points to verbiage from another pleading that purportedly signifies that the government admitted that Broom's indictment was secured by false testimony from the lead detective. This evidence allegedly did not surface until after Broom's federal habeas relief was denied.

Even assuming for the sake of discussion that the lead detective's testimony at the indictment phase was false in some respect, Broom does not point to any *judicial* finding that the indictment underlying the conviction that he is now serving was based on false information, perjury, or government misconduct. *Cf. United States v. Hyder,* 732 F.2d 841, 845 (11th Cir. 1984) (explaining that, absent a judicial finding of perjury or government misconduct at the indictment phase, an indictment is not flawed simply because it is based on testimony that later may prove to be questionable). Furthermore, any defect in the lead detective's testimony, at the indictment phase, does not impugn any independent evidence presented to obtain the pertinent indictment. *Cf. United States* v. *Calandra,* 414 U.S. 338, 344-45, 94 S.Ct. 613, 618, 38 L.Ed.2d 561 (1974) ("an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence"). Most important, any defect in the lead detective's testimony, even at the indictment phase underlying the subject conviction, does not invalidate the testimony and other evidence, in support of Broom's conviction, presented and admitted at his trial. *Cf. United States v. Mcintosh,* 704 F.3d 894, 901-03 (11th Cir. 2013) (holding that a conviction remained in effect, and a district court retained jurisdiction, despite the dismissal of the indictment), *petition for cert. filed,* (U.S. May 22, 2013) (No. 12-10466). Thus, Broom's claims that are based on allegedly false testimony at the indictment phase, even if taken as true, would fail to show that no reasonable factfinder would have found Broom guilty at trial. Therefore, Broom's second and third claims do not provide a basis for a second or successive § 2254 petition.

For his fourth claim, Broom's argument is unclear, but he seems to assert that a state court did not properly act on another court's order that granted Broom habeas relief. For his fifth claim, Broom argues that the Florida Supreme Court violated Broom's rights to due process and equal

protection when it expressly retained jurisdiction on Broom's habeas petition to pursue sanctions. Those two claims are far afield from the statutory purposes of a second or successive § 2254 application, which seeks relief from the judgment of conviction. 28 U.S.C. § 2244(b). In any event, Broom's claims do not rely, as Broom admits, on newly discovered evidence or a new rule of constitutional law. Therefore, Broom's fourth and fifth claims do not meet the statutory requirements under § 2244(b).

Accordingly, because Broom 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.