

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 8, 2009

Elisabeth A. Shumaker
Clerk of Court

In re:

FRANK MEDEL, JR.,

Movant.

No. 09-4093
(D.C. No. 2:09-CV-00167-CW)
(D. Utah)

ORDER

Before **BRISCOE**, **HARTZ**, and **HOLMES**, Circuit Judges.

Movant Frank Medel, Jr., a Utah state prisoner proceeding pro se, has filed a motion for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus application. He attempted to file his second or successive § 2254 application in the district court without the required circuit court authorization to do so. See 28 U.S.C. § 2244(b)(3)(A). The district court transferred the matter to this court, see *In re Cline*, 531 F.3d 1249, 1251-52 (10th Cir. 2008), and Mr. Medel has now moved for authorization. We deny authorization.

Background. In 1987, Mr. Medel pleaded guilty to two counts of forcible sodomy, one count of object rape, and one count of aggravated sexual assault. He was sentenced to four indeterminate five-year-to-life prison terms, to be served consecutively. Mr. Medel filed a § 2254 application in 1999, asserting that he did

not enter his guilty plea knowingly and voluntarily; the trial court's plea colloquy did not comply with procedural requirements; he received ineffective assistance of counsel; the constitutional separation of powers doctrine was violated; and various Utah laws were violated. *See Medel v. Galetka*, No. 2:99-CV-224, slip. op. at 2-3 & 3 n.1 (D. Utah, Nov. 20, 2001). The application was denied by the district court, and this court denied him a certificate of appealability. *See Medel v. Galetka*, 36 F. App'x 644 (10th Cir. 2002).

In June 2003, Mr. Medel filed a state petition for post-conviction relief, asserting that he had recently discovered that, during the criminal proceedings, the state failed to disclose to him exculpatory evidence in its possession, despite the fact that this evidence was responsive to his discovery requests. He argued this failure to disclose violated his due process rights under *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"). The asserted new evidence consists of more than 100 documents, including medical, laboratory and police reports. The state court dismissed his petition, and the Utah Supreme Court upheld that dismissal. *Medel v. State*, 184 P.3d 1226, 1228 (Utah 2008). The Utah Supreme Court noted that, according to the state's response, the state did fail to disclose to Mr. Medel evidence in its possession before entering into plea negotiations, despite defense

discovery requests. *Id.* at 1229. It ruled, however, that Mr. Medel had not shown that his conviction was obtained in violation of his state or federal constitutional rights, and that his knowing and voluntary guilty plea constituted a waiver of any pre-plea constitutional violations. *Id.* at 1228.

Mr. Medel then filed a § 2254 application in federal district court in February 2009, seeking to present his claims based on the newly disclosed evidence. As noted, the district court transferred the matter to this court in order to give Mr. Medel an opportunity to seek the circuit-court authorization needed to file a second or successive § 2254 application.

In his motion for authorization, Mr. Medel identifies the following as newly discovered evidence not disclosed by the state during his criminal proceedings: (1) a psychological interview and mental status examination of him by Dr. Michael DeCaria which stated Mr. Medel exhibited psychotic thought processes and behavior; (2) signed victim statements, which would have indicated their limited recollection of the events in question; (3) the Utah Crime Laboratory's analysis of physical evidence seized from Mr. Medel's person and property; (4) police reports that identified other persons as potential suspects; and (5) medical records and Utah Crime Laboratory analysis relating to the rape victims. Mot. for Authorization at 6-7; *see also Medel*, 184 P.3d at 1229-30 (describing the recently disclosed evidence). Mr. Medel did provide copies of this new evidence in his memorandum in support of the unauthorized second or

successive § 2254 application that he filed in the district court, which the district court provided to this court pursuant to its transfer order.

Mr. Medel claims that sixteen years after his guilty plea, he filed a record request and learned that the state had failed to disclose material exculpatory evidence in its possession, even though the evidence had been responsive to his discovery requests. He argues that the state's failure to disclose this evidence violated his due process rights under *Brady* and negates his guilty plea. He contends that he exercised due diligence in obtaining this evidence because his attorney filed six discovery motions during his criminal proceedings and he repeatedly requested all evidence in the state's possession during state post-conviction proceedings.

Analysis. A court of appeals may authorize a second or successive § 2254 filing “only if it determines that the application makes a prima facie showing that the applicant satisfies” the requirements of § 2244(b)(2). *Id.* § 2244(b)(3)(C). Under § 2244(b), the movant must show that he has not raised his claim in a previous habeas application, 28 U.S.C. § 2244(b)(1), and that his new claim either “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” *id.* § 2244(b)(2)(A), or depends on facts, previously undiscoverable through the exercise of due diligence, that “if proven and viewed in the 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 [him] guilty,” *id.* § 2244(b)(2)(B). Mr. Medel does not argue that his claims are based on any new constitutional law, but bases his claim on the newly-discovered evidence prong.

A “prima facie showing” sufficient to obtain circuit court authorization of a new evidence claim is “simply a sufficient showing of possible merit to warrant a fuller exploration by the district court.” *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997). “If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application.” *Id.* at 469-70.

We assume for the sake of argument that Mr. Medel has made a prima facie showing that the newly disclosed evidence qualifies as such under 28 U.S.C. § 2244(b)(2)(B)(i); that is, that the factual predicate of Mr. Medel’s claim could not have been discovered previously through the existence of due diligence.

We cannot conclude, however, that Mr. Medel has made a prima facie showing that the facts underlying his claim, if true, would constitute a constitutional violation. *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (requiring that second or successive movant show constitutional error). All of the new evidence that Mr. Medel presents is impeachment evidence or, in the case of Dr. DeCario’s

report, evidence relating to a possible affirmative defense. The Supreme Court has held that the Constitution does *not* require the government to disclose impeachment material or any evidence regarding any possible affirmative defense before entering into a plea agreement with a defendant. *United States v. Ruiz*, 536 U.S. 622, 629, 633 (2002). Mr. Medel argues the state's failure to disclose the evidence in question was a *Brady* due process violation, but the focus of *Brady* is on a defendant's right to a fair trial. The *Ruiz* Court emphasized that the *Brady* rule requiring disclosures of exculpatory and impeachment evidence is linked to the Constitution's guarantee of a fair *trial*, *id.* at 628, but that when a defendant pleads guilty, he "forgoes not only a fair trial, but also other accompanying constitutional guarantees," *id.* at 628-29. The Court explained that the need for impeachment information and affirmative defense information is relevant "to the *fairness of a trial*, not in respect to whether a plea is *voluntary*." *Id.* at 629 (emphasis in original). The Court explained that it "is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty," *id.* at 630.

Further, and for the same reasons, the state's failure to disclose the impeachment information does not render Mr. Medel's guilty plea involuntary.

Quoting from *Ruiz*, this court has “rejected any notion that a defendant must know with specificity the result he forfeits before his waiver is valid:

The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances-- even though the defendant may not know the *specific detailed* consequences of invoking it. A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.

United States v. Hahn, 359 F.3d 1315, 1327 (10th Cir. 2004) (quoting *Ruiz*, 536 U.S. at 629-30); *see also Fisher v. Gibson*, 262 F.3d 1135, 1143-44 (10th Cir. 2001) (noting that a defendant who knowingly and voluntarily pleads guilty waives all constitutional challenges to his conviction).

Moreover, we cannot conclude that Mr. Medel has made a *prima facie* showing that the facts underlying his claim, “if proven and viewed in the 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 [him] guilty.” § 2244(b)(2)(B)(ii). None of the new evidence indicates factual innocence, rather, it is, at best, impeachment evidence. The Supreme Court has held that impeachment evidence is rarely sufficient to meet the no-reasonable-factfinder § 2244(b)(2)(B) test. *See Sawyer v. Whitley*, 505 U.S. 333, 349 (1992). Any evaluation of the asserted new evidence must be considered in light of the evidence “as a whole.” § 2244(b)(2)(B). Mr. Medel has not shown

that the asserted impeachment evidence would have negated the state's other, unimpeached testimony and evidence that it could present at trial such that no reasonable factfinder would have found Mr. Medel guilty.

Based on *Ruiz*, as well as our review of the new evidence, we cannot conclude Mr. Medel has made prima facie case that his new evidence satisfies the authorization requirements of § 2244(b)(2). Accordingly, we DENY Mr. Medel's motion for authorization to file a second or successive § 2254 petition. This denial of authorization is not appealable and "shall not be the subject of a petition for rehearing or for a writ of certiorari." *Id.* § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk