IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 10-10592-P

IN RE: MARTIN GROSSMAN,

Petitioner.

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

Before TJOFLAT, BLACK, and MARCUS, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), as amended by § 106 of the Antiterrorism and Effective Death Penalty Act of 1996, Martin Grossman 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). Grossman also has filed an "Emergency Motion for Stay of Execution" pending this Court's consideration of his application. Because Grossman has failed to demonstrate that his proposed claim relies on either a new rule of constitutional law or newly discovered evidence, as required by § 2244(b)(2), he has not satisfied the statutory criteria. Therefore, his application is denied and his motion for a stay is denied as moot.

Grossman raises only one claim in his application for a second habeas corpus petition. He submits that the state post-conviction court that heard his Fla. R. Crim. P. 3.850 motion wrongly denied him an evidentiary hearing on whether his trial counsel was ineffective during the penalty phase for failing to investigate and arrange for a competent mental health examination.

First, Grossman's proposed claim does not rely on a new rule of constitutional law within the meaning of § 2244(b)(2)(A). Grossman cites in support the Supreme Court's recent decisions in *Cone v. Bell*, 556 U.S. ___, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009), and *Wellons v. Hall*, No. 09-5731 (U.S. Jan. 19, 2010), which he contends have "direct application" to his case. In *Cone*, the Supreme Court held, *inter alia*, that "[w]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Cone*, 556 U.S. at ___, 129 S.Ct. at 1781. The Court explained that "[a] claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration—not when the claim has been presented more than once." *Id.* Recently, the Supreme Court in *Wellons* vacated this Court's finding that the petitioner's claim of improper *ex parte* contacts between the judge and jury was procedurally barred, and remanded for further consideration in light of *Cone*. *Wellons*, No. 09-5731, slip op. at 1, 7. In remanding, the Court noted, in relevant

part, that this Court's decision committed the same procedural error as in *Cone*, and it was not possible to tell how this Court would have ruled if it had the benefit of the *Cone* ruling. *Id.* at 1.

Grossman's reliance on *Cone* and *Wellons* is misplaced. Both *Cone* and, by extension, *Wellons*, involved straightforward interpretations of well-established procedural-default principles. *See id.* at 1, 7; *Cone*, 556 U.S. at ___, 129 S.Ct. at 1781. Specifically, *Cone* reiterated the longstanding rule that constitutional claims that have been exhausted in state court are ripe for federal habeas review. *See Cone*, 556 U.S. at ___, 129 S.Ct. at 1781 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3, 111 S.Ct. 2590, 2595 n.3, 115 L.Ed.2d 706 (1991)). Moreover, the holding in *Cone*—that a subsequent state court decision refusing to readjudicate a claim that previously has been determined on the merits does not create a procedural bar to federal habeas review—has no application to the state-court procedural-default error that Grossman alleges. Therefore, neither *Cone* nor *Wellons* announced a new rule of constitutional law within the meaning of 28 U.S.C. § 2244(b)(2)(A).

Beyond that, Grossman's proposed claim also fails to meet the newly-discovered-evidence standard in § 2244(b)(2)(B) both because the evidence is not new and because the evidence fails to establish that "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B). Grossman contends that new caselaw—specifically, *Massaro v. United States*, 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003), *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000), and *Gaskin v. State*, 737 So.2d 509 (Fla. 1999)—establishes that he has a right to raise his ineffective-assistance-of-counsel claim in a collateral proceeding, and that an evidentiary hearing is required unless the motion and record conclusively show that he is not entitled to relief. Grossman also contends that Dr. Maher was prepared to testify "that non-statutory mental mitigation evidence was present," and that, following the Supreme Court's recent decision in *Porter v.*

McCollum, 558 U.S. ___, ___, 130 S.Ct. 447, 455, ___ L.Ed.2d ___ (2009) (holding that, under Florida law, mental health evidence offered in the penalty phase of a capital murder prosecution that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating), such evidence now may be considered.

The problem is that Grossman has failed to cite any "new" evidence that could not have been discovered previously through the exercise of due diligence. 28 U.S.C. § 2244(b)(2)(B)(i). In his application, Grossman admits that his prior counsel had ordered a mental evaluation of Grossman. Thus, any mental-competency evidence that Dr. Maher could now present would have been discoverable with due diligence either by talking with Grossman's prior counsel or with Grossman himself. Thus, Grossman's evidence does not meet the criteria in § 2244(b)(2)(B)(i).

Likewise, Grossman cannot meet the requirements of § 2244(b)(2)(B)(ii). First, law is not new evidence. Thus, to the extent that Grossman cites *Porter*, *Massaro*, *Allen*, and *Gaskin* themselves as new evidence, his reliance is misplaced because they are court decisions and have no factual bearing on Grossman's individual innocence of his first-degree murder conviction. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). Second, because Grossman's purported new evidence only relates to counsel's alleged ineffectiveness in not presenting enough mitigation evidence during the penalty phase, it is insufficient as a matter of law to establish that "no reasonable factfinder would have found [Grossman] guilty of the underlying offense." *See id.* Simply put, Grossman's assertion that he is entitled to an evidentiary hearing to develop his mental-competency claims by definition does not meet the § 2244(b)(2)(B)(ii) because it has "nothing to do with [petitioner's] guilt or innocence of the underlying offense." *In re Medina*, 109 F.3d 1556, 1565 (11th Cir. 1997) (denying a successive application in a state death-penalty case and holding that "[t]he § 2244(b)(2)(B) exception to the bar against second habeas applications has no application to claims that relate only to the

sentence"), *overruled on other grounds by Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998).

Finally, Grossman has filed an emergency motion for a stay of his execution pending this Court's consideration and review of his current application to file a second or successive § 2254 petition. Because this Court has now fully considered his application and determined that he cannot satisfy the requirements of § 2244(b), his motion for a stay is moot.

Accordingly, because Grossman 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. Grossman's "Emergency Motion for Stay of Execution" is DENIED AS MOOT.