UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
APPLICATION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION
28 U.S.C. § 2244(b)
BY A PRISONER IN STATE CUSTODY

Name: Martin Grossman **Prisoner Number:** 089742

Institution: Florida State Prison

CAPITAL CASE
DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR
FEBRUARY 16, 2010 at 6:00 P.M.

Street Address: 7819 N.W. 228 Street

City: Raiford **State:** Florida **Zip Code:** 32026

APPLICATION

1. (a) **Name and location of court which entered the judgment of conviction under attack:** The Circuit Court in and for Pinellas County, Florida

   (b) **Case number:** CRC 84 - 11698 CFANO - C

2. **Date of judgment of conviction:** December 13, 1985

3. **Length of sentence:** Death **Sentencing judge :** Crockett Farnell

4. **Nature of offense or offenses for which you were convicted**: First Degree Murder

5. **Have you ever filed a post-conviction petition, application, or motion for collateral relief in any federal court related to this conviction and sentence?**
   Yes (x) No ( ) if "yes", how many times? One **(if more than one, complete 6 and 7 below as necessary)**
   (a) Name of court : Federal District Court - Middle District of Florida
   (b) Case number: 98:1929 - CIV -T- 17F
   (c) Nature of proceeding: Habeas Corpus Petition pursuant to 28 U.S.C. §2254
   (d) Grounds raised (list all grounds; use extra pages if necessary):

The grounds raised in the Petition for Writ of Habeas Corpus were:

1. The failure to sever Mr. Grossman's trial from that of a non-testifying co-defendant after it was requested, where the co-defendant's confession and statements were admitted at their joint trial, denied Mr. Grossman the right of cross examination, in violation of the 6th and 14th Amendment rights under the U.S. Constitution.

2. The Public Defender's office had a conflict of interest in representing the co-defendant, Thayne Taylor, because the office had previously interviewed Mr. Grossman and had access to privileged information which was used in the defense of Mr. Taylor against Mr. Grossman in a joint trial, in violation of the attorney client privilege and the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution.

3. The sentencing court by failing to properly and timely state the reasons for imposing a sentence of death, either orally or in writing, violated Mr. Grossman's rights under the 8th and 14th Amendments of the U.S. Constitution

4. Refusing to give Mr. Grossman's requested jury instructions, that the testimony of an accomplice should be received by the jury with great caution, and other special penalty phase instructions, violated the 6th, 8th, and 14th Amendments to the U.S. Constitution.

5. Mr. Grossman's sentencing jury was misled by unconstitutional jury instructions and the state's argument that diluted their sense of responsibility in the sentencing process in violation of the 8th and 14th Amendments.

6. Mr. Grossman was denied the effective assistance of counsel on direct appeal by counsel failing to raise issues which constituted clearly reversible error in violation of his 6th, 8th, and 14th Amendment rights as guaranteed by the U.S. Constitution

7. The State withheld material and exculpatory evidence in violation on the 6th, 8th, and 14th to the U.S. Constitution

8. Mr. Grossman was denied his rights under the 6th, 8th,, and 14th Amendments to the United States Constitution when the State knowingly exploited an opportunity to question Mr. Grossman outside the presence of counsel, and obtained incriminating statements.

9. Mr. Grossman was denied the effective assistance of counsel at the penalty phase of his trial in violation of the 6th and 14th Amendments to the U.S. Constitution.

10. Mr. Grossman's death sentence was tainted by constitutionally invalid jury instructions on aggravating factors, and improper application of those aggravating factors in violation of his 8th and 14th Amendment rights.

11. The trial court erred in denying Mr. Grossman's Motion to Dismiss the indictment because Section 921.141, Florida Statutes is unconstitutional on its face and as applied and violates the 5th, 6th, and 14th Amendments to the U.S. Constitution

12. Mr. Grossman's 6th, 8th, and 14th Amendment constitutional rights were violated when the trial court denied his counsel's Motion for Continuance.

13. In admitting State's Photographs where they were gory and gruesome violated Mr.

Grossman's 6th and 14th Amendment rights to a fair trial.

14. The court erred in allowing the State to introduce character and victim impact evidence at trial in violation of Mr. Grossman's 6th, 8th, and 14th Amendment rights.

15. Florida's capital sentencing statute is unconstitutional on its face and as applied in this case because it fails to prevent the arbitrary and imposition of the death penalty, and it violates due process and is cruel and unusual punishment, violating the U.S. Constitution

16. Mr. Grossman was denied the effective assistance of counsel in violation of the 6th, 8th, and 14th Amendments. Trial counsel failed to subject the prosecution's case to meaningful adversarial testing in the guilt phase of the defendant's trial by conceding guilt without consultation.

17. Mr. Grossman was denied the effective assistance of counsel at the penalty phase of his trial in violation of the 6th and 14th Amendments to the U.S. Constitution and contrary to the holding in Wiggins v. Smith, 539 U.S. 510 (2003).

18. The Florida death sentencing statute as applied is unconstitutional under the 6th, 8th, and 14th Amendments of the U.S. Constitution under the holding in Ring v. Arizona, 536 U.S. 584 (2002).

(e) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ( ) No (x)
(f) Result: Denied
(g) Date of result: January 31, 2005

6. As to any second federal petition, application, or motion, give the same information:
(a) Name of court: Not applicable (n/a)
(b) Case number: n/a
(c) Nature of proceeding: n/a
(d)Grounds raised)list all grounds; use extra pages if necessary: n/a
(e) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ( ) No ( ) n/a
(f) Result: n/a
(g) Date of result: n/a

7. As to any third federal petition, application, or motion, give the same information:
(a) Name of court: n/a
(b) Case number: n/a
(c) Nature of proceeding: n/a
(d)Grounds raised)list all grounds; use extra pages if necessary: n/a

(e) Did you receive an evidentiary hearing on your petition, application, or motion?
Yes ( ) No ( ) n/a
(f) Result: n/a

(g) Date of result: n/a

8. **Did you appeal the result of any action taken on your federal petition, application, or motion? (Use extra pages to reflect additional petitions if necessary)**

(1) First petition, etc. **No ( ) Yes (x) Appeal No.** 05-11150-P
(2) Second petition, etc. **No ( ) Yes ( ) Appeal No.**_____
(3) Third petition, etc. **No ( ) Yes ( ) Appeal No.**_____

9. **If you did <u>not</u> appeal from the adverse action on any petition, application, or motion, explain briefly why you did not:** n/a

10. State <u>concisely</u> every ground on which you now claim that you are being held unlawfully. Summarize <u>briefly</u> the <u>facts</u> supporting each ground.

A. Ground one:

The post-conviction court erred in denying Mr. Grossman an evidentiary hearing for his successor motion. As a result, Mr. Grossman was deprived of his constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution.

Supporting FACTS:

In violation of his Due Process rights pursuant to the 14th Amendment of the United States Constitution, some of Mr. Grossman's claims were never heard by a court. Mr. Grossman was denied his constitutional rights because he was not granted an evidentiary hearing on his claim of ineffective assistance of counsel during the penalty phase of his trial. Trial counsel was ineffective because Mr. Grossman was not examined by a competent mental health professional. In a 3.850 motion filed on August 13, 1990 by prior post conviction counsel, Mr. Grossman claimed he was denied a competent mental health examination and that counsel was ineffective for failing to investigate and arrange for such an evaluation.

In the trial court's order issued on October 16, 1991, the court denied Mr. Grossman an evidentiary hearing on his claim of ineffective assistance of counsel based on failure to provide for, or arrange an examination by a competent mental health professional. The post conviction court,

relying on Medina v. State, 573 So.2d 293, 295 (Fla. 1990), ruled that Mr. Grossman's claim was procedurally barred due to the claim allegedly being "used as a second appeal, or to use a different argument to relitigate the same issue, or to circumvent the rule against second appeals." Order dated October 16, 1991 page 7 (V) (A).

Had a hearing been granted, Dr. Henry Dee would have been able and willing to testify. Since no hearing was granted on the claim, Dr. Dee never testified as to his findings.

Present post conviction counsel, in preparing a successive motion for post conviction relief, retained Dr. Dee to conduct a mental health evaluation of Martin Grossman. Post conviction counsel had no knowledge that before the initial post conviction motion was filed, Dr. Dee had already evaluated Mr. Grossman. Present post conviction counsel did not know of the evaluation as no report had been generated. Present post conviction counsel only learned of the evaluation when Dr. Dee advised counsel that an evaluation was already done. Dr. Dee was still in possession of his raw data.

During the preparation of the successive motion for post conviction relief, Dr. Dee became ill and died. Present postconviction counsel then retained Dr.Michael Maher M.D. to review the raw data of Dr. Dee and to evaluate Mr. Grossman.

The analysis of the raw data obtained from the files of the late Dr. Dee was not a part of the appellate record. Additionally, a report of Dr. Brad Fischer, who did evaluate Mr. Grossman, was also not in the appellate record.

Present post conviction counsel was preparing a successive post conviction motion when Governor Crist signed a death warrant on January 12, 2020 scheduling Mr. Grossman's execution date for February 16, 2010 at 6:00 p.m. Present post conviction counsel then filed Mr. Grossman's successive post conviction motion raising the claim that he was denied the effective assistance of

counsel at the penalty phase of his trial. A hearing was held on January 20, 2010 where arguments were presented to determine if an evidentiary hearing would be held.

Counsel argued that based on the late Dr. Henry Dee's findings, which would have shown that trial counsel was ineffective during the penalty phase, Mr. Grossman should be granted a hearing. Dr. Michael Maher interpreted the findings on the late Dr. Dee, and was ready and able to evaluate Mr. Grossman and testify at an evidentiary hearing about trial counsel's ineffectiveness.

In the order of January 21, 2010 denying relief on this claim, the state circuit court held:

> Nevertheless, the Defendant contends that he should be granted an evidentiary hearing on this claim based upon Massaro v. United States; 538 U.S. 500 (2003), Allen v. Butterworth; 756 So.2d 52 (Fla. 2000); and Porter v. McCollum, 130 S.Ct. 447 (U.S. 2009). This court is not bound to grant an evidentiary hearing based on these cases. The court notes that Massaro deals with an initial claim and holds that allegations of ineffective assistance of counsel may be brought in collateral proceedings – not that evidentiary hearings should always be held on such claims. See Massaro, 538 U.S. at 502-503, 504. Additionally, Allen suggested proposed amendments to the Florida Rules of Criminal Procedure that would require an evidentiary hearing "in respect to the *initial* motion in every case." (See Court order of Jan. 21, 2010 page 6).

Mr. Grossman then appealed the denial of the successive post conviction motion to the Florida Supreme Court on January 25, 2010. The Florida Supreme Court affirmed the circuit court's denial of the successive post conviction motion on February 8, 2010. Grossman v. State, SC 10-118. The opinion is attached to this application.

Was this claim raised in a prior federal petition, application, or motion?

Yes ( ) No (x)

Does this claim rely on a "new rule of law?" Yes (x) No ( )

If "yes," state the new rule of law (give case name and citation):

The Supreme Court of the United States in Cone v. Bell, 129 S.Ct. 1769 (2009) held:

> When 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. In *Ylst v. Nunnemaker*, 501 U.S. 797, 804,n. 3,111 S.Ct. 2590, 115 L.Ed 2d 706 (1991), we observed in passing that when a state court declines to revisit a claim it has already adjudicated, the effect of the later decision upon the availability of federal habeas is "nil" because "a later state decision based upon ineligibility for further state review neither rests upon procedural default nor lifts a pre-existing procedural default." FN 12 When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provides strong evidence that the claim has already been given full consideration by the state courts and thus is *ripe* for federal adjudication. See 28 U.S.C. § 2254 (b)(1)(A) (permitting issuance of a writ of habeas corpus only after "the applicant has exhausted the remidies available in the courts of the State").
>
> FN 12. With the exception of the Sixth Circuit, all Courts of Appeals to have directly confronted the question both before and after *Ylst*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706, have agreed that a state court's successive rejection of a federal claim does not bar federal habeas review. *See, e.g., Page v. Frank*, 343 F.3d 901, 907 (C.A.7 2003); *Brechen v. Reynolds*, 41 F.3d 1343, 1358 (C.A.10 1994); *Bennett v. Whitley*, 41 F.3d 1581, 1582 (C.A.5 1994); *Silerstein v. Henderson*, 706 F.2d 361, 368 (C.A.2 1983). See also *Lambright v. Stwart*, 241 F.3d 1201, 1206 (C.A.9 2001).
>
> 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.

The Supreme Court of the United States in Wellons v. Hall, 558 U.S. __ (2010) held that "when 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 habeas review."

Both Cone and Wellons have direct application to Mr. Grossman's case. In Mr. Grossman's case, the court, in denying the initial 3.850 post conviction motion, stated:

> V. The sixth claim presented by the Defendant is that he was denied a competent mental health examination and that counsel was ineffective for failing to investigate and arrange for such an examination in violation of Defendant's constitutional rights under the federal and state constitutions.
>
> A. Defendant's claims here are procedurally barred as a Fla. R. Crim. Proc. 3.850 motion can not be used as a second appeal, or to use a different argument to relitigate the same issue, or to circumvent the rule against second appeals. Medina v. State, 573 So.2d 293, 295 (Fla. 1990) (summary denial of similar claims of whether the mental health exam was competently performed, and defendant's competency at sentencing, proper by trial court).

The trial court, in Mr. Grossman's case, by denying his claim without an evidentiary hearing committed a similar error that would be proscribed by Cone and Wellons. The only avenue that Mr. Grossman could take to present his claim that he was denied a competent mental health examination and that counsel was ineffective was through a collateral challenge in post conviction. As held in Cone, "[w]hen a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. Id at 1781. That is exactly what the trial court did - it refused to hear the claim while erroneously concluding that it was relitigating the same issue. The new rule of law in Cone and Wellons makes clear that Mr. Grossman was denied an opportunity to be heard when the lower courts incorrectly applied a procedural default to his claim.

Does this claim rely on "newly discovered evidence?" Yes (x) No ( )

If "yes," briefly state the newly discovered evidence, and why it was not previously available to you:

New case law shows Mr. Grossman's argument to be timely based on newly discovered evidence.

The standard for summary denial of an evidentiary hearing on Defendant's 3.850 claims

is detailed in Gaskin v. State, 737 So.2d 509 (Fla. 1999):

> Under rule 3.850, a post-conviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. *See* Fla. R. Crim.P. 3.850 (d);*Rivera v. State,* 717 So.2d 477 (Fla. 1998); *Valle,* 705 So.2d at 1333; *Roberts v. State,* 568 So.2d 1255, 1256 (Fla. !990). The movant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel if he alleges specific "facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." *Id.* At 1259, *See Mendyk v. State,* 592 So.2d 1076, 1079 (Fla. 1992); *Kennedy v. State,* 547 So.2d 912, 913 (Fla. 1989). Upon review of a trial court's summary denial of post-conviction relief without an evidentiary hearing, we must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. *Valle,* 705 So.2d at 1333.
> FOOTNOTE OMITTED
> While the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a *conclusive* demonstration that the defendant is entitled to no relief. In essence, the burden is upon the State to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief. The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion. To the contrary, the "rule was promulgated to establish an effective procedure in the courts best equipped to adjudicate the rights of those originally tried in those courts."
>
> *Roy v. Wainwright,* 151 So.2d 825, 828 (Fla. 1963). Its purpose was to provide a simplified but "complete and efficacious postconviction remedy to correct convictions on any grounds which subject them to collateral attack." *Id.* It is especially important that initial motions in capital cases predicated upon a claim of ineffective assistance of counsel be carefully reviewed to determine the need for a hearing. *Cf. Rivera* 717 So.2d at 487 (reversing for evidentiary hearing on claim of ineffective assistance of counsel where defendant alleged extensive evidence of mitigation in 3.850 motion compared to limited mitigation actually presented at trial); *Ragsdale v. State,* 720 So.2d 203 (Fla. 1998) (same holding) Id. at 516-517.

Case law is clear that the defendant has an absolute right to attack this ineffective assistance

of counsel claim in a collateral proceeding. Massaro v. U.S., 538 U.S. 500 (2003) holds in part:

> An ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal. Requiring a criminal defendant to bring ineffective-assistance claims on direct appeal does not promote the procedural default rules objectives: conserving judicial resources and respecting the law's important interest in the finality of judgements. Applying that rule to ineffective-assistance claims would create a risk that defendants would feel compelled to raise the issue before there has been opportunity fully to develop the claims factual predicate, and would raise the issue for the first time in a forum not best suited to assess those facts,... Id. At 504.

The reasoning for granting an evidentiary hearing is further detailed in Allen v Butterworth, 756 So.2d 52 (Fla. 2000):

> In addition to the unnecessary delay and litigation concerning the disclosure of public records, we have identified another major cause of delay in post-conviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required. This failure can result in years of delay. This Court has been compelled to reverse a significant number of cases due to this failure. When a case gets reversed for this reason, the entire system is put on hold, as the hearing on remand takes many months to be scheduled and completed, and the appeal therefrom takes many additional months in order for the record on appeal to be prepared and the briefs to be filed in this Court. In order to alleviate this problem, our proposed rules require that an evidentiary hearing be held in respect to the initial motion in every case. This single change will eliminate a substantial amount of the delay that is present in the current system Id. At 66,67.

This claim was improperly denied because the record did not show that the defendant was entitled to no relief pursuant to Gaskins, Massaro, and Allen v. Butterworth.

The Florida Supreme Court frequently relies on procedural defaults to preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002); Jones v. State, 709 So. 2d 512, 519-20, 525 (Fla. 1998).

The refusal to consider such issues increases the risk that the innocent or the legally undeserving will be executed. It diminishes a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not" Furman, at 313 (White, J., concurring).

The ABA Report recommended that "State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid." ABA Report at 241. The ABA Report on page 232 also states:

> Florida post-conviction courts, including the circuit court hearing the 3.851 motion and the Florida Supreme Court hearing an appeal from the denial of the motion, do not use the "knowing, understanding, and voluntary" standard for overcoming procedural default of constitutional errors not properly preserved at trial or raised on appeal.....the Florida Supreme Court hearing an appeal from the motion, does not use the "knowing, understanding and voluntary" standard for overcoming procedural default of state law errors not properly preserved at trial or raised on appeal. If the constitutional error claimed for the first time in a post-conviction could have been, but was not raised on appeal, the claim of error is procedurally barred during post conviction proceedings. In order to obtain post-conviction consideration of such claim, rule 3.851 requires the movant to give reasons why the claim was not raised on direct appeal. Other than ineffective assistance of counsel, it is unclear what other reasons for not raising the claim on direct appeal would justify consideration of a procedurally barred claim.

The Florida Supreme Court denied five of Mr. Grossman's claims, including the conflict of interest claim, and in footnote 6 said that the claims were procedurally barred but without explanation. Grossman at 708 So.2d 250. (Fla. 1997). The court did not explain how or why the procedural bar was applicable. A paltry declaration concerning an issue of constitutional importance should not deny Mr. Grossman federal habeas review.

The Florida Supreme Court dismissed numerous claims in Mr. Grossman's appeals because

they were purportedly procedurally defaulted. Had the merits been reached, Mr. Grossman would have obtained relief.

Regarding the issue of whether or not Mr. Grossman was entitled to an evidentiary hearing on the successor motion, Mr. Grossman cites for authority:

Lemon v. State, 498 So.2d 923 (Fla. 1986). The Lemon Court held:

> George Lemon, a state prisoner for whom a death warrant has been signed, appeals the circuit court's denial of his motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V.§ 3(b)(1), Fla. Const. We granted a stay of execution and now reverse the trial court's order and remand for an evidentiary hearing. We previously affirmed appellant's conviction for first-degree murder and sentence of death. *See Lemon v. State*, 456 So.2d 885 (Fla. 1984), *cert. denied*, 469 U.S. 1230 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985).
>
> It is clear that appellant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief" Fla. R. Crim. P. 3.850; *State v. Crews*, 477 So.2d 984 (Fla. 1985); *O'Callaghan v. State*, 461 So.2d 1354 (Fla. 1984). Having reviewed appellant's motion, files and record, we find that his allegations are sufficient to require an evidentiary hearing. Accordingly, we remand to the circuit court for further proceedings consistent herewith. The stay of execution issued November 4, 1986, is hereby dissolved
> It is so ordered. Id. at 923.

Before the hearing on January 20, 2010, a conversation took place between present post conviction counsel and his retained expert, Dr. Maher. Dr. Maher said that since he did not get a chance to conduct a complete clinical evaluation of Mr. Grossman, he was unable to opine whether or not statutory mitigation was present. However, he did opine that non-statutory mental mitigation was present.

In Porter v. McCollum, 130 S.Ct. 447, 454-455 (2009), the United States Supreme Court held:

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory- investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing. Under Florida law, mental health evidence 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. *See, e.g.,* Hoskins v. State, 965 So.2d 1, 17-18 (Fla. 2007) *(per curiam).* Indeed, the Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 711 L.Ed. 1 (1982), Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge. Id. at 454-5

Prior to Porter, Florida Courts did not consider non-statutory mental mitigation *as* mitigation. Dr. Maher's anticipated testimony regarding non-statutory mental mitigation - and possibly statutory mental mitigation pending a clinical evaluation - would have swayed a penalty phase jury to vote for life. Since the evidence of non-statutory mitigation could not have been used prior to Porter, this evidence should be considered newly discovered evidence in light of Porter.

B. Ground two: n/a

Supporting FACTS (tell your story briefly without citing cases or law):n/a

Was this claim raised in a prior federal petition, application, or motion?
Yes ( ) **No ( )** n/a

Does this claim rely on a "new rule of law?" **Yes ( )** **No ( )** n/a
If "yes," state the new rule of law (give case name and citation): n/a

Does this claim rely on "newly discovered evidence?" **Yes ( )** **No ( )** n/a
If "yes," briefly state the newly discovered evidence, and why it was not previously available to you: n/a

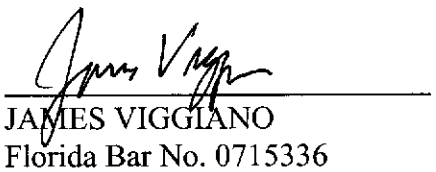
[Additional grounds may be asserted on extra pages if necessary]

11. Do you have any motion or appeal now pending in any court as to the judgment now under attack? Yes ( ) No (x)
If yes, name of court : n/a Case number: n/a

Wherefore, applicant, by and through his undersigned counsel, prays that the United States Court of Appeals for the Eleventh Circuit grant an Order Authorizing the District Court to Consider Applicant's Second or Successive Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application for Leave to file a Second or Successive Habeas corpus Petition has been furnished to all counsel of record this 10th day of February 2010.



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