UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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March 28, 2017

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Appeal Number: 17-10452-F
Case Style: In re: Krishna Maharaj
District Court Docket No: 1:02-cv-22240-PCH

The enclosed order has been entered. No further action will be taken in this matter.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Dionne S. Young, F
Phone #: (404) 335-6224

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10452-F

IN RE: KRISHNA MAHARAJ,

Petitioner.

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

Before MARTIN, ROSENBAUM, and JILL PRYOR, Circuit Judges.

BY THE PANEL:

Krishna Maharaj, proceeding with counsel, seeks an order authorizing the district court to consider a second or successive 28 U.S.C. § 2254 petition for a writ of habeas corpus. We may grant such authorization 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); *see also Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a prima facie showing that the statutory criteria have been met is simply a threshold determination).

In his application, attachments to the application, and supplement to the application, Mr. Maharaj indicates that he wishes to raise the following claims in a second or successive § 2254 petition: (1) he is actually innocent; (2) the government suppressed favorable evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (3) the government knowingly presented perjured testimony at trial, in violation of *Giglio v. United States*, 405 U.S. 150 (1972); (4) his trial counsel was ineffective; (5) he was intentionally framed by law enforcement officers; (6) his post-conviction counsel was ineffective; and (7) cumulative error in his prosecution violated his fundamental rights.[1] He asserts that his claims are predicated on newly discovered evidence that, if proved 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 him guilty.[2] Because we conclude that Mr. Maharaj has made a *prima facie* showing that

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[1] Although Mr. Maharaj only indicates in his application that he wishes to raise one claim, his proposed habeas petition, which is attached to his application, sets forth seven claims.

[2] Mr. Maharaj makes two additional arguments that we pause to consider. He argues that his claims rely on new, retroactively applicable rules of constitutional law. Because we grant his application based on his allegations of newly discovered evidence, we do not address this argument. Mr. Maharaj further asserts that his request for authorization to file a second or successive habeas petition should instead be deemed a motion to amend or reconsider his initial § 2254 petition. To the extent that he wishes to amend his 2002 § 2254 petition, the proper course would be to file, in the district court, a motion to amend the prior petition. *See* Fed. R. Civ. P. 15. Likewise, if he seeks reconsideration of the judgment denying his prior § 2254 petition, he should file a motion under Rule 60(b) of the Federal Rules of Civil Procedure for

his subclaims 2(c) through (f) satisfy § 2244(b)(2)(B), we grant his request for authorization to file a second or successive habeas petition in the district court.

The parties to this case are familiar with the facts, so we need not recount them in detail here. *See generally Maharaj v. Sec'y for Dep't of Corr.*, 432 F.3d 1292, 1298-1300 (11th Cir. 2005). In short, Mr. Maharaj was convicted of the 1986 murders of Derrick Moo Young and his son, Duane Moo Young, which Mr. Maharaj apparently committed because of a personal vendetta against the elder Moo Young. The State relied on three primary sources of evidence to tie Mr. Maharaj to the murders. First, the State presented testimony from a key witness, Neville Butler, who testified that he arranged the meeting between Mr. Maharaj and the victims at Miami's Dupont Plaza Hotel and witnessed Mr. Maharaj commit the murders in a room inside the hotel. Second, the State presented evidence that a dozen of Mr. Maharaj's fingerprints were found inside the hotel room where the murders took place. And third, the State presented evidence that the murder weapon was a Smith & Wesson 9mm semiautomatic pistol which, because of its manufacture date, had a serial number below 270000 and that Mr. Maharaj owned a Smith & Wesson 9mm semiautomatic pistol with a serial number of A235464.

In Claims 2(c)-(f), Mr. Maharaj alleges that the State suppressed materials or information from five individuals who could testify that a cartel hit man actually committed the murders. *See Brady v. Maryland*, 373 U.S. 83 (1963). He alleges that he was tipped off to the existence of this material in 2014 when he learned during a state evidentiary hearing that a man named Jaime Vallejo Mejia, a purported member of a drug cartel led by Pablo Escobar, allegedly resided in a hotel room across the hall from the one in which the murders occurred and had been under a criminal investigation for money laundering when the murder investigation took place. The

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relief from judgment in the district court. *See* Fed. R. Civ. P. 60(b). We note that Mr. Maharaj's right to proceed under Rules 15 and 60(b) is subject to all applicable time limits and tolling rules.

alleged *Brady* material includes four pieces of evidence regarding information from five individuals about the Moo Young murders. First, a federal informant and former pilot for Escobar known by pseudonym as "John Brown" provided information that in 1986, when the murders occurred, Escobar told him that "El Chino" or "Los Chinos" had stolen from him. Escobar stated that he had "El Chino" or "Los Chinos" killed at a hotel, which Brown understood to be the Dupont Plaza Hotel. Mr. Maharaj alleges that Brown also would attest that "Cuchilla" was one of Escobar's assassins. Second, a man named Jorge Maya, an "enforcer" for the cartel, provided information that the victims were murdered by the cartel. Specifically, Jorge stated that his brother, Luis Maya, had spoken with Escobar, who explained that the Moo Youngs were stealing from him. On Escobar's orders, Luis Maya paid Cuchilla, the hit man "who came to Miami to oversee the murders." DE 1, attachment 1 (Second Pet. for Writ of Habeas Corpus) at 163. Third, Mr. Maharaj's new evidence includes an affidavit[3] from Jhon Jairo Velasquez Vasquez (known as "Popeye"), one of Escobar's lieutenants at the time of the murders, explaining that Escobar ordered the Moo Young murders and Cuchilla carried them out. According to Popeye, Escobar had the Moo Youngs killed because they were stealing from him. Fourth, Mr. Maharaj alleges that an additional witness who insists on anonymity, "Witness A," came forward in 2016 to state that he can provide evidence of a conversation between two cartel members, Juan Lopez and Jhon Henry Millan. During this conversation, Millan stated that the Moo Youngs were working for Escobar. When Lopez asked what happened to the victims, Millan replied, "The truth is people were sent to skin [*pelar*] them." DE 1, attachment 1-2 (Second Pet. for Writ of Habeas Corpus) at 194-95.

[3] Mr. Maharaj has not attached this affidavit or those of any other potential witnesses to the application that is before us; however, we must assume for purposes of deciding whether he has satisfied § 2244(b)(2)(B) that the facts he alleges are true. *See In re Boshears*, 110 F.3d 1538, 1541 & n.1 (11th Cir. 1997).

As an applicant seeking permission to file a second or successive § 2254 petition based on newly discovered evidence, Mr. Maharaj must show, first, that this evidence could not have been uncovered through a reasonable investigation undertaken before the initial § 2254 petition was litigated. *In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997) (citing 28 U.S.C. § 2244(b)(2)(B)). Second, he must allege newly discovered facts that are not conclusively refuted by the record and that, when taken as true, establish a constitutional error. *Id.* at 1541 & n.1. Third, we evaluate these facts in light of the evidence as a whole to determine whether, had Mr. Maharaj known these facts at the time of his trial, the application "clearly proves that [he] could not have been convicted." *Id.* At this stage we determine only whether Mr. Maharaj has made a *prima facie* showing that his request for authorization satisfies these statutory requirements. *In re Everett*, 797 F.3d 1282, 1288 (11th Cir. 2015).

We conclude that Mr. Maharaj has made this threshold showing with respect to Claims 2(c)-(f). *See Jordan*, 485 F.3d at 1357-58. First, Mr. Maharaj has sufficiently alleged his own diligence. He first learned of the *Brady* material at a hearing in 2014, and he aggressively investigated any related material until November 2016, at which point counsel prepared the instant request for filing. *See* DE 1 (indicating that Mr. Maharaj signed his Verification on December 13, 2016). One of the witnesses, Witness A, only came forward in 2016, during the course of Mr. Maharaj's investigation. Second, Mr. Maharaj has sufficiently alleged a *Brady* violation: he learned in 2014 that Mejia—an individual who resided in close proximity to the murder scene and who apparently was involved with the cartel—was under criminal investigation during the investigation of the Moo Young murders, a fact that the prosecution or the police knew but did not disclose. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (*Brady* evidence includes that known by the prosecutor and the police).

Third, at this preliminary stage, Mr. Maharaj has made a *prima facie* showing that his new evidence, when viewed in light of the evidence as a whole, would demonstrate that he could not have been found guilty of the Moo Young murders beyond a reasonable doubt because if a hit man for the cartel committed the murders, Mr. Maharaj did not. The principal evidence of Mr. Maharaj's guilt was his possession of one of thousands of guns that could have been the murder weapon, which was not strong evidence of guilt, and his fingerprints in the hotel room where the murders occurred. The presence of Mr. Maharaj's fingerprints in the room is consistent with his version of the events leading up to the murder. According to Mr. Maharaj, he visited the hotel room the morning of the murders hoping to meet with a potential business partner Butler had promised to bring to the room but left when neither man appeared. The murders apparently occurred approximately two to three hours after Mr. Maharaj departed. If Mr. Maharaj's version of the events is correct, then his fingerprints would be expected in the hotel room.

Moreover, although Butler's trial testimony appears to have been compelling, so too is the testimony of five additional witnesses whose stories independently corroborate one another's. Three of those witnesses mention a man named Cuchilla, an assassin hired by notorious cartel leader Escobar. Two attest that Cuchilla committed the Moo Young murders at Escobar's direction because Escobar believed the victims were stealing from him. All five individuals' stories reflect that the Moo Youngs were killed by the cartel. At this preliminary stage, we conclude that this new evidence satisfies the standard for granting Mr. Maharaj authorization to file a second or successive § 2254 petition for a writ of habeas corpus.

"As usual, nothing about our ruling here binds the district court, which must decide every aspect of the case fresh, or in the legal vernacular, *de novo*." *In re Chance*, 831 F.3d 1335, 1338

(11th Cir. 2016) (internal quotation marks omitted). This includes the merits of Mr. Maharaj's motion, "along with any other issues that may arise." *Id.*

APPLICATION GRANTED.[4]

[4] Mr. Maharaj's "Motion to Allow Additional Words for Application for Successive Habeas Corpus Petition and Attached Petition for Writ of Habeas Corpus" is **GRANTED**.