

No. 4:13CV137 JAR

Petitioner now alleges that his postconviction-relief counsel was ineffective based on the United States Supreme Court's recent case Martinez v. Ryan, 132 S. Ct. 1309 (2012). In Martinez, the Court held that "ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding." Id. at 1316. Petitioner believes that, because most of the claims in his original § 2254 petition were dismissed as defaulted, his new claim for ineffective assistance should excuse the default and revive his claims, therefore providing him with a new means for federal habeas relief.

Petitioner has labeled the instant motion as a Rule 60(b) motion, and he intended to file it in the 1990 action. However, applications by prisoners that assert a federal basis for relief from a state court judgment of conviction under § 2244(b) must comply with the second or successive restrictions. See Gonzalez v. Crosby, 545 U.S. 524, 530 (2005). Thus, if the motion's factual predicate deals primarily with the constitutionality of the underlying state conviction, it should be construed as a second or successive habeas petition. See Peach v. United States, 468 F.3d 1269, 1272 (10th Cir. 2006); Brian R. Means, Federal Habeas Manual § 11:42 (2012). Because the factual predicate of the instant motion deals with the validity of petitioner's state


conviction, the Court construes the motion as a successive petition for writ of habeas corpus.

To the extent that petitioner seeks to relitigate claims that he brought in his original petition, those claims must be denied pursuant to 28 U.S.C. § 2244(b)(1). To the extent that petitioner seeks to bring new claims for habeas relief, petitioner must obtain leave from the United States Court of Appeals for the Eighth Circuit before he can bring those claims in this Court. 28 U.S.C. § 2244(b)(3)(A). Petitioner has not been granted leave to file a successive habeas petition in this Court. As a result, the petition shall be dismissed.

Accordingly,

IT IS HEREBY ORDERED that petitioner's petition for writ of habeas corpus is **DISMISSED**.

Dated this 4th day of February, 2013.



JOHN A. ROSS
UNITED STATES DISTRICT JUDGE