No._____

IN THE SPREME COURT OF THE UNITED STATES

James Ray Booth,
Petitioner,

VS.
Secretary, Florida Department of Corrections, et al.,
Respondents,

INDEX TO APPENDIX

APPENDIX

A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12219
Non-Argument Calendar

D.C. Docket No. 8:14-cv-02233-JDW-AAS

JAMES BOOTH,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(April 6, 2018)

Before ED CARNES, Chief Judge, WILLIAM PRYOR, and ANDERSON, Circuit Judges.

PER CURIAM:

James Booth, a Florida inmate proceeding pro se, appeals the district court's dismissal of his 28 U.S.C. § 2254 petition as untimely.

A jury found Booth guilty of third degree murder with a firearm and aggravated assault with a firearm. He was sentenced on June 5, 2008 to consecutive life terms on those convictions. On December 18, 2008 the trial court granted his motion to correct his sentence and resentenced him to ten years on the assault conviction, still running consecutively with the life sentence for the murder conviction. On September 18, 2009 the state appellate court affirmed his convictions but directed that his sentences should run concurrently, not consecutively. The Florida Supreme Court denied review on February 10, 2011, and the judgment became final on May 11, 2011 when the time for filing a petition for certiorari in the United States Supreme Court expired.

Once the judgment became final, the one-year limitation period for filing a federal habeas petition began to run. See 28 U.S.C. § 2244(d)(1)(A) (providing that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court," and that the period "shall run from the latest of the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review").

On December 15, 2011 (218 days after the judgment became final), Booth filed a state post-conviction motion, which tolled the limitation period. See id. § 2244(d)(2). The trial court denied that motion, and the state appellate court affirmed. That motion remained pending until the state appellate court issued its mandate on December 2, 2013. Once the mandate issued, the limitation clock began to run again and Booth had 147 days — until April 28, 2014 — to file a federal habeas petition.

Booth did not file this § 2254 petition challenging his convictions and sentences until September 5, 2014, which was 130 days after the limitation period had expired. On October 8, 2014, he filed a motion in the state trial court to clarify his sentence so that it would reflect the state appellate court's holding that his sentences ran concurrently, not consecutively. The trial court granted that motion on November 6, 2014, stating that its order was a "ministerial correction." The next month, the state filed a motion to dismiss his petition as untimely. Booth argued that the trial court's November 6, 2014 order restarted the one-year limitation period, which made his petition timely.

The district court rejected Booth's argument that the trial court's order restarted the limitation period. It also ruled that Booth was not entitled to equitable tolling and did not qualify for the actual innocence exception to time-barred habeas petitions. Alternatively, the court ruled that his claims were procedurally barred.

The court denied him a certificate of appealability, Booth appealed, and we granted a COA on the following issue: Whether the district court properly dismissed Booth's § 2254 petition as time-barred.

We review de novo the court's dismissal of Booth's petition as time-barred. Ferreira v. Sec'y, Dep't of Corr., 494 F.3d 1286, 1289 (11th Cir. 2007). Booth acknowledges that he filed his petition after April 28, 2014, when the one-year limitation period expired, but he contends that the trial court's November 6, 2014 order restarted the limitation period, and as a result his petition is timely.[1] That argument fails.

Section 2244(d)(1)'s "statute of limitations begins to run when the judgment pursuant to which the petitioner is in custody, which is based on both the conviction and the sentence the petitioner is serving, is final." Id. at 1293. Although a new judgment that results from resentencing restarts the one-year limitation period, see id. at 1292–93, the trial court did not resentence Booth on November 6, 2014. Instead, as the trial court specified, its order was a "ministerial correction" reflecting the state appellate court's holding that Booth's sentences ran concurrently, not consecutively. That order did not authorize Booth's confinement, nor did it vacate any of his sentences and replace them with new

[1] Booth does not challenge the court's ruling that he is not entitled to equitable tolling and that he has not demonstrated actual innocence, so he has abandoned those issues. See Timson v. Sampson, 518 F.3d 870, 874 (11th Cir. 2008) ("[I]ssues not briefed on appeal by a pro se litigant are deemed abandoned.").

ones. See Patterson v. Sec'y, Fla. Dep't of Corr., 849 F.3d 1321, 1326–27 (11th Cir. 2017) (en banc) (holding that an order granting habeas petitioner's motion to correct his sentence did not qualify as a new judgment because the state court "never issued a new prison sentence . . . to replace" his original sentence or "issue[d] a new judgment authorizing [his] confinement"). Booth remains incarcerated under the trial court's original June 5, 2008 judgment, which was modified on December 18, 2008, and the November 6, 2014 order does not give the Florida Department of Corrections any new authority to imprison Booth. See id. As a result, the court did not err in dismissing his petition as untimely. See id. at 1326 (rejecting the argument that "an order that alters a sentence necessarily constitutes a new judgment").

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JAMES BOOTH,

Petitioner,

v. Case No. 8:14-cv-2233-T-27AAS

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER

James Booth, a Florida inmate proceeding *pro se*, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 (Dkt. 1) and supporting memorandum (Dkt. 2). He challenges his Hernando County convictions for third degree murder, aggravated assault with a firearm, and felonious possession of a firearm. Respondent argues that the petition is untimely (Dkt. 10). Petitioner filed a reply (Dkt. 12). Upon consideration, the petition is DISMISSED as time-barred.

PROCEDURAL HISTORY

Petitioner was convicted after a jury trial of murder in the third degree with a firearm (count one) and aggravated assault with a firearm (count four). (Dkt. 11-10, pp. 80, 84). He pleaded guilty to possession of a firearm by a convicted felon (count five).[1] (Dkt. 11-10, pp. 88-90). He was sentenced to consecutive terms of life imprisonment as a habitual felony offender ("HFO") on counts one and four, and a sentence of 20.25 years on count five as a HFO concurrent to count one. (Dkt. 11-11, pp. 3-12). The court granted his motion to correct sentencing error filed under Florida Rule

[1] Petitioner was found not guilty of counts two and three. (Dkt. 11-10, pp. 82-83).

of Criminal Procedure 3.800(b)(2) while his appeal was pending,[2] and resentenced him on count four to 10 years in prison as a HFO, consecutive to count one. (Dkt. 11-11, p. 72 - Dkt. 11-12, p. 7). His other sentences were not affected. (Dkt. 11-12, p. 7). The appellate court affirmed the convictions but reversed for the imposition of concurrent HFO sentences on counts one and four, and to correct the sentencing documents to reflect that count one was a second degree felony. *Booth v. State*, 18 So.3d 1142, 1143-44 (Fla. 5th DCA 2009).

Petitioner filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. (Dkt. 11-12, p. 63 - Dkt. 11-13, p. 37). The postconviction court denied relief and the appellate court affirmed, *per curiam*. (Dkt. 11-13, pp. 39-55; Dkt. 11-22 pp. 54-60, 66; Dkt. 11-23, p. 83). He also filed a motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a), which was denied. (Dkt. 11-23, p. 88 - Dkt. 11-24, p. 28). After he filed a motion for rehearing or clarification of sentence, the state court entered an order and an amended sentence reflecting that his sentences on counts one and four were to run concurrently, rather than consecutively. (Dkt. 11-24, pp. 30-37).

TIMELINESS OF FEDERAL HABEAS PETITION

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides a one-year period of limitations for § 2254 federal habeas petitions. 28 U.S.C. § 2244(d)(1). *Lawrence v. Florida*, 549 U.S. 327, 331 (2007). This period runs from the later of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The limitations period is tolled for "[t]he time during

[2] Florida rules allow a defendant to "file in the trial court a motion to correct a sentencing error" when "an appeal is pending." Fla. R. Crim. P. 3.800(b)(2).

which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

On direct appeal, the Florida Fifth District Court of Appeal certified conflict with other Florida decisions. *Booth*, 18 So.3d at 1144.[3] The Florida Supreme Court denied discretionary review on February 10, 2011. *Booth v. State*, 55 So.3d 1286 (Fla. 2011) (table). The judgment became final ninety days later, on May 11, 2011, when the time for filing a petition for writ of certiorari in the United States Supreme Court expired. *Clay v. United States*, 537 U.S. 522, 527 (2003); *Bond v. Moore*, 309 F.3d 770, 774 (11th Cir. 2002). A total of 218 days of un-tolled time passed before Petitioner filed his Rule 3.850 motion on December 15, 2011. (Dkt. 11-12, p. 63). That motion remained pending until the state appellate court issued its mandate on December 2, 2013. (Dkt. 11-23, p. 86). At that point, Petitioner had 147 days, until April 28, 2014, to file his federal habeas petition. That deadline passed before he filed any additional motions in state court,[4] and before he filed his habeas petition on September 5, 2014.

Petitioner contends that the state court's November 6, 2014 amendment to his sentence constitutes a new judgment that re-started the AEDPA limitations period. He is mistaken. On direct appeal, the Fifth District Court of Appeal determined that the trial court could not impose consecutive HFO sentences for crimes arising from a single criminal episode. *Booth*, 18 So.3d at 1143. On remand, it directed the trial court to impose concurrent sentences on counts one and four.

---

[3] The conflict concerned the imposition of a life sentence for third degree murder through the application of § 775.087(2)(a), Fla. Stat., Florida's 10-20-Life law. *Booth*, 18 So.3d at 1144.

[4] Petitioner's August 8, 2014 Rule 3.800(a) motion (*see* Dkt. 11-23 p. 88) did not have any effect on the limitations period. *See Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) ("A state-court petition . . . that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled.").

Id. at 1143-44. It does not appear that the trial court took any action until Petitioner filed a motion for rehearing or clarification of sentence on October 8, 2014. The trial court's order of November 6, 2014 provided: "count 1 remains the same. This is a ministerial correction," and "count 4 no longer consecutive to cnt 1 it is now concurrent w/ cnt 1." (Dkt. 11-24, p. 36). An amended sentencing document was entered that provided that counts one and four were concurrent. (*Id.*, p. 37).[5]

For purposes of the AEDPA's statute of limitations, "there is one judgment, comprised of both the sentence and conviction." *Insignares v. Sec'y, Fla. Dep't of Corr.*, 755 F.3d 1273, 1281 (11th Cir. 2014) (citing *Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286, 1292 (11th Cir. 2007)). "[A] state prisoner's AEDPA limitations period does not begin to run until both his conviction and sentence become final." *Thompson v. Fla. Dep't of Corr.*, 606 Fed. App'x 495, 501 (11th Cir. 2015). A modification of a sentence after it is imposed, such as a resentencing, may therefore result in a "new judgment" that re-starts the AEDPA limitations period. *See Insignares*, 755 F.3d at 1281 ("The limitations provisions of AEDPA 'are specifically focused on the judgment which holds the petitioner in confinement,' and resentencing results in a new judgment that restarts the statute of limitations.") (quoting *Ferreira*, 494 F.3d at 1292-93).

Whether Petitioner's habeas petition was timely therefore turns on whether the November 2014 order and amended sentence resulted in a new judgment that started a new one year limitation period. The crucial question is whether the order and amended sentence constitute the judgment under which the Department of Corrections is authorized to confine Petitioner.

---

[5] The court checked a box next to the statement, "IT IS FURTHER ORDERED that the sentence imposed for [sic] shall run concurrent with the sentence set forth in Counts 1 & 4 of this case." (Dkt. 11-24, p. 37).

Although addressing second or successive habeas petitions, the Eleventh Circuit recently explained that in determining whether a new judgment has been entered,"[t]he relevant question is not the magnitude of the change, but the issuance of a new judgment *authorizing* the prisoner's confinement." *Patterson v. Sec'y, Fla. Dep't of Corr.*, 849 F.3d 1321, 1326-27 (11th Cir. 2017) (rh'g en banc) (emphasis original).

In *Patterson*, the petitioner was originally sentenced to life and chemical castration, but the state court subsequently entered an order that he not undergo chemical castration. *Patterson*, 849 F.3d at 1323. In finding that this order was not the judgment under which the Department of Corrections was authorized to confine Patterson, the Eleventh Circuit noted that it "did not vacate Patterson's sentence and replace it with a new one. Nor did it direct the Department of Corrections to hold Patterson or perform any affirmative act." *Id.* at 1324. The court noted in comparison that *Magwood v. Patterson*, 561 U.S. 320 (2010) found that a new judgment was rendered when "the state court . . . conducted a new sentencing hearing and entered a new judgment and sentence of imprisonment." *Id.* at 1325. Similarly, the court noted that in *Insignares*, the state court entered a new judgment when it "changed Insignares's term of imprisonment and 'entered [a] corrected sentence and new judgment'" and "[t]his corrected sentence 'committed [Insignares] to the custody of the Department of Corrections.'" *Id.* at 1326 (quoting *Insignares*, 755 F.3d at 1277).

Here, the November 2014 order and amended sentence did not constitute a new judgment authorizing Petitioner's confinement, and therefore did not start a new one year limitation period. Respondent was authorized to take custody of Petitioner when he was sentenced in June 2008, after his trial and plea. At that time, the state court entered a "Uniform Commitment to Custody of Department of Corrections." (Dkt. 11-11, p. 1). And the state court authorized Respondent to take

custody of Petitioner when he was resentenced in December 2008, following his successful Rule 3.800(b)(2) motion during the pendency of his direct appeal. In re-sentencing Petitioner, the court reduced the length of his imprisonment on count four and entered an order reflecting the shorter sentence. (Dkt. 11-12, p. 7).

In contrast, the November 2014 order and amended sentence merely reflects a change in the manner in which Respondent was to carry out Petitioner's sentences on counts one and four, running those sentences concurrent rather than consecutive. The order did not constitute a re-sentencing for purposes of the AEDPA limitations period, as it did not constitute an authorization or modification of Respondent's authority to confine Petitioner. *Patterson*, 849 F.3d at 1326-27. Accordingly, the November 2014 order did not start a new one year AEDPA limitations period.

As the one-year limitations period expired before Petitioner filed his federal habeas petition, the petition is untimely under 28 U.S.C. § 2244(d)(1)(A), unless Petitioner demonstrates entitlement to equitable tolling or that he is actually innocent of the crimes for which he was convicted.

Equitable Tolling

The one-year limitations period in § 2244(d) "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). Equitable tolling is available when a petitioner demonstrates "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). Equitable tolling "is an extraordinary remedy 'limited to rare and exceptional circumstances and typically applied sparingly.'" *Cadet v. State of Fla. Dep't of Corr.*, ___ F.3d ___, 2017 WL 727547 at *3 (11th Cir. Feb. 24, 2017) (quoting *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009)). A petitioner must demonstrate the applicability of equitable

tolling by making specific allegations. *Cole v. Warden, Ga. State Prison*, 768 F.3d 1150, 1158 (11th Cir. 2014) ("The petitioner has the burden of establishing his entitlement to equitable tolling; his supporting allegations must be specific and not conclusory.").

Determining whether a circumstance is extraordinary "depends not on 'how unusual the circumstance alleged to warrant tolling is among the universe of prisoners, but rather how severe an obstacle it is for the prisoner endeavoring to comply with AEDPA's limitations period.'" *Id.* at 1158 (quoting *Diaz v. Kelly*, 515 F.3d 149, 154 (2d Cir. 2008)). A petitioner must "show a causal connection between the alleged extraordinary circumstances and the late filing of the petition." *San Martin v. McNeil*, 633 F.3d 1257, 1267 (11th Cir. 2011).

Petitioner argues that he is entitled to equitable tolling because his postconviction appellate counsel failed to timely inform him that the appellate court entered a decision on appeal of the denial of his Rule 3.850 motion. When the appellate court's mandate issued on December 2, 2013, Petitioner had 147 days, until April 28, 2014, to file his federal habeas petition. He states that counsel did not inform him of the court's ruling until after the limitations period expired. His contention is supported by the following portion of counsel's July 2, 2014 letter to him:

> Dear Mr. Booth:
>
> > I regret to inform you that the District Court of Appeal denied your appeal on 11/5/13, with a mandate being entered on 12/2/13. A copy of the Court's decision is enclosed. However, I was not aware of this until Donna called me on today's date to check on the status of the appeal. Typically, the Court will send an email when a decision has been reached in a case; however, I checked my emails from the 5th DCA from November, and the Court did not send me an email. However, I did see an email from December, but that was only the mandate and not the decision. Thus, because I have just been made aware of the denial, I am now sending you the decision and your records.

(Dkt. 1-3, p. 11).

The letter demonstrates that Petitioner's appellate counsel received email notification of the appellate court's December 2013 mandate. Therefore, counsel should have known that the appellate court had issued a decision. *See* Fla. R. App. P. 9.340(a) ("Unless otherwise ordered by the court or provided by these rules, the clerk shall issue such mandate or process as may be directed by the court after expiration of 15 days from the date of an order or decision."). Notwithstanding, Petitioner has not demonstrated that counsel's failure to timely inform him of the decision amounts to an extraordinary circumstance warranting equitable tolling.

While appellate's counsel's error is troubling, it was, at most, negligence. Indeed, Petitioner refers to his attorney's conduct as negligent. (Dkt. 1-3, pp. 3, 4; Dkt. 12, pp. 4, 7). But an attorney's negligence does not constitute an extraordinary circumstance. *See Cadet*, 2017 WL 727547 at *17 ("[W]e hold . . . that an attorney's negligence, even gross negligence, or misunderstanding about the law is not by itself a serious instance of attorney misconduct for equitable tolling purposes."). Rather, some other professional misconduct, including but not limited to abandonment, bad faith, dishonesty, divided loyalty, or mental impairment, must be shown and must have a causal link to the failure to timely file. *Id.* at *16.

Petitioner has not demonstrated misconduct of this nature on the of his appellate counsel. He has not argued or shown that his counsel's conduct amounted to abandonment or cited any controlling authority to support such a conclusion. "Negligence, however gross, is not the same as abandonment. . . . Abandonment denotes renunciation or withdrawal, or a rejection or desertion of one's responsibilities, a walking away from a relationship." *Id.* at *14. As with the attorney in *Cadet,* who was negligent but did not abandon the client, counsel here "did not withdraw from representing [Petitioner], renounce [her] role as counsel, utterly shirk all of [her] professional responsibilities to

[Petitioner], or walk away from their attorney-client relationship." *Id.* at *14.

And while under agency law, effective abandonment may occur through an attorney's adverse interest or breach of loyalty, Petitioner does not demonstrate either circumstance. "[A]n agent is deemed to have acted adversely to his principal's interests only when he acts, or fails to act, for the purpose of advancing his own interests or those of a third party." *Id.* at *10. "[A]ttorney error alone does not breach the duty of loyalty; the attorney must instead have permitted another interest or consideration to interfere with his loyalty to the petitioner." *Id.* at *11 (citing *Towery v. Ryan*, 673 F.3d 933, 942 (9th Cir. 2012)).

There is no evidence that Petitioner's appellate counsel advanced her own interests or those of another party, or that those interests interfered with her duty of loyalty to Petitioner. Rather than abandoning him, therefore, she simply made an error in failing to realize that the appellate court had issued a decision. And Petitioner does not argue or demonstrate that any other type of professional misconduct, such as bad faith, dishonesty, or mental impairment occurred, and there is no evidence in the record suggesting or demonstrating the existence of such. Since Petitioner has not demonstrated that his attorney's error constituted anything more than negligence or gross negligence, he cannot show extraordinary circumstance sufficient to warrant equitable tolling.

Nor has Petitioner shown that he used diligence in pursuing his rights, as is required to support equitable tolling. "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland*, 560 U.S. at 653 (citation and quotation marks omitted). After receiving counsel's July 2, 2014 letter, Petitioner wrote her and filed a Florida Bar complaint, alleging that her error affected his ability to file a timely federal habeas petition. (Dkt. 1-3, pp. 10, 14). Specifically, he stated that his "case proceeded *from conviction* to appeal to

postconviction without delay *with the intent to proserve* [sic] *federal habeas filing.*" (*Id.*, p. 14) (emphasis added).

It is therefore apparent that from the time of his conviction, Petitioner knew that a federal habeas filing deadline applied. But there is no indication that he took any action, such as contacting counsel or the appellate court, for information about his postconviction appeal in order to ensure a timely filing of his habeas petition. *See, e.g., San Martin*, 633 F.3d at 1269-70 ("[W]e have held that a petitioner's efforts to learn the disposition of pre-federal habeas steps are crucial to determining whether equitable tolling is appropriate.") (citing *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1288 (11th Cir. 2002)). *Cf. Downs v. McNeil*, 520 F.3d 1311, 1323 (11th Cir. 2008) (Petitioner sufficiently alleged diligence by stating he wrote numerous letters to counsel "to express concern over the running of the AEDPA filing period and to urge the filing of his federal habeas petition or an additional state court pleading" and provided counsel materials for preparing a petition); *Holland*, 560 U.S. at 653 (the district court incorrectly relied on a lack of diligence when petitioner wrote letters to counsel asking for information and providing direction, contacted courts and the Florida Bar to have counsel removed in light of his concerns, and filed a *pro se* federal habeas petition immediately upon learning the limitations period expired).

In sum, Petitioner has not demonstrated that he diligently pursued the timely filing of his federal habeas petition but that extraordinary circumstances beyond his control prevented him from doing so. He has therefore not shown entitlement to equitable tolling.

Actual Innocence

A showing of actual innocence may permit the consideration of a time-barred habeas petition. *See McQuiggin v. Perkins*, __U.S. __, 133 S.Ct. 1924, 1928 (2013) ("We hold that actual innocence,

if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations."). To obtain review of his petition, Petitioner must identify new evidence demonstrating actual innocence. *Id.* at 1935. But he fails to meet this burden. Although he contends that a State witness gave fabricated testimony, he does not point to new evidence establishing his actual innocence.

Martinez v. Ryan

In his reply, Petitioner cites *Martinez v. Ryan*, 566 U.S. 1 (2012). To the extent he argues that *Martinez* applies to permit consideration of his untimely petition, his argument fails. *Martinez* applies only when a habeas petitioner seeks to overcome the procedural default of a claim of ineffective assistance of trial counsel that was not raised in an initial-review collateral proceeding by asserting that the petitioner had no counsel in that proceeding or counsel was ineffective. 566 U.S. at 17. *Martinez* "does not apply to AEDPA's statute of limitations or the tolling of that period." *Arthur v. Thomas*, 739 F.3d 611, 630 (11th Cir. 2014).

PROCEDURAL BAR

Alternatively, even if Petitioner's petition was timely or he overcame the time bar by demonstrating actual innocence or the applicability of equitable tolling, his claims are procedurally defaulted and thus barred from review.

Petitioner raises four claims of ineffective assistance of trial counsel. He argues in Ground One that counsel was ineffective in failing to object to the State's improper notice of HFO sentencing. He claims in Ground Two that counsel was ineffective in advising him to reject a plea offer. In Ground Three, he alleges that counsel was ineffective in not calling "Miss King" as a witness. In Ground Four, he contends that counsel was ineffective in not investigating the motives

of prosecution witness Thor Richardson, and for not discovering Richardson's prior inconsistent statements and using them for impeachment.

Petitioner failed to exhaust these grounds of ineffective assistance of counsel because he failed to raise them on postconviction appeal. In his state appellate brief, he did not challenge the denial of his ineffective assistance of counsel claims regarding HFO sentencing and failing to call King. (Dkt. 11-23, pp. 2-22). With respect to his claim that counsel misadvised him to reject a plea, he argued that the state court failed to consider all aspects of his claim and therefore "erroneously limited the scope of this ground." (Dkt. 11-23, pp. 2-9). He did not challenge the denial of the substantive ineffective assistance allegation. (*Id.*). Similarly, with respect to his claim concerning Thor Richardson, he argued that the state court failed to address all aspects of his ineffective assistance claim. (Dkt. 11-23, pp. 12-22). But again, he did not challenge the denial of his substantive allegation of ineffective assistance of counsel. (*Id.*).

Accordingly, the substantive claims of ineffective assistance of counsel presented in Petitioner's federal habeas petition remain unexhausted. *See* 28 U.S.C. § 2254(b)(1)(A); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) ("[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition."); *Leonard v. Wainwright*, 601 F.2d 807, 808 (5th Cir. 1979) ("In Florida, exhaustion usually requires not only the filing of a Rule 3.850 motion, but an appeal from its denial.").

Petitioner's argument that he exhausted those claims because the state appellate court was required to review all arguments raised in his postconviction motion is misplaced. By not including these claims in is initial brief, he is deemed to have abandoned them. Since some of Petitioner's claims were denied after an evidentiary hearing, his appeal proceeded under Florida Rule of

Appellate Procedure 9.141(b)(3), which requires the submission of an initial brief. In Florida, an appellant is considered to have abandoned any claims that were not briefed with argument. *See Coolen v. State*, 696 So.2d 738, 742 n.2 (Fla. 1997) ("Coolen's failure to fully brief and argue these points constitutes a waiver of these claims."). *See also Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present argument in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").

Since Petitioner cannot return to state court to file an successive collateral appeal, *see* Fla. R. Crim. P. 3.850(k), his claims are procedurally defaulted. *See Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001) (the doctrine of procedural default provides that "[i]f the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief, unless either the cause and prejudice or the fundamental miscarriage of justice exception is established.").

Again, to the extent Petitioner argues that he meets the cause and prejudice exception under *Martinez v. Ryan*, his argument fails. As noted, *Martinez* applies to the default of ineffective assistance of trial counsel claims that were not raised in an initial-review collateral proceeding if there was no counsel or postconviction counsel was ineffective. 566 U.S. at 17. Here, however, Petitioner's ineffective assistance claims were defaulted because they were not raised on collateral appeal. And errors in postconviction appellate counsel's performance do not establish cause. *Martinez* states that "[t]he holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings." *Id.* at 16. *See Baker v. Dep't of Corr., Sec'y*, 634 Fed. App'x 689, 693 (11th Cir. 2015) (*Martinez*'s exception "does not

extend to attorney errors made in appeals from initial-review collateral proceedings."). Petitioner fails to show that the cause and prejudice exception applies to overcome the default of his claims.

Nor does he establish that the fundamental miscarriage of justice exception applies. A fundamental miscarriage of justice occurs in an extraordinary case where a constitutional violation has probably resulted in the conviction of someone who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *Henderson v. Campbell*, 353 F.3d 880, 892 (11th Cir. 2003). As addressed, Petitioner has not provided evidence of actual innocence. Therefore, he has not shown the applicability of either exception to overcome the default of his ineffective assistance of trial counsel claims.

Petitioner also claims in Ground One that the State failed to provide proper notice of its intent to seek HFO sentencing, resulting in a federal due process violation. When he raised his federal due process claim in his Rule 3.800(a) motion to correct illegal sentence, the state court found this claim to be barred, stating, "[t]he issue of whether there was a failure to give notice of intent to seek a habitual offender sanction is not properly raised in a motion to correct illegal sentence. *Judge v. State*, 596 So.2d 73, 77-78 (Fla. 2nd DCA 1992)." (Dkt. 11-24, p. 26).

Generally, federal habeas review of a claim is barred if the petitioner has failed to comply with state procedural rules governing the presentation of the claim. *Coleman v. Thompson*, 501 U.S. 722 (1991); *Caniff v. Moore*, 269 F.3d 1245, 1247 (11th Cir.2001); *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). A state court's procedural ruling constitutes an independent and adequate state rule of decision if (1) the last state court rendering a judgment in the case clearly and expressly states that it is relying on a state procedural rule to resolve the federal claim without reaching the merits of the claim, (2) the state court's decision rests solidly on state law grounds and is not

intertwined with an interpretation of federal law, and (3) the state procedural rule is not applied in an "arbitrary or unprecedented fashion" or in a "manifestly unfair manner." *Id.* (citing *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990)).

Petitioner's procedural challenge to the State's lack of notice of the HFO sentencing was not cognizable under Rule 3.800(a). Florida courts recognize the principle that procedural claims of this nature are barred under that Rule. *Martinez v. State*, ___ So.3d ___, 2017 WL 728098 (Fla. Feb. 23, 2017), held that a claim alleging lack of notice of potential punishment in the charging document was not cognizable in a Rule 3.800(a) motion. As the Florida Supreme Court explained, "Martinez challenged the procedure that led to the imposition of his mandatory minimum sentence by arguing that he was deprived of his due process right to notice of the potential punishment he faced. Such a challenge, however, is not cognizable in a rule 3.800(a) motion." *Id.* at *3.

The state court's reliance on an independent and adequate state law bar results in a procedural default of this claim. The claim can only be considered if Petitioner establishes that either the cause and prejudice or fundamental miscarriage of justice exception applies to overcome the default. *See Harris v. Reed*, 489 U.S. 255, 262 (1989) ("[A]n adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show" one of these exceptions). For the reasons discussed, Petitioner does not demonstrate the applicability of either exception to overcome the default.

Finally, Petitioner states within Ground Four that "The state court [trial] Judge . . . clearly violated Petitioner's 14th Amendment right when the [sic] interjected himself." (Dkt. 2, p. 19). This claim of trial court error is unexhausted because it was not raised on direct appeal. (Dkt. 11-12, pp. 21-29). It is procedurally defaulted because state procedural rules do not authorize successive direct

appeals. See Fla. R. App. P. 9.140. Petitioner has not established the applicability of the cause and prejudice or fundamental miscarriage of justice exception. Accordingly, his claims are procedurally defaulted and thus barred from federal habeas review.[6]

Accordingly it is ORDERED that:

1. The Petition for writ of habeas corpus is DISMISSED as time-barred.

2. The Clerk shall enter judgment against Petitioner and close this case.

3. Petitioner is not entitled to a certificate of appealability ("COA"). He does not have the absolute right to appeal. 28 U.S.C. § 2253(c)(l). A COA must first issue. *Id.* He is entitled to a COA only if he demonstrates that reasonable jurists would find debatable whether the Court's procedural ruling was correct and whether the § 2254 petition stated "a valid claim of the denial of a constitutional right." *Id.*; *Slack* v. *McDaniel,* 529 U.S. 473, 484 (2000). Petitioner cannot make the required showing. He cannot demonstrate that reasonable jurists would debate whether this court's procedural ruling that his petition is time-barred was correct, or whether the petition stated a valid claim of the denial of a constitutional right. Finally, because he is not entitled to a COA, he is not entitled to appeal *in forma pauperis.*

DONE and ORDERED this 12th day of April, 2017.

JAMES D. WHITTEMORE
United States District Judge

Pro se Petitioner, Counsel of Record

[6] Petitioner seeks an evidentiary hearing on the merits of his claims. An evidentiary hearing is not warranted. *See Henry v. Warden, Ga. Diagnostic Prison*, 750 F.3d 1226, 1232 (11th Cir. 2014) ("Henry is not entitled to an evidentiary hearing on the merits of his claim of juror misconduct because he procedurally defaulted that claim.").