EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10161-G

CHARLES R. BAKER,

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

ORDER:

Charles Baker moves for a certificate of appealability ("COA"), in order to appeal the denial of his *pro se* 28 U.S.C. § 2254 federal habeas corpus petition. To merit a COA, he must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Baker has not met this standard, and his motion for a COA is DENIED. His motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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July 31, 2018

Charles R. Baker
Desoto Annex - Inmate Legal Mail
13617 SE HWY 70
ARCADIA, FL 34266-7800

Appeal Number: 18-10161-G
Case Style: Charles Baker v. Secretary, Florida Department, et al
District Court Docket No: 5:15-cv-00264-WTH-PRL

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Bryon Robinson, G/lt
Phone #: (404) 335-6185

MOT-2 Notice of Court Action

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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

Before MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Charles Baker has filed a motion for reconsideration, pursuant to 11th Cir. R. 22 1(c) and 27-2, of this Court's April 27, 2018, order denying a certificate of appealability and leave to proceed *in forma pauperis*, in his 28 U.S.C. § 2254 federal habeas proceeding. Upon review, his motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

EXHIBIT B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CHARLES R. BAKER,

Petitioner,

-vs- Case No. 5:15-cv-264-Oc-10PRL

SECRETARY, DEPT. OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER OF DISMISSAL - PETITION IS UNTIMELY

Charles R. Baker, an inmate in the custody of the State of Florida, initiated this case by filing a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, seeking to set aside his conviction and sentence in state court.[1] (Docs. 1, 6.) Respondents have filed a response and relevant portions of the state court record, arguing that the petition is untimely (Docs. 28, 29). Petitioner has filed a reply. (Doc. 32.) Because it affirmatively appears from the record already compiled that the petition is time-barred, no evidentiary hearing is required. See Rule 8, Rules Governing Section 2254 cases.

History of the Case

Because the Court concludes that the Petition is time-barred, discussion of the history of the case will be limited to the events relevant to the Petitioner's timeliness.

[1] In later filings with the Court (Docs. 34, 35), Petitioner stated that since he has already served approximately 29 years in prison, he asks the Court to reduce his sentence to time served and grant him immediate release.

July 11, 1986. A Marion County jury convicted Petitioner of two counts of capital sexual battery and two counts of lewd and lascivious assault. (Respondents' Appendix, Doc. 29, Exh. A.) He was sentenced to life imprisonment and was required to serve at least 25 years before becoming eligible for parole. (Id.) Petitioner's conviction was affirmed, *per curiam* and without written opinion, by the Fifth District Court of Appeal in June 1987. (Exh. B; Doc. 1, p. 2); Baker v. State, 509 So. 2d 327 (Fla. 5th DCA 1987) (table).

July 2012. Petitioner alleges that in July 2012, his "mother advised him over the phone that she had found a legal document that had been mixed in with some insurance papers she was going through." (Doc. 1, Exh. A, p. 7.) Petitioner alleges that his mother read him the document and then mailed it to him. It is purported to state, in relevant part: "The prosecutor has made an offer of a plea to Attempted Capitol Sex [sic] battery with a sentence of ten (10) years in the Department of Corrections followed by ten (10) years probation." (Id. at p. 8.) Petitioner contends his trial counsel never communicated this plea offer to him. Petitioner has not provided a copy of the purported letter to this Court, nor it is otherwise in the record below as provided by Respondents. (Doc. 29.)

October 15, 2013. Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (Respondents' Appendix, Exh. C.) He raised one ground for relief: trial counsel was constitutionally ineffective for failing to communicate the plea offer, and had he known about the plea offer, Petitioner would have accepted it. (Id.)

June 6, 2014. The post-conviction court summarily denied the Rule 3.850 motion. (Resp. Exh. O.) The post-conviction court concluded that the motion was time-barred, as it had been filed more than two years after Petitioner's judgment and sentence became final. The court further concluded that the exception to the limitations period for situations where "the facts on which the claim is based were unknown to the defendant and counsel and could not have been ascertained through the exercise of due diligence" did not apply. (Id. at p. 1.) Specifically, the court stated:

> In the event that the Defendant is claiming newly discovered evidence because he recently discovered the plea offer, the Defendant's claim is without merit. According to the Defendant, the plea offer was discovered in a pile of papers. The Defendant could have discovered the plea offer with the exercise of due diligence. Therefore, the newly discovered evidence exception to the two year limitation does not apply.

(Id. at p. 2.) No evidentiary hearing was conducted.

The Fifth District Court of Appeal affirmed, *per curiam* without written opinion, and mandate issued February 2, 2015. (Resp. Exhs. R. U.)

May 15, 2015. Petitioner filed the present federal habeas petition. (Doc. 1.) He raises one ground for relief: the trial court erred by not giving an adequate rationale for finding that Petitioner could have discovered the plea offer with due diligence.[2] (Id. at p. 5.) Respondents contend that the petition is untimely. (Doc. 28.)

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[2] See also Missouri v. Frye, 566 U.S. 134, 147 (2012) (where defense counsel did not communicate formal plea offers to defendant, counsel's performance was deficient; to show prejudice, the defendant "must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel.").

Timeliness: One-Year Limitation Period

Pursuant to 28 U.S.C. § 2244(d)(1), a Petitioner has one year to file a federal habeas petition. The one-year limitations period begins to run on the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Section 2244(d)(2) also provides that the one-year time limit is tolled for any properly filed state collateral petitions or motions.

Section 2244 was enacted under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which became effective on April 24, 1996. For state prisoners like Petitioner, whose convictions were final before the limitations period was established, the one year period from the finality of the judgment (Subsection A of § 2244(d)(1)) began running April 24, 1996 and expired one year later, on April 23, 1997. Wilcox v. Fla. Dept. Of Corr., 158 F.3d 1209, 1211 (11th Cir. 1998). Accordingly, under Subsection A of § 2244(d)(1), the present Petition, filed May 15, 2015 (Doc. 1), is clearly time-barred.

However, § 2244(d)(1) states that the limitations period begins to run at the latest of the four triggering provisions. Here, Petitioner seeks to avail himself of Subsection D, which starts the limitations period from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." In his petition, Petitioner states that the plea offer was not discovered until July 2012, and therefore his petition is timely. (Doc. 1, p. 14.)

Even generously assuming that documentation of the plea offer exists, and that petitioner exercised due diligence in discovering the plea offer such that § 2244(d)(1)(D) applies,[3] the present federal habeas petition is still time-barred. Petitioner does not give a specific date in July 2012, but assuming he discovered the plea offer on July 31, 2012, **the limitations period ran for 365 days until it expired on July 31, 2013.** Petitioner's (untimely) Rule 3.850 motion was filed even later, on October 15, 2013.[4] The present petition, filed May 15, 2015, (Doc. 1), is untimely pursuant to 28 U.S.C. § 2244(d)(1)(D).

In his reply (Doc. 32), Petitioner argues that he is entitled to equitable tolling. Equitable tolling is appropriate when "extraordinary circumstances have

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[3] See Frederick v. McNeil, 300 Fed. Appx. 731, 734 (11th Cir. 2008) (to determine whether § 2244(d)(1)(D) is the appropriate triggering date, the appropriate standard is whether the petitioner exercised due diligence in discovering the factual predicate for his claim, not whether the claim is sufficient to merit federal habeas relief).

[4] See Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir. 2001) (holding that a state court post-conviction petition "that is filed following the expiration of the federal limitations period 'cannot toll that period because there is no period remaining to be tolled.'") (quoting Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)).

worked to prevent an otherwise diligent petitioner from timely filing his petition."[5] Petitioner bears the burden of showing what "extraordinary circumstances. . . both beyond his control and unavoidable even with diligence" justify such relief.[6] Petitioner does not address his lack of due diligence after he discovered the plea offer in July 2012 – he took more than a year to file his Rule 3.850 motion in state court. During that time, any arguable federal habeas limitations period expired.[7] Petitioner has not demonstrated entitlement to equitable tolling.

Conclusion

The Petition (Doc. 1) is **DISMISSED with prejudice**. The Clerk is directed to enter judgment accordingly, terminate any pending motions, and close the file.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida, this 13th day of December, 2017.

UNITED STATES DISTRICT JUDGE

Copies to: Charles R. Baker, *pro se*
Counsel of Record

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[5] Diaz v. Sec'y for Dept. of Corr., 362 F.3d 698, 700 (11th Cir. 2004) (*quoting* Helton v. Sec'y for Dept. of Corr., 259 F.3d 1310, 1312 (11th Cir. 2001) (internal quotations omitted).

[6] Drew v Dep't of Corr., 297 F.3d 1278, 1286 (11th Cir. 2002).

[7] Petitioner appears to be operating under the assumption that if he filed his Rule 3.850 motion within two years of discovering the plea offer, then both his Rule 3.850 and the present petition are timely. (Doc. 1, p. 14.) However, the limitations period for each filing are governed by entirely separate laws. Petitioner's ignorance of the law is not sufficient to demonstrate entitlement to equitable tolling.

Additional material from this filing is available in the Clerk's Office.