

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11477-D

GEORGE E. BROWN,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: MARTIN and ROSENBAUM, Circuit Judges.

BY THE COURT:

George E. Brown has filed a motion for reconsideration of this Court's order dated November 1, 2018, denying his motion for a certificate of appealability ("COA") and his motion for leave to amend that COA motion, in the appeal from the denial of his 28 U.S.C. § 2254 petition. Because Mr. Brown has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, this motion for reconsideration is DENIED.

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ORDER:

George E. Brown is a Florida prisoner serving a 30-year sentence after being convicted, in a jury trial, of second-degree murder. Mr. Brown appealed, and the Fifth District Court of Appeal of Florida affirmed without a written opinion on April 24, 2007. The mandate issued on May 11, 2007.

In 2009, Mr. Brown filed a Fla. R. Crim. P. 3.850 motion for post-conviction relief, which the state court denied. Mr. Brown appealed the denial of his Rule

3.850 motion, and the Fifth District Court of Appeals affirmed without a written opinion.

In 2016, Mr. Brown filed a 28 U.S.C. § 2254 petition, alleging that counsel provided ineffective assistance by failing to object to a manslaughter jury instruction at trial. Mr. Brown argues that counsel should have objected to the manslaughter jury instruction, pursuant to Montgomery v. State, 39 So. 3d 252 (Fla. 2010), which held that the standard jury instruction on manslaughter—requiring the jury to find that the defendant intended to kill the victim—was erroneous and resulted in fundamental error.

The district court denied Mr. Brown's § 2254 petition as untimely and on the merits. The district court ruled that: (1) Mr. Brown's conviction became final in 2007; (2) his first Rule 3.850 motion, filed in 2009, did not statutorily toll the federal limitations period; and (3) his instant § 2254 petition was untimely. The district court also found that Mr. Brown had not alleged facts demonstrating abandonment of the attorney-client relationship that would warrant equitable tolling. Further, Mr. Brown had not demonstrated he acted with due diligence in filing the Rule 3.850 motion, or his federal habeas petition.

Alternatively, the district court denied Mr. Brown's petition on the merits because Montgomery, the case upon which Mr. Brown relied and says should have formed the basis of counsel's jury instruction objection, was decided three years

after he was convicted. The court concluded that counsel could not be deemed ineffective for not objecting to the jury instruction because Montgomery's holding did not yet exist, and counsel was not deficient for failing to anticipate changes in the law. The court denied a COA in the same order.

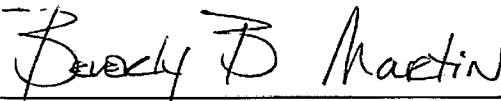
Mr. Brown filed a Fed. R. Civ. P. 59(e) motion to alter or amend judgment, reiterating his ineffective assistance claim. The district court denied the motion, finding that he was attempting to relitigate his ground for relief and had not demonstrated the existence of newly-discovered evidence or manifest errors of law or fact. Mr. Brown filed a notice of appeal, appealing the district court's dismissal of his § 2254 petition and denial of his Rule 59(e) motion. He filed a motion for leave to proceed IFP on appeal, which the district court denied. He then filed motions for a COA and IFP status in this Court.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas petition on procedural grounds, the petitioner must show that jurists of reason would find debatable: (1) whether the motion states a valid claim of the denial of a constitutional right; and (2) whether the district court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Here, reasonable jurists would not debate whether Mr. Brown's § 2254 motion states a valid claim of the denial of a constitutional right. Gordon v. Sec'y

Dep't of Corr., 479 F.3d 1299, 1300 (11th Cir. 2007) (holding that a COA should not issue when the claim is foreclosed by binding circuit precedent). Mr. Brown's conviction had been affirmed on appeal and was final three years before the Florida Supreme Court issued its decision in Montgomery, 39 So. 3d 252. Because of the timing of his direct appeal, his ineffective assistance of counsel claim is controlled by this Court's precedent in Rambaran v. Sec'y, Dep't of Corr., 821 F.3d 1325 (11th Cir. 2016), which held that counsel was not ineffective by failing to anticipate the Florida Supreme Court's decision in Montgomery. Id. at 1334. Mr. Brown's motion for a COA is therefore DENIED.

Because the first prong of the Slack test is not met, this Court does not address whether the district court correctly evaluated Mr. Brown's equitable tolling arguments. Mr. Brown's motion to file an amended COA motion is also DENIED because it only provides information relevant to his equitable tolling arguments.



UNITED STATES CIRCUIT JUDGE