IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE E. BROWN,
Petitioner,

Vs.

MARK INCH,
SECRETARY, DEPARTMENT
of CORRECTIONS, et al.,
Respondent.
_____/

U.S. Case No. 18A711
Appeal Case no.: 18-11477-D
Case No.: 6:17-cv-4-Orl37KRS

APPENDIX
EXHIBIT INDEX

EXHIBIT	DOCUMENT
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2.	Opinion of the United States district court denying petitioner's 28 U.S.C. § 2254 petition
3.	Order denying rehearing to the United States Court of Appeals
4.	Letter granting extension of time to file the petition for writ of certiorari
5.	Charging Information
6.	Verdict
7.	Scoresheet/Sentence
8.	5TH DCA Decision, direct appeal
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10. Amendments to Manslaughter Jury Instructions (2005-2017)

11. Motion for Postconviction Relief

12. Supplemental Motion for Postconviction Relief

13. Order Denying Amended Supplemental Motion For Postconviction Relief

14. 5th DCA Decision, postconviction appeal

15. Mandate, postconviction appeal

16. Petitioner's 2254 petition

17. Respondent's Response to 2254 petition

18. Petitioner's Reply to the Response

19. Petitioner's Appended Exhibit to his Reply

20. Petitioner's Fed.R.Civ.P. 59(e) Motion To Alter Or Amend Judgment

21. Order Denying Petitioner's Fed.R.Civ.P. 59(e) Motion To Alter Or Amend Judgment

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30. Amended Motion For Postconviction Relief

31. Motion In Leave To File Amended Certificate of Appealability

32. Amended Certificate of Appealability and Appendix

George E. Brown, #X52380
Avon Park Correctional Institution
8100 County Road 64 East
Avon Park, FL 33825

DECLARATION PURSUANT TO 28 U.S.C. § 1746

I declare under penalties of perjury under the laws of the United States of America that the foregoing Appendices are true and correct. Executed on the 9th of April 2019

George E. Brown, #X52380

CERTIFICATE OF SERVICE

Under penalties of perjury, I hereby certify that a true and correct copy of the foregoing has been served by first-class mail on after being placed in the hands of a prison official for mailing at Avon Park Correctional Institution:

SUPREME COURT OF THE UNITED STATES
One First St. N.E.,
Washington, DC 20543

Attorney General's Office
Daytona Beach Office (Fifth DCA)
444 Seabreeze Blvd. Ste. 500,
Daytona Beach 32118, Fl. 32118

On this 9th day of April 2019

George E. Brown #X52380
Avon Park Correctional Institution
8100 HWY Road 64 East
Avon Park, FL 33825

1

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

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.

Barbara D Martin
UNITED STATES CIRCUIT JUDGE

18-11477

George E. Brown
#x52380
Avon Park CI - Inmate Legal Mail
8100 HWY 64E
AVON PARK, FL 33825

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

For rules and forms visit
www.call.uscourts.gov

November 01, 2018

Elizabeth Warren
U.S. District Court
401 W CENTRAL BLVD
ORLANDO, FL 32801

Appeal Number: 18-11477-D
Case Style: George Brown v. Attorney General, State of Fl., et al
District Court Docket No: 6:17-cv-00004-RBD-KRS

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Scott O'Neal, D
Phone #: (404) 335-6189

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

GEORGE E. BROWN,

Petitioner,

v. **Case No: 6:17-cv-4-Orl-37KRS**

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

Respondents.

ORDER

This case is before the Court on Petitioner George E. Brown's Petition for Writ of Habeas Corpus ("Petition," Doc. 1). Respondents filed a Response to the Petition ("Response," Doc. 12) in compliance with this Court's instructions. Petitioner filed a Reply to the Response ("Reply," Doc. 16).

Petitioner asserts one ground for relief. For the following reasons, the Petition will be dismissed as untimely and on the merits.

I. PROCEDURAL HISTORY

A jury found Petitioner guilty of second degree murder. (Doc. 13-1 at 9.) The state court sentenced Petitioner to a thirty-year term of imprisonment with a twenty-five year mandatory minimum. (*Id.* at 19.) Petitioner appealed, and the Fifth District Court of Appeal of Florida ("Fifth DCA") affirmed *per curiam* on April 24, 2007. (*Id.* at 71.) Mandate issued on May 11, 2007. (*Id.* at 73.)

On June 21, 2007, Petitioner, through counsel, filed a motion to modify sentence. (*Id.* at 75-76.) The state court denied the motion on July 10, 2007. (*Id.* at 77.) Petitioner did not appeal.

On May 11, 2009, Petitioner, through counsel, filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, which counsel amended twice. (*Id.* at 80-85.) The state court denied the motion. (*Id.* at 12-16.) Petitioner appealed, and the Fifth DCA affirmed *per curiam*. (*Id.* at 61.) Mandate issued on June 3, 2016. (*Id.* at 63.)

Petitioner filed the Petition on December 30, 2016, under the mailbox rule. (Doc. 1.)

II. ANALYSIS

Pursuant to 28 U.S.C. § 2244:

> (d)(1) 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. The limitation period shall run from 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 that 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 facts supporting the claim or claims

> presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

28 U.S.C. § 2244(d).

In the present case, the Fifth DCA affirmed Petitioner's conviction on April 24, 2007. Petitioner then had ninety days, or through July 23, 2007, to petition the Supreme Court of the United States for a writ of certiorari. *See* Sup. Ct. R. 13.[1] Thus, under § 2244(d)(1)(A), the judgment of conviction became final on July 23, 2007, and Petitioner had through July 24, 2008, absent any tolling, to file a federal habeas corpus petition. *See Bond v. Moore*, 309 F.3d 770, 774 (11th Cir. 2002) (holding that the one-year period of limitation does not begin to run until the ninety-day period for filing a petition for certiorari with the United States Supreme Court has expired). Thus, the Petition is untimely under § 2244(d)(1)(A) absent tolling.

---

[1]Rule 13 provides as follows:

> The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

Sup. Ct. R. 13(3).

The Court is aware that Petitioner filed a Rule 3.850 motion on May 11, 2009. However, because the one-year limitation period concluded before Petitioner initiated that proceeding, the tolling provision of § 2244(d)(2) does not apply to it. *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."). Therefore, the Petition was not timely filed under § 2244(d) because the limitation period expired on July 24, 2008, before Petitioner filed an application for post-conviction relief in the state courts.

Petitioner argues that his Petition is timely under § 2244(d)(1)(C). *See* Doc. 16 at 1-4. In support of this argument, Petitioner relies on *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016), as revised (Jan. 27, 2016) ("*Montgomery I*"). *Montgomery I* held that *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), which held that a juvenile convicted of homicide could not be sentenced to mandatory life in prison without the possibility of parole, was a new substantive constitutional rule that was retroactive on collateral review. *Montgomery*, 136 S. Ct. at 736. Therefore, if Petitioner had raised a claim that he was unconstitutionally sentenced as a juvenile to a mandatory life sentence, his argument would be meritorious.

The problem with Petitioner's argument is that his only ground for relief is that trial counsel rendered ineffective assistance by failing to object to the manslaughter jury instruction, constituting fundamental error. (Doc. 1 at 4-5.) To support his ground, Petitioner relies on *Montgomery v. State*, 39 So. 3d 252 (Fla. 2010), which held that the standard jury instruction on manslaughter requiring the jury to find the defendant

intended to kill the victim was erroneous and resulted in fundamental error. This case, however, is wholly unrelated to *Montgomery I* and was issued by the Supreme Court of Florida. In other words, Petitioner's ground is not premised on the right recognized in *Miller* and held to be retroactive in *Montgomery I*. Consequently, § 2244(d)(1)C) is not applicable.

Petitioner also argues that equitable tolling is warranted. (Doc. 16 at 4-10.) The Supreme Court of the United States has held that the AEDPA's one-year statutory limitations period set forth in "§ 2244(d) is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). Equitable tolling is appropriate 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)). "The diligence required for equitable tolling purposes is 'reasonable diligence,'. . . 'not maximum feasible diligence. . . .'" *Id.* at 653 (internal quotations and citations omitted). To show extraordinary circumstances, 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) (citing *Lawrence v. Florida*, 421 F.3d 1221, 1226-27 (11th Cir. 2005)). "[T]he reasonable diligence and extraordinary circumstance requirements are not blended factors; they are separate elements, both of which must be met before there can be any equitable tolling." *Cadet v. Fla, Dep't of Corr.*, 853 F.3d 1216, 1225 (11th Cir. 2017) *cert. denied*, No. 17-6146, 2018 WL 942542 (U.S. Feb. 20, 2018) (citing *Menominee Indian Tribe of Wisc. v. United States*, 577 U.S. __, 136 S. Ct. 750, 757 n.5 (2016)).

The Eleventh Circuit Court of Appeals has held that "that attorney negligence, even gross or egregious negligence, does not by itself qualify as an 'extraordinary circumstance' for purposes of equitable tolling; either abandonment of the attorney-client relationship, . . . *or* some other professional misconduct *or* some other extraordinary circumstance is required." *Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1227 (11th Cir. 2017) (emphasis in original), *cert. denied*, No. 17-6146, 2018 WL 942542 (U.S. Feb. 20, 2018). "Abandonment denotes renunciation or withdrawal, or a rejection or desertion of one's responsibilities, a walking away from a relationship." *Id.* at 1234. "'[B]ad faith, dishonesty, divided loyalty, [and] mental impairment' . . . may . . . serve as extraordinary circumstances that support a claim to equitable tolling." *Thomas v. Attorney Gen., Fla.*, 795 F.3d 1286, 1292 (11th Cir. 2015) (quoting *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008), *rev'd on other grounds*, *Holland v. Florida*, 560 U.S. 631 (2010)). "Affirmative misrepresentations by counsel about the filing of a state habeas petition can constitute extraordinary circumstances that warrant equitable tolling." *Roper v. Dep't of Corr.*, 434 F. App'x 786, 790 (11th Cir. 2011). As explained by the Eleventh Circuit:

> It is well settled that "[t]he burden of proving circumstances that justify the application of the equitable tolling doctrine rests squarely on the petitioner." *San Martin*, 633 F.3d at 1268. A petitioner "must plead or proffer enough facts that, if true, would justify an evidentiary hearing on the issue." *Hutchinson v. Florida*, 677 F.3d 1097, 1099 (11th Cir. 2012). "And the allegations supporting equitable tolling must be specific and not conclusory." *Id.* In light of the petitioner's burden, district courts are not "required to mine the record, prospecting for facts that the habeas petitioner overlooked and could have, but did not, bring to the surface." *Chavez*, 647 F.3d at 1061.

Lugo v. Sec'y, Fl. Dep't of Corr., 750 F.3d 1198 (11th Cir. 2014).

In the instant case, Petitioner contends that he retained Wesley Blankner, Jr. ("Blankner") in February 2006 to litigate his direct appeal and his Rule 3.850 proceeding. (Doc. 16 at 5.) According to Petitioner, he wrote Blankner multiple letters asking him to pursue federal and state relief. (*Id.*) However, as acknowledged by Petitioner, Blankner always responded to him by indicating that state post-conviction was their focus and a federal habeas relief occurs after the state proceedings. (*Id.*) Blankner filed Petitioner's Rule 3.850 motion on May 11, 2009, the final date to timely do so under state law. (*Id.*) Blankner subsequently amended and supplemented Petitioner's Rule 3.850 motion but had no further communication with Petitioner after July 16, 2013. (*Id.*) Petitioner and his family attempted to meet with Blankner, but Blankner would always reschedule the meetings and no meeting was ever conducted. (*Id.* at 6.) Petitioner retained another attorney on July 31, 2014, to represent him in the state post-conviction proceeding, but Blankner failed to give the other attorney Petitioner's file and "almost totally" did not communicate with Petitioner from 2013 through 2015 despite his numerous requests. (*Id.* at 6-7.) Petitioner hired another attorney to represent him on appeal after his Rule 3.850 motion was denied. (*Id.* at 7.)

Petitioner argues that Blankner essentially abandoned him by allowing his Rule 3.850 proceeding to linger in the state court, by not preserving any of his federal limitation period, and by failing to communicate with him for several years. (*Id.* at 8-10.) Petitioner further argues that Blankner "acted in bad faith and dishonestly" as evidenced by

Blankner's conduct in other cases and warning from the Fifth DCA concerning his dilatory behavior in one of those cases. (*Id.* at 9; Doc. 16-6 at 2-5.)

Petitioner has not established that Blankner's delay in filing his Rule 3.850 motion is an extraordinary circumstances that prevented him from timely filing his petition. First, Petitioner does not assert that Blankner affirmatively misrepresented that he had filed or would file a Rule 3.850 motion within one year from the issuance of mandate. *See* Doc. 16. Moreover, Petitioner has not asserted that Blankner was hired to file a federal habeas petition. Blankner timely filed Petitioner's Rule 3.850 motion under Florida law and amended it twice.

Although Petitioner notes that he told Blankner he wanted to pursue federal habeas relief, there is no indication from Petitioner's statements that Blankner told him that he would file a federal petition or that he would preserve Petitioner's limitation period. *See id.* at 5, 8 (Petitioner stating that "Blankner's reply has always been 3.850 is our focus at this point a federal habeas corpus is after this[,]" and "Blankner assured Petitioner during meetings that federal time is unnecessary because state court is our primary focus."). Additionally, while Blankner was reprimanded in relation to another case, this action did not occur in relation to Petitioner's proceedings, nor does Blankner's actions in an unrelated case evidence bad faith or dishonesty toward Petitioner. Finally, from Petitioner's allegations, it appears that Blankner did not stop communicating with Petitioner until 2013, years after Petitioner's statutory time to file his federal petition had expired, and Petitioner had other counsel after 2013. Petitioner, therefore, has not alleged facts demonstrating that Blankner's 2013 abandonment of the attorney-client relationship

caused him to untimely file his Petition. *See, e.g., Cadet*, 853 F.3d at 1234 (noting that "the reason the filing deadline was missed must be because of abandonment or some other extraordinary circumstance, not negligence alone, even gross negligence."); *see also Gomez-Muniz v. Sec'y, Dep't of Corr.*, 694 F. App'x 701, 703 (11th Cir. 2017) ("If Muniz could provide evidence at a hearing showing that his attorney failed to notify him that he was withdrawing from the case and failed to communicate with Muniz *until after the statute of limitations already expired*—especially if that evidence showed Muniz continued to seek updates from his attorney throughout the tolling period—then Muniz would likely meet the standard for diligence and an extraordinary circumstance that would trigger equitable tolling.") (emphasis added). Petitioner also has not demonstrated that Blankner acted with bad faith, dishonesty, or divided loyalty, nor is there any allegation of mental impairment. Thus, Petitioner has not demonstrated an extraordinary circumstance prevented him from timely filing his petition.

Furthermore, Petitioner has not demonstrated that he acted with due diligence. Petitioner knew throughout Blankner's representation that he wanted to pursue federal habeas relief. Nevertheless, Petitioner has not alleged that he took any steps to preserve his limitation period other than mentioning to Blankner his desire to pursue such relief. Despite knowing that his Rule 3.850 proceeding was initiated two years after his conviction became final on appeal, Petitioner continued to employ Blankner as his attorney through at least 2013. Moreover, Petitioner spoke with one of his attorneys on May 13, 2016, to discuss the Fifth DCA's decision affirming the denial of his Rule 3.850 motion and Petitioner's options, including seeking federal habeas relief. *See* Doc. 16-3 at

2-3. Nevertheless, instead of immediately filing a federal petition at that time, Petitioner waited approximately eight months to do so. Under these circumstances, Petitioner has not established he exercised due diligence. Consequently, the Petition is untimely.

Alternatively, the Petition is denied on the merits. Petitioner asserts that trial counsel rendered ineffective assistance by failing to object to the manslaughter jury instruction, constituting fundamental error. (Doc. 1 at 4-5.) Petitioner, who was convicted in 2005, relies on *Montgomery*, which was issued five years later. (*Id.*)

Petitioner raised this claim in his Rule 3.850 motion. The state court denied the claim because *Montgomery* was issued after Petitioner's conviction became final. (Doc. 13-2 at 14.)

"Ultimately, before a federal court may grant habeas relief under [28 U.S.C.] § 2254(d), 'a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1346 (11th Cir. 2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Petitioner has failed to meet this burden.

Petitioner has not demonstrated that counsel rendered ineffective assistance by failing to object to the standard manslaughter jury instruction in effect at the time of his trial in 2005. Florida courts have held that counsel's failure to challenge a standard jury instruction not disapproved by the Supreme Court of Florida does not constitute ineffective assistance of counsel. *See McGill v. State*, 117 So. 3d 804, 804-05 (Fla. 4th DCA

2013) (citing *Lukehart v. State*, 70 So. 3d 503, 520-521 (Fla. 2011); *Rodriguez v. State*, 919 So. 2d 1252, 1272 (Fla. 2005)). Furthermore, counsel is not required to anticipate changes in the law. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); *United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001); *see also Ross v. State*, 82 So. 3d 975, 976 (Fla. 4th DCA 2011) (holding that *Montgomery* "does not apply retroactively to convictions which were final before our supreme court issued that decision.").

Montgomery was issued approximately five years after Petitioner's trial and three years after his conviction became final. As noted by the Fifth District Court of Appeal of Florida,

> the First District Court of Appeal, in *Montgomery v. State*, 70 So. 3d 603, 2009 WL 350624 (Fla. 1st DCA 2009), *approved*, 39 So. 3d 252 (Fla. 2010) held that the standard manslaughter by act jury instruction, . . . improperly imposed an additional element of intent to kill and was therefore fundamentally erroneous. *No court had previously so held.* To the contrary, this Court, in *Barton v. State*, 507 So. 2d 638 (Fla. 5th DCA 1987), *quashed in part on other grounds*, 523 So. 2d 152 (Fla. 1988), had approved the standard manslaughter by act jury instruction and was the controlling law in this district at the time. . . .

Lopez v. State, 68 So. 3d 332, 333 (Fla. 5th DCA 2011) (emphasis added). Thus, at the time of Petitioner's trial, the Fifth DCA had held that the manslaughter instruction was proper and the Supreme Court of Florida had not disapproved the instruction. For these reasons, counsel was not deficient for failing to object to the manslaughter instruction nor has

Petitioner demonstrated that a reasonable probability exists that the outcome of the trial or appeal would have been different had counsel done so. *See, e.g., White v. Sec'y, Dep't of Corr.*, No. 8:14-CV-94-T-36MAP, 2017 WL 1165576, at *21–22 (M.D. Fla. Mar. 29, 2017) (denying claim of ineffective assistance of trial counsel premised on counsel's failure to object to manslaughter instruction); *Marshall v. Tucker*, No. 12-20557-CIV, 2012 WL 9570403, at *15–17 (S.D. Fla. Dec. 31, 2012) (same), *report and recommendation adopted in part*, No. 12-20557-CIV, 2013 WL 6388615 (S.D. Fla. Dec. 5, 2013), *aff'd sub nom. Marshall v. Dep't of Corr.*, 661 F. App'x 971 (11th Cir. 2016). Accordingly, Petitioner's ground is alternatively denied pursuant to § 2254(d).

III. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner has not demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner has failed to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

Accordingly, it is hereby **ORDERED AND ADJUDGED:**

1. The Petition for Writ of Habeas Corpus (Doc. 1) filed by George E. Brown is **DENIED**, and this case is **DISMISSED WITH PREJUDICE.**

2. Petitioner is **DENIED** a Certificate of Appealability.

3. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

DONE AND ORDERED in Orlando, Florida, on March 5th, 2018.

ROY B. DALTON JR.
United States District Judge

Copies to:
OrlP-1 3/5
George E. Brown
Counsel of Record

3

3

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.

18-11477

George E. Brown
#x52380
Avon Park CI - Inmate Legal Mail
8100 HWY 64E
AVON PARK, FL 33825

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

For rules and forms visit
www.call.uscourts.gov

December 19, 2018

George E. Brown
Avon Park CI - Inmate Legal Mail
8100 HWY 64E
AVON PARK, FL 33825

Appeal Number: 18-11477-D
Case Style: George Brown v. Attorney General, State of Fl., et al
District Court Docket No: 6:17-cv-00004-RBD-KRS

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: Scott O'Neal, D
Phone #: (404) 335-6189

MOT-2 Notice of Court Action

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