IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13564-D

FREDDIE LEE MORRIS,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

ORDER:

Freddie Lee Morris is a Florida prisoner serving a life sentence, after pleading guilty to second-degree murder and robbery. He was sentenced on March 23, 1978, and he did not file a direct appeal. On November 11, 2017, Morris filed his 28 U.S.C. § 2254 petition for writ of habeas corpus, which the district court dismissed as time-barred. Morris has filed an appeal, and he now moves this Court for a certificate of appealability ("COA").

To obtain a COA, a § 2254 petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Where the district court has denied a

habeas petition on procedural grounds, the petitioner must show that reasonable jurists would find debatable whether: (1) the district court was correct in its procedural ruling, and (2) the petition stated a valid claim of the denial of a constitutional right. *Id.* If the petitioner fails to satisfy either prong of this two-part test, a court should deny a COA. *Id.*

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations for filing a § 2254 federal habeas petition. 28 U.S.C. § 2244(d)(1). As relevant here, this limitation period begins on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. *Id.* § 2244(d)(1)(A).

A court "may consider an untimely § 2254 petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned." *San Martin v. McNeil*, 633 F.3d 1257, 1267-68 (11th Cir. 2011) (quotations omitted). To succeed on a claim of actual innocence, the petitioner "must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 536-37 (2006) (quotation omitted). Finally, this Court has held that *Martinez* "relates to excusing a procedural default of ineffective-trial-counsel claims and 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).

Here, the district court properly found that Morris's § 2254 petition was time-barred. Morris filed his § 2254 petition approximately 40 years after his conviction became final, well beyond the one-year limitation period. Morris's argument that he is entitled to the miscarriage-of-justice exception fails because he did not present any evidence that establishes his

actual innocence. *San Martin*, 633 F.3d at 1267-68. Rather, Morris conceded that he could not assert, and was not asserting, a claim of actual innocence. Additionally, Morris's attempt to use *Martinez* here was misplaced because *Martinez* does not apply to time-bar dismissals under the AEDPA. *See Arthur*, 739 F.3d at 630. Thus, reasonable jurists would not debate whether Morris's § 2254 petition was time-barred.

Accordingly, Morris's motion for a COA is DENIED. His motion for leave to proceed IFP on appeal is DENIED AS MOOT.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

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Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

Before: WILLIAM PRYOR and NEWSOM, Circuit Judges.

BY THE COURT:

Freddie Lee Morris has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated December 6, 2018, denying his motions for a certificate of appealability and leave to proceed *in forma pauperis*, in his appeal of the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition as time-barred. Upon review, Morris's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit that warrant relief.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FREDDIE LEE MORRIS,

Petitioner,

v. **Case No. 8:17-cv-2892-T-35AEP**

SECRETARY, DEPARTMENT OF CORRECTIONS, *et al.*,

Respondent.
_____/

ORDER

Morris petitions for the writ of habeas corpus under 28 U.S.C. § 2254. (Doc. 1) This cause comes before the Court on Petitioner Morris's response to the earlier order to show cause why federal review of his petition is not barred. (Docs. 3 and 4) Upon consideration of the petition and the response to the Order to show cause, and in accordance with the *Rules Governing Section 2254 Cases in the United States District Courts*, it is **ORDERED** that the petition is **DISMISSED AS TIME-BARRED**:

Morris challenges the validity of his state convictions for second-degree murder and robbery, for which he is imprisoned for life. Morris represents that he pleaded guilty to avoid the possibility of the death penalty. (Doc. 4 at 9) The underlying offenses occurred in 1977 and the challenged sentences were imposed in 1978. Morris does not explain why he waited forty years to file his petition.

The earlier Order (Doc. 3) determined that the petition is untimely and directed Morris to show (1) that the petition should not be dismissed as time-barred, (2) that he is

entitled to a start of the limitation under a provision other than 28 U.S.C. § 2244(d)(1)(A), (3) that he is entitled to equitable tolling, or (4) that he can prove his actual innocence *See Day v. McDonough*, 547 U.S. 198, 210 (2006) (Although a district court may raise timeliness *sua sponte*, "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."). Morris does not challenge this Court's earlier determination that his petition is untimely, and he admits that he cannot prove his actual innocence. Morris acknowledges that he "cannot and does not make a claim of 'actual innocence' because . . . he was with Charles Malone when Malone committed these crimes and . . . the State could pursue a prosecution against [him] as an aider and abettor." (Doc. 4 at 5)

Morris alleges that, after he was arrested and detained in 1977, his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), were violated when an informant was placed in his cell for the purpose of gaining incriminating evidence. Affording his response a generous interpretation, Morris presents two arguments for overcoming the time-bar. Morris asserts entitlement to the "fundamental miscarriage of justice exception" to the limitation and contends that *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), allow him to "overcome various procedural rules, such as filing deadlines." (Doc. 4 at 4) Morris erroneously believes that the "fundamental miscarriage of justice exception" is different from the "actual innocence exception," and he misunderstands the applicability of *Martinez*.

Miscarriage of Justice:

The miscarriage of justice exception and the actual innocence exception are the same exception. *See Sawyer v. Whitley*, 505 U.S. 333, 333 (1992) ("The miscarriage of

justice exception applies where a petitioner is 'actually innocent' of the crime of which he was convicted."); *Schlup v. Delo*, 513 U.S. 298, 321 (1995) ("To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence."); *House v. Bell*, 547 U.S. 518, 537 (2006) (using both miscarriage of justice and actual innocence to describe the same exception).

However, as stated earlier, Morris admits that he cannot show that he is factually innocent of the offenses. As a consequence, Morris cannot prove entitlement to the "fundamental miscarriage of justice exception" (as he characterizes the actual innocence exception) to the limitation. *Bousley v. United States*, 523 U.S. 614, 623 (1998) ("It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency.").

Procedural Default:

Morris erroneously interprets *Martinez*, which holds that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. 9 Morris misunderstands the narrowness of the equitable principle announced in *Martinez*. "What the *Martinez* decision did — and the only thing it did — was create a narrow, equitable exception to the general rule that a petitioner cannot rely on the ineffectiveness of collateral counsel to serve as cause for excusing the procedural default of a claim in state court, thereby permitting federal habeas review of the merits of that claim." *Chavez v.*

Sec'y, Dep't of Corr., 742 F.3d 940, 945 (11th Cir. 2014) (citing *Martinez*, 132 S. Ct. at 1315–20). *Martinez* does not afford Morris relief because, as *Chavez*, 742 F.3d at 945–46, explains, *Martinez* does not afford Morris a new limitation:

> We have emphasized that the equitable rule established in *Martinez* applies only "to excusing a procedural default of ineffective-trial-counsel claims" and, for that reason, has no application to other matters like the one-year statute of limitations period for filing a § 2254 petition.
> . . . .
>
> While § 2244(d)(1) includes a number of alternate triggering dates for calculating the one-year deadline, the only one even potentially relevant here — "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" – is inapplicable because *Martinez* did not announce a new rule of constitutional law. *See* 28 U.S.C. § 2244(d)(1)(C); *Arthur,* 739 F.3d at 629 ("The *Martinez* rule is not a constitutional rule but an equitable principle."); *see also Buenrostro v. United States,* 697 F.3d 1137, 1139 (9th Cir. 2012) (holding that *Martinez* "did not announce a new rule of constitutional law"). And while the federal limitations period is subject to equitable tolling in certain circumstances, we have rejected the notion that anything in *Martinez* provides a basis for equitably tolling the filing deadline. *Arthur,* 739 F.3d at 630–31 ("Because Arthur's § 2254 petition was denied due to his complete failure to timely file that § 2254 petition, the Supreme Court's analysis in *Martinez* . . . of when and how 'cause' might excuse noncompliance with a state procedural rule is wholly inapplicable here.").

Accord Arthur v. Thomas, 739 F.3d 611, 630 (11th Cir. 2014) ("[T]he *Martinez* rule explicitly relates to excusing a procedural default of ineffective-trial-counsel claims and does not apply to AEDPA's statute of limitations or the tolling of that period.").

* * * *

To summarize, *Martinez* applies only when a claim of ineffective assistance of trial counsel was procedurally defaulted in state court, and *Martinez* does not afford a petitioner a new one-year limitation. No authority authorizes the granting of Morris's request for "an exemption [from] procedural default." (Doc. 4 at 8) Consequently, Morris's

petition is time-barred, and it appears that he is not entitled to any equitable principle that will allow a review of his petition. Morris fails to show (1) that the earlier determination of untimeliness is incorrect, (2) that he is entitled to a delayed start of the limitation under 28 U.S.C. § 2244(d)(1), (3) that he is entitled to equitable tolling, or (4) that he is actually innocent. As a consequence, federal review of the petition is precluded.

Accordingly, the petition for the writ of habeas corpus (Doc. 1) is **DISMISSED AS TIME-BARRED**. The **CLERK** is directed enter a judgment against Morris and to **CLOSE** this case.

DENIAL OF BOTH A CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL *IN FORMA PAUPERIS*

IT IS FURTHER ORDERED that Morris is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability ("COA"). Section 2253(c)(2) limits the issuing of a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a certificate of appealability, Morris must show that reasonable jurists would find debatable both the merits of the underlying claims and the procedural issues. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir 2001). Because he fails to show that reasonable jurists would debate either the merits of the claims or the procedural issues, Morris is not entitled to a certificate of appealability and he is not entitled to appeal *in forma pauperis*.

Accordingly, a certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **DENIED**. Morris must obtain permission from the circuit court to appeal *in forma pauperis*.

DONE AND ORDERED in Tampa, Florida, this 8th day of August, 2018.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE