

**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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February 13, 2019

Clerk - Southern District of Georgia
U.S. District Court
125 BULL ST
PO BOX 8286
SAVANNAH, GA 31402

Appeal Number: 18-12836-A
Case Style: Milton Mitchell v. Glen Johnson
District Court Docket No: 4:17-cv-00108-WTM-GRS

The enclosed copy of the Clerk's Entry of Dismissal for failure to prosecute in the above referenced appeal is issued as the mandate of this court. See 11th Cir. R. 41-4.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Denise E. O'Guin, A
Phone #: (404) 335-6188

Enclosure(s)

DIS-2 Letter and Entry of Dismissal

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12836-A

MILTON MITCHELL,

Petitioner - Appellant,

versus

GLEN JOHNSON,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Milton Mitchell has failed to pay the filing and docketing fees to the district court within the time fixed by the rules., effective February 13, 2019.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

by: Denise E. O'Guin, A, Deputy Clerk

FOR THE COURT - BY DIRECTION

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12836-A

MILTON MITCHELL,

Petitioner-Appellant,

versus

GLEN JOHNSON,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

ORDER:

Milton Mitchell, a Georgia prisoner, seeks a certificate of appealability ("COA") and leave to proceed on appeal *in forma pauperis* ("IFP") in the appeal of the district court's dismissal of his current 28 U.S.C. § 2254 petition for a writ of habeas corpus as impermissibly second or successive. Mitchell previously filed a § 2254 petition in 2000 that was denied on the merits.

As an initial matter, a COA is unnecessary because a COA is not required for a prisoner to appeal the district court's order dismissing a § 2254 petition as impermissibly successive. *See Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004). However, because Mitchell has moved this Court for leave to proceed IFP, the appeal is subject to a frivolity determination. *See* 28 U.S.C. § 1915(e)(2)(B). An action is frivolous if it is without arguable merit either in law or fact. *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002).

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) provides that, before a petitioner may file a second or successive habeas petition, the petitioner first must obtain an order from the court of appeals authorizing the district court to consider the petition. *See 28 U.S.C. § 2244(b)(3)(A).* Without authorization, the district court lacks jurisdiction to consider a second or successive petition. *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003). In this case, Mitchell previously filed a § 2254 petition in 2000 that was denied on the merits. The record indicates that Mitchell did not obtain permission from this Court to file a second or successive § 2254 petition. Accordingly, Mitchell does not have a nonfrivolous issue on appeal because his current § 2254 petition was impermissibly second or successive and the district court lacked jurisdiction. *See id.*

Based on the foregoing, Mitchell’s motion for a COA is DENIED AS UNECESSARY. His motion for leave to proceed on appeal IFP is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12836-A

MILTON MITCHELL,

Petitioner-Appellant,

versus

GLEN JOHNSON,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

Before: WILLIAM PRYOR and JORDAN, Circuit Judges.

BY THE COURT:

Milton Mitchell has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated November 7, 2018, denying as unnecessary his motion for a certificate of appealability and denying his motion for leave to proceed on appeal *in forma pauperis* in the appeal of the district court's dismissal of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Because Mitchell has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

FILED
U.S. DISTRICT COURT
SAVANNAH DIV.

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CLERK

SO. DIST. OF GA.

MILTON MITCHELL,)
)
Petitioner,)
)
v.) CASE NO. CV417-108
)
GLEN JOHNSON,)
)
Respondent.)
)

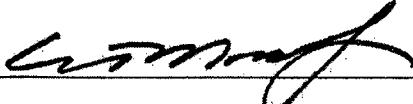
O R D E R

Before the Court is the Magistrate Judge's Report and Recommendation (Doc. 18), to which objections have been filed (Doc. 19). After careful review of the record, the report and recommendation is **ADOPTED** as the Court's opinion in this case. In his objections, Petitioner fails to address the Magistrate Judge's conclusion that his petition is not only untimely, but also successive. In addition, Petitioner provides no other meritorious objection to the report and recommendation. As a result, Respondent's Motion to Dismiss for Lack of Jurisdiction (Doc. 16) is **GRANTED** and Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) is **DISMISSED**. Petitioner is also not entitled to a Certificate of Appealability, rendering

moot any request to proceed in forma pauperis on appeal.

The Clerk of Court is **DIRECTED** to close this case.

SO ORDERED this 11th day of June 2018.



WILLIAM T. MOORE, JR.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

MILTON MITCHELL,)
Petitioner,)
v.) CV417-108
GLEN JOHNSON,)
Respondent.)

REPORT AND RECOMMENDATION

Sentenced to life imprisonment in 1984 for robbery, rape, and assault, Milton Mitchell petitions this Court for 28 U.S.C. § 2254 relief.

Doc. 1. Preliminary review under Rule 4 of the Rules Governing Section 2254 Cases shows that his petition must be dismissed.

Though it is unclear precisely on what date he was sentenced, Mitchell began serving his sentence February 6, 1984. *See* <http://www.dcor.state.ga.us/GDC/Offender/Query>. He did not appeal, and he did not seek state habeas relief until “about ten years ago” (doc. 1 at 8) -- relief which was summarily denied. *See* doc. 1 at 3 & 8.

Mitchell must have been sentenced sometime around the beginning of his incarceration on February 6, 1984. Because he was sentenced prior to the passing of the Anti-Terrorism and Effective Death Penalty

year clock has run out, it cannot be restarted or reversed merely by filing a new state court or federal action. *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (a state post-conviction motion filed after expiration of the limitations period cannot toll the period, because there is no period remaining to be tolled); *Nowill v. Barrow*, 2013 WL 504626 at * 1 n. 3 (S.D. Ga. Feb. 8, 2013).

Accordingly, Milton Mitchell's § 2254 petition is untimely and should be **DISMISSED**. Applying the Certificate of Appealability (COA) standards set forth in *Brown v. United States*, 2009 WL 307872 at * 1-2 (S.D. Ga. Feb. 9, 2009), the Court discerns no COA-worthy issues at this stage of the litigation, so no COA should issue either. 28 U.S.C. § 2253(c)(1); Rule 11(a) of the Rules Governing Habeas Corpus Cases Under 28 U.S.C. § 2254 ("The district court *must* issue or deny a certificate of appealability when it enters a final order adverse to the applicant.") (emphasis added). Any motion for leave to appeal *in forma pauperis* therefore is moot.

in this Court prior to the expiration of the one-year deadline. *See Holland*, 560 U.S. at 649; *Aureoles*, 609 F. App'x at 624.