

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10855-A

DALE L. BROWN,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

Dale L. Brown is a Florida prisoner serving a life sentence after being convicted by a jury in 1999 of first-degree murder. Brown pursued a direct appeal in state court, and the state court of appeals affirmed *per curiam* on December 12, 2000. Brown did not petition the U.S. Supreme Court for a writ of *certiorari*. Subsequently, Brown filed a Fla. R. Crim. P. 3.850 motion for post-conviction relief, which was denied. A state appellate court affirmed the denial in 2003. Brown filed another Rule 3.850 motion in 2003, which was likewise denied. A state appellate court affirmed the denial in 2004. Brown did not seek post-conviction relief again until 2010.

In July 2017, Brown filed in the district court the instant 28 U.S.C. § 2254 petition for a writ of habeas corpus. In his § 2254 petition, Brown argued that he was actually innocent because the woman that he was convicted of murdering actually committed suicide, which he told the police at the time that she died. Brown also argued that his constitutional rights had

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been violated and that he had been unable to obtain all of the court documents that he allegedly needed to challenge his conviction. The district court dismissed Brown's § 2254 petition as time-barred. Brown now seeks a certificate of appealability ("COA") from this Court.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court has denied a § 2254 petition on procedural grounds, the movant must show that jurists of reason would find debatable whether (1) the district court was correct in its procedural ruling, and (2) the § 2254 petition states a valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

This Court reviews *de novo* the district court's dismissal of a § 2254 petition as untimely. *Pugh v. Smith*, 465 F.3d 1295, 1298 (11th Cir. 2006). Pursuant to 28 U.S.C. § 2244(d)(1), a § 2254 petition is governed by a one-year statute of limitations period that typically begins to run on the date on which the petitioner's conviction became final. 28 U.S.C. § 2244(d)(1)(A). A state prisoner's conviction becomes final when the U.S. Supreme Court denies *certiorari* or issues a decision on the merits, or when the 90-day period in which to file a *certiorari* petition expires. *Nix v. Sec'y for Dep't of Corr.*, 393 F.3d 1235, 1236-37 (11th Cir. 2004). The one-year limitation period for filing a § 2254 petition is tolled during times in which a properly filed application for state post-conviction relief is pending, but an application for state post-conviction relief filed after the statute of limitations has lapsed does not toll or reset the statute of limitations. 28 U.S.C. § 2244(d)(2); *Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004).

In this case, the district court correctly determined that Brown's § 2254 petition was time-barred. Because Brown did not file a petition for a writ of *certiorari*, the statute of limitations began to run on March 12, 2001, 90 days after a Florida appeals court affirmed his

conviction. *See Nix*, 393 F.3d at 1236-37. Brown pursued state post-conviction relief, which tolled the statute of limitations. *See* 28 U.S.C. § 2244(d)(2). However, more than one year of untolled time passed between final disposition of Brown's second Rule 3.850 motion in 2004 and his application for state post-conviction relief in 2010. Brown's 2010 filing and subsequent filings for state post-conviction relief did not toll or reset the statute of limitations. *See Sibley*, 377 F.3d at 1204. Accordingly, Brown's § 2254 petition, filed in 2017, was barred by the one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1).

Further, Brown was not entitled to equitable tolling because, as it has been nearly 20 years since his conviction, he cannot show due diligence or that an extraordinary circumstance prevented him from timely filing his § 2254 petition. *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (holding that the statute of limitations may be equitably tolled upon a showing of diligence and an extraordinary circumstance that prevented a timely filing). He also cannot show that he is entitled to the fundamental-miscarriage-of-justice exception because his argument that the woman he was convicted of murdering actually committed suicide was available to him at trial, and, thus, he cannot show new evidence that he is factually innocent. *See McQuiggin v. Perkins*, 569 U.S. 383, 386, 399 (2013) (holding that, to make a credible showing of actual innocence to overcome the statute of limitations, a petitioner must present new reliable evidence that was not presented at trial and that would make it more likely than not that a reasonable jury would not have convicted him). Because reasonable jurists would not debate the district court's dismissal of Brown's § 2254 petition at time-barred, his motion for a COA is DENIED.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

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Before: WILLIAM PRYOR and NEWSOM, Circuit Judges.

BY THE COURT:

Dale L. Brown has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated August 30, 2018, denying his motion for a certificate of appealability in the appeal of the district court's dismissal of his 28 U.S.C. § 2254 petition for a writ of habeas corpus as time-barred. Because Brown has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

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