IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15247-A

ROBERT WAYNE GILLMAN,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

Before: WILLIAM PRYOR and ROSENBAUM, Circuit Judges.

BY THE COURT:

Robert Wayne Gillman has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated April 24, 2019, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed *in forma pauperis*. Because Gillman 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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SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

ORDER:

Robert Gillman is a Florida prisoner serving a life sentence of imprisonment after a jury convicted him of first-degree murder, second-degree murder, and armed burglary. He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") to appeal the denial of his construed Rule 60(b), Fed. R. Civ. P., motion, in which he argued that his first 28 U.S.C § 2254 habeas corpus petition, which was filed in 2010, was timely. Specifically, he argued that this Court overlooked the fact that he had signed his Fla. R. Crim. P. 3.850 motion a few days before the one-year limitation period expired; but his postconviction counsel failed to timely file his Rule 3.850 motion.

This Court has held that "a [COA] is required for the appeal of any denial of a Rule 60(b) motion for relief from a judgment in a § 2254 or § 2255 proceeding." *Gonzalez v. Sec'y for Dep't*

of Corrs., 366 F.3d 1253, 1263 (11th Cir. 2004) (*en banc*). To merit a COA, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

The appeal of a Rule 60(b) motion is limited to a determination of whether the district court abused its discretion in denying the motion and shall not extend to the validity of the underlying judgment *per se*. *Rice v. Ford Motor Co.*, 88 F.3d 914, 918-19 (11th Cir. 1996). A Rule 60(b) motion permissibly may assert that a federal court's previous habeas ruling that precluded a merits determination (*i.e.*, a procedural ruling such as failure to exhaust, a procedural bar, or a statute-of-limitations bar) was in error. *Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005). To show that the district court abused its discretion in denying a Rule 60(b) motion, the petitioner "must demonstrate a justification so compelling that the district court was required to vacate its order." *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006)

Here, the district court did not abuse its discretion in denying Gillman's Rule 60(b) motion because he merely sought to relitigate the timeliness of his § 2254 petition based on equitable tolling, which had already been resolved against him by the district court and this Court. Moreover, Gillman did not assert any other basis for relief demonstrating that the denial of his motion was unwarranted. *See Cano*, 435 F.3d at 1342. Accordingly, Gillman's motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ROBERT WAYNE GILLMAN,

Petitioner,

v. **Case No: 5:10-cv-380-Oc-10PRL**

SECRETARY, DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL

Respondents.
_____/

ORDER

By Order dated May 14, 2018, on remand from the Court of Appeals, the Court liberally construed a petition for habeas relief that Petitioner filed in another case to include a motion for relief from judgment in this matter – 5:10-cv-380. After allowing Petitioner the opportunity to file motions memoranda and exhibits, the Court denied the motion. Petitioner has since filed a Notice of Appeal (Doc. 77), Motion for Certificate of Appealability (Doc. 80) and Motion for Leave to Appeal *In Forma Pauperis*. (Doc. 78).

The Court should grant an application for a Certificate of Appealability only if the Petitioner makes a substantial showing of the denial of a constitutional right.[1] To make this showing, Petitioner "must demonstrate that the issues are debatable among jurists of reason" or "that a court could resolve the issues [differently]."[2] In addition, Petitioner could show "the questions

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[1] See Fed.R.Civ. P. 22; see also 28 U.S.C. § 2253.

[2] Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S.Ct. 3383 (1983) (citation omitted).

are adequate to deserve encouragement to proceed further."[3] Specifically, where a district court has rejected a prisoner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.[4]

Here, the Petitioner has not identified in his Motion for Certificate of Appealability the specific issue or issues he intends to argue in the Court of Appeals, nor has he presented any authority suggesting that reasonable jurists would find this Court's ruling to be debatable or wrong. As such, he is not entitled to relief.

Accordingly, the request for a Certificate of Appealability (Doc. 80) is **DENIED** and the Motion for Leave to Proceed on Appeal as a Pauper (Doc. 78) is **DENIED**.

IT IS SO ORDERED.

DONE and **ORDERED** in Ocala, Florida on February 5, 2019.

UNITED STATES DISTRICT JUDGE

[3] Id.

[4] See Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595 (2000); Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.), cert. denied, 531 U.S. 966 (2000).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ROBERT WAYNE GILLMAN,

Petitioner,

v. case no. 5:10-cv-380-Oc-10PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

By Order dated June 19, 2013, the Court denied the Petition filed pursuant to 28 U.S.C. § 2254 . (Doc. 33). An amended order was entered and judgment followed. (Doc. 37, 38). By Order dated May 14, 2018, because of a remand, the Court liberally construed a petition for habeas relief that Petitioner filed in 5:16-cv-479 (Doc. 4) to include a motion for relief from judgment. After allowing Petitioner the opportunity to file motions, memoranda and exhibits, the Court denied the motion. (Doc. 74). Pending before the Court is Petitioner's Motion for Reconsideration of the denial of the Motion for Relief from Judgment. (Doc. 75).

Upon due consideration, the motion (Doc. 75) is **DENIED**. The request for relief from judgment was properly denied for the reasons stated in the Court's November 14, 2018. Petitioner has not otherwise demonstrated that he is entitled to relief.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida, this 6th day of December, 2018.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ROBERT WAYNE GILLMAN,

Petitioner,

v. case no. 5:10-cv-380-Oc-33PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

Petitioner, a state inmate proceeding *pro se*, filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. By Order dated June 19, 2013, after an evidentiary hearing, the Court denied the Petition as untimely. (Doc. 33). An Amended Order and Judgment were entered. (Doc. 37, 38). Pending before the Court is Petitioner's Motion for Relief from Judgment filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (Doc. 51).[1] The motion is based on Petitioner's argument that the Court should have considered his attorneys' misconduct in determining the issue of equitable tolling. Petitioner has filed a memorandum (Doc. 54) and a number of notices and exhibits in support of the request for relief. (Docs. 56, 57, 58, 62, 64, 65, 66, 69 and 70). For the reasons stated in this Order, Petitioner's Motion is due to be denied.

Procedural History

At the time this matter commenced, the issue before the Court was whether the federal

[1] Although the docket reflects that Petitioner initiated this case through counsel, the Court will consider the *pro se* post-conviction motion given the nature of the procedural history and the arguments relating to counsel's performance.

habeas Petition was timely filed. Petitioner provided the following argument regarding timeliness in his Petition:

> Charles Daniel Akes, Esquire, was hired immediately after the conclusion of my direct appeal to prosecute a motion for post-conviction relief in state court. I specifically and repeatedly directed that he do so within such time as to preserve my ability to comply with the time limitations of 28 U.S.C. 2244. Mr. Akes failed to do so and frustrated my ability to file within that period. When his failure to act timely became apparent, I obtained other counsel, who diligently investigated the grounds for post-conviction relief and filed a motion in state court on June 20, 2006. I also had filed a motion to correct sentencing error on July 8, 2005 (having earlier filed it by placement in institutional mail) and appealed from the denial thereof to the Fifth District Court of Appeal (No. 5D05-269), resulting in affirmance on January 18, 2006.
>
> Mr. Akes' license to practice law has been suspended by the Supreme Court of Florida because of his failure to provide services for other clients of his, including clients for whom he was hired to provide timely and competent services on motions for post-conviction relief.

Respondents filed a response moving to dismiss the Petition as untimely. (Doc. 4). Petitioner, through counsel, filed a reply to the response arguing that equitable tolling should apply because of Mr. Akes' performance. (Doc. 11).

On March 6, 2013, the Court conducted an evidentiary hearing to address whether Petitioner would have timely filed his habeas petition but for his counsel's alleged deficient performance, and whether Petitioner's claim was procedurally defaulted. (Doc. 20).

The parties agreed at the hearing that the Petition was untimely filed outside of the statute of limitations and it was due to be dismissed without the application of equitable tolling. The parties subsequently filed memoranda. By Amended Order dated July 5, 2013, the Court found that Petitioner's counsel, Mr. Akes, did not prevent him from timely filing his Petition. (Doc. 37). Accordingly, the Petition was denied with prejudice as untimely. (Doc. 37).

In 2014, the United States Court of Appeals for the Eleventh Circuit affirmed the decision

finding that this Court correctly concluded that Petitioner was not entitled to equitable tolling because he failed to show a causal connection between Mr. Akes' misconduct and his failure to timely file the federal petition. (Doc. 44). Mandate was issued. (Doc. 47). The United States Supreme Court denied a writ of certiorari. (Doc. 48).

In 2016, Petitioner, proceeding *pro se*, filed another petition pursuant to 28 U.S. C. § 2254 in case number 5:16-cv-479.[2] By Order dated December 16, 2016, the Court dismissed it as successive because Petitioner had not demonstrated that he had obtained permission from the Eleventh Circuit Court of Appeals to file a second or successive petition. The Court then denied Petitioner's Motion for Reconsideration.

The docket in 5:16-cv-479 reflects that the Court of Appeals affirmed in part, vacated in part and remanded that case to this Court. Specifically, the Court of Appeals agreed that "Gillman's § 2254 petition, if construed as such, was second or successive and that he was required to obtain authorization from [the Court of Appeals] before filing it in the district court, which he did not do." Id. However, the order also provided that Petitioner "contends that the district court failed to consider his request to construe his petition, insofar as it pertained to equitable tolling based on the conduct of his lawyers who replaced Akes, as a motion for relief under Federal Rule of Civil Procedure 60(b)(6) from the judgment dismissing his initial § 2254 petition." The Court of Appeals held a remand was warranted because it could not discern from the record whether this Court considered Petitioner's tolling argument under Fed.R.Civ.P. 60(b)(6) or, if so, on what grounds it may have rejected the argument. The order provided that "we remand for the district court to decide whether to entertain Gillman's pleading as a Rule 60(b)(6) motion and, if so, whether relief

[2] The petition was filed on the standard habeas form.

is warranted." Id.

By Order dated May 14, 2018, because of the remand, the Court liberally construed the petition filed in 5:16-cv-479 (Doc. 4) to include a motion filed pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. In light of the fact that Petitioner is seeking relief from judgment with respect to the initial ruling, the Court found that the motion was more properly docketed in the instant case - 5:10-cv-380.

Rule 60(b) Motion

In the Petition filed in 5:16-cv-479, Petitioner raised seven grounds for relief.[3] Again, these claims were deemed successive, but Petitioner provides an additional argument under the habeas form's section on timeliness, which is the basis for the request for relief from judgment under Rule 60(b). Now, Petitioner switches focus from Mr. Akes' performance to William Sheppard and Bryan DeMaggio's alleged misconduct. William Sheppard and Bryan DeMaggio represented Petitioner at the evidentiary hearing.[4]

The background and facts that were before the Court at that hearing are thoroughly discussed in the July 5, 2013 Order denying the Petition. Id. In relevant part, Petitioner hired Mr. Akes in 2004 to handle his 3.850 post-conviction motion. The evidence at the hearing showed that

[3] The seven grounds for relief were: (1) ineffective assistance of counsel due to the conflict of interest of trial counsel's partner, Tricia Jenkins, esquire; (2) the trial counsel failed to inquire regarding conflict of interest; (3) ineffective assistance of counsel for failing to properly and timely investigate and assert the incompetency of state witness Ralph Troisi; (4) ineffective assistance of counsel for failing to object to jury instructions identifying Gallard as Gillman's accomplice; (5) ineffective assistance of counsel for failing to object to supplemental jury instruction in response to question by the jury; (6) ineffective assistance of counsel for failing to object to and affirmatively present inadmissible hearsay testimony relating to the entry into Town's residence; and (7) ineffective assistance of counsel for failing to properly and timely assert Defendant's competency to stand trial. (Doc. 51).

[4] The record reflects that Mr. Sheppard filed the original petition in the instant case on Petitioner's behalf. (Doc. 1).

Petitioner and his family and friends made several attempts to communicate with the attorney and his staff regarding the status of his motion. Clearly dissatisfied with the response, or lack thereof, Petitioner eventually requested that Mr. Akes return his transcripts, and in August 2015, he filed a complaint with the Florida Bar. Petitioner testified at the evidentiary hearing that after the Florida Bar made its November 17, 2005 ruling that there was no cause regarding the complaint, he knew that his relationship with Mr. Akes' had ended and he decided to look for another attorney.

Because the only question before the Court was Mr. Akes' performance, the Court based its decision regarding the application of equitable tolling solely on Petitioner's interactions with that attorney. Notably, Petitioner argued that Mr. Akes' failure to return his transcripts prohibited him from filing his 3.850 motion. In order to make that determination, the Court considered testimony regarding Petitioner's subsequent relationships with other attorneys and their ability to file the motion with the transcripts.

After Petitioner deemed Mr. Akes' representation to be terminated, he hired another attorney, Stephanie Mack, through his sister to handle the matter. Time still remained under the statute of limitations to file his 3.850 motion. However, Petitioner testified that Ms. Mack disclosed that a conflict of interest existed. Petitioner stated that he refused to sign a waiver with respect to the conflict of interest and discharged Ms. Mack in March 2005. But, Petitioner's deadline to file the 3.850 motion was April 17, 2005, so that time still remained to do so.

Instead of filing the motion *pro se*, Petitioner hired William Sheppard and Bryan DeMaggio to pursue the matter. Petitioner signed the motion on April 12, 2006, which included citations to the trial transcripts. It was untimely filed on June 20, 2006.

In the July 5, 2013 Order, the Court found that even if Mr. Akes improperly failed to return

the transcripts, Petitioner still had months to pursue his claims, obtain transcripts, and Mr. Akes did not prevent Petitioner from complying with the statute of limitations.

Having failed at his equitable tolling argument based on Mr. Akes' performance, Petitioner contends in the instant motion, 3 years later, that he is entitled to relief from judgment because Mr. Sheppard and Mr. DeMaggio were the reason he did not comply with the statute of limitations. (Doc. 51). Petitioner states that he transmitted his 3.850 motion on April 12, 2006, 5 days before the deadline, but due to Mr. Sheppard and Mr. DeMaggio's ignorance, inadvertence and deliberate acts, it was untimely filed. Petitioner claims that the attorneys' failure to timely file the motion has deprived him of the opportunity to present his factual innocence claims.[5] Petitioner argues that this Court erred in only considering Mr. Akes' actions in conducting the equitable tolling analysis and he should be allowed to proceed. Specifically, Petitioner states that the Court failed to consider that Petitioner's 3.850 was signed, notarized and mailed to Mr. Sheppard and Mr. DeMaggio 5 days prior to the expiration of the statute of limitations.[6]

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[5] Petitioner refers to two grounds for relief he raised in his initial habeas petition: (1) ineffective assistance due to conflict of interest of trial counsel; and (2) ineffective assistance for failing to investigate the competency of the State's most critical witness, Ralph Troisi. A review of PACER reflects that Petitioner filed an application to submit a successive petition, which was denied. See In re Robert Gillman, docket number 15-14723. Petitioner argued that trial counsel's conflict of interest deprived him of the exculpatory evidence of Troisi's incompetency to testify and that Jenkins, trial counsel's law partner, the state and the trial court perpetrated a fraud on the jury by falsely representing Troisi as competent to testify and concealing evidence of incompetency. The Eleventh Circuit Court of Appeals found that the claims did not merit authorization to proceed. The order provides that the evidence that Petitioner relied upon could have been discovered following a reasonable investigation before is original 2254 proceedings ended, as he contended in his original 2254 petition that Troisi's incompetency had been concealed from him. Further, the order states that any evidence of Troisi's incompetency as a star witness or the concealment of such evidence relates to the sufficiency of trial evidence against Petitioner, but does not demonstrate, by clear and convincing evidence, that he is actually innocent of his offenses.

[6] The mailbox rule does not apply to prisoners with counsel. See United States v. Camilo, 2017 U.S. App. LEXIS 6747, *4 (11th Cir. 2017).

For the first time in his memorandum, Petitioner also claims that Ms. Mack caused the late filing because of her conflict of interest. (Doc. 54). Petitioner states that while this Court acknowledged Ms. Mack's conflict of interest, it did not discuss or factor it into its equitable tolling analysis. Petitioner claims that he "cannot be charged with the time spent while Mack was retained, but not representing his interests." Id. Petitioner states that the attorney failed to act as his representative and he is entitled to equitable tolling "during that time." Id.

Petitioner then argues that he was prejudiced by counsels' conflicts of interest dating back to 1997 making reference to an "agency breach" throughout the memorandum. Id. Petitioner complains about his counsels' performance at trial and counsels' alleged conflicts during his appeals and habeas proceedings. Petitioner claims that his trial counsel introduced inadmissible hearsay evidence later relied upon during the State's closing arguments to prove the burglary charge making the attorney an agent of the state; trial counsel continuously interfered with other attorneys for Petitioner throughout his state appeal and habeas proceedings; Mr. Troisi's mental health records were withheld through trial counsel's "agency breach;" and there is no reasonable explanation for the late filing of his 2254 petition other than Mr. Sheppard's self-interest, divided loyalties, dishonesty and bad faith.[7] Id.

Moreover, Petitioner contends that this Court erred in not construing his habeas petition as a motion under Rule 60(b) and the Court can reopen the case. Id. It appears that Petitioner adds that he is entitled to proceed with his claims through equitable tolling because he is factually innocent. In sum, Petitioner maintains that he is entitled to equitable tolling because his attorneys "abandoned him or labored under a conflict of interest and Gillman had his state post-conviction

[7] Petitioner states that "Johnson Vipperman and Jenkins are an associate/sister law firm of Sheppard, White, Thomas, Kachergus and DeMaggio." (Doc. 54).

motion signed, notarized, and turned over to prison officials prior to the expiration of AEDPA's limitations period." Id.

The Court is not persuaded that Petitioner is entitled to relief from the final judgment. Rule 60(b) of the Federal Rules of Civil Procedure permits a court to relieve a party from a judgment, order, or proceeding in a limited number of circumstances including: (1) mistake or neglect; (2) newly discovered evidence; (3) fraud; (4) when a judgment is void; or (5) when a judgment has been satisfied. The rule also provides a catchall provision authorizing relief based on "any other reason that justifies relief."

First, Petitioner's motion for relief from judgment is fatally flawed for the same reason his initial petition was denied. It is untimely. A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of judgment or order or the date of the proceeding. Fed.R.Civ.P. 60(c). Petitioner does not specify which reason he relies upon in filing his motion. If Petitioner relies on reasons (1), (2) or (3), then he is certainly out of time. The Court entered its judgment in this case on July 8, 2013. Petitioner did not file his successive petition, which apparently included the request for relief from judgment, until July 18, 2016.

Assuming arguendo that Petitioner brings his request pursuant to Rule 60(b)(4)(5) or (6), he still did not file the motion within a reasonable time. "A determination of what constitutes a reasonable time depends on the facts in an individual case, and in making the determination, courts should consider whether the movant had a good reason for the delay in filing and whether the non-movant would be prejudiced by the delay." Ramsey v. Walker, 2008 U.S. App. LEXIS 26286 (11th Cir. 2008) (citing Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930 (5th Cir. 1976)).

Petitioner filed his motion more than 3 years after judgment was entered. There is nothing in the record to reflect that Petitioner could not have raised his arguments to the Court at an earlier time. This is especially true since the crux of Petitioner's argument is that this Court erred when it did not consider at the March 2013 evidentiary hearing Mr. Sheppard, Mr. DeMaggio's and Ms. Mack's failure to file his 3.850 motion. In all of Petitioner's filings, the Court cannot identify a reason for the 3 year delay.

Second, even if the motion was timely filed, it is without merit. As stated, Petitioner does not specify which reason for relief upon which he relies under Rule 60(b). There is no allegation that opposing counsel engaged in misconduct, or that the judgment is void or satisfied. Accordingly, reasons (3)(4) or (5) are eliminated. To the extent that Petitioner relies on Rule 60(b)(1), the record refutes any claim of mistake or excusable neglect. The original petition filed in the instant case, along with the reply to the response, the arguments raised during the evidentiary hearing and the subsequent briefing all focused on Mr. Akes' performance and how it allegedly hindered him from pursuing his 3.850 motion.

The Court recognizes that Mr. Sheppard filed the initial 2254 petition in this case and represented him at the evidentiary hearing, but it was Petitioner's choice to hire this attorney. In other words, it was Petitioner's decision to proceed with his case through Mr. Sheppard and limit his equitable tolling argument to his previous attorney's conduct. It is clear from the record that Petitioner knew all of the facts, including Mr. Sheppard and Mr. DeMaggio's failure to timely file the 3.850 motion, but did not make this argument to the Court when it was time to do so. Accordingly, there is nothing to show mistake, inadvertence, surprise or excusable neglect.

For the same reason, Petitioner is not entitled to relief under Rule 60(b)(2). Petitioner could have and should have raised all of his arguments when the case was initially considered and there

is no adequate showing of newly discovered evidence to support relief.[8] The Court did not err in failing to consider claims that were known, but not presented.

It would appear that the crux of Petitioner's argument is that the Court should find another reason to justify relief pursuant to Rule 60(b)(6). The Court is not inclined to do so. While Petitioner may argue that all of these attorneys were working against him and had their own interests at heart throughout the trial and post-conviction proceedings, there was nothing to prohibit Petitioner from making these "conflict of interest" and "agency breach" claims in support of equitable tolling when the Court considered the timeliness of the petition.

Moreover, the Court is not persuaded that Petitioner's factual innocence or miscarriage of justice arguments entitle him to relief under Rule 60(b)(6) or any other subsection of that rule. Petitioner's claim of innocence is insufficient to reopen the judgment. Assuming that actual innocence is an extraordinary circumstance warranting relief from judgment, Petitioner has presented nothing that persuades the Court that he can proceed with his claims. The "supplemental authority" does not entitle him to relief.

Finally, the Court notes that Petitioner refers to Martinez v. Ryan, 132 S.Ct. 1309 (2012) in his memorandum and supplemental authority.[9] (Docs. 54, 56). To the extent that Petitioner relies on this case, the Eleventh Circuit has expressly held that Martinez did not recognize a new rule of constitutional law and thus has no effect on the triggering date for the one year AEDPA

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[8] The docket reflects that Petitioner filed motions to submit "new evidence" and exhibits for the Court's review. See Docs. 53, 62, 64, 65, 69 and 70.

[9] In Martinez, the Supreme Court held that procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of trial counsel if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

statute of limitations under § 2244(d)(1), nor does Martinez provide a basis for equitable tolling of the limitations period. Lambrix v. Sec'y, Fla. Dep't of Corr., 756 F.3d 1246, 1262-63 (11th Cir. 2014) (citing Chavez v. Sec'y, Fla. Dep't of Corr., 742 F.3d 940 (11th Cir. 2014) (finding that "the equitable rule in Martinez applies only to the issue of cause to excuse the procedural default of an ineffective assistance of trial counsel claim that occurred in a state collateral proceeding and has no application to the operation or tolling of the §2244(d) statute of limitations for filing a § 2254 petition."). Since the issue before the Court was not one of procedural default but timeliness, Martinez provides no basis for tolling the one year period.

Conclusion

Upon due consideration, the petition was properly dismissed as untimely for the reasons stated in the Court's July 5, 2013 Order, which the Court of Appeals affirmed. Petitioner's motion for relief filed pursuant to Fed.R.Civ.P. 60(b) (Doc. 51)is **DENIED.**

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida, this 14th day of November, 2018.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ROBERT WAYNE GILMAN,

Petitioner,

-vs- Case No. 5:10-cv-380-Oc-33PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et. al.,

Respondents.

AMENDED O R D E R

Petitioner, through counsel, initiated this case by filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1). Respondents filed a Response to the Petition asserting that the case is due to be dismissed because the Petition was untimely filed. (Doc. 4). Petitioner filed a Reply to the Response. (Doc. 11). At the direction of the Court, Respondents submitted a Supplemental Brief. (Docs. 12, 13). This case is ripe for review. (Doc. 16).

Procedural History

In October 11, 2002, a jury in the Circuit Court of the Fifth Judicial Circuit in and for Marion County, Florida found Petitioner guilty of Felony Murder in the First Degree, Murder in the Second Degree, Burglary While Armed and Armed Extortion. (Doc. 6, Ex. B). On

April 11, 2003, the trial court granted a judgment of acquittal as to the Armed Extortion count. (Doc. 6, Ex. C). The court sentenced Petitioner to life imprisonment on the First Degree Murder offense and 20 years imprisonment on the Murder in the Second Degree and Burglary offenses to run concurrent with each other, but consecutive to the life sentence. Id.

Petitioner appealed the judgment and sentence. On April 20, 2004, the Fifth District Court of Appeal (Fifth DCA) affirmed the judgment and sentence. (Doc. 6, Ex. H). Petitioner then filed a motion for rehearing and motion for rehearing *en banc*. (Doc. 6, Exs. I, J). The Fifth DCA denied the motion and mandate issued on June 28, 2004. (Doc. O).

On July 1, 2005, Petitioner filed a *pro se* motion pursuant to Rule 3.800 of the Florida Rules of Criminal Procedure. (Doc. 6, Ex. P). The trial court denied the 3.800 motion and the Fifth DCA affirmed the denial. (Doc. 6, Exs. Q, V).

On February 2, 2006, Petitioner filed a *pro se* petition with the Florida Supreme Court seeking review of the Fifth DCA's opinion affirming the denial of the motion to correct sentence. (Doc. 6, Ex. Z). On February 3, 2006, the Florida Supreme Court dismissed the petition for lack of jurisdiction. (Doc. 6, Ex. AA). Mandate issued on February 6, 2006. (Doc. 6, Ex. Y).

On June 20, 2006, Petitioner, through counsel, filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (Doc. 6, Ex. Doc. BB). The motion was denied and the Fifth DCA affirmed the denial. (Doc. 26). Mandate

issued on July 21, 2010. Id. Petitioner, through counsel, filed his federal habeas Petition on August 10, 2010, which is pending before the Court. (Doc. 1).

By Order dated January 18, 2013, the Court scheduled an evidentiary hearing to address the issue of whether Petitioner would have timely filed his federal habeas Petition but for his counsel's alleged deficient performance, and whether Petitioner's claim is procedurally defaulted. (Doc. 16). On March 6, 2013, the Court conducted the hearing and received subsequent briefs from the Parties on the issue. (Docs. 20, 26, 27, 30).

Background and Relevant Facts

Petitioner contends that on July 2004, he wrote to an attorney, C. Daniel Akes, regarding his case. (Doc. 26). In a letter dated July 16, 2004, Mr. Akes responded to Petitioner acknowledging receipt of the letter and states that he "would be happy to try and help out." (Evid. Hearing, Ex. 2).[1] Mr. Akes also explains that he charges $800.00 to review a post-conviction matter and to advise Petitioner on whether it will give him a chance for relief. Id. The letter states that if Petitioner decides that he wants Mr. Akes to pursue the post-conviction motion, it will cost an additional $2,500.00. Id.

Mr. Akes also explains that there are additional costs if there is an evidentiary hearing and directs him to forward pertinent documents if Petitioner wishes to proceed. Id. Petitioner claims that he sent the transcripts to Mr. Akes. (Doc. 26; Doc. 31, pgs. 39-40). On November 4, 2004, Petitioner's direct appeal attorney sent Mr. Akes the record

[1]At the evidentiary hearing, Petitioner submitted Exhibit 2, which includes attachments Petitioner sent to the Florida Bar to support a Bar complaint against Mr. Akes.

on appeal. Id. At the evidentiary hearing, Richard Barner, Petitioner's friend, testified that he gave an $800.00 check to Mr. Akes' paralegal dated August 25, 2004. (Ex. 31, pg. 34, Evid. Hearing, Ex. 1).

The record reflects that even though Mr. Barner paid the $800.00, Petitioner had difficulty communicating with Mr. Akes and began to correspond with him to voice his frustration and concern. Specifically, in a letter dated February 21, 2005, Petitioner states that "after many wholehearted attempts writing letters to your office, I have failed to get any form of response." (Evid. Hearing, Ex. 2). Petitioner's letter also provides the following:

> I am at a total loss for understanding why no response has been illicited [sic] by your office. I've requested one many times. I possess much useful information to share, but we must have established communication in order to do so. There are filing deadlines to meet, and I'd most certainly like to do so. Without being reasonably informed immediately, I will not know what to do other then to file a complaint to the Florida Bar Ass[ociation.]...
>
> Id.

In another letter dated March 2, 2005, Petitioner advises Mr. Akes and his paralegal that "it is [his] understanding as told to [him by the attorney representing him during the direct appeal] that we only have 1 year to keep open federal appeals. Let's file something as to stop the time clock from running. The mandate came out in June 2004." Id. Mr. Akes responded with a letter dated March 7, 2005, acknowledging receipt of Petitioner's letters. Id. The letter states that Mr. Akes would like to assure Petitioner that he is working on the case and has asked his paralegal to make it a priority. Id.

Despite Mr. Akes' March 7, 2005 letter, Petitioner continued to correspond with his office to express frustration with the progress of his case. In two letters dated March 24, 2005, Petitioner complained of the "seriously slow responses from the office," and that requested the return of the trial transcripts and other documents that he sent to the office. Id. Petitioner states that "this brief is going to be filed by June or sooner, so I need to be working in the event that your office fails to be ready." Id.

The testimony at the evidentiary hearing also reflects that Petitioner attempted to communicate with Mr. Akes and his office via telephone. Petitioner testified that after he did not receive a response from Mr. Akes with respect to his letters, he had his friend, mother and sister try to call his office to no avail. (Doc. 31, pg. 42). Petitioner states that at the times that they did make contact with his office, Mr. Akes "would assure them that he was going to do his job and that he was working on it..." (Doc. 31, pg. 41).

Further, Petitioner testified that he eventually spoke with the paralegal and Mr. Akes and was assured that Mr. Akes' office was going to "get the case done and file it." (Doc. 31, pg. 43). Moreover, Petitioner's sister, Laura Gillman, testified that she called Mr. Akes' office in January and March and the paralegal informed her that they were working on Petitioner's case. (Doc. 31, pg. 14).

On July 1, 2005, Petitioner, proceeding *pro se*, filed a motion pursuant to Florida Rule of Criminal Procedure 3.800. (Doc. 6, Ex. P). Petitioner asserts that he filed the motion in an effort to toll the time limit to file his federal petition. (Doc. 26). During the pendency of the 3.800 motion, Petitioner wrote Mr. Akes again asking for his set of

transcripts. (Evid. Hearing, Ex. 2). The August 1, 2005 letter reflects that Petitioner had made many requests for the return of his personal transcripts and requested that Mr. Akes send the documents "at once." Id. Petitioner states that he "wish[ed] to avoid being time-barred from federal appeals under rule 28 U.S.C.A. 2244 as [his] mandate was June 28, 2004." Id. Petitioner requested the documents "so [he] may work to insure a timely filing should [Mr. Akes] fail to do so." Id.

On August 15, 2005, Petitioner filed a complaint against Mr. Akes with the Florida Bar Association. Id. On August 29, 2005, the Florida Bar sent a copy of the complaint to Mr. Akes and directed him to respond. (Evid. Hearing, Ex. 3). On September 30, 2005, the Florida Bar sent another letter to Mr. Akes, which requested a response. (Evid. Hearing, Ex. 4). On October 14, 2005, the complaint was forwarded to the grievance committee for further investigation and disposition. (Evid. Hearing, Ex. 5). On November 17, 2005, the Florida Bar issued a "Notice of No Probable Cause and Letter of Advice to Accused." (Evid. Hearing, Ex. 8).[2]

In Mid-December Petitioner retained another attorney through his sister. (Doc. 31, pg. 19). However, Petitioner testified that the attorney disclosed to Petitioner that a conflict of interest existed. (Doc. 31, pg. 48). Petitioner stated that he refused to sign a waiver with respect to the conflict of interest. Id. Petitioner testified that he then retained his current counsel and filed his motion for post-conviction relief on June 20, 2006. (Doc. 31, pg. 48;

[2]The Florida Bar subsequently suspended Mr. Akes from the practice of law after other individuals complained about his failure to work on their cases. (Evid. Hearing, Exs. 9-11).

See Doc. 26). On August 5, 2010, he executed his federal habeas Petition and filed it through counsel on August 10, 2010. (Doc. 1).

Discussion

The issue before the Court is whether this Petition is due to be dismissed because it was untimely filed. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a petitioner has one-year from the date the conviction and sentence became final to file a federal habeas petition. The AEDPA also provides that the one-year time limit is statutorily tolled during the pendency of any properly filed state collateral petitions or motions.

The one-year limitations period may also be equitably tolled if a petitioner can show: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. San Martin v. Secretary, Florida Dept. of Corrections, 633 F.3d 1257 (11th Cir. 2011) (citing Holland v. Florida, 130 S.Ct. 2549, 2562 (2010)). The tolling remedy must be used sparingly. Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000).

With respect to the first prong, the petitioner must show reasonable diligence, rather than demonstrate maximum feasible diligence. Id. (citing Holland, 130 S.Ct. at 2565). As for extraordinary circumstances, the petitioner must show a causal connection between the alleged extraordinary circumstances and the late filing of the petition. San Martin, 633 F.3d at 1267. At least sometimes, an attorney's unprofessional conduct can be so egregious as to create an extraordinary circumstance warranting equitable tolling even if

a petitioner is not entitled to equitable tolling for "a garden variety claim of excusable neglect." Holland, 130 S.Ct. at 2553. In these circumstances, equitable tolling can be applied in the "absence of an allegation of proof of bad faith, dishonesty, divided loyalty, [or] mental impairment." Id. at 2573.

Here, Petitioner does not contest that his federal petition was untimely filed. (Doc. 31, pg. 4). The Parties, and the Court, are in agreement that without the application of equitable tolling, the Petition is due to be dismissed. Specifically, the record reflects that Fifth DCA issued its mandate on June 28, 2004 with respect to the denial of Petitioner's motion for rehearing, motion for rehearing *en banc*, and motion to strike. (Doc. 6, Ex. N). Petitioners' one-year limitation period did not begin to run until September 7, 2004, which was 90 days after the motion for rehearing was denied.[3] On July 1, 2005, Petitioner filed his *pro se* 3.800 motion. (Doc. 6, Ex. P). At this time, 297 days had passed on the one-year limitations period. On July 13, 2005, the trial court denied the motion and on December 13, 2005, the Fifth DCA affirmed the denial. (Doc. 6, Exs. Q, V). Mandate issued on February 6, 2006. (Doc. 6, Ex. Y).

The limitations period began to run again with 68 days remaining, putting the deadline at April 17, 2006.[4] On June 20, 2006, Petitioner filed a motion pursuant to 3.850 of the Florida Rules of Criminal Procedure, which was denied. (Doc. 6, Ex. BB, Ex. 31, pg.

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[3]Supreme Court rule 13.3 provides that the 90 day period for filing a petition for writ of certiorari runs from the date of the denial of a motion for rehearing.

[4]The Parties contend that the period expired on April 15, 2006. However, April 15, 2006 was a Saturday. Accordingly, the deadline was April 17, 2006, Monday. See Fed.R.Civ.P. 6(a).

50). Mandate issued on July 21, 2010. (Doc. 31, pg. 50). On August 5, 2010, Petitioner executed his federal habeas Petition. (Doc. 1). As such, Petitioner untimely filed the Petition. Petitioner argues that despite his due diligence, his attorneys misconduct caused him to filed outside of the statute of limitations. (Doc. 26). Accordingly, he claims he is entitled to equitable tolling. Id.

As an initial matter, at the evidentiary hearing and in the filings with the Court, Respondents argue that Petitioner cannot demonstrate that attorney misconduct amounted to an extraordinary circumstance because Mr. Akes was not counsel of record "properly hired to represent [Petitioner]." (Doc. 18; Doc. 31, pg. 10-11). Respondents rely on Mr. Akes' July 16, 2004 letter to Petitioner, which explains that he charges $800.00 to review the post-conviction matter and that if Petitioner decided to pursue the state motion it would cost an additional $2,500.00. (Evid. Hearing, Ex. 2). Respondents contend that the record reflects that only $800.00 was paid, and, therefore, Petitioner never paid to file the 3.850 motion at the time when he was prepared to file it. (Doc. 31, pg. 10).

Respondents also cite to a facsimile Mr. Akes purportedly sent to Laura Gillman, which states that he finished the 3.850 motion, it was ready to be filed on or before Monday August 22, 2005, and that it was his understanding that Ms. Gillman would be forwarding payment upon receipt of the correspondence. (Doc. 31, 16-17; Doc. 13, Ex. OO). Respondents claim that the letter reflects that Mr. Akes sent the letter and he never received a response or payment. (Doc. 27).

Accordingly, Respondents argue that Petitioner "did nothing more than pay for services by Mr. Akes to review his record for purposes of determining whether or not there were any issues raised in the 3.850 post-conviction motion." (Doc. 31, pg. 10). Respondents claim that Petitioner never hired Mr. Akes to file the motion on his behalf and did not appear as counsel. Id. As such, attorney misconduct does not entitled Petitioner to equitable tolling because there was no attorney responsible for pursuing the state matter.

The Court is not persuaded by this argument. The Court recognizes that Florida Rules of Professional Responsibility permit agreements which limit the scope of representation. Rule 4-1.2. However, Petitioner, his sister and friend all testified that Mr. Akes and his paralegal informed them that they were "working on the case." (Doc. 31). Indeed, Mr. Akes advised Petitioner in the March 7, 2005 letter that he "would like to assure [Petitioner] that we are working on [Petitioner's] case..." (Evid. Hearing, Ex. 2).

While Mr. Akes may have been referring to the initial review of the case file in the letter, the testimony shows that Mr. Akes' office gave some indication that they were working on Petitioner's 3.850 motion. Specifically, as discussed in this Order, Ms. Gillman testified that she called the office in January and March and the paralegal told her that "they were working on the case and would be ready to file." (Doc. 31, pg. 14). Mr. Barner, Petitioner's friend, also testified that Mr. Akes would work on the motion. The transcript reflects the following:

State Attorney: You told them that you were ready to pay the $2500?

Mr. Barner: Yes.

State Attorney: But were you aware that there would be no $2500 to pay unless Mr. Akes determined that there were some valid issues to raise in a post-conviction motion?

Mr. Barner: We finally got past that point. He was doing whatever the motion was and it was going to be $2500 after that. He would call me when the paperwork was ready and I would give him the money. That was Akes.

(Doc. 31, pg. 36).

Further, Petitioner testified that he spoke with Mr. Akes on the telephone was advised that Mr. Akes was his attorney and that he was "going to get the case done and file it, and it looked like it was a good thing." (Doc. 31, pg. 48-49). Petitioner claims that he sent his transcript and records to Mr. Akes for his review and it was not until after the Florida Bar concluded with Petitioner's complaint that he realized the attorney had "abandoned him and was no longer functioning as his attorney." (Doc. 26, Doc. 31, pg. 46).

Even if there was only payment for the initial review of the files, the Court finds that there is no merit to the claim that equitable tolling should not be applied because Mr. Akes was not "counsel of record." Petitioner could have reasonably thought that Mr. Akes and his paralegal's reassurances meant that there was a possibility that his office might pursue the post-conviction motion matter. Indeed, Petitioner's testimony and his letters to Mr. Akes reflect that he repeatedly requested the return of the transcripts and files in case Mr.

Akes decided not to the file the motion. (Evid. Hearing, Ex. 2; Doc. 31, pg. 43). Mr. Akes did not return the files. (Doc. 31, pg. 46).

Moreover, assuming Mr. Akes sent the facsimile to Ms. Gillman, she testified that she did not receive it. (Doc. 31, pgs. 16-19). She stated that the facsimile did not make sense because she was not responsible for payment. (Doc. 31, pg. 17). Mr. Barner testified that he made it clear to Mr. Akes and his paralegal that he was responsible for payment. (Doc. 31, pg. 32).

Despite the Court's rejection of Respondents' "no counsel of record argument," the Court finds that Petitioner is not entitled to equitable tolling. The seminal case on attorney misconduct and how it applies to equitable tolling is Holland. Indeed, Petitioner relies heavily on this case in his attempt to demonstrate that his case should go forward. (See Docs. 11, 26, 31). In Holland, the Supreme Court held that an attorney's serious misconduct may warrant equitable toling. 130 S.Ct. at 2564-65. The defendant in the case filed a *pro se* federal habeas petition after the deadline had already passed. Id. at 2554-55. The defendant claimed that he was entitled to tolling because of his attorney's conduct. Id. at 2555. The defendant alleged that during the two years that his state habeas petition was pending, his attorney communicated with him only three times by letter and never met him or updated him on his case. Id.

After the attorney argued the appeal before the Florida Supreme Court, the defendant wrote multiple letters to counsel regarding the importance of filing his federal habeas petition on time. Id. at 2556. The attorney still missed the filing deadline for his

federal habeas petition. Id. at 2556-57. Once the defendant learned that the Florida Supreme Court had decided his case and the federal filing deadline had passed, he immediately filed his own *pro se* federal habeas petition. Id. at 2557.

The Supreme Court found that the attorney's failure to timely file despite the many letters emphasizing the importance of doing so, the apparent lack of research regarding the correct filing date, the failure to inform the defendant that the Florida Supreme Court had decided his case, and the cumulative failure to communicate with the defendant over a period of years amounted to more than simple negligence. Id. at 2564. The Court held that under this circumstance the attorney's misconduct may have constituted extraordinary circumstances warranting tolling and remanded the case for such a determination. Id. at 2565.

Like the defendant in Holland, Petitioner made many unanswered attempts to contact his attorney and expressed the importance of meeting the federal deadline. However, an important distinction exists between the facts in Holland and the circumstances in the instant case. Once Petitioner's relationship with Mr. Akes was admittedly terminated, a significant amount of time remained on Petitioner's federal one-year limitation period.

Petitioner testified that after the Florida Bar made its November 17, 2005 ruling that there was no cause regarding Petitioner's complaint against Mr. Akes, he knew that their relationship had ended and he decided to look for another attorney. (Doc. 31, pg. 46). Not only was there time remaining when Petitioner realized that Mr. Akes was no longer

representing his interests, but the limitations period was actually statutorily tolled at that time. Specifically, in July 2005, Petitioner filed a *pro se* motion pursuant rule 3.800 of the Florida Rules of Criminal Procedure for the purpose of tolling the deadline. (Doc. 6, Ex. P; Doc. 31, pg. 44). On July 13, 2005, the trial court denied the motion and on December 13, 2005, the Fifth DCA affirmed the denial. (Doc. 6, Exs. Q, V). Mandate issued on February 6, 2006. (Doc. 6, Ex. Y). The limitations period began to run again putting the deadline at April 17, 2006. Petitioner did not file his 3.850 motion until June 20, 2006. (Doc. 6, Ex. BB).

Accordingly, several months passed before he filed his 3.850 motion and federal habeas petition. (Doc. 31, pg. 63). The Florida Bar may have suspended Mr. Akes in the following years after allegations of similar misconduct which might help show that he led people to believe he was assisting them when he was not, but Petitioner admits that he was aware that his case was abandoned in November 2005. Even if Petitioner was not inclined to work on his 3.850 motion and federal petition during the pendency of his 3.800 motion, he still had 68 days remaining after the motion was denied and mandate issued.

Petitioner had adequate time to timely file his own post-conviction motion and his federal petition even if Mr. Akes failed to "do what [Petitioner] paid him to do" as Petitioner asserts. (Doc. 31, pg. 55). Petitioner, through his sister, retained another attorney in mid-December 2005. Id. After the attorney revealed that a conflict of interest existed, Petitioner discharged her in March 2005. (Doc. 31, pgs. 55, 63). Petitioner acknowledges

that he could have filed his motion *pro se* at this time, but instead hired another attorney to pursue the matter. (Doc. 31, pg. 63).

Based on these circumstances, the Court finds that Mr. Akes' actions did not prevent Petitioner from timely filing. Even if attorney misconduct may in some instances amount to egregious behavior, the extraordinary circumstance must actually stand in the way of a timely filing. See Holland, 130 S.Ct. at 2562. Indeed, the Eleventh Circuit requires that a defendant show a causal connection between the alleged extraordinary circumstances and the late filing of the petition. San Martin, 633 F.3d at 1267, (citing Lawrence v. Florida, 421 F.3d 1221, 1226-27 (11th Cir. 2005). Petitioner has simply not demonstrated such a connection.

Petitioner makes much of the fact that he requested his transcripts from Mr. Akes, but did not receive them. Petitioner argues that without the returned copies of the file, "it is unrealistic to expect [Petitioner] to prepare and file a meaningful petition on his own within the limitations period." (Doc. 26, pg. 18). The Court is again not satisfied by this argument. The Court appreciates the fact that Petitioner attempted to retrieve his files from Mr. Akes. Indeed, Petitioner's Florida Bar Complaint reflects that Petitioner complained that the attorney failed to return his "personal transcript sets." (Evid. Hearing, Ex. 2).

However, as late as November 2005, Petitioner knew for sure that Mr. Akes had abandoned the case. With time remaining on the federal limitations clock, Petitioner retained another attorney, and that attorney was able to obtain the transcripts. (Doc. 31, pg. 46). On April 12, 2005, after retaining yet another attorney and with time still remaining,

Petitioner signed his 3.850 motion, which cites to the trial transcript. (Doc. 6, Ex. BB). Even if Mr. Akes improperly failed to return the transcripts, Petitioner still had months to pursue his claims. Again, Mr. Akes' conduct did not prevent Petitioner from timely filing his Petition.

Accordingly, the Court finds that the application of equitable tolling is not appropriate in this case and the Petition is due to be dismissed as untimely.

Conclusion

Upon due consideration, the Petition (Doc. 1) is hereby **DENIED with prejudice**. The Clerk is directed to enter judgment against Petitioner, terminate any pending motions and close the file.

Certificate of Appealability and Leave to Appeal *In Forma Pauperis* Denied

The Court declines to issue a certificate of appealability pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts because Petitioner has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2). Because Petitioner is not entitled to a certificate of appealability, Petitioner is not entitled to appeal in forma pauperis.

DONE and ORDERED at Tampa, Florida this 5th day of July, 2013.

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Copies to: Robert Wayne Gillman
Counsel of Record

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