

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-15138-H

CARMEN A. ZAMMIELLO,

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:

Carmen Anthony Zammiello is a Florida prisoner serving a 30-year sentence of imprisonment after a jury convicted him in 2005 of burglary of an occupied structure. He seeks leave to proceed *in forma pauperis* ("IFP") to appeal the dismissal of his second or successive 28 U.S.C. § 2254 habeas corpus petition for lack of jurisdiction.

Because Zammiello seeks leave to proceed IFP, his 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).

* Here, the district court properly dismissed Zammiello's § 2254 petition for lack of jurisdiction. Zammiello filed a prior § 2254 petition in 2013, which the district court denied as time-barred, and he has not obtained leave from this Court to file a second or successive § 2254

petition. *See Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2013) (holding that, without authorization from this Court, the district court lacks jurisdiction to consider a second or successive habeas petition). Moreover, Zammiello's claims in his § 2254 petition do not fit within the small subset of claims that are not successive. See *Stewart v. United States*, 646 F.3d 856, 863-65 (11th Cir. 2011) (holding that a small subset of claims based on previously unavailable facts, such as the *vacatur* of a prior state conviction, must not be categorized as successive). Consequently, any appeal of this issue would be frivolous, and Zammiello's motion for leave to proceed IFP on appeal is DENIED.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

18-15138

RECEIVED ON: MON. APR. 22 ND. 2019

Carmen A. Zammello
#083535
CFRC, East Unit - Inmate Legal Mail
7000 H C KELLEY RD
ORLANDO, FL 32831-2518

RESPONSE TO "NOTICE OF INQUIRY"
THAT WAS FILED ON APR. 9TH 2019

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.ca11.uscourts.gov

April 15, 2019

Carmen A. Zammuello
CFRC, East Unit - Inmate Legal Mail
7000 H C KELLEY RD
ORLANDO, FL 32831-2518

Appeal Number: 18-15138-H

Case Style: Carmen Zammuello v. Secretary, Department of Corr., et al
District Court Docket No: 8:18-cv-02877-CEH-AAS

In response to your notice of inquiry dated April 9, 2019, your motion for in forma pauperis was Denied. Refer to April 10, 2019, MOT-2 Notice of Court Action letter.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

MP-1

[EX "A-1"]

Carmen A. Zammello
#083535
CFRC, East Unit - Inmate Legal Mail
7000 H C KELLEY RD
ORLANDO, FL 32831-2518

RECEIVED ON: FRI. MAY 17TH 2019.
MOTION/PETITION FOR PANEL RE-
HEARING AND REQUEST FOR A COA

APPENDIX "A-1"

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.ca11.uscourts.gov

May 14, 2019

Carmen A. Zammiello
CFRC, East Unit - Inmate Legal Mail
7000 H C KELLEY RD
ORLANDO, FL 32831-2518

Appeal Number: 18-15138-H
Case Style: Carmen Zammiello v. Secretary, Department of Corr., et al
District Court Docket No: 8:18-cv-02877-CEH-AAS

RETURNED UNFILED: Motion for panel rehearing filed by Carmen A. Zammiello is returned unfiled because this case is closed. No further relief is available from this Court.

This appeal is closed and will remain closed until the filing fee deficiency has been complied with in the district court.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

MOT-11 Motion or Document Returned

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CARMEN A. ZAMMIELLO,

Petitioner,

v.

Case No: 8:18-cv-2877-T-36AAS

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

Respondents.

RELATED CASE ORDER
AND TRACK ONE NOTICE

It is hereby ORDERED that, no later than fourteen days from the date of this Order, counsel and any pro se party shall comply with Local Rule 1.04(d), and shall file and serve a certification as to whether the instant action should be designated as a similar or successive case pursuant to Local Rule 1.04(a) or (b). The parties shall utilize the attached form NOTICE OF PENDENCY OF OTHER ACTIONS. It is

FURTHER ORDERED that, in accordance with Local Rule 3.05, this action is designated a Track One case. All parties must comply with the requirements established in Local Rule 3.05 for Track One cases.

November 27, 2018

Charlene Edwards Honeywell
Charlene Edwards Honeywell
United States District Judge

Attachment: Notice of Pendency of Other Actions [mandatory form]

APPENDIX "A - 2"
PAGES 1 OF 6

Copies to: All Counsel of Record
All Pro Se Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CARMEN A. ZAMMIELLO,

Petitioner,

v.

Case No: 8:18-cv-2877-T-36AAS

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

Respondents.

NOTICE OF PENDENCY OF OTHER ACTIONS

In accordance with Local Rule 1.04(d), I certify that the instant action:

IS related to pending or closed civil or criminal case(s) previously filed in this Court, or any other Federal or State court, or administrative agency as indicated below:

IS NOT related to any pending or closed civil or criminal case filed with this Court, or any other Federal or State court, or administrative agency.

I further certify that I will serve a copy of this NOTICE OF PENDENCY OF OTHER ACTIONS upon each party no later than fourteen days after appearance of the party.

Dated:

Counsel of Record or Pro Se Party
[Address and Telephone]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CARMEN A. ZAMMIELLO,

Petitioner,

-vs-

Case No. 8:18-cv-2877-T-36AAS

SECRETARY, DEPARTMENT
OF CORRECTIONS,

Respondent.

ORDER

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("petition") (Dkt. 1). The Court has undertaken the preliminary review mandated by Rule 4, Rules Governing Section 2254 Cases, and concludes that the petition is subject to summary dismissal, without prejudice.

Because Petitioner filed his request for federal habeas relief after the enactment date of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), the petition is governed by the provisions thereof. *See Wilcox v. Singletary*, 158 F.3d 1209, 1210 (11th Cir. 1998), *cert. denied*, 531 U.S. 840 (2000). The AEDPA contains several habeas corpus amendments, one of which established a "gatekeeping" mechanism for the consideration of "second or successive habeas corpus applications" in the federal courts, *see* 28 U.S.C. § 2244(b). *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-42 (1998). Section 2244(b) provides, in pertinent part, that before a second or successive application for habeas corpus relief is "filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).

Petitioner has previously sought federal habeas relief in this Court regarding the conviction he

challenges in this action. *See Zammiello v. Secretary, Department of Corrections*, Case No. 8:13-cv-2285-T-30TGW (M.D.Fla.) (petition dismissed as time-barred April 14, 2014). The instant petition therefore is a second or successive petition. Petitioner, however, has not shown that he has received authorization from the court of appeals to file a second or successive habeas petition. Consequently, this court lacks jurisdiction to grant Petitioner the requested relief. See Gilreath v. State Bd. of Pardons & Paroles, 273 F.3d 932, 933 (11th Cir. 2001). Therefore, pursuant to 28 U.S.C. § 2244(b)(3), this case will be dismissed without prejudice to allow Petitioner the opportunity to seek authorization from the Eleventh Circuit Court of Appeals to file a successive habeas corpus petition in this Court.

Accordingly, it is **ORDERED** that:

1. Petitioner's petition for a writ of habeas corpus (Dkt. 1) is **DISMISSED** without prejudice as an unauthorized successive petition.
2. The Clerk is directed to terminate all pending motions, and close this case.

DONE AND ORDERED in Tampa, Florida, on November 27, 2018.

Charlene Edwards Honeywell
Charlene Edwards Honeywell
United States District Judge

Copy to: Pro se Petitioner

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CARMEN A. ZAMMIELLO,

Petitioner,

-vs-

Case No. 8:18-cv-2877-T-36AAS

SECRETARY, DEPARTMENT
OF CORRECTIONS,

Respondent.

ORDER

Before the Court is Petitioner's Notice of Appeal (Dkt. 7) of the Court's November 27, 2018 Order dismissing Petitioner's habeas petition as an unauthorized successive petition (*see* Dkt. 5). To the extent that the Notice of Appeal may be liberally construed as an application for a certificate of appealability, “[a] certificate of appealability... is not required for an appeal of an order dismissing a petitioner's filing as a successive habeas petition.” *Hutto v. Lawrence Cty., Alabama*, 717 F. App'x 960 (11th Cir. 2018) (citing 28 U.S.C. § 2253(c); *Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004) (per curiam)).

Accordingly, it is **ORDERED** that Petitioner's construed application for a certificate of appealability (Dkt. 7) is **DENIED** as unnecessary.

DONE AND ORDERED in Tampa, Florida, on December 21, 2018.

Charlene Edwards Honeywell
Charlene Edwards Honeywell
United States District Judge

Copy to: Pro se Petitioner

[EX. "B"]



RECEIVED ON: FRI.

AUG. 24TH 2018

[EX "B"]

**DISTRICT COURT OF APPEAL
SECOND DISTRICT**
Post Office Box 327
LAKELAND, FLORIDA 33802
(863)940-6060

ACKNOWLEDGMENT OF NEW CASE

DATE: August 21, 2018

STYLE: CARMEN A. ZAMMIELLO v. STATE OF FLORIDA

2DCA#: 2D18-3333

The Second District Court of Appeal has received the Petition reflecting a filing date of August 20, 2018.

The county of origin is Pinellas.

The lower tribunal case number provided is 04-4372.

The filing fee is: No Fee-Habeas Corpus.

Case Type: Habeas Corpus Criminal.

The Second District Court of Appeal's case number must be utilized on all pleadings and correspondence filed in this cause. Moreover, ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

Please review and comply with any handouts enclosed with this acknowledgment.

APPENDIX "B"

cc: Attorney General, Tampa

Carmen A. Zammiello

Ken Burke, Clerk

RECEIVED ON THURS. OCT. 25TH 2018

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

October 22, 2018

CASE NO.: 2D18-3333
L.T. No.: 04-4372

CARMEN A. ZAMMIELLO

v. STATE OF FLORIDA

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

Petitioner's petition for writ of habeas corpus is denied.
Petitioner's motion to rule is denied as moot.

LaROSE, C.J., and MORRIS and SALARIO, JJ., Concur.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

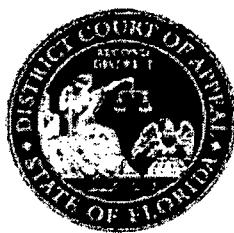
Served:

Attorney General, Tampa Carmen A. Zammiello Ken Burke, Clerk

td

Mary Elizabeth Kuenzel

Mary Elizabeth Kuenzel
Clerk



2 0F, 2

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