IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14174-K

MICHAEL WAYNE NELSON,

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

ORDER:

Michael Nelson moves for a certificate of appealability, and leave to proceed *in forma pauperis*, in order to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. To merit a certificate of appealability, Nelson 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, 120 S. Ct. 1595, 1600-01, 146 L. Ed. 2d 542 (2000). Nelson's motion for a certificate of appealability is DENIED because he failed to make the requisite showing, and his motion for leave to proceed *in forma pauperis* is DENIED AS MOOT.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

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SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
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Respondents-Appellees.

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

Before: MARCUS and GRANT, Circuit Judges.

BY THE COURT:

Michael Nelson has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's July 9, 2019, order denying him a certificate of appealability from the district court's order dismissing with prejudice his 28 U.S.C. § 2254 petition. Upon review, Nelson's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MICHAEL WAYNE NELSON,

Petitioner,

v. Case No. 3:17-cv-188-J-20PDB

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

Respondents.

ORDER

I. Status

Petitioner Michael Wayne Nelson, an inmate of the Florida penal system, initiated this action by filing a pro se Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 1, Petition) on February 14, 2017.[1] Petitioner challenges a 2006 state court (Putnam County, Florida) judgment of conviction. See Doc. 1 at 1.

Petitioner raises three grounds for relief in his Petition. See Doc. 1 at 4. In Ground One, Petitioner asserts that his trial counsel was ineffective for failing to investigate a viable defense of self-defense. Id. at 6-15. In Ground Two, Petitioner asserts that the trial court lacked subject matter jurisdiction because

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[1] See Houston v. Lack, 487 U.S. 266, 276 (1988) (mailbox rule).

the assistant state attorney who signed the Information charging Petitioner did not take a valid oath of office. Id. at 18-19. Finally, in Ground Three, Petitioner appears to claim that his underlying state action was in fact a civil bankruptcy proceeding disguised as a criminal proceeding. Id. at 21-24.

Respondents assert that the Petition is untimely filed and request dismissal of this case with prejudice. See Response to Petition (Doc. 14) (Resp.).[2] Petitioner filed four "Affidavits," which this Court collectively construes as a Reply. See Doc. 19; Doc. 21; Doc. 22; Doc. 23. This case is ripe for review.

II. One-Year Limitations Period

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended 28 U.S.C. § 2244 by adding the following subsection:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

[2] The Court cites to the exhibits attached to the Response as "Resp. Ex."

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) 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; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

III. Analysis and Conclusion

On January 13, 2005, the state of Florida filed an Information charging Petitioner with one count of Second Degree Murder with a Firearm and one count of Grand Theft. Resp. Ex. A. On March 14,

2005, Petitioner was charged by Indictment with one count of First Degree Murder with a Firearm and two counts of Grand Theft. Id. On August 3, 2006, Petitioner entered an open plea of nolo contendere to a reduced charge of Second Degree Murder with a Firearm and the two counts of Grand Theft, as charged. Resp. Ex. B. That same day, the circuit court sentenced Petitioner to a twenty-five-year term of incarceration for the Second Degree Murder conviction, and a five-year term of incarceration for each Grand Theft conviction, with each five-year term to run consecutive to the other. Resp. Ex. C.

Upon review of the circuit court's docket, it appears Petitioner's judgment and sentence was filed with the clerk, and therefore, rendered on August 16, 2006.[3] State v. Nelson, 2004-CF-1203 (Fla. 7th Cir. Ct.); see also Fla. R. App. P. 9.020(h) (sentence is rendered with signed, written order is filed with the clerk of court). Petitioner did not seek a direct appeal of his judgment and sentences. As such, his judgment and sentences became final upon the expiration of the time to file a notice of appeal, Friday, September 15, 2006. The AEDPA one-year limitations period began to run the following Monday, September 18, 2006, and expired on September 18, 2007, without Petitioner filing a state

[3] Respondents erroneously state Petitioner's judgment and sentence was rendered on January 25, 2013 (Resp. at 9); however, such date is clearly inaccurate, and the exhibit "GG" they cite in support of this date is not a provided exhibit.

postconviction motion that would toll the one-year period of limitations.

On August 11, 2010, after the expiration of the federal limitations period, Petitioner filed his first state court Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.850. Resp. Ex. D. Thereafter, Petitioner filed approximately four more motions for collateral relief in state court.[4] See Resp. Exs. J; R; U; CC. Because there was no time left to toll, however, these motions for postconviction relief did not toll the federal one-year limitations period. See Sibley v. Culliver, 377 F.3d 1196, 1204 (11th Cir. 2004) (stating that where a state prisoner files postconviction motions in state court after the AEDPA limitations period has expired, those filings cannot toll the limitations period because "once a deadline has expired, there is nothing left to toll"); Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000) (per curiam) ("Under § 2244(d)(2), even 'properly filed' state-court petitions must be 'pending' in order to toll the limitations period. A state-court petition like [the petitioner]'s that is filed following the expiration of the limitations period cannot toll that period because there is no

[4] Petitioner currently has a Rule 3.850 Motion pending in state court; however, this pending Motion is irrelevant to this Court's timeliness analysis and both parties have informed this Court that it is unrelated to the underlying claims in the instant Petition. See Doc. 26; Doc. 27.

period remaining to be tolled."). As such, the Court finds that the Petition is untimely filed.

Because the Petition is untimely, to proceed, Petitioner must show he is entitled to equitable tolling. "When a prisoner files for habeas corpus relief outside the one-year limitations period, a district court may still entertain the petition if the petitioner establishes that he is entitled to equitable tolling." Damren v. Florida, 776 F.3d 816, 821 (11th Cir. 2015). The United States Supreme Court established a two-prong test for equitable tolling of the one-year limitations period, stating that a petitioner "must show (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing." Lawrence v. Florida, 549 U.S. 327, 336 (2007); see Cadet v. Fla. Dep't of Corr., 742 F.3d 473, 477 (11th Cir. 2014) (recognizing equitable tolling is an extraordinary remedy "limited to rare and exceptional circumstances and typically applied sparingly"); see also Brown v. Barrow, 512 F.3d 1304, 1307 (11th Cir. 2008)(per curiam) (noting the Eleventh Circuit "held that an inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence." (citation omitted)).

While it is difficult to decipher Petitioner's incoherent claims regarding equitable tolling, it appears Petitioner is claiming he is entitled to equitable tolling because he recently

discovered that the state attorney who prosecuted his case did not take the required oath of office. See Doc. 1 at 29; Doc. 19; Doc. 21; Doc. 22; Doc. 23. According to Petitioner, this omission deprived the state attorney of the authority to sign Petitioner's Information, and thus, deprived the trial court of subject matter jurisdiction over Petitioner's case. Id. Petitioner contends that he was diligent in his pursuant of federal relief because he filed the instant Petition raising this issue within one year of discovering the defect. Id.

Contrary to Petitioner's allegations, however, a review of Petitioner's initial Rule 3.850 Motion, filed on August 11, 2010, reveals that Petitioner was aware of the state attorney's oath qualifications and any related claim regarding the trial court's subject matter jurisdiction almost seven years prior to filing the instant Petition. See Resp. Ex. D. On October 1, 2010, the trial court denied these allegations, finding that the charging document did not wholly fail to state a claim, and concluding that Petitioner waived any alleged defect when he entered a plea to the charges. See Resp. Ex. E. The Fifth District Court of Appeal affirmed the trial court's denial on May 31, 2011. Resp. Ex. F. The Mandate was entered on July 18, 2011. Resp. Ex. I. Petitioner did not file the instant Petition until five years later. Petitioner's five-year delay in raising this claim in federal court

does not demonstrate the diligence necessary to warrant equitable tolling.

Petitioner further seems to maintain that he is uneducated and deprived of adequate legal assistance. See Doc. 19 at 2. Upon review of the record and considering Petitioner's extreme delay in filing the instant Petition, this Court finds Petitioner's argument unavailing.

> "[C]ircumstances warranting equitable tolling" do not include restricted access to a law library. Miller v. Florida, 307 Fed. Appx. 366, 368 (11th Cir. 2009) (citing Akins v. United States, 204 F.3d 1086, 1089-90 (11th Cir. 2000); see also Paulcin v. McDonough, 259 Fed. Appx. 211, 213 (11th Cir. 2007) ("Paulcin's transfer to county jail and denial of access to his legal papers and the law library did not constitute extraordinary circumstances."); Coleman v. Mosley, 2008 WL 2039483, at *3 (M.D. Ala. May 12, 2008) ("Petitioner'[s] pro se status, ignorance of the law, limited law library access, and lack of legal assistance are insufficient grounds on which to toll the limitation period.").

Couch v. Talladega Circuit Courts, No. 1:11-cv-1737-JFG-MHH, 2013 WL 3356908, at *5 (N.D. Ala. July 3, 2013). The Court further finds that while lack of a formal education presents some challenges, it does not excuse Petitioner from complying with the time constraints for filing a federal petition. See Moore v. Bryant, No. 5:06cv150/RS/EMT, 2007 WL 788424, at *2-*3 (N.D. Fla. Feb. 12, 2007), report and recommendation adopted by the District Court on March 14, 2007. As such, under these circumstances, the Court finds