

**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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April 14, 2020

Eric Bernard Scott
Wilcox SP - Inmate Legal Mail
470 S BROAD ST
PO BOX 397
ABBEVILLE, GA 31001

Appeal Number: 19-14658-J
Case Style: In re: Eric Scott
District Court Docket No: 4:13-cv-00072-WTM-GRS

Enclosed is the clerk's entry of dismissal of your petition for lack of prosecution pursuant to Eleventh Circuit Rule 42-1(b), which is issued as the mandate of this court. See 11th Cir. R. 41-4.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Davina C Burney-Smith, J
Phone #: (404) 335-6183

Enclosure(s)

PRO-8 Ltr Entry of Dismissal Mandamus

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14658-J

In re: ERIC BERNARD SCOTT,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the
Southern District of Georgia

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this petition is hereby
DISMISSED for want of prosecution because the Petitioner Eric Bernard Scott failed to pay the
filing and docketing fees to the clerk of this court within the time fixed by the rules, effective
April 14, 2020.

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

by: Davina C Burney-Smith, J, Deputy Clerk

FOR THE COURT - BY DIRECTION

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14658-J

In re:

ERIC SCOTT,

Petitioner.

On Petition for Writ of Mandamus from the
U.S. District Court for the
Southern District of Georgia

ORDER:

Eric Scott, a Georgia prisoner proceeding *pro se*, has filed a petition for a writ of mandamus, arising from his 2005 28 U.S.C. § 2254 petition for habeas relief in the U.S. District Court for the Southern District of Georgia and subsequent appeal in this Court. The district court denied his § 2254 petition as time-barred and denied Scott a certificate of appealability ("COA") in 2006. Scott appealed, and this Court also denied him a COA. Scott seeks: (1) a ruling from this Court on his motion to recall mandate, which he asserts has been pending since April 2015 in that prior appeal; (2) a hearing on equitable tolling of his § 2254 petition; and (3) reinstatement of his appeal from the district court's denial of his § 2254 petition. He also moves for leave to proceed *in forma pauperis* ("IFP").

Scott seeks to file this mandamus petition pursuant to 28 U.S.C. § 1915(a). Section 1915(a) provides that a United States court may authorize the commencement of any proceeding, without

prepayment of fees, by a person who submits an affidavit that includes a statement of assets that he possesses, and indicates that he is unable to pay such fees. This Court, however, may dismiss an action at any time if it determines that the allegation of poverty is untrue or the action or appeal is frivolous. 28 U.S.C. § 1915(e)(2). In this case, Scott has attempted to establish poverty by way of an affidavit of indigency and a prison account certification. Regardless of whether Scott has established poverty, his mandamus petition is frivolous.

Mandamus is available “only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion.” *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997) (quotation marks omitted). Mandamus may not be used as a substitute for appeal or to control decisions of the district court in discretionary matters. *Id.* The petitioner has the burden of showing that he has no other avenue of relief, and that his right to relief is clear and indisputable. *See Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989). “[A] writ of mandamus may issue only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.” *In re Smith*, 926 F.2d 1027, 1030 (11th Cir. 1991) (quotation marks omitted).

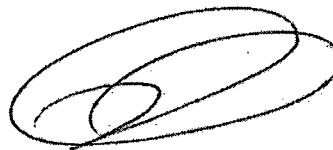
This Court’s rules provide that an application to this Court for a COA may be considered by a single circuit judge. 11th Cir. R. 22-1(c). The denial of a certificate of appealability, whether by a single circuit judge or by a panel, may be the subject of a motion for reconsideration, but it may not be the subject of a petition for panel rehearing or a petition for rehearing *en banc*. *Id.* Successive motions for reconsideration are not permitted; a party may file only one motion for reconsideration with respect to the same order. 11th Cir. R. 27-3.

Here, Scott has not presented a non-frivolous claim for mandamus relief. None of his requests for this Court to act are cognizable in mandamus, as this Court may only compel a lower

federal court to exercise its authority, not act itself. *See Smith*, 926 F.2d at 1030. Scott is asking this Court to act itself by recalling the mandate in his previous appeal and reviewing again the denial of his § 2254 petition. *See id.*

In any case, even if Scott's requests were cognizable in mandamus, they would not present any non-frivolous claim for mandamus relief. In essence, Scott challenges the dismissal of his § 2254 petition in the district court and this Court's denial of a COA, and seeks further review of those orders. But he had the adequate alternative remedies of appealing to this Court after the district court dismissed his § 2254 petition and moving for a COA, which he did, and petitioning this Court for reconsideration after it denied him a COA. *See 11th Cir. Rs. 22-1(c), 27-3.* Thus, he had adequate alternative remedies for the relief he now seeks, such that mandamus relief is not appropriate. *See Mallard*, 490 U.S. at 309.

Accordingly, Scott's IFP motion is hereby **DENIED**, as his mandamus petition is frivolous.

A handwritten signature in black ink, consisting of a large, stylized 'D' with a horizontal line through it, followed by a smaller, less distinct mark.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14658-J

In re:

ERIC SCOTT,

Petitioner.

On Petition for Writ of Mandamus from the
U.S. District Court for the
Southern District of Georgia

Before: GRANT and LUCK, Circuit Judges.

BY THE COURT:

Eric Scott, a Georgia prisoner proceeding *pro se*, moves for reconsideration of our denial of leave to proceed *in forma pauperis* (“IFP”) as to his petition for a writ of mandamus. His mandamus petition arose from his 2005 28 U.S.C. § 2254 petition for habeas relief in the U.S. District Court for the Southern District of Georgia and subsequent appeal in this Court. The district court denied his § 2254 petition as time-barred and denied Scott a certificate of appealability (“COA”) in 2006. Scott appealed, and we also denied him a COA. Scott filed a motion to recall mandate in December 2014, which we denied. In that motion, Scott argued he had also previously filed a motion to recall the mandate that was tendered in November 2008 and was returned unfiled.

In his mandamus petition, Scott appeared to request: (1) a ruling on his motion to recall the mandate in his prior appeal; (2) a hearing on his § 2254 petition; and (3) reinstatement of his appeal in his § 2254 proceedings. In an order issued on March 19, 2020, we determined that Scott was

not entitled to proceed IFP because his mandamus petition was frivolous. Specifically, we concluded that none of Scott's requests were cognizable in mandamus, as he requested this Court to act itself. We further concluded that, even if his claims were cognizable, he had the adequate alternative remedies of moving this Court for a COA with respect to his § 2254 proceedings, which he did, and petitioning this Court for reconsideration after it denied him a COA.

A party seeking rehearing or reconsideration must specifically allege any point of law or fact that we overlooked or misapprehended. *See* Fed. R. App. P. 40(a)(2). Mandamus is available "only in drastic situations, when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997) (quotation marks omitted). The petitioner has the burden of showing that he has no other avenue of relief, and that his right to relief is clear and indisputable. *See Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989). "[A] writ of mandamus may issue only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *In re Smith*, 926 F.2d 1027, 1030 (11th Cir. 1991) (quotation marks omitted).

Here, Scott does not raise any points of law or fact that we overlooked or misapprehended. *See* Fed. R. App. P. 40(a)(2). First, Scott does not address the first ground for denying his IFP motion—that his request for this Court to order itself to act by ruling on his motion to recall mandate was frivolous because it was not cognizable in mandamus. *See Smith*, 926 F.2d at 1030. Next, Scott cites no applicable authority supporting his assertion that we must issue an order denying his motion to recall mandate. *See Mallard*, 490 U.S. at 309. Accordingly, as Scott has not pointed to any facts or law that we overlooked or misapprehended in reaching its conclusions, his motion for reconsideration is hereby **DENIED**.

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

ERIC BERNARD SCOTT,

Petitioner,

v.

KEVIN ROBINSON, WARDEN,

Respondent.

Case No. CV405-151

ORDER

Let a copy of this Report and Recommendation be served upon petitioner and counsel for the respondent. Any objections to this Report and Recommendation must be filed with the Clerk of Court not later than April 12, 2006. The Clerk shall submit this Report and Recommendation together with any objections to the Honorable William T. Moore, Jr., Chief Judge, on April 13, 2006. Failure to file an objection within the specified time means that this Report and Recommendation may become the opinion and order of the Court, Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982), and further waives the right to appeal the District Court's Order. Thomas v. Arn, 474 U.S. 140 (1985).

All requests for additional time to file objections to this Report and Recommendation should be filed with the Clerk for consideration by the District Judge to whom this case is assigned.

SO ORDERED this 28th day of March, 2006.


UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

2006 APR 12 AM 11:52

S. DIST. OF GA.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

ERIC BERNARD SCOTT,

Petitioner,

v.

Case No. CV405-151


KEVIN ROBINSON, WARDEN,

Respondent.

ORDER

After a careful de novo review of the record in this case, the Court concurs with the Magistrate Judge's Report and Recommendation, to which objections have been filed. Accordingly, the Report and Recommendation of the Magistrate Judge is adopted as the opinion of the Court.

SO ORDERED this 12th day of APRIL, 2006.


WILLIAM T. MOORE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 06-13577-H

ERIC BERNARD SCOTT,

Petitioner-Appellant,

versus

KEVIN ROBINSON,

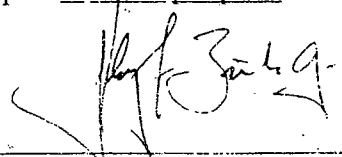
Respondent-Appellee.

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

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the procedural issues 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). Appellant has failed to satisfy the second prong of Slack's test because his petition is plainly barred by the one-year statute of limitations under 28 U.S.C. § 2244(c). Guenther v. Holt, 173 F.3d 1328, 1331 (11th Cir. 1999); Wilcox v. Florida Dep't. of Corrections, 158 F.3d 1209, 1211 (11th Cir. 1998). The motion for a certificate of appealability is DENIED.

Appellant's motion for leave to proceed on appeal in forma pauperis is DENIED AS MOOT.


UNITED STATES CIRCUIT JUDGE

Corrections, 158 F.3d 1209, 1211 (11th Cir. 1998); Drew v. Dep't of Corrections, 297 F.3d 1278, 1296 (11th Cir. 2002). Accordingly, such prisoners have until April 24, 1997, one year after the enactment of AEDPA, to file a § 2254 motion. United States v. Moore, 344 F.3d 1313, 1320 (11th Cir. 2003).

The time during which a properly filed application for state post-conviction relief is pending does not count toward the one-year limitations period. 28 U.S.C. § 2244(d)(2). Petitioner's state habeas petition was pending until May 10, 1996, when the Georgia Supreme Court denied his application for a certificate of probable cause to appeal. Petitioner then had one year from that date in which to file a petition for habeas relief in this Court. Petitioner filed the instant action on August 5, 2005, over nine years later. The instant action is extremely belated and, therefore, must be DISMISSED.

SO REPORTED AND RECOMMENDED this 28th day of March, 2006.


UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14658-J

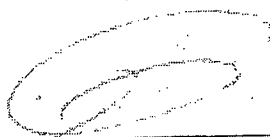
In re: ERIC BERNARD SCOTT,

Petitioner.

On Petition for Writ of Mandamus from the United States District Court for the
Southern District of Georgia

ORDER:

The Appellant's motion for extension of time to file a motion for reconsideration out of
time is GRANTED.


UNITED STATES CIRCUIT JUDGE