

No. 19-6483

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**FILED**

Jul 14, 2020

DEBORAH S. HUNT, Clerk

DAVID TRAVIS FRAZIER,

Petitioner-Appellant,

v.

HERBERT H. SLATERY, III; FCI MEMPHIS;  
DEWAYNE HENDRIX, Warden,

Respondents-Appellees.

ORDER

Before: MOORE, WHITE, and THAPAR, Circuit Judges.

David Travis Frazier, a pro se federal prisoner, moves this court for reconsideration of its order of May 22, 2020, denying him a certificate of appealability. Frazier appealed the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254, and this court construed his notice of appeal as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2). Frazier also moves this court to take judicial notice of documents outside the record.

In 2004, Frazier pleaded guilty in the Polk County Criminal Court to two counts of felony evading arrest in exchange for a two-year suspended and probationary sentence on each count, to be served concurrently. After Frazier repeatedly violated the conditions of his probation, the trial court ordered him to serve the balance of his two-year concurrent sentences. In 2013, Frazier filed a motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1. Frazier supplemented his motion, asserting that Tennessee law required consecutive rather than concurrent sentences for his felony evading arrest convictions because he committed his second evading offense while he was released on bail. *See* Tenn. Code Ann. § 40-20-111(b). The trial court summarily dismissed Frazier's motion. Frazier appealed, and the Tennessee Court of

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Criminal Appeals reversed the trial court's summary dismissal and remanded for a hearing on Frazier's motion. *Frazier v. State*, No. E2013-02563-CCA-R3-CD, 2014 WL 2743243 (Tenn. Crim. App. June 16, 2014). On remand, the trial court conducted a hearing and entered corrected judgments imposing consecutive one-year sentences. Frazier subsequently filed another motion to correct an illegal sentence, asserting that the trial court failed to comply with the proper procedure in entering the corrected judgments. The trial court vacated the corrected judgments as void ab initio and set the matter for an evidentiary hearing. After the hearing, the trial court agreed that Frazier's concurrent sentences were illegal but found that the illegal concurrent sentencing was not a material component of his plea agreement. The trial court went on to dismiss Frazier's motion as moot because his illegal concurrent sentences had long expired. Frazier appealed, and the Tennessee Court of Criminal Appeals affirmed the dismissal of his motion. *State v. Frazier*, No. E2016-00006-CCA-R3-CD, 2017 WL 2782202 (Tenn. Crim. App. June 27, 2017), *perm. app. denied* (Tenn. Nov. 16, 2017).

Frazier subsequently filed a habeas petition under 28 U.S.C. § 2254 raising claims related to the adjudication of his motion to correct an illegal sentence. The district court denied Frazier's habeas petition and declined to issue a certificate of appealability. Frazier filed a motion for reconsideration, which the district court denied.

Frazier filed a timely notice of appeal, which this court construed as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2). This court denied a certificate of appealability, concluding that reasonable jurists would not debate the district court's determination that Frazier failed to satisfy the "in custody" requirement under 28 U.S.C. § 2254(a), that his habeas petition was barred by the one-year statute of limitations under 28 U.S.C. § 2244(d), that his claims were not cognizable on federal habeas review, and that Federal Rule of Civil Procedure 60(b)(4) did not provide a remedy for his claims. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In support of his motion for reconsideration, Frazier asserts that the record is incomplete because the respondent withheld the agreed order to withdraw his plea. The agreed order, attached

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to Frazier's motion to take judicial notice, states that he was "allowed to withdraw his plea entered July 19, 2004, on the grounds the sentence was an illegal sentence and agree to a new sentence in this matter." The agreed order was filed on July 21, 2014, the same day that the corrected judgments imposing consecutive one-year sentences were filed. Frazier appears to argue that, when the trial court later vacated the corrected judgments as void ab initio, the agreed order withdrawing his plea remained in effect and that the original charges are still pending. Frazier's argument is without merit. As the trial court pointed out in its order vacating the corrected judgments, the agreed order to withdraw was conditioned upon an agreement to a new sentence. The trial court went on to vacate[] the orders and corrected judgments entered on [July 21, 2014] as void *ab initio*."

Frazier has not identified any point of law or fact that this court overlooked or misapprehended in denying a certificate of appealability. See Fed. R. App. P. 40(a)(2). We GRANT Frazier's motion to take judicial notice and DENY his motion for reconsideration.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk

No. 19-6483

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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DAVID TRAVIS FRAZIER,

Petitioner-Appellant,

v.

HERBERT H. SLATERY, III; FCI MEMPHIS;  
DEWAYNE HENDRIX, Warden,

Respondents-Appellees.

ORDER

Before: McKEAGUE, Circuit Judge.

David Travis Frazier, a pro se federal prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. This court construes Frazier's notice of appeal as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2). Frazier moves this court for leave to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

In 2004, Frazier pleaded guilty in the Polk County Criminal Court to two counts of felony evading arrest in exchange for a two-year suspended and probationary sentence on each count, to be served concurrently. After Frazier repeatedly violated the conditions of his probation, the trial court ordered him to serve the balance of his two-year concurrent sentences. In 2013, Frazier filed a motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1. Frazier supplemented his motion, asserting that Tennessee law required consecutive rather than concurrent sentences for his felony evading arrest convictions because he committed his second evading offense while he was released on bail. *See* Tenn. Code Ann. § 40-20-111(b). The trial court summarily dismissed Frazier's motion. Frazier appealed, and the Tennessee Court of Criminal Appeals reversed the trial court's summary dismissal and remanded for a hearing on

Frazier's motion. *Frazier v. State*, No. E2013-02563-CCA-R3-CD, 2014 WL 2743243 (Tenn. Crim. App. June 16, 2014). On remand, the trial court conducted a hearing and entered corrected judgments imposing consecutive one-year sentences. Frazier subsequently filed another motion to correct an illegal sentence, asserting that the trial court failed to comply with the proper procedure in entering the corrected judgments. The trial court vacated the corrected judgments as void ab initio and set the matter for an evidentiary hearing. After the hearing, the trial court agreed that Frazier's concurrent sentences were illegal but found that the illegal concurrent sentencing was not a material component of his plea agreement. The trial court went on to dismiss Frazier's motion as moot because his illegal concurrent sentences had long expired. Frazier appealed, and the Tennessee Court of Criminal Appeals affirmed the dismissal of his motion. *State v. Frazier*, No. E2016-00006-CCA-R3-CD, 2017 WL 2782202 (Tenn. Crim. App. June 27, 2017), *perm. app. denied* (Tenn. Nov. 16, 2017).

Failed to recognize the "Agreed orders" to withdraw

On June 7, 2018, Frazier filed a habeas petition under 28 U.S.C. § 2254 raising claims related to the adjudication of his motion to correct an illegal sentence: (1) the trial court failed to appoint him counsel as required, (2) the trial court violated his Sixth Amendment rights in "re-imposing the 2004 judgments" because enhancement factors were neither found by a jury nor admitted by him, (3) the trial court allowed the prosecution to breach its contract, and (4) the trial court violated the mandate rule and the law-of-the-case doctrine in dismissing his motion on the basis that his sentences had expired. Citing Federal Rule of Civil Procedure 60(b)(4), Frazier asserted that his sentences were void and that he was entitled to relief from the void judgments. The district court denied Frazier's habeas petition and declined to issue a certificate of appealability. The district court concluded that Frazier failed to satisfy the "in custody" requirement under 28 U.S.C. § 2254(a), that his habeas petition was barred by the one-year statute of limitations under 28 U.S.C. § 2244(d), and that his claims were not cognizable on federal habeas review. Frazier filed a motion for reconsideration, which the district court denied. This timely appeal followed.

Frazier must obtain a certificate of appealability to appeal the district court's judgment denying his habeas petition. See 28 U.S.C. § 2253(c)(1)(A). To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To obtain a certificate of appealability when the district court denies relief on procedural grounds, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The district court first determined that Frazier failed to satisfy § 2254(a)'s "in custody" requirement. Federal courts are authorized to "entertain an application for a writ of habeas corpus in behalf of a person *in custody* pursuant to the judgment of a State court only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). "This language is jurisdictional: if a petitioner is not 'in custody' when [he] files [his] petition, courts may not consider it." *Hautzenroeder v. DeWine*, 887 F.3d 737, 740 (6th Cir. 2018). "Thus, a district court may consider a prisoner's petition only if he files it while "'in custody' under the conviction or sentence under attack.'" *In re Lee*, 880 F.3d 242, 243 (6th Cir. 2018) (quoting *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) (per curiam)). "[O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." *Maleng*, 490 U.S. at 492. Frazier's total effective sentence of two years for his felony evading arrest convictions expired in 2008. <sup>(false) expired in 2014</sup> Accordingly, jurists of reason would not debate the district court's conclusion that Frazier failed to satisfy the "in custody" requirement.

The district court next determined that Frazier's habeas petition was barred by the one-year statute of limitations under § 2244(d). Except in circumstances not applicable here, the one-year

limitations period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). *FORSEY NEW JUDGMENTS BECAME VOID*

Frazier's judgments became final on August 18, 2004, thirty days after they were entered. See

Tenn. R. App. P. 4(a); *State v. Green*, 106 S.W.3d 646, 650 (Tenn. 2003). The statute of limitations

for filing a habeas petition expired one year later. Frazier's subsequent motion to correct an illegal sentence did not revive the already expired limitations period. *FROMS OBTAINED A HABEAS CORPUS ORDER FROM THIS WHICH VACATED JUDGMENTS.* See *Yroman v. Brigano*, 346 F.3d

598, 602 (6th Cir. 2003). Although a corrected judgment imposing a new sentence will reset the

limitations period, see *Crangle v. Kelly*, 838 F.3d 673, 680 (6th Cir. 2016) (per curiam), the trial

court vacated the corrected judgments as void ab initio and left the 2004 judgments intact. No

*THIS IS CONTRARY TO CRANGLE* reasonable jurist would debate the district court's conclusion that Frazier's habeas petition was

untimely.

*NEW IS RAISED -> DUE PROCESS CONCERNS*

The district court also determined that Frazier's claims relating to the adjudication of his motion to correct an illegal sentence were not cognizable on federal habeas review. "[E]rrors in post-conviction proceedings are outside the scope of federal habeas corpus review." *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007). Jurists of reason would not debate the district court's conclusion that Frazier's claims were not cognizable.

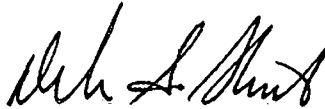
In support of his motion for reconsideration, Frazier argued that the district court failed to address his habeas petition's incorporation of Rule 60(b)(4), which provides that a district court may relieve a party from a final judgment, order, or proceeding if "the judgment is void." Rule 60(b) allows a party "to seek relief from a final judgment and request a federal district court to reopen his case under limited circumstances." *Franklin v. Jenkins*, 839 F.3d 465, 472 (6th Cir. 2016). The rule does not authorize the district court to grant relief from a state court judgment. No reasonable jurist would disagree with the district court's conclusion that Rule 60(b)(4) did not provide a remedy for Frazier's claims.

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For these reasons, the court **DENIES** Frazier's application for a certificate of appealability and **DENIES** as moot his motion for leave to proceed in forma pauperis on appeal.

ENTERED BY ORDER OF THE COURT

A handwritten signature in cursive script, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

DAVID FRAZIER,

Petitioner,

v.

HERBERT H. SLATERY, III,

Respondent.

No.: 1:18-CV-277-HSM-SKL

MEMORANDUM OPINION

Petitioner David Frazier, a federal inmate proceeding pro se, has filed a federal habeas petition pursuant to 28 U.S.C. § 2254 challenging his expired Tennessee judgments of conviction for two counts of felony evading arrest. Having considered the submissions of the parties, the State-court record, and the law applicable to Petitioner's claims, the Court finds that the petition should be denied.

**I. PROCEDURAL HISTORY**

On July 19, 2004, Petitioner pleaded guilty to two counts of felony evading arrest in the Polk County Criminal Court and was sentenced to concurrent two-year sentences, which were suspended to probation [Doc. 17-1 p. 18-19; Doc. 17-18]. In September 2013, Petitioner, by that time a federal inmate, challenged his State-court judgments by filing a pro se motion to correct an illegal sentence pursuant to Tennessee Rule of Criminal Procedure 36.1 [Doc. 17-1 p. 13-16]. In a supplemental motion, Petitioner alleged that the concurrent alignment of his sentences was illegally lenient, as a statute mandated consecutive alignment because Petitioner was released on bail when he committed the offenses [*Id.* at 25-28]. The trial court summarily dismissed the motion [*Id.* at 35].

On appeal, the State conceded that the trial court erred in summarily dismissing the motion without holding an evidentiary hearing [Doc. 17-3]. The Tennessee Court of Criminal Appeals (“TCCA”) reversed the summary dismissal and remanded to the trial court for further proceedings. *See Frazier v. State*, No. E2013-02563-CCA-R3-CD, 2014 WL 2743243 (Tenn. Crim. App. June 16, 2014).<sup>1</sup>

On remand, the trial court held a hearing and attempted to correct the illegal nature of Petitioner’s sentences by entering corrected judgments for consecutive one-year sentences [Doc. 17-9, p. 8-9]. On April 27, 2015, Petitioner filed another motion to correct an illegal sentence, alleging that the trial court did not comply with the prior appellate opinion [Doc. 17-6 p. 4-6]. In light of that motion, the trial court agreed with Petitioner and vacated the corrected judgments as void [*Id.* at 19]. The trial court then held another hearing to resolve the pending motion [Doc. 17-7]. After that hearing, the trial court entered an order dismissing the motion to correct an illegal sentence because the sentences had already expired [Doc. 17-6 p. 40-61].

On appeal from the remand, the TCCA affirmed the dismissal of the motion to correct an illegal sentence due to the expiration of the sentences. *See State v. Frazier*, No. E2016-0006-CCA-R3-CD, 2017 WL 2782202 (Tenn. Crim. App. June 27, 2017). The State court based its decision on a change in intervening State law subsequent to its prior opinion remanding the case. *Id.* at \*2 (citing *State v. Brown*, 479 S.W.3d 200, 210 (Tenn. 2015)). The Tennessee Supreme Court denied discretionary review [Doc. 17-21].

On June 7, 2018, Petitioner filed the instant petition in the United States District Court for the Western District of Tennessee, raising various claims based on the State court’s adjudication

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<sup>1</sup> During his appellate proceedings in State court, Petitioner filed a motion to vacate his federal sentence under 28 U.S.C. § 2255, which was enhanced based on his prior State record. That § 2255 motion was ultimately denied. *See Frazier v. United States*, No. 1:14-CV-134, 2016 WL 885082 (E.D. Tenn. Mar. 8, 2016).

of his motion to correct an illegal sentence [Doc. 1]. The Western District transferred the petition to this Court on November 6, 2018 [Doc. 8]. This Court subsequently ordered Respondent to file a response to the petition, and Respondent complied by filing an answer on June 26, 2019, asserting that the petition fails to meet the statutory custody and statute of limitation requirements, and that it otherwise fails to present a cognizable basis for federal habeas review [Doc. 18]. The Court agrees.

## II. DISCUSSION

### A. "In Custody" Requirement

A federal court may entertain a habeas corpus petition "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody by violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Where a petitioner's sentences have fully expired at the time the petition is filed, he is no longer "in custody" as required by the statute. *See Carafas v. LaVallee*, 391 U.S. 234, 238 (1968); *see also Lackawanna Cty. Dist. Attorney v. Cross*, 532 U.S. 394, 401 (2001) (citing *Maleng v. Cook*, 490 U.S. 488, 493 (1989)). Moreover, a conviction used to enhance a subsequent criminal sentence may not generally be used to "challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." *Cross*, 532 U.S. at 403-04; *Daniels v. United States*, 532 U.S. 374, 382 (2001). Therefore, the fact that these State-court judgments might have been used to enhance Petitioner's federal sentence is not of consequence in these proceedings.

Here, Petitioner challenges judgments that were entered on July 19, 2004 [Doc. 17-1 p. 18-19]. Due to four different probation revocations, Petitioner's total effective sentence of two years was served in 2007 [Doc. 17-6 p. 42-45]. Petitioner is no longer in custody under the State

judgments challenged here, and therefore, he fails to satisfy the “in custody” requirement of 28 U.S.C. § 2254.<sup>2</sup>

#### B. Timeliness Requirement

A habeas corpus petition challenging a prisoner’s confinement under a State-court judgment must typically be filed within one year of the date on which the judgment “became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).<sup>3</sup> Once the one-year limitation period commences, the pendency of a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim” is not counted against the one-year period. 28 U.S.C. § 2244(d)(2).

In this case, Petitioner’s State judgments became final on August 18, 2004, thirty days after they were entered. See *State v. Green*, 106 S.W.3d 646, 650 (Tenn. 2003) (holding “judgment of conviction upon a guilty plea becomes a final judgment thirty days after entry”). The federal statute of limitation commenced the next day and expired a year later. Petitioner did not collaterally attack his judgments until 2013, when he filed his initial motion to correct an illegal sentence [Doc. 17-1 p. 13]. Consequently, there was no statutory tolling of the limitation period, as the collateral petition was filed after the expiration of the statute of limitation. *See, e.g., Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) (noting petition filed after expiration of limitation period does not restart the time to file federal habeas petition). Therefore, Petitioner’s State-court proceedings have no bearing on the untimeliness of the instant petition. *See Thompson v. Washburn*, No. 3:18-CV-32, 2019 WL 446983, at \*3 (M.D. Tenn. Feb. 5, 2019) (noting that “the

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<sup>2</sup> This conclusion is not altered by consideration of the corrected judgments entered by the trial court after initial remand from the TCCA, as those judgments were later vacated as void *ab initio*, and the original judgments were left intact [See Doc. 17-6 p. 48].

<sup>3</sup> The exceptions in § 2244(d)(1)(B)-(D) are inapplicable in this case.

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UNLESS DECISION MOVED.

petitioner's Rule 36.1 motion to correct an illegal sentence does not affect the tolling analysis because the petitioner filed the motion. . . years after the statute of limitations had expired"). Accordingly, the instant petition is properly dismissed as untimely.

### **C. Non-cognizable Claims**

In his federal habeas petition, Petitioner raises the following claims, as paraphrased by the Court: (1) the trial court failed to appoint counsel to represent Petitioner in his motion to correct an illegal sentence [Doc. 1 p. 5]; (2) the trial court violated the Sixth Amendment by "re-imposing the 2004 judgments" [*Id.* at 6]; (3) the "trial court allowed the government to breach its contract" [*Id.* at 8]; and (4) the State courts erred in denying the motion to correct an illegal sentence [*Id.* at 10].

All of Petitioner's claims are assignments of error from the litigation on Petitioner's motion to correct an illegal sentence. Petitioner's motion, and its resolution, were predicated on State law. The Supreme Court has "stated many times that federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (internal quotation omitted). Petitioner cannot seek to layer a federal claim on his State-court proceedings seeking to correct an illegal sentence, as there is no constitutional right to collateral review or the representation of counsel in such proceedings. See *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987). Therefore, because all of Petitioner's claims arise from the adjudication of his motion to correct an illegal sentence under Tennessee law, his claims are non-cognizable on federal habeas review.

### **III. CERTIFICATE OF APPEALABILITY**

A petitioner must obtain a certificate of appealability ("COA") before he may appeal this Court's decision denying federal habeas relief. 28 U.S.C. § 2253(c)(1). A COA will not issue unless a petitioner makes "a substantial showing of the denial of a constitutional right" of any claim rejected on its merits, which a petitioner may do by demonstrating that "reasonable jurists

would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To obtain a COA on a claim that has been rejected on procedural grounds, a petitioner must demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Applying this standard, the Court concludes that a COA should be denied in this case.

#### IV. CONCLUSION

Petitioner has failed to demonstrate an entitlement to federal habeas relief. Therefore, his petition for a writ of habeas corpus will be **DENIED**, and this action will be **DISMISSED WITH PREJUDICE**. A certificate of appealability from this decision will be **DENIED**.

Further, the Court will **CERTIFY** that any appeal from this action would not be taken in good faith and would be totally frivolous. Fed. R. App. P. 24.

**AN APPROPRIATE JUDGMENT ORDER WILL ENTER.**

s/ Harry S. Mattice, Jr.  
HARRY S. MATTICE, JR.  
UNITED STATES DISTRICT JUDGE