

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12389-A

COREY DENARD THOMAS,

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:

Corey Thomas, a Florida prisoner serving a 30-year sentence for trafficking in illegal drugs and contempt, moves this Court for a certificate of appealability (“COA”) to appeal the district court’s orders denying as time-barred his 28 U.S.C. § 2254 petition, and denying his Fed. R. Civ. P. 59(e) motion. He also moves for leave to proceed on appeal *in forma pauperis* (“IFP”).

To obtain a COA, a petitioner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Where the district court denied a § 2254 petition on procedural grounds, the petitioner must show that reasonable jurists would debate whether: (1) the motion states a valid claim of the denial of a constitutional right; and (2) the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, reasonable jurists would not debate the district court's procedural ruling, that Mr. Thomas's § 2254 petition was untimely. The Florida Fifth District Court of Appeal dismissed his direct appeal on October 30, 2012, and his judgment became final 90 days later, on January 28, 2013, upon expiration of the period to petition for a writ of *certiorari*. *See Clay v. United States*, 537 U.S. 522, 527 (2003). Thus, absent tolling, he had until January 28, 2014, to file this § 2254 petition, which he failed to do, as he was not arrested until June 14, 2014.¹ Consequently, his § 2254 petition, filed in January 2019, was untimely by nearly five years.

Additionally, Mr. Thomas was not entitled to equitable tolling, as the majority of the federal limitations period expired while he was a fugitive, such that any delay in his filings stemmed from his own actions. To the extent that he claimed that defense counsel abandoning him on appeal affected the timeliness of his petition, counsel appealed despite his absence, and, so long as he was a fugitive, his appeal was subject to dismissal. *See Vasquez v. State*, 832 So. 2d 901, 901 (Fla. 3d DCA 2002). He also did not argue that he is actually innocent. *See McQuiggin v. Perkins*, 569 U.S. 383, 386-87 (2013).

The district court also did not abuse its discretion in denying Mr. Thomas's 59(e) motion, as he did not identify an intervening change in controlling law, present newly-discovered evidence, or show that the court committed clear error or a manifest injustice. *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007).

Mr. Thomas's motion for a COA is DENIED. His IFP motion is DENIED AS MOOT.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

¹ Mr. Thomas, who was free on bond at the time, failed to appear on the second day of his 2012 trial, and was a fugitive from the law until his arrest on June 14, 2014.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12389-A

COREY DENARD THOMAS,

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

Before: JILL PRYOR and BRASHER, Circuit Judges.

BY THE COURT:

Corey Thomas has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2 and 22-1(c), of this Court's October 16, 2020, order denying a certificate of appealability. Upon review, Thomas's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX "B"

Reserved for Recording

**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA**

STATE OF FLORIDA

vs

COREY DENARD THOMAS

Case Number 05-2008-CF-020481-AXXX-XX

OBTS Number(s) 0501179313

SENTENCE

The Defendant, COREY DENARD THOMAS, herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the Defendant should not be sentenced as provided by law, and no cause being shown

It is the sentence of the Court that

(as to Count 1)

- The Defendant pay a fine of \$500,000 00 pursuant to Section 775 083, Florida Statutes, plus \$25,000 00 as the 5% surcharge required by Section 938 04, Florida Statutes The Defendant pay a surcharge of \$20 00 pursuant to Section 938 06, Florida Statutes for the Crime Stoppers Trust Fund
- The Defendant is hereby committed to the custody of the Department of Corrections

To be imprisoned (Check one, unmarked sections are inapplicable)

- For a term of thirty (30) years

APPENDIX "C"

**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA**

STATE OF FLORIDA

Case Number 05-2008-CF-020481-AXXX-XX

vs

OBTS Number(s) 0501179313

COREY DENARD THOMAS

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed

(as to Count 1)

Minimum/Mandatory Provisions

Drug Trafficking It is further ordered that the 25-year minimum mandatory imprisonment provisions of Section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count

Other Provisions

Original Jail Credit It is further ordered that the defendant be allowed a total of 34 days as credit for time incarcerated before imposition of this sentence

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**CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA**

STATE OF FLORIDA

Case Number 05-2008-CF-020481-AXXX-XX

vs

COREY DENARD THOMAS

SIGNATURE PAGE

In the event the above sentence is to the Department of Corrections, the Sheriff of Brevard County, Florida, is hereby ordered and directed to deliver the Defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute

The Defendant was advised in open court of the right to appeal from this sentence by filing a notice of appeal within thirty (30) days from this date with the clerk of this court and the Defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency

In imposing the above sentence, the Court further recommends
(Items marked with *(COP) *(COCC) and *(COS) are Conditions of Probation Community Control and Condition of Suspension)

(as to Count 1)

General

PREVIOUSLY FOUND GUILTY BY THE JURY ON 3-28-12, DEFENDANT WAS NOT PRESENT ON
3-28-12

ATTORNEY CHRISTOPHER BOVE PRESENT

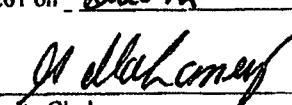
THE COURT HEREBY ORDERS THE DEFENDANT remanded to the Brevard County Detention Center

DONE AND ORDERED at Brevard County, Florida, on June 20, 2012


JOHN M. GRIESBAUM, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail / hand delivery to CHRISTOPHER BOVE, 7165 MURRELL RD STE 101, MELBOURNE, FL 32940-8261 on 6/20/12


Deputy Clerk

I acknowledge receipt of a certified copy of this Order, and the conditions have been explained to me. I will immediately report to the Probation and Parole Office for further instructions

Date

Probationer/Community Control

INSTRUCTED BY

Reserved for Recording

**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA**

STATE OF FLORIDA

Case Number: 05-2008-CF-020481-AXXX-XX

vs.

OBTS Number(s): 0501179313, 0501304237

COREY DENARD THOMAS

SENTENCE

The Defendant, COREY DENARD THOMAS, having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the Defendant should not be sentenced as provided by law, and no cause being shown

It is the sentence of the Court that:

(as to Count 2)

The Defendant is hereby committed to the custody of the Sheriff of Brevard County, Florida.

To be imprisoned (Check one; unmarked sections are inapplicable):

For a term of twenty-two (22) days.

APPENDIX "D"

**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA**

STATE OF FLORIDA

Case Number: 05-2008-CF-020481-AXXX-XX

vs.

OBTS Number(s): 0501179313, 0501304237

COREY DENARD THOMAS

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed:

(as to Count 2)

Other Provisions:

Original Jail Credit

X It is further ordered that the defendant be allowed a total of 22 days as credit for time incarcerated before imposition of this sentence.

**CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY, FLORIDA**

STATE OF FLORIDA

Case Number: 05-2008-CF-020481-AXXX-XX

vs.

COREY DENARD THOMAS

SIGNATURE PAGE

In the event the above sentence is to the Department of Corrections, the Sheriff of Brevard County, Florida, is hereby ordered and directed to deliver the Defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The Defendant was advised in open court of the right to appeal from this sentence by filing a notice of appeal within thirty (30) days from this date with the clerk of this court and the Defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the Court further recommends:
(Items marked with *(COP), *(COCC), and *(COS) are Conditions of Probation, Community Control, and Condition of Suspension)

THE COURT HEREBY ORDERS THE DEFENDANT discharged/released.

DONE AND ORDERED at Brevard County, Florida, on June 30, 2014.



JOHN M. SRIESBAUM, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail / hand delivery to CHRISTOPHER BOVE, 7165 MURRELL RD STE 101, MELBOURNE, FL 32940-8261 on 6-30-14.



Deputy Clerk

I acknowledge receipt of a certified copy of this Order, and the conditions have been explained to me. I will immediately report to the Probation and Parole Office for further instructions.

Date

Probationer/Community Control

INSTRUCTED BY: _____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

COREY DENARD THOMAS,

Petitioner,

v.

Case No: 6:18-cv-2031-Orl-41EJK

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

Respondents.

ORDER

THIS CAUSE is before the Court on the Amended Petition for Writ of Habeas Corpus (“Amended Petition,” Doc. 6) filed by Petitioner pursuant to 28 U.S.C. § 2254. Petitioner also filed a supporting Memorandum of Law (Doc. 7). Respondents filed a Corrected Response to Petition (“Response,” Doc. 21) in compliance with this Court’s instructions and with the *Rules Governing Section 2254 Cases in the United States District Courts*. Petitioner filed a Reply (Doc. 25) and an Amended Reply (Doc. 31) to the Response. For the reasons set forth herein, the Amended Petition will be denied as untimely.

I. PROCEDURAL BACKGROUND

The State Attorney in and for the Eighteenth Judicial Circuit charged Petitioner by criminal information in Brevard County, Florida with one count of trafficking in illegal drugs. (Doc. 22-1 at 6). On the second day of trial (March 28, 2012), Petitioner failed to appear, and he failed to appear for the remainder of the trial. (*Id.* at 47). The jury found Petitioner guilty, and the trial court issued a bench warrant for Petitioner’s arrest. (*Id.* at 52-54). The trial court adjudicated Petitioner

Appendix “A”

guilty and sentenced him to imprisonment for a term of thirty years.¹ (*Id.* at 59-62). Petitioner filed a direct appeal, which Florida's Fifth District Court of Appeal ("Fifth DCA") dismissed on October 30, 2012, for failure to file a record on appeal. (*Id.* at 68).

On June 14, 2014, Petitioner was taken into custody on the warrant. (*Id.* at 70). On August 8, 2014, Petitioner sought to file a belated appeal, which the Fifth DCA denied on October 10, 2014. (*Id.* at 72).

On November 5, 2014, Petitioner filed a petition for writ of habeas corpus, which the Fifth DCA dismissed as untimely on November 13, 2014. (*Id.* at 80-88, 113).² The Fifth DCA denied Petitioner's motion for rehearing on December 17, 2014. (*Id.* at 124).

On October 30, 2014, Petitioner filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, raising five claims. (*Id.* at 126-39). The trial court denied the motion on November 25, 2014. (*Id.* at 142-48). Petitioner appealed, and, on April 17, 2015, the Fifth DCA remanded the case for the trial court to hold an evidentiary hearing on Claims One and Two. (*Id.* at 267-69). The mandate issued on May 11, 2015. (*Id.* at 271).

On remand, Petitioner moved to amend his Rule 3.850 motion, and the trial court denied his request. (*Id.* at 288-91). On December 22, 2015, the Fifth DCA affirmed the denial *per curiam*. (*Id.* at 320). The mandate issued on February 9, 2016. (*Id.* at 324).

¹ Petitioner also failed to appear for sentencing. (*Id.* at 56). Petitioner explains that he was absent from trial because "he was feeling very ill." (Doc. 25 at 8). He also states that he never received notification of the sentencing date and that he did not become aware that he "had been sentenced in abstentia" until after his arrest on June 14, 2014. (*Id.*).

² Unless otherwise noted, the pleadings filed by Petitioner after the conclusion of all direct appeal proceedings were *pro se*. References to the filing date of those pleadings shall be the filing date under the mailbox rule. *See Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999) (under the "mailbox rule," a pro se prisoner's motion to vacate, set aside, or correct sentence was filed on the date that he signed, executed, and delivered his petition to prison authorities for mailing).

On July 22, 2015, Petitioner again sought a belated direct appeal, which the Fifth DCA denied on July 28, 2015. (*Id.* at 326-37). Petitioner's request for a rehearing was denied on September 3, 2015. (*Id.* at 346).

On April 8, 2016, the trial court held an evidentiary hearing on Claims One and Two and denied the claims on April 22, 2016. (*Id.* at 445-55). The Fifth DCA affirmed *per curiam* on April 11, 2017. (Doc. 22-2 at 58). The mandate issued on July 18, 2017. (*Id.* at 70).

On March 13, 2018, Petitioner filed a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800, which the trial court denied. (*Id.* at 72-79). The Fifth DCA affirmed and issued the mandate on November 30, 2018. (*Id.* at 111).

On November 9, 2018, Petitioner filed a second petition for writ of habeas corpus, which the Fifth DCA denied on February 25, 2019. (*Id.* at 113-25, 142).

II. LEGAL STANDARDS

Pursuant to 28 U.S.C. § 2244,

(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 of conviction became final by the conclusion of direct review or the expiration of the time for seeking such review;

(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 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.

III. ANALYSIS

In the present case, the Fifth DCA dismissed Petitioner's direct appeal on October 30, 2012.

As a result, Petitioner had until October 31, 2013, absent tolling, to file a federal habeas petition.

The Court is aware that Petitioner filed several other post-conviction motions in the state court; however, those proceedings did not toll the statute of limitations because the one-year period expired before Petitioner initiated those actions. *See Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004) (concluding "[a] state court filing after the federal habeas filing deadline does not revive it"); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) ("A state-court petition . . . that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled."). Consequently, the Amended Petition was untimely.

Petitioner argues that the one-year period of limitation should not apply because the state courts failed to "determine whether his failure to appeal had been willful or knowingly made. This meant that the issues were not ripe for federal review as this critical factual determination had not yet been made." (Doc. 25 at 4). Petitioner maintains that "the timeliness of the federal petition is dependent on equitable tolling which in turn revolves around the question of whether Petitioner willfully failed to appear for his trial, and sentencing, and as a result, abandoned his appeal." (*Id.* at 7). Petitioner also mentions that the dismissal of his direct appeal was the result of his counsel's errors. (*Id.* at 9-10).

The Supreme Court recognizes that the one-year period of limitation is subject to equitable tolling in appropriate circumstances. *Holland v. Florida*, 560 U.S. 631, 645 (2010). However, a petitioner is entitled to equitable tolling only when it is demonstrated that 1) the petitioner "has been pursuing his rights diligently," and 2) "some extraordinary circumstance stood in his way and

prevented timely filing.” *Id.* at 649 (internal quotations and citations omitted). As to the first prong, the movant need only demonstrate “reasonable diligence” rather than “maximum feasible diligence.” *Id.* at 653 (quotations omitted). As to the second prong, an extraordinary circumstance is one that is both beyond the movant’s control and unavoidable even with diligence. *Drew v. Dep’t of Corrs.*, 297 F.3d 1278, 1286 (11th Cir.2002). Equitable tolling “is an extraordinary remedy which is typically applied sparingly,” and the movant bears the burden of showing that it is warranted. *Id.* (quotation omitted).

In the present case, Petitioner failed to appear on the second day of trial, and he remained at large until he was taken into custody on June 4, 2014, which was almost eight months after the one-year period of limitation expired. Clearly, Petitioner did not pursue his rights in any manner between the time he failed to appear for trial and June 4, 2014, and it was his own actions that caused his failure to comply with the one-year period of limitation. Certainly, Petitioner has not shown that he pursued his rights diligently or that some extraordinary circumstance stood in his way and prevented timely filing. As such, the Court finds that Petitioner has failed to satisfy either prong set forth in *Holland* or to otherwise demonstrate that he is entitled to equitable tolling.

In sum, Petitioner has not pointed to any valid statutory ground for extending the deadline for filing his federal petition, and he has not presented any arguments supporting a claim for equitable tolling or actual innocence. Further, the record does not reveal any basis for statutory or equitable tolling. Thus, the Amended Petition is time-barred by the AEDPA’s one-year statute of limitations and is dismissed.

IV. CERTIFICATE OF APPEALABILITY

This 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.” 28 U.S.C. § 2253(c)(2). To make such a showing “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*,

529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

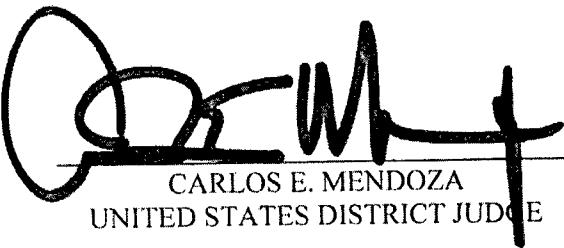
Petitioner fails to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot demonstrate that jurists of reason would find this Court's procedural rulings debatable. Petitioner fails to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

V. CONCLUSION

Therefore, it is **ORDERED** and **ADJUDGED** as follows:

1. The Amended Petition for Writ of Habeas Corpus (Doc. 6) is **DENIED**.
2. This case is **DISMISSED with prejudice**.
3. The Clerk of the Court is directed to enter judgment in favor of Respondents and to close this case.
4. Petitioner is **DENIED** a certificate of appealability in this case.

DONE and **ORDERED** in Orlando, Florida on April 13, 2020.



CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party