

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11071-JJ

THOMAS L. FAST,

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: ROSENBAUM, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11071
Non-Argument Calendar

D.C. Docket No. 8:17-cv-02670-EAK-TBM

THOMAS L. FAST,

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

(September 2, 2020)

Before ROSENBAUM, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

Thomas L. Fast appeals the district court's *sua sponte* dismissal of his *pro se* 28 U.S.C. § 2254 petition as untimely. We granted Fast's motion for a certificate of appealability (COA) on one issue: whether the district court erred in *sua sponte* dismissing his § 2254 petition as untimely, solely relying on his filings. After review,¹ we affirm the district court's dismissal.

Pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA), a § 2254 petition is governed by a one-year statute of limitations that begins to run on the latest of four triggering events, including the date of final judgment. 28 U.S.C. § 2244(d)(1). Statutory tolling allows state prisoners to toll the limitations period while properly filed state post-conviction actions are pending. *Id.* § 2244(d)(2).

Fast's petition and its attachments plainly demonstrated the instant motion was statutorily time-barred. *See* Rules Governing § 2254 Cases, Rule 4 ("If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner."). First, Fast included a comprehensive history of his post-conviction filings, including dates and the types of motions filed. Second, Fast conceded that 151 untolled days accumulated between the time his direct

¹ We review *de novo* the district court's dismissal of a § 2254 petition as untimely. *Pugh v. Smith*, 465 F.3d 1295, 1298 (11th Cir. 2006).

appeal became final on August 25, 2011, and the filing of his Rule 3.850 motion on May 21, 2012. While Fast argued in his petition that certain filings tolled the limitations period until March 29 or July 5, 2017, those dates correspond with when he received responses to Freedom of Information Act (FOIA) requests. The FOIA requests were not post-conviction actions that tolled the limitations period, however. *See Hall v. Sec'y Dep't of Corr.*, 921 F.3d 983, 987 (11th Cir. 2019) (explaining this court recognizes the following Florida proceedings as applications for state post-conviction or other collateral review under § 2244(d)(2): (1) a motion for state post-conviction relief under Fla. R. 3.850; (2) a motion to correct an illegal sentence filed under Fla. R. 3.800(a); (3) a motion for rehearing on the denial of a motion to correct an illegal sentence; and (4) any appeals filed in state court from the denial of these motions). Looking to the other filings Fast listed, the most recent action that could have tolled the limitations period was Fast's appeal of a Rule 3.850 motion. *See* 28 U.S.C. § 2244(d)(2); *Hall*, 921 F.3d at 987. But if the motion and appeal were properly filed, the appeal would have only tolled the limitations period from July 24, 2014, to May 13, 2015. *See* 28 U.S.C. § 2244(d)(2). Thus, Fast's October 30, 2017, § 2254 petition was still filed more than two years after this latest state post-conviction action, and it is clear from Fast's application that it was untimely. *See* 28 U.S.C. § 2244(d)(1)-(2); Rules Governing § 2254 Cases, Rule 4. Additionally, while the district court noted Fast

had filed two prior § 2254 petitions that were dismissed without prejudice, the present petition does not relate back to those filings for purposes of determining timeliness. *See Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000) (stating an untimely § 2254 petition cannot relate back to a previously filed petition that was dismissed without prejudice). Thus, because it plainly appeared from Fast's petition and its attachments the petition was untimely, Habeas Rule 4 permits the district court to dismiss the petition on that basis. Rules Governing § 2254 Cases, Rule 4.

Furthermore, the district court provided Fast with sufficient notice of its dismissal and an opportunity to respond. *See Paez v. Sec., Fla. Dep't of Corr.*, 947 F.3d 649, 653 (11th Cir. 2020) (“We hold that the District Court did not err by *sua sponte* dismissing Mr. Paez’s § 2254 petition after giving him notice of its decision and an opportunity to be heard in opposition.”). The district court dismissed Fast’s petition but stated it would entertain a motion to reopen within 30 days. Fast timely filed the motion to reopen and presented arguments, but the district court denied the motion to reopen.

Finally, Fast has abandoned any claim his petition was timely based on equitable tolling or the exception for actual innocence by failing to raise them in his initial brief. *See Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) (stating arguments raised for the first time in a reply brief are not

properly before this Court). Regardless, even construing Fast's arguments liberally, his unsupported, conclusory statements failed to present the type of rare and exceptional circumstances that warrant equitable tolling or to demonstrate actual innocence that would overcome the timeliness bar. *See McQuiggin v. Perkins*, 569 U.S. 383, 390 (2013) (stating to demonstrate actual innocence, a petitioner must show that, in light of new evidence, it is more likely than not that no reasonable juror would have voted to find him guilty beyond a reasonable doubt); *(Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1221 (11th Cir. 2017)) (explaining the statute of limitations can be equitably tolled when a petitioner pursued his rights diligently, but some extraordinary circumstance stood in his way and prevented timely filing); *Dupree v. Warden*, 715 F.3d 1295, 1299 (11th Cir. 2013) (explaining habeas petitions filed by a *pro se* litigant are liberally construed).

Accordingly, we affirm the district court.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THOMAS L. FAST,

Applicant,

v.

CASE NO. 8:17-cv-2670-T-60AEP

SECRETARY, Department of Corrections,

Respondent.

O R D E R

An earlier order (Doc. 20) *sua sponte* dismisses Fast's application under 28 U.S.C. § 2254 as clearly time-barred. The circuit court granted a certificate of appealability on “[w]hether the district court erred in *sua sponte* dismissing Fast's § 2254 petition as untimely, solely relying on Fast's filings.” (Doc. 39 at 4) The appeal is pending.

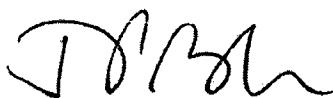
Because the only issue on appeal is the district court's dismissal of the Section 2254 application as untimely, an earlier order (Doc. 49) denies Fast's motions (1) “for order of designation, and supplement the appendix, of record on appeal” (Doc. 46), which appears to involve the underlying grounds for relief, and (2) “for permission to compel court to forward the state court record” (Doc. 48), which involves the alleged confiscation of Fast's property while imprisoned. Fast

moves (Doc. 50) for rehearing of the order (Doc. 49) that denies his attempts to supplement the record in the district court.

In his motion for rehearing Fast argues that this court erred in not allowing him to supplement the record with additional papers from the state court proceeding. In the underlying denied motions to supplement Fast asserted entitlement to supplement the record under Rule 10(c) and (e), Federal Rules of Appellate Procedure. Fast's proposed supplements are transcript pages and exhibits. Fast can proceed under neither Rule 10(c), which applies when a transcript of a federal district court proceeding is unavailable (Fast attempts to file transcript pages from the state court trial) nor Rule 10(e), which corrects or modifies the record of what occurred in the federal district court (Fast's exhibits purportedly show his attempts to purchase or otherwise obtain copies of state court records).

Fast's motion for rehearing (Doc. 50) is DENIED.

ORDERED in Tampa, Florida, on September 17, 2019.



THOMAS P. BARBER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THOMAS L. FAST,

Petitioner,

v.

Case No. 8:17-cv-2670-T-17TBM

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

On November 29, 2017, the Court dismissed Fast's petition as time-barred, but allowed him 30 days to show, with record evidence, that his petition was not time barred. (See Order attaching, dismissing the petition as time-barred). Fast was convicted of murdering and dismembering his stepmother in 2007.

Fast has now filed an incomprehensible response to the Court order, with voluminous exhibits. Nothing in his filing demonstrates that his petition is not time-barred.

Accordingly, the Court orders:

That Fast's motion to reopen this case (Doc. 22) is denied.

CERTIFICATE OF APPEALABILITY AND

LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

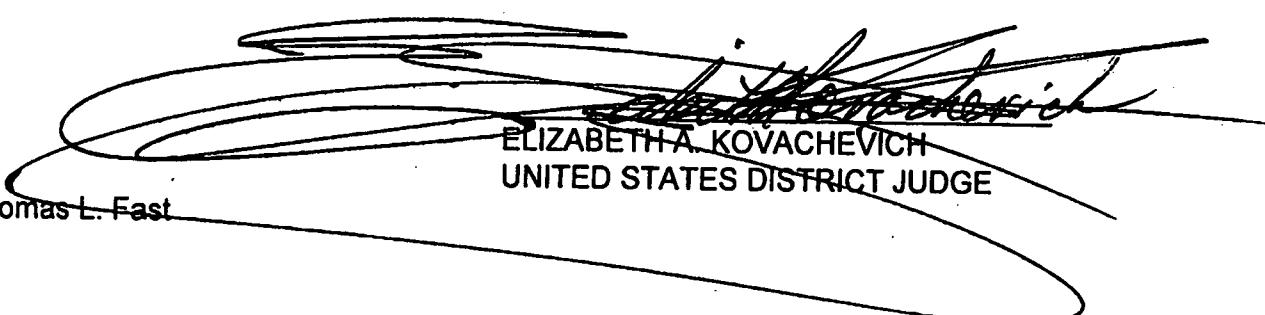
The Court declines to issue a certificate of appealability pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts because Petitioner

has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).

Because Petitioner is not entitled to a certificate of appealability, Petitioner is not entitled to appeal in forma pauperis. Petitioner is required to pay the \$505.00 appellate filing fee unless the appellate court grants Petitioner in forma pauperis status on appeal.

ORDERED at Tampa, Florida, on JANUARY 30 ¹⁸, 2018.

Thomas L. Fast


ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THOMAS L. FAST,

Petitioner,

v.

Case No. 8:17-cv-2670-T-17TBM

SECRETARY, DEPT. OF CORRECTIONS,

Respondent.

ORDER

THIS CAUSE is before the Court on pro se Petitioner Thomas Fast's 28 U.S.C. § 2254 petition for writ of habeas corpus. Fast challenges his Manatee County, Florida, 2009 convictions for first degree murder and robbery (counts one and two). Fast was convicted of murdering and dismembering his stepmother in 2007.

Fast states that he appealed his conviction and sentence and that the state district court of appeal per curiam affirmed his conviction and sentence in 2011. He alleges that he filed a petition that was transferred to the Florida Supreme Court and denied on May 15, 2012. He alleges that he filed a petition for writ of mandamus in the state district court of appeal for Manatee County, Florida. That petition was dismissed December 14, 2011. Fast appealed, and the court per curiam affirmed the dismissal on September 19, 2012. The Florida Supreme Court denied Fast's motion for discretionary review in December 2012.

Fast claims that he needs additional time to conduct proper discovery and investigations, and to complete amendments to the petition.

Previously, Fast filed a 28 U.S.C. § 2254 petition in case number 8:11-cv-1884-T-33TBM. On August 31, 2011, the Court dismissed the petition, without prejudice, as incomprehensible, and sent Fast the forms for filing a timely proper petition. Fast did not do so.

Subsequently, Fast filed a 149-page 28 U.S.C. § 2254 petition in case number 8:13-cv-06-T-33TGW, which the Court dismissed, without prejudice to Fast's filing a petition on the proper form in a new case with a new case number. The Court stated that the Respondent would not be required to respond to "unbelievable and implausible grounds for relief." For example, Fast claimed that a "male and female, dressed in nightgowns, sat behind Fast in church-styled pews, and sprayed Fast with a water-like substance, possible diluted "hydrotetradoxine" during trial. Fast also claimed that the State Attorney refused to accept or recognize Fast's list of individuals who dismember their victims. Fast also claimed that State Agents refused to take into consideration Fast's extended fight with both Soviet Russian Mafia and Revolutionary Armed Forces of Columbia. He claims that, during Memorial Day weekend, two agents chased Fast to Washington, D.C., and then to Ft. Bragg. He claims these agent "subversives achieved Fast's fast imprisonment through the State's miscarriage of justice." (See Exhibit 1 to Doc. 4 in case 8:13-cv-06-T-33TGW.)

Fast did not file a new petition until December 2017. The petition is untimely.

DISCUSSION

The Anti-Terrorism and Effective Death Penalty Act created a limitation for a Section 2254 petition for the writ of habeas corpus. "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 . . . 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). Additionally, "[t]he 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)(2).

The record demonstrates that Fast's present filing challenging his 2009 conviction, for crimes committed in 2007, is time-barred. See *Day v. McDonough*, 547 U.S. 198, 209 (2006) ("[W]e hold that

district courts are permitted . . . to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition."), and *Jackson v. Sec'y, Dep't of Corr.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (holding that a district court possesses discretion to *sua sponte* raise the issue of the timeliness of a Section 2254 petition for habeas corpus). Although a district court may raise timeliness *sua sponte*, Day cautions that "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." *Day, supra*, at 210.

Accordingly, the Court orders;

1. That Fast's petition is dismissed. The Clerk is directed to terminate all pending motions and to close this case.
2. That, within 30 days of the date of this Order, the Court will entertain a motion to reopen this case if Fast can demonstrate, with record evidence, that he is entitled to equitable tolling.

ORDERED at Tampa, Florida, on November 28, 2017.

Thomas Fast

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE