

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-14475-E

TIMOTHY ALAN MARR,

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:

Timothy Marr has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's March 3, 2021 order denying a certificate of appealability and *in forma pauperis* status in his appeal from the district court's denial of his second Fed. R. Civ. P. 60(b) motion for relief from the judgment dismissing his 28 U.S.C. § 2254 habeas corpus petition as untimely. Upon review, his motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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SECRETARY, DEPARTMENT OF CORRECTIONS,
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Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Timothy Alan Marr is a Florida prisoner serving a term of life imprisonment after a jury found him guilty of robbing, fleeing an officer, resisting an officer with violence, and possessing cocaine. On January 16, 2015, Mr. Marr filed a 28 U.S.C. § 2254 habeas corpus petition challenging the constitutionality of his convictions and total sentence. The district court denied Mr. Marr's § 2254 petition, finding that it was untimely. The court also noted that a Rule 3.850 motion for post-conviction relief that Mr. Marr had filed on April 4, 2011, did not serve to toll the limitation period in his case because it was not properly filed and had been dismissed for failure to comply with the state post-conviction court's rules.

Mr. Marr then filed a motion for reconsideration under Rule 60(b), arguing that the district court improperly determined that his § 2254 petition was untimely. He also filed a

Fed. R. Civ. P. 59(e) motion, arguing that he was entitled to equitable tolling based on his bipolar disorder and low intelligence. The district court denied both motions.

Mr. Marr appealed and moved this Court for a certificate of appealability (“COA”), *in forma pauperis* (“IFP”) status, and appointment of counsel. A single judge of this Court denied his motions, concluding that the district court correctly determined that his § 2254 petition was untimely and that he had failed to demonstrate that he was entitled to equitable tolling.

Subsequently, Mr. Marr filed his present, second Rule 60(b) motion for relief from the judgment denying his § 2254 petition. Therein, he argued that the district court committed a mistake in calculating the deadline for filing his § 2254 petition because he filed his Rule 3.850 motion on February 4, 2011, not on April 4, 2011. He also argued that the state post-conviction court mistakenly denied his Rule 3.850 motion, and he reiterated that “[t]he district court’s determination that although Petitioner suffers from bi-polar disorder, he is not entitled to equitable tolling is incorrect.” The district court denied Mr. Marr’s second Rule 60(b) motion. Mr. Marr appealed, and he now moves for a COA and IFP status.

To obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong,” or that the issues “deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Rule 60(b) of the Federal Rules of Civil Procedure allows a party to seek relief or reopen his case based upon, among other things, a mistake or excusable neglect. Fed. R. Civ. P. 60(b)(1). We review the district court’s denial of a Rule 60(b) motion for an abuse of discretion, and review does not extend to the validity of the underlying judgment *per se*. *Rice v. Ford Motor Co.*, 88 F.3d 914, 918-19 (11th Cir. 1996).

Here, reasonable jurists would not debate the district court's denial of Mr. Marr's second Rule 60(b) motion. *See Slack*, 529 U.S. at 484. First, any alleged mistake by the district court concerning the date on which Mr. Marr filed his Rule 3.850 motion had no bearing on the correctness of its ultimate denial of Mr. Marr's § 2254 petition as untimely because the Rule 3.850 motion was not properly filed and had no tolling effect on Mr. Marr's limitation period. *See* 28 U.S.C. § 2244(d)(2) (noting that the limitation period under § 2244(d) is statutorily tolled for “[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”). Second, to the extent that Mr. Marr argued that the state post-conviction court erred in denying his Rule 3.850 motion, the argument was improperly raised under Rule 60(b) because Rule 60(b) is a federal rule that provides for relief against judgments in federal courts only. *See* Fed. R. Civ. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.”). Finally, concerning Mr. Marr's argument that he was entitled to equitable tolling due to his bipolar disorder, Mr. Marr merely expressed his disagreement with the district court's previous denial of equitable tolling, but he failed to establish that he was entitled to the tolling by demonstrating that his bipolar disorder prevented the timely filing of his § 2254 petition. *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (holding that the AEDPA limitations period may be equitably tolled upon a showing that the movant has been pursuing his rights diligently and that some extraordinary circumstance stood in his way to prevent timely filing).

Accordingly, Mr. Marr's motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

/s/ Jill Pryor
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TIMOTHY ALAN MARR,

Applicant,

v.

CASE NO. 8:15-cv-134-T-23TGW

SECRETARY, Department of Corrections,

Respondent.

ORDER

Marr applies under 28 U.S.C. § 2254 for the writ of habeas corpus (Doc. 1) and challenges the validity of his state convictions for robbery, fleeing or eluding an officer, resisting an officer with violence, and possession of cocaine, for which convictions he is imprisoned for life as a habitual felony offender and prison releasee re-offender. Marr supports his application with exhibits ("Petitioner's Exhibit __") primarily from the post-conviction proceedings. (Doc. 1) Numerous exhibits ("Respondent's Exhibit __") support the response. (Doc. 10) The respondent correctly argues that the application is time-barred.

Under the Anti-Terrorism and Effective Death Penalty Act, "[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, under 28 U.S.C. § 2244(d)(2), “[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.”

Marr’s conviction was final on August 4, 2009,¹ and the limitation expired one year later, absent tolling for a state post-conviction proceeding. Marr let 226 days elapse before filing a state Rule 3.800 motion to correct illegal sentence on March 18, 2010. (Respondent’s Exhibit 6) Tolling continued until February 11, 2011, when the mandate issued.² (Respondent’s Exhibit 15) Marr had 139 days remaining (365 - 226 = 139). The deadline for applying under Section 2254 was June 30, 2011 (February 11, 2011 + 139 days = June 30, 2011).

On April 4, 2011, Marr filed a motion under Rule 3.850 for post-conviction relief. The motion was stricken with leave to amend because the motion exceeded the fifty-page limit by twenty pages. Marr’s amended motion, which was fifty-two pages, was stricken for the same reason because Marr supplemented the amended motion with an additional eighteen pages. Marr’s second amended motion, which

¹ Marr’s direct appeal concluded on May 6, 2009. (Respondent’s Exhibit 4) The conviction became final after ninety days, the time allowed for petitioning for the writ of *certiorari*. 28 U.S.C. § 2244(d)(1)(A). *See Bond v. Moore*, 309 F.3d 770 (11th Cir. 2002), and *Jackson v. Sec’y, Dep’t Corr.*, 292 F.3d 1347 (11th Cir. 2002).

² Marr’s petition under Rule 9.141, Florida Rules of Appellate Procedure, for the writ of habeas corpus, in which he alleged the ineffective assistance of appellate counsel, was both filed and denied while the state Rule 3.800 motion was pending. As a consequence, the federal one-year limitation is unaffected by the Rule 9.141 petition. (Respondent’s Exhibits 17 and 18)

was also supplemented, totaled eighty-two pages. As a consequence, the motion was denied with prejudice for failing to comply with the rules governing the length of a motion under Rule 3.850.

Under Section 2244(d)(2) an applicant must “properly file” a state motion for post-conviction relief to qualify for tolling. *Artuz v. Bennett*, 531 U.S. 4, 8–9 (2000) (italics original) (citations omitted), explains the meaning of “properly filed:”

An application is “filed,” as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. And an application is “properly filed” when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.

[I]f, for example, an application is erroneously accepted by the clerk of a court lacking jurisdiction, or is erroneously accepted without the requisite filing fee, it will be pending, but not properly filed.

Because the state court rejected his motions for violating the court’s rules, Marr’s motions under Rule 3.850 for post-conviction relief were not “properly filed” and failed to toll the limitation. As a consequence, Marr’s limitation deadline remained June 30, 2011. Marr applied under Section 2254 on January 16, 2015, more than three years late.

Alternatively, Marr’s application is untimely even if afforded tolling for the Rule 3.850 motions. As determined above, Marr let 226 days elapse before he filed his initial Rule 3.800 motion to correct illegal sentence on March 18, 2010, and he had 139 days of the limitation remaining. Marr let an additional 52 days elapse after

that proceeding concluded before he filed his initial “improperly filed” Rule 3.850 motion on April 4, 2011. This left Marr with 87 days of the limitation remaining (365 days - 226 - 52 = 87 days). On June 5, 2014, the mandate issued on the appeal from the denial of the Rule 3.850 motions, but while that appeal was pending Marr had filed a second motion under Rule 3.800 to correct an illegal sentence, which would toll the limitation and which concluded with the issuance of a mandate on October 17, 2014. (Petitioner’s Exhibit E-5) The deadline for applying under Section 2254 was January 12, 2015 (October 17, 2011 + 87 days = January 12, 2015). Marr applied under Section 2254 on January 16, 2015, untimely even if afforded tolling for the “improperly filed” Rule 3.850 motions.

Accordingly, the application for the writ of habeas corpus (Doc. 1) is **DISMISSED AS TIME-BARRED**. The clerk must enter a judgment against Marr and **CLOSE** this case.

**DENIAL OF BOTH
A CERTIFICATE OF APPEALABILITY
AND LEAVE TO APPEAL IN FORMA PAUPERIS**

Marr is not entitled to a certificate of appealability (“COA”). A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court’s denial of his application. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a COA. Section 2253(c)(2) permits issuing a COA “only if the applicant has made a substantial showing of the denial of a constitutional right.” To merit a COA, Marr must show that reasonable jurists would find debatable both (1) the merits of

the underlying claims 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 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir 2001). Because the application is clearly time-barred, Marr cannot meet *Slack*'s prejudice requirement. 529 U.S. at 484. Finally, because Marr is not entitled to a COA, he is not entitled to appeal *in forma pauperis*.

Accordingly, a certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **DENIED**. Marr must pay the full \$505 appellate filing fee unless the circuit court allows Marr to appeal *in forma pauperis*.

ORDERED in Tampa, Florida, on March 22, 2018.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TIMOTHY ALAN MARR,
Applicant,

v.

CASE NO. 8:15-cv-134-T-23TGW

SECRETARY, Department of Corrections,
Respondent.

ORDER

Marr's application under 28 U.S.C. § 2254 (Doc. 1) was dismissed as untimely. (Doc. 20) The appeal was dismissed when the circuit court declined to issue a certificate of appealability after concurring with both the timeliness calculation and the absence of entitlement to equitable tolling. (Doc. 29) Marr moves (Doc. 30) under Rule 60(b), Federal Rules of Civil Procedure, for relief from judgment. Under Rule 60(b)(1)(A), a party may move for relief from a judgment or order based on "mistake, inadvertence, surprise, or excusable neglect." The earlier timeliness determination is properly the subject of a motion under Rule 60. *Franqui v. Florida*, 638 F.3d 1368 (11th Cir. 2011) ("[A] 60(b) motion can properly be used just to 'assert that a previous ruling which precluded a merits determination was in error' or just to attack 'some defect in the integrity of the federal habeas proceedings.'") (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)), *cert. denied*, 566 U.S. 978 (2012).

First, Marr contends that the district mistakenly calculated the limitation by determining that he filed his state motion for post-conviction relief on April 4, 2011, rather than two months earlier on February 4, 2011. No matter which date is correct, the asserted discrepancy is inconsequential because the motion for post-conviction relief failed to toll the limitation because — as determined in the district court's order of dismissal, with which the circuit court concurred — the motion was not "properly filed."

Second, Marr contends that the state court mistakenly dismissed his motion for post-conviction relief for not complying with state rules that govern post-conviction motions. A state court's alleged mistake is beyond the reach of Rule 60, which applies only to a mistake by a federal court.

Lastly, Marr again asserts entitlement to equitable tolling based on his bi-polar disorder. Both the district court and the circuit court rejected this same asserted basis for equitable tolling. Marr alleges nothing new to support the asserted basis; his disagreement with the earlier determination is insufficient to support relief under Rule 60(b).

Marr's motion (Doc. 30) under Rule 60(b), Federal Rules of Civil Procedure, for relief from judgment is **DENIED**.

ORDERED in Tampa, Florida, on November 3, 2020.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**