IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13923-A

JOHN DAVID WILSON, JR.,

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: GRANT and LAGOA, Circuit Judges.

BY THE COURT:

John Wilson, Jr., has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's March 17, 2021, order denying a certificate of appealability and *in forma pauperis* status in his appeal from the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition for lack of jurisdiction and denial of his Fed. R. Civ. P. 59(e) motion. Upon review, Wilson's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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ORDER:

John Wilson, Jr., moves for a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") on his appeal from the: (1) dismissal of his 28 U.S.C. § 2254 habeas corpus petition for lack of jurisdiction; and (2) denial of his Fed. R. Civ P. 59(e) motion for relief from the judgment. To merit a COA, Wilson must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). The motion for a COA is DENIED because Wilson has failed to make the requisite showing. Additionally, his motion for leave to proceed IFP is DENIED AS MOOT.

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN DAVID WILSON, JR.,

Petitioner,

-vs- Case No. 8:20-cv-1761-T-36TGW

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER

Petitioner, a Florida prisoner, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (Doc. 1) challenging convictions for domestic violence battery and violation of a domestic violence injunction entered in Hillsborough County, Florida, in case no. 00-CM-2394. Because Petitioner is not in custody pursuant to those convictions, this Court lacks jurisdiction to adjudicate the petition.

"Section 2254 is triggered where a prisoner is 'in custody pursuant to the judgment of a State court.'" *Thomas v. Crosby*, 371 F.3d 782, 787 (11th Cir. 2004) (quoting 28 U.S.C. § 2254(a)). The United States Supreme Court has interpreted § 2254 "as requiring that the habeas petitioner be 'in custody' *under the conviction or sentence under attack* at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488, 491 (1989) (emphasis added). *See also Hendrix v. Lynaugh*, 888 F.2d 336, 337 (5th Cir. 1989) ("Federal district courts do not have jurisdiction to entertain section 2254 actions if, at the time the petition is filed, the petitioner is not 'in custody' under the conviction or sentence which the petition attacks.") (citing *Maleng*).

Petitioner was not in custody under the convictions in case no. 00-CM-2394 at the time he filed the instant petition in 2020. He was sentenced to 12 months on probation for those convictions, on April 5, 2000, and to time served when his probation was revoked on February 21, 2001. Therefore, his sentence for those convictions had completely expired before he filed the instant petition. Accordingly, this court is without jurisdiction to consider the petition. *See Stacey v. Warden, Apalachee Corr. Inst.*, 854 F.2d 401, 403 (11th Cir. 1988) (the "in custody" requirement of 28 U.S.C. § 2254(a) is jurisdictional); *Diaz v. Fla. Fourth Judicial Circuit*, 683 F.3d 1261, 1264 (11th Cir. 2012) ("Diaz's state sentence had fully expired at the time he filed his § 2254 petition and therefore deprived the district court of jurisdiction to decide the petition's merits.").

Petitioner contends that for purposes of Section 2254, he is in custody under the convictions in case no. 00-CM-2394 because they were used to enhance the life sentence he is currently serving after he was convicted of attempted murder and aggravated battery in 2001. Petitioner cannot use the 2001 convictions as a maneuver to challenge the expired 2000 convictions. "If. . .a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse." *Daniels v. United States*, 532 U.S. 374, 382 (2001). *See also Lackwanna County District Attorney v. Coss*, 532 U.S. 394 (2001) (using same rationale as *Daniels* to bar Section 2254 review of a prior state conviction used to enhance a new state conviction).[1]

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1 The petition cannot be construed as a challenge to the 2001 convictions because Petitioner previously challenged those convictions in a federal habeas corpus proceeding, which was denied on the merits. *See Wilson v. Sec'y, Dep't of Corrections*, Case No. 8:07-cv-2185-T-33MAP (M.D.Fla.). Consequently, Petitioner must receive permission from the Eleventh Circuit Court of Appeals before pursuing a second or successive petition. "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). *See Felker v. Turpin*, 518 U.S. 651, 664 (1996). Moreover, Petitioner is currently challenging those

Accordingly:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DISMISSED** for lack of jurisdiction.

2. The **Clerk** is directed to close this case.

3. Pursuant to Rule 11 of the Rules Governing Section 2254 Cases, Petitioner is hereby **DENIED** a certificate of appealability because he cannot show "that jurists of reason would find it debatable whether the petition states a valid claim of 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, 478 (2000). Since Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis*.

DONE AND ORDERED in Tampa, Florida, on August 26, 2020.

Charlene Edwards Honeywell
Charlene Edwards Honeywell
United States District Judge

Copy to: *Pro Se* Petitioner

convictions in this Court in a separate petition for the writ of habeas corpus. *See Wilson v. Sec'y, Dep't of Corrections*, Case No. 8:20-cv-1064-T-33TGW (M.D.Fla.).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN DAVID WILSON, JR.,

Petitioner,

-vs- Case No. 8:20-cv-1761-T-36TGW

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER

Before the Court is Petitioner's Motion for Rehearing and Rehearing En Banc (Doc. 13), filed under Rules 35 and 40, Federal Rules of Appellate Procedure. Petitioner is not entitled to relief under these Rules because the "Federal Rules of Appellate Procedure do not apply in [the] district court[s]." *Chavez v. Credit Nation Auto Sales, Inc.*, 2014 WL 12780146, at *3 (N.D. Ga. June 5, 2014) (citations omitted). And to the extent the motion for rehearing may be liberally construed as a motion to alter or amend a judgment under Rule 59(e), Federal Rules of Civil Procedure, the motion warrants no relief because Petitioner has failed to either present new evidence demonstrating entitlement to relief or demonstrate that the dismissal of his habeas petition for lack of jurisdiction was a manifest error of law or fact. *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) ("The only grounds for granting [a Rule 59(e)] motion are newly discovered evidence or manifest errors of law or fact.").

Accordingly, it is **ORDERED** that:

1. Petitioner's Motion for Rehearing and Rehearing En Banc (Doc. 13) is **DENIED**.

2. Pursuant to Rule 11 of the Rules Governing Section 2254 Cases, Petitioner is hereby **DENIED** a certificate of appealability because he cannot show "that jurists of reason would find it debatable whether the petition states a valid claim of 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, 478 (2000). Since Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis*.

DONE AND ORDERED in Tampa, Florida, on October 2, 2020.

Charlene Edwards Honeywell
Charlene Edwards Honeywell
United States District Judge

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