IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14932-A

JAMES E. LYONS,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: MARTIN and BRANCH, Circuit Judges.

BY THE COURT:

James Lyons has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated April 13, 2021, denying his motion for a certificate of appealability following the district court's denial of his second Fed. R. Civ. P. 60(b) motion. Because Lyons has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

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

ORDER:

James Lyons is currently serving a life sentence after he was convicted of multiple crimes in 1999. Mr. Lyons appealed his conviction, and a Florida appellate court affirmed on September 26, 2000, and issued its mandate on October 13, 2000. On March 26, 2002, Mr. Lyons filed a counseled Rule 3.850 motion, which the state court denied. Mr. Lyons appealed, and a Florida appellate court affirmed on

September 9, 2003, and issued its mandate on September 27, 2003. Then, in March 2004, Mr. Lyons filed a pro se § 2254 petition, raising seven claims for relief.

The state opposed Mr. Lyons's petition, arguing that it should be dismissed as untimely. Mr. Lyons argued that the untimeliness of his petition should be excused because it was due to attorney ineffectiveness and abandonment. Mr. Lyons said the private attorney he retained to file his Florida Rule of Criminal Procedure 3.850 motion purposefully allowed the federal habeas deadline to run before filing the motion, thereby making Mr. Lyons's habeas petition eligible for equitable tolling.

In 2007, the District Court dismissed Mr. Lyons's § 2254 petition as untimely. It said that Mr. Lyons had until January 13, 2002, to timely file his federal habeas petition, but Lyons did not pursue any postconviction relief until the filing of his Rule 3.850 motion on March 26, 2002. And his state postconviction motion did not toll the statutory deadline because it was also filed past the one-year deadline.

Next, the District Court addressed Mr. Lyons's claim that he was entitled to equitable tolling due to his postconviction counsel's ineffective assistance. It stated that, "although Petitioner's counsel's actions [could not] be condoned," the actions did not provide a basis for equitable tolling because the miscalculation of the federal limitation period was not sufficient to warrant equitable relief. It found that Mr. Lyons was not constitutionally entitled to counsel in his postconviction proceedings,

and ineffective assistance of postconviction counsel did not provide cause to overcome procedural default.

Ten years later, in April 2017, Mr. Lyons filed a Federal Rule of Civil Procedure 60(b) motion for relief from the 2007 dismissal of his § 2254 petition. He argued that, although his petition was untimely, he was entitled to equitable tolling because his postconviction attorney abandoned him and he diligently pursued his rights after his state postconviction motion was denied. He cited to Rule 60(b)(5) and 60(b)(6) in arguing that he was entitled to relief. The District Court denied Mr. Lyons's motion, finding that Rule 60(b)(5) did not apply to federal habeas cases.

Then, in August 2017, Mr. Lyons filed a second Rule 60(b) motion, asking the District Court to reconsider its denial of his first Rule 60(b) motion. He argued that, although he explicitly cited to Rule 60(b)(5), the District Court should have also considered his motion under other applicable Rule 60(b) subsections considering his pro se status. The District Court denied Mr. Lyons's second Rule 60(b) motion for the reasons stated in its order denying the first Rule 60(b) motion.

Mr. Lyons appealed, and moved the District Court for a certificate of appealability ("COA"), which it declined to issue. Mr. Lyons now moves this Court for a COA.

Movants must obtain a COA in order to appeal "any denial of a Rule 60(b) motion for relief from a judgment in a [28 U.S.C.] § 2254 . . . proceeding." Gonzalez

v. Sec'y for Dep't of Corr., 366 F.3d 1253, 1263 (11th Cir. 2004) (en banc), aff'd on other grounds sub nom. Gonzalez v. Crosby, 545 U.S. 524, 125 S. Ct. 2641 (2005). 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, 120 S. Ct. 1595, 1604 (2000) (quotation marks omitted). Pro se litigants' filings must be liberally construed. Timson v. Sampson, 518 F.3d 870, 874 (11th Cir. 2008) (per curiam).

We review the District Court's denial of a Rule 60(b) motion for an abuse of discretion. Rice v. Ford Motor Co., 88 F.3d 914, 918-19 (11th Cir. 1996). Here, the District Court did not abuse its discretion because, even if Mr. Lyons could show that his counsel abandoned him after his state postconviction motion was denied, he is still bound by his counsel's negligence in filing the state motion after the deadline to file a federal habeas petition already passed. See Cadet v. Florida Dep't of Corr., 853 F.3d 1216, 1226 (11th Cir. 2017) (holding that "gross negligence, standing alone" is not sufficient for equitable tolling, where an attorney has not abandoned the client). Accordingly, reasonable jurists would not debate the District Court's

denial of Mr. Lyons's second Rule 60(b) motion, and his motion for a COA is **DENIED**.

Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JAMES E. LYONS,

Petitioner,

-vs- Case No. 5:04-cv-97-Oc-10GRJ

SECRETARY, DEPT. OF CORRECTIONS,

Respondent.

ORDER

Petitioner initiated this case by filing a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on March 11, 2004. (Doc. 1). On April 27, 2007, the Petition was dismissed as time-barred. (Doc. 15). On April 20, 2017, Petitioner filed a Motion for Reconsideration. (Doc. 17). In an Order dated October 3, 2017, Petitioner's Motion for Reconsideration was denied. (Doc. 20). Pending before the Court is Petitioner's Notice of Appeal (construed as a motion for certificate of appealability) and a motion for leave to appeal *in forma pauperis*. (Docs. 21, 22, 24).

The 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.[1] Where a district court has rejected a prisoner's constitutional claims on the merits,

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[1] **Error! Main Document Only.** See Fed. R. Civ. P. 22; see also 28 U.S.C. § 2253.

the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[2]

Petitioner's Notice of Appeal and Motion do not specify any claim of error to be presented to the Court of Appeals. Petitioner has failed to demonstrate that reasonable jurists would find the Court's assessment of the constitutional claims debatable or wrong.

Accordingly, the request for a Certificate of Appealability (Doc. 22) and Motion for Leave to Appeal as a Pauper (Doc. 24) are **DENIED.**

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida this 29th day of November, 2017.

UNITED STATES DISTRICT JUDGE

Copies to: James E. Lyons
Counsel of Record

[2] See Slack v. McDaniel, 529 U.S. 473, 484 (2000); Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.), cert. denied, 531 U.S. 966 (2000).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JAMES E. LYONS,

Petitioner,

v. **Case No. 5:04-cv-97-Oc-10GRJ**

SECRETARY, DEPT. OF CORRECTIONS,

Respondent.

ORDER

Petitioner initiated this case by filing a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on March 11, 2004. (Doc. 1). The Petition stemmed from Petitioner's 1999 jury-trial conviction for attempted second degree murder, kidnaping, and witness tampering, for which Petitioner is serving a life sentence and concurrent 10 and 30-year sentences. Petitioner contended that his Fourth Amendment rights and his right to the effective assistance of counsel were violated in connection with his 1999 conviction. The Respondents filed a Response asserting that the Petition was time-barred and should therefore be dismissed. (Doc. 4). Petitioner conceded that the Petition is untimely, but argued that he was entitled to equitable tolling of the limitations period because his retained postconviction counsel failed to timely pursue postconviction remedies. See Docs. 12, 13. On April 27, 2007, the Petition was dismissed as time-barred. (Doc. 15).

Pending before the Court is Petitioner's Motion for Relief from Judgment, filed on April 18, 2017. In his motion, filed pursuant to Rule 60(b)(5), Petitioner requests that the order dismissing his petition for writ of habeas corpus be vacated and he "be allowed to re-submit a new Petition for Habeas relief raising any such claims as may be appropriate thereunder." (Doc. 17 at 7).

Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence. Rule 60(b), *Fed. R. Civ. P.* Rule 60(b)(5), the particular provision under which Lyons brought his motion, permits reopening when the movant shows that the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.

However, the Supreme Court has made it clear that Rule 60(b)(5) applies in ordinary civil litigation where there is a judgment granting continuing prospective relief, such as an injunction, but not to the denial of federal habeas relief. Griffin v. Sec'y, Fla. Dep't of Corr., 787 F.3d 1086, 1089 (11th Cir. 2015). In its Agostini opinion,[1] the Supreme Court limited its holding in the course of rejecting the argument that the decision would create "a deluge of Rule 60(b)(5) motions

[1] In Agostini v. Felton, the Board of Education of the City of New York sought relief from a permanent injunction that was based on the Supreme Court's earlier interpretation of the Establishment Clause in Aguilar v. Felton. See Agostini, 521 U.S. 203, 208–09 (1997) (citing Aguilar, 473 U.S. 402 (1985)). The Agostini Court held that the Board was entitled to relief under Rule 60(b)(5) because later Establishment Clause decisions had effectively overruled Aguilar, making ongoing injunctive relief based on that decision inequitable. See Agostini, 521 U.S. at 237.

premised on nothing more than the claim that various judges or Justices have stated that the law has changed." Agostini v. Felton, 521 U.S. 203, 238 (1997). The Court explained that, because the last clause of Rule 60(b)(5) applies only to judgments with "prospective application," there would be:

> no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue. Cf. Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 [103 L.Ed.2d 334] (1989) (applying a more stringent standard for recognizing changes in the law and "new rules" in light of the "interests of comity" present in federal habeas corpus proceedings).

Agostini, 521 U.S. at 239.

The reason there was no need to worry about "a deluge of Rule 60(b)(5) motions" based on nothing more than a change in the law, the Court reasoned, is that the rule does not apply in most civil cases including, for example, federal habeas cases. Id. at 238–39. The reason it does not apply is that, unlike civil cases in which the judgment granted injunctive relief of some sort, there is no injunctive relief or continuing prospective effect within the meaning of Rule 60(b)(5) in federal habeas cases. Griffin, 787 F.3d at 1090. In this way the Court sent a clear message in its Agostini opinion that Rule 60(b)(5) does not apply in federal habeas proceedings, at least the typical ones where the judgment is an unconditional denial of habeas relief with no injunctive effect. Id. Further, the interpretation of "prospective" requirement for application of Rule 60(b)(5) forecloses any reasonable debate as to whether it can be used to challenge a final district court judgment denying habeas relief. Griffin, 787 F.3d at 1092.

In his motion, Lyons seeks to use Rule 60(b)(5) to challenge or re-litigate this Court's legal conclusion that his habeas petition is time-barred. This type of claim is forbidden by the Supreme Court. See Horne v. Flores, 557 U.S. 433, 477 (2009) (The Court explained that the portion of Rule 60(b)(5) governing prospective judgments "may not be used to challenge the legal conclusions on which a prior judgment or order rests.").

Accordingly, Petitioner's motion for reconsideration (Doc. 17) is **DENIED**.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 8th day of August, 2017.

UNITED STATES DISTRICT JUDGE

Copies to: Petitioner; Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JAMES E. LYONS,

Petitioner,

v. Case No. 5:04-cv-97-Oc-10GRJ

SECRETARY, DEPT. OF CORRECTIONS,

Respondent.

ORDER OF DISMISSAL

Petitioner initiated this case by filing a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on March 11, 2004 (Doc. 1). The Petition stems from Petitioner's 1999 jury-trial conviction for attempted second degree murder, kidnaping, and witness tampering, for which Petitioner is serving a life sentence and concurrent 10 and 30-year sentences. Petitioner contends that his Fourth Amendment rights and his right to the effective assistance of counsel were violated in connection with his 2002 conviction. The Respondents have filed a Response asserting that the Petition is time-barred and should therefore be dismissed. Doc. 4. Petitioner concedes that the Petition is untimely, but argues that he is entitled to equitable tolling of the limitations period because his retained postconviction counsel failed to timely pursue postconviction remedies. See Docs. 12, 13. For the following reasons, the Court concludes that the Petition should be

dismissed as time-barred.[1]

One-Year Limitation

Petitioners whose convictions became final after the effective date of the AEDPA have a one-year period within which to seek federal habeas corpus review of their convictions. The one-year limitations period begins to run, *inter alia*, 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[.]"[2] The one-year limitations period is statutorily tolled during the pendency of a properly-filed state application for post conviction relief, and may be equitably tolled in appropriate "extraordinary circumstances."[3]

Discussion

Petitioner timely appealed his conviction, and the state appellate court affirmed per curiam on September 26, 2000. Lyons v. State, 770 So. 2d 694 (Fla. 5th DCA 2000). The mandate issued on October 13, 2000. App. tab A., 88-90. Petitioner's conviction became final for purposes of § 2244 ninety days later, on or about January 13, 2001, following the expiration of the time for seeking a writ of

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[1] Because the Court may resolve the Petition on the basis of the record, the Court has determined that an evidentiary hearing is not warranted. See Rule 8, Rules Governing Habeas Corpus Petitions Under Section 2254.

[2] 28 U.S.C. § 2244(d)(1).

[3] 28 U.S.C. § 2244(d)(2); Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000).

certiorari from the U.S. Supreme Court.[4] Therefore, absent any state court post-conviction proceeding that would have tolled the federal limitations period,[5] Petitioner had until January 13, 2002, to timely file his federal habeas corpus petition.

Petitioner did not pursue any state postconviction remedies until March 26, 2002, when he filed a motion pursuant to Fla. R. Crim. P. 3.850. App. tab D. At that point, the federal habeas filing period had already elapsed. Petitioner's postconviction proceedings remained pending until the state appellate court affirmed the trial court's denial of relief and mandate issued on September 27, 2003. See App. tab D, 78-83. The state proceedings did not toll the federal habeas filing period because there was nothing left to toll at the time that Petitioner commenced his state postconviction remedies.

Petitioner argues that he is entitled to equitable tolling of the federal limitations period because his retained postconviction counsel delayed in pursuing his state remedies, and then wrongly advised Petitioner after the conclusion of the state proceedings that Petitioner still had one year within which to pursue federal habeas relief. See Docs. 12, 13. Petitioner has provided copies of letters from his postconviction counsel that support Petitioner's claims, and documents that also reflect that his counsel submitted a disciplinary resignation to the Florida Bar following numerous complaints filed by Petitioner and other clients. See id.

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[4] See Bond v. Moore, 309 F.3d 770 (11th Cir. 2002) (Petitioner has ninety days to seek certiorari in Supreme Court after direct review in state courts)

[5] 28 U.S.C. § 2244(d)(2).

Although Petitioner's counsel's actions cannot be condoned, the asserted deficiencies of a postconviction counsel's performance do not provide a basis for equitably tolling the limitations period. There is no constitutional right to postconviction counsel. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Accordingly, the ineffective assistance of postconviction counsel does not provide cause to overcome a procedural default. Coleman v. Thompson, 501 U.S. 722, 752-57 (1991). Of particular relevance to the instant case, the Supreme Court recently held that attorney errors in miscalculating the § 2244 limitations period are "simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." Lawrence v. Florida, ___ U.S. ___, 127 S.Ct. 1079, 1085 (2007); see also Gordon v. Sec'y Dept. of Corr., ___ F.3d ___, 2007 WL 609788 (11th Cir. 2007) (denying COA on issue whether § 2244 statute of limitations should be equitably tolled when postconviction counsel delays in pursuing state collateral relief).

In light of the foregoing controlling authority, the Court concludes that Petitioner is not entitled to the extraordinary relief of equitable tolling of the federal habeas statute of limitations. Accordingly, the Petition must be dismissed as time-barred.

Conclusion

For the reasons set forth in this Order, the Petition is **DISMISSED as time-barred**. The Clerk is directed to enter judgment dismissing this case with prejudice,

terminate any pending motions, and close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 25th day of April 2007.

UNITED STATES DISTRICT JUDGE

c: James E. Lyons
Respondent

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