IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12540-JJ

LOUIS MATTHEW CLEMENTS,

Petitioner-Appellant,

versus

STATE OF FLORIDA,
FLORIDA ATTORNEY GENERAL,
SECRETARY, DOC,

Respondents-Appellees.

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

ORDER:

Upon our own motion, this appeal is DISMISSED, in part, for lack of jurisdiction as to the district court's July 30, 2021 and August 18, 2021 orders denying Appellant's motions for reconsideration of the final order of dismissal. The statutory time limit required that Appellant file a notice of appeal challenging these postjudgment orders on or before Monday, August 30, 2021 and Friday, September 17, 2021, respectively. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A), (C). However, Appellant failed to do so, as the amended notice of

appeal was filed on January 26, 2022. Thus, the amended notice of appeal is untimely and cannot invoke our Court's jurisdiction. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A); *Green v. Drug Enf't Admin.*, 606 F.3d 1296, 1300 (11th Cir. 2010) (noting that, in a civil case, the statutory time limit for filing a notice of appeal is a jurisdictional requirement).

No motion for reconsideration may be filed unless it complies with the timing and other requirements of 11th Cir. R. 27-2 and all other applicable rules.

DAVID J. SMITH
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT - BY DIRECTION

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LOUIS MATTHEW CLEMENTS,

Petitioner - Appellant,

versus

STATE OF FLORIDA,
FLORIDA ATTORNEY GENERAL,
SECRETARY, DOC,

Respondents - Appellees.

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

ORDER:

The Court's sua sponte motion to appoint counsel for appellant having been granted by order dated February 15, 2022, the Court hereby appoints the following attorney as counsel for the appellant:

Keith Upson
2335 Stanford Court, Suite 503
Naples, FL 34112

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

LOUIS MATTHEW CLEMENTS,

Petitioner,

v. Case No. 2:17-cv-396-JLB-NPM

STATE OF FLORIDA, FLORIDA ATTORNEY GENERAL, and SECRETARY, DOC,

Respondents.

ORDER OF DISMISSAL

This cause is before the Court on an amended 28 U.S.C. § 2254 petition for habeas corpus relief filed by Louis Matthew Clements ("Petitioner") on July 31, 2017. (Doc. 6.) In his petition, Petitioner challenges his plea-based conviction for lewd and lascivious conduct entered against him on June 4, 2008 by the Twentieth Judicial Circuit Court of Lee County, Florida. (Id. at 1.)

Respondents filed a response and a supplemental response in which they argue, inter alia, that this Court does not have jurisdiction to consider the section 2254 petition because Petitioner was not "in custody" pursuant to the challenged judgment of conviction when he filed it. (Doc. 24; Doc. 42.) Petitioner argues that he is still required to register as a sex offender, which is a collateral consequence of his conviction sufficient to satisfy the in-custody requirement of 28 U.S.C. § 2254(d).

(Doc. 43 at 27.) Alternatively, he asks the Court to construe his petition as brought under 28 U.S.C. § 2255. (Doc. 43 at 29–30.)

After reviewing the pleadings and relevant law, the Court concludes that this petition must be dismissed for lack of subject matter jurisdiction. Petitioner filed this action after his sentence had fully expired, and his ongoing requirement to register as a sex offender did not render him "in custody" for federal habeas corpus purposes.

I. Background and Procedural History

On June 14, 2007, the State of Florida charged Petitioner by information with one count of lewd and lascivious battery on a person between the ages of 12 and 16 years old. (Doc. 25-1 at 17.) On June 4, 2008, Petitioner subsequently entered into a negotiated plea in which he agreed to plead guilty to the lesser charge of lewd and lascivious conduct in exchange for a sentence of five years of sexual offender probation. (Id. at 47–51, 56–69.) Petitioner did not appeal that Florida state conviction and sentence.

Approximately eight months later, on February 17, 2009, Petitioner filed a pro se motion to withdraw his plea, alleging that he was pressured by his family and attorney into accepting the plea. (Doc. 25-1 at 121.) Thereafter, Petitioner, through appointed counsel, filed an amended motion to withdraw the plea. (Id. at 123.) After holding an evidentiary hearing, the circuit court denied Petitioner's motion to withdraw his plea. (Id. at 133–56.) Petitioner filed an appeal on

November 24, 2009, but it was dismissed at Petitioner's request on December 2, 2009. (Doc. 25-2 at 4, 6.)

On November 25, 2009, Petitioner filed a motion for postconviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure ("Rule 3.850 Motion"). (Doc. 25-2 at 8–15.) After holding an evidentiary hearing, the Florida state postconviction court denied relief on April 28, 2010. (Id. at 24–26.) Petitioner did not timely appeal, but more than two years later—on or about July 9, 2012—Petitioner sought a belated appeal in case number 2D12-1749. (Id. at 86–97.) Florida's Second District Court of Appeal ("Second DCA") dismissed the petition for failure to amend. (Id. at 99.) Petitioner filed another petition for belated appeal in case number 2D12-4410. (Id. at 103–16.) But the Second DCA denied the petition on February 27, 2013. (Id. at 128.) On August 18, 2014, the Second DCA amended the February 27, 2013 order to reflect that the petition was dismissed as untimely. (Id. at 137.) Petitioner unsuccessfully sought rehearing. (Id. at 139–41, 157.)

Thereafter, Petitioner asked the Second DCA to reinstate the belated appeal petition he had filed in 2D12-1749. (Doc. 25-2 at 159–60.) The Second DCA directed a circuit court judge to conduct an evidentiary hearing to resolve whether postconviction counsel had failed to file an appeal as requested by Petitioner. (Id. at 167.) After holding an evidentiary hearing (id. at 174–219), the judge recommended to the Second DCA that the belated appeal request be denied (Id. at

221–23.) On January 29, 2015, the Second DCA denied the petition for belated appeal. (Id. at 225.)

Petitioner filed his first habeas petition in this Court on July 13, 2017. (Doc. 1.)

II. Legal Standards

Because federal courts have limited jurisdiction, this Court can hear "only those cases within the judicial power of the United States as defined by Article III of the Constitution or otherwise authorized by Congress." Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994). And because a district court must not act without proper authority to do so, it "should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings." Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 410 (11th Cir. 1999).

Federal courts may "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphases added). This language is jurisdictional: if a petitioner is not "in custody" when he files his petition, federal courts lack jurisdiction to consider it. See Unger v. Moore, 258 F.3d 1260, 1263 (11th Cir. 2001) (recognizing that whether a petitioner is in custody pursuant to the judgment of a state court is a jurisdictional question). Although the Supreme Court has never held that a petitioner must actually be physically confined in prison to meet section 2254(a)'s in-custody requirement, it has explained that the

challenged restraint on a petitioner's liberty must "significantly restrain" him from doing "those things which in this country free men are entitled to do." Jones v. Cunningham, 371 U.S. 236, 243 (1963); cf. Maleng v. Cook, 490 U.S. 488, 490–92 (1989); see also Diaz v. Fla. Fourth Judicial Circuit ex rel. Duval County, 683 F.3d 1261, 1264 (11th Cir. 2012). Further, "once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." Maleng, 490 U.S. at 492.

III. Discussion

Here, it is undisputed that Petitioner's term of sex offender probation ended before he filed his section 2254 petition. Petitioner's order of probation was filed on June 11, 2008. At no time during the next five years was his period of probation extended. Accordingly, his five-year sentence expired, at the latest, on June 10, 2013.[1] However, Petitioner did not file his federal habeas petition until July 13, 2017.

Respondents now argue that this Court must dismiss this petition for lack of jurisdiction. (Doc. 24 at 7.) Specifically, Respondents note that because Petitioner's five-year term of probation had already expired, he was not "in custody" when he filed his section 2254 petition. (Id.) In reply, Petitioner urges that this Court does have jurisdiction to consider his petition and characterizes Respondent's

[1] Petitioner did not enter his plea until more than a year after his arrest. (Doc. 25-1 at 40, 56.) It is unclear whether Petitioner received any credit for time served before he entered his plea.

arguments otherwise as "silly." (Doc. 43 at 24–25.) However, other than asserting that his requirement to register as a sex offender is a collateral consequence sufficient to keep his petition from becoming moot upon sentence expiration, he does not address the fact that his five-year sentence of sex-offender probation expired before he filed the petition and as a result, federal jurisdiction never attached in the first instance. (Id. at 26.) Nevertheless, this Court will consider whether Petitioner's requirement to register as a sex offender is a present restraint sufficient to satisfy section 2254(a)'s in-custody requirement.

Although the Eleventh Circuit has not directly addressed the question, the overwhelming majority of circuit courts of appeals that have done so have concluded that sex-offender registration requirements are merely collateral consequences of a conviction that do not meet section 2254(a)'s in-custody requirement. See Hautzenroeder v. Dewine, 887 F.3d 737, 741 (6th Cir. 2018) (calling registration requirements "a serious nuisance," but declining to find the registration requirements sufficient to satisfy section 2254(a)'s custody requirement); Calhoun v. Att'y Gen. of Colorado, 745 F.3d 1070, 1074 (10th Cir. 2014) (finding the Colorado sex offender reporting requirements to be "collateral consequences of conviction that do not impose a severe restriction on an individual's freedom" and were therefore "insufficient to satisfy the custody requirement of § 2254"); Sullivan v. Stephens, 582 F. App'x 375, 375 (5th Cir. 2014) (finding that a petitioner's "obligation to register as a sex offender does not render him 'in custody' for purposes of a § 2254 challenge"); Wilson v. Flaherty, 689 F.3d 332, 337–38 (4th Cir. 2012) (same);

Virsnieks v. Smith, 521 F.3d 707, 717–20 (7th Cir. 2008) (same); Williamson v. Gregoire, 151 F.3d 1180, 1183–84 (9th Cir. 1998) (same). Federal district courts in the Eleventh Circuit also uniformly conclude that sex offender registration requirements are insufficient to meet section 2254(a)'s in-custody requirement. See, e.g., Ridley v. Conley, No. 5:16-cv-192-MP-GRJ, 2016 WL 6634905, at *1 (N.D. Fla. Nov. 8, 2016) ("[Mr. Ridley] finished his sentence in 1999, and being required to register as a sex offender does not constitute being 'in custody.' "); Godwin v. United States, No. 3:12-cv-1387-J-32TEM, 2014 WL 7074336, at *6 (M.D. Fla. Dec. 15, 2014) ("The sex offender registration requirements imposed by SORNA and Florida law are not so onerous as to place Petitioner 'in custody' for purposes of habeas jurisdiction.").

However, the Third Circuit reached a different conclusion in Piasecki v. Court of Common Pleas, Bucks Cty., PA, 917 F.3d 161 (3d Cir. 2019). In Piasecki, the court found that the state's ability to compel a petitioner's in-person attendance for various reasons weighed heavily in favor of concluding that the petitioner was still in custody, even after his sentence expired. Id. at 170. In reaching this conclusion, the court considered several restraints on the petitioner's liberty caused by the sex-offender registration requirements, including the fact that the petitioner was not free to "come and go" as he pleased, each "change of address, including any temporary stay at a different residence, required an accompanying trip to the State Police barracks within three business days," and the petitioner was required "to regularly report to police if he had no address and became homeless." Id. Thus,

the petitioner "was required to be in a certain place or one of several places—a State Police barracks—at least four times a year for the rest of his life," and was "compelled . . . to personally report to the State Police if he operated a car, began storing his car in a different location, changed his phone number, or created a new email address." Id. at 171 (internal quotation marks omitted). The petitioner was also prevented from accessing the internet. Id. The Piasecki court found these restraints to be sufficiently restrictive to constitute custody because they were severe, immediate (i.e., not speculative), and "not shared by the public generally." Id. at 170–71.

The Third Circuit, however, expressly limited its holding, finding that the "in custody" requirement was met when "severe, immediate, physical, and (according to the state's own definition) punitive restraints on liberty . . . are imposed pursuant to—and included in—the judgment of a state court such as the one here." Id. at 176 (parenthetical in original). The Third Circuit emphasized the "punitive" aspect of this holding, recognizing that the "sister circuit courts of appeals that have held registration requirements are not imposed pursuant to the judgment of sentence have done so, in part, because the respective state courts have determined that their state registration schemes are remedial, not punitive." Id. at 173–74. Contrastingly, Pennsylvania courts had concluded that the state registration schemes are punitive, not remedial, in nature, "unlike the courts in nearly every other state." Id. at 175.

Notwithstanding the Third Circuit's considered opinion, this Court is persuaded that the decisions from the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits are more persuasive here. A brief survey of Florida's sex offender registration law is helpful to discern if the registration requirements are punitive in nature or merely collateral consequences of a conviction. To find that answer, the Court starts where it should: the text of Florida's sex offender registration statute. It does not take much to quickly discern that the Florida Legislature did not craft the sex-offender registration rules to continue punishing offenders who complete their sentences. The plain and unambiguous text of Florida Statute § 943.0435 expressly states that the designation of a person as a sexual offender is neither a "sentence" nor a "punishment." Id. § 943.0435(12) (2020) ("The designation of a person as a sexual offender is not a sentence or a punishment but is simply the status of the offender which is the result of a conviction for having committed certain crimes.").

And the Florida state courts—unlike the Pennsylvania courts at issue in Piasecki—have expressly recognized that Florida's registration requirements are not punitive; instead, they are remedial. See State v. Partlow, 840 So. 2d 1040, 1043 (Fla. 2003) (recognizing that "the requirement to register [as a sex offender] is not punishment at all" and "is merely a collateral consequence of the plea"); Brinson v. State, 291 So.3d 620, 624 n.2 (Fla. 1st DCA 2020) ("[Florida's] [s]tatutory sexual offender notification and registration requirements are not intended to be punitive. They are designed to be remedial in nature by protecting the public from sexual

offenders and protecting children from sexual activity. The information collected and disseminated as a result of sexual offender status is information that, by law, the public is entitled to access.")

The Court therefore finds that Florida's sex offender registration requirements are simply collateral consequences of an offender's commission of a prescribed sexual offense, as determined by the Florida Legislature. For example, a Florida sex offender must register in person at the sheriff's office in the county where he establishes or maintains permanent, temporary, or transient residence within 48 hours of either establishing such residence or being released from custody. Fla. Stat. § 943.0435(2)(a) (2020). The sex offender must also maintain a driver's license or identification card, notify the sheriff's office of where he lives, works, and attends school, and provide identifying information about himself, his residence, phone numbers, email addresses, and any other internet identifiers. Id. §§ 943.0435(2) and (3). The offender must also report to the sheriff's department in person two or four times per year (depending on the conviction). Id. § 943.0435(14)(a). Notably, Florida's sex offender registration law does not restrict an offender's freedom of movement, require him to obtain the government's approval before locating or re-locating somewhere, or condition an offender's continued liberty on remaining employed or refraining from lawful activities.[2]

[2] Those are typical requirements of a probationary portion of a criminal sentence.

While inconvenient to the sex offender registrant, the registration requirements are simply collateral consequences of a conviction that the Florida Legislature made a policy decision to attach to those convicted of particular crimes. Those consequences are not punitive and do not meet the "in-custody" requirement set forth in section 2254(a) to invoke this Court's jurisdiction. As the First Circuit aptly stated, "even grievous collateral consequences stemming directly from a conviction cannot, without more, transform the absence of custody into the presence of custody for the purpose of habeas review." Lefkowitz v. Fair, 816 F.2d 17, 20 (1st Cir. 1987) (holding that the loss of a medical license did not render a sex offender who had completed his sentence "in custody").

Finally, Petitioner asks this Court to construe the present petition as brought under 28 U.S.C. § 2255 instead of 28 U.S.C. § 2254. (Doc. 26; Doc. 27). Presumably, this is because a petitioner who challenges an expired state sentence used to enhance a current federal sentence may do so under section 2255. See Birdsell v. State of Alabama, 834 F.2d 920, 922 (11th Cir. 1987). However, Petitioner is not currently serving a federal sentence and his Florida state conviction was not used to enhance a federal sentence. Therefore, section 2255 provides Petitioner no grounds for relief, and the Court will not construe this petition as brought under 28 U.S.C. § 2255.

IV. Conclusion

Accordingly, it is now **ORDERED AND ADJUDGED:**

1. Petitioner's 28 U.S.C. § 2254 petition is **DISMISSED** for lack of jurisdiction.[3]

2. The **Clerk of the Court** is directed to enter judgment accordingly, terminate any pending motions, and close the case.

DONE AND ORDERED in Fort Myers, Florida on July 26, 2021.

JOHN L. BADALAMENTI
UNITED STATES DISTRICT JUDGE

SA: FTMP-2

Copies furnished to:
Counsel of Record
Unrepresented Parties

[3] Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Id. However, a dismissal for lack of subject-matter jurisdiction, as here, "is not a final order in a habeas corpus proceeding within the meaning of the statute." Hubbard v. Campbell, 379 F.3d 1245, 1247 (11th Cir. 2004); Howard v. Warden, 776 F.3d 772, 775 (11th Cir. 2015) ("The question of whether a person is 'in custody' within the meaning of 28 U.S.C. § 2241(c)(3) is one of subject-matter jurisdiction.").

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

LOUIS MATTHEW CLEMENTS,

Petitioner,

v. Case No.: 2:17-cv-396-JLB-NPM

STATE OF FLORIDA, FLORIDA ATTORNEY GENERAL and SECRETARY, DOC,

Respondents.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that pursuant to this Court's Order of July 26, 2021, Petitioner's 28 U.S.C. § 2254 petition is DISMISSED for lack of jurisdiction.

July 26, 2021

ELIZABETH M. WARREN,
CLERK

/s/M. Janczewski, Deputy Clerk

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

LOUIS MATTHEW CLEMENTS,

Petitioner,

v. CASE NO.: 2:17-cv-396-JLB-NPM

STATE OF FLORIDA, FLORIDA ATTORNEY GENERAL and SECRETARY, DOC,

Respondents.
_____/

ORDER

Before the Court is Petitioner Louis Matthew Clements's Motion for Reconsideration or Motion for Certificate of Appealability (Doc. 53) and Motion for Leave to Appeal In Forma Pauperis. (Doc. 55.) The Court dismissed this case on July 28, 2021 for lack of subject matter jurisdiction (Doc. 51) and judgment has been entered. (Doc. 52.) For the reasons given below, Petitioner's motion for reconsideration or motion for certificate of appealability is denied. Petitioner's motion to appeal in forma pauperis is granted.

1. Motion to Reconsider or Motion for Certificate of Appealability

A habeas petitioner may file a motion to alter or amend a judgment within 28 days after the entry of judgment. Fed. R. Civ. P. 59(e). Rule 59(e) gives a district court the chance " 'to rectify its own mistakes in the period immediately following' its decision." Banister v. Davis, 140 S. Ct. 1698, 1703 (2020) (quoting White v. New Hampshire Dep't of Employment Security, 455 U.S. 445, 450 (1982)). However, "courts will not address new

arguments or evidence that the moving party could have raised before the decision issued." Banister, 140 S. Ct. at 1703. The decision to reconsider a judgment is committed to the sound discretion of the district court. Drago v. Jenne, 453 F.3d 1301, 1305 (11th Cir. 2006); Lockard v. Equifax, Inc., 163 F.3d 1259, 1267 (11th Cir. 1998). Notably, a Rule 59(e) motion should not be used to "relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Michael Linet, Inc. v. Village of Wellington, Fla., 408 F.3d 757, 763 (11th Cir. 2005).

In this case, Petitioner rehashes the arguments originally made in the petition and subsequent pleadings and offers new arguments for why the courts should consider him "in custody" for his section 2254 petition. While a Court can consider the need to correct clear error, the movant must do more than simply restate previous arguments, which is what Petitioner does here. Bautista v. Cruise Ships Catering & Service Intern'l, N.V., 350 F. Supp. 2d 987, 992 (S.D. Fla. 2003). If Petitioner thinks the legal reasoning underlying the Court's decision is wrong, he should appeal the ruling, not seek reconsideration. Jacobs v. Tempur-Pedic International, Inc., 626 F.3d 1327, 1344 (11th Cir. 2010).

Alternatively, Petitioner seeks a certificate of appealability on the Court's order of dismissal. Petitioner does not need a certificate of appealability to appeal the dismissal of his section 2254 petition because it was dismissed for lack of subject-matter jurisdiction. See Hubbard v. Campbell, 379 F.3d 1245, 1247 (11th Cir. 2004).

2. Motion to Appeal In Forma Pauperis

Finally, Rule 24(1)(1) of the Federal Rules of Appellate Procedure provides that a party to a district court action who desires to appeal in forma pauperis must file a motion in the district court. Petitioner has demonstrated an inability to pay the appellate filing fee.

(Doc. 55.) An appeal may not be taken in forma pauperis if the Court determines that it is not taken in good faith. 28 U.S.C. § 1915(a)(3). "[T]o determine that an appeal is in good faith, a court need only find that a reasonable person could suppose that the appeal has some merit." Walker v. O'Brien, 216 F.3d 626, 631 (7th Cir. 2000).

Here, the Court concluded that a habeas corpus petitioner (such as Petitioner) with an expired sentence and subject only to Florida's sex-offender registration requirements when he filed his petition was not "in custody" pursuant to the judgment of a state court to invoke this Court's jurisdiction under 28 U.S.C. § 2254(a). (Doc. 51 at 11.) This conclusion is in accordance with the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuit Courts of Appeals and other district courts in the Eleventh Circuit. However, the Eleventh Circuit has not decided this issue, and the Third Circuit Court of Appeals has decided differently on similar—although not identical—facts. The split demonstrates that reasonable jurists could find the district court's assessment of its subject matter jurisdiction debatable or wrong. Therefore, the Court finds that Petitioner's appeal is undertaken in good faith and will grant him leave to appeal in forma pauperis.

Accordingly, it is

ORDERED:

1. Petitioner's Motion for Reconsideration or Motion for Certificate of Appealability (Doc. 53) is **DENIED**.
2. Petitioner's Motion for Leave to Appeal *In Forma Pauperis* (Doc. 55) is **GRANTED**.
3. The Clerk is **DIRECTED** to send a copy of this Order to the Clerk for the Eleventh Circuit Court of Appeals.

DONE and ORDERED in Fort Myers, Florida on this 30th day of July 2021.

JOHN L. BADALAMENTI
UNITED STATES DISTRICT JUDGE

SA: FTMP-2
Copies: All parties of record,
Clerk, Eleventh Circuit Court of Appeals

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

LOUIS MATTHEW CLEMENTS,

Petitioner,

v. Case No. 2:17-cv-396-JLB-NPM

STATE OF FLORIDA,FLORIDA ATTORNEY GENERAL and SECRETARY, DOC,

Respondents.

ORDER

This cause is before the Court on Petitioner's amended second motion for reconsideration. (Doc. 59, filed Aug. 12, 2021.) Petitioner now argues that his 28 U.S.C. § 2254 petition was timely filed and that this Court failed to properly consider his equitable tolling argument. (Id. at 2–3.) Petitioner also urges that he received "insufficient post-conviction process" and that the state purposefully delayed his state court remedies until after his sentence had expired. (Id. at 4–5.) Petitioner asserts that the motion is filed under "either section (a) or (b)(1, 2, 5 or 6)" of Rule 60 of the Federal Rules of Civil Procedure. (Id. at 1.) Respondent opposes the motion. (Doc. 60.)

Under Rule 60(b) of the Federal Rules of Civil Procedure, a court may relieve a party of a final order or judgment for certain enumerated reasons, like mistake, newly discovered evidence, fraud, a void judgment, a satisfied judgment, or "any

other reason that justifies relief." Fed. R. Civ. P. 60(b)(1)–(6). None of these apply here. As Petitioner is aware, the timeliness of his habeas petition was not considered by this Court in its order dismissing his case. Rather, the petition was dismissed for lack of subject-matter jurisdiction because Petitioner was not "in custody" when he filed it. (Doc. 51.) Petitioner appealed the decision (Doc. 54), and his case is now before the United States Court of Appeals for the Eleventh Circuit in case number 21-12540. (Doc. 56.) It is unwise for Petitioner to continue to litigate this matter with further motions for reconsideration while it is on appeal.[1] If the Eleventh Circuit concludes that the undersigned had subject matter jurisdiction to consider Petitioner's habeas petition and remands the case, Petitioner will have an opportunity to raise his equitable-tolling and insufficient-process arguments.

Petitioner has presented no meritorious reason for the Court to reconsider its dismissal of this case for lack of subject-matter jurisdiction, and his motion for relief from judgment (Doc. 58) and amended motion (Doc. 59) are **DENIED**.

DONE AND ORDERED in Fort Myers, Florida on August 18, 2021.

JOHN L. BADALAMENTI
UNITED STATES DISTRICT JUDGE

[1] When Petitioner filed his notice of appeal, it divested this Court with jurisdiction over "those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982).

SA: FTMP-2

Copies furnished to:
Counsel of Record
Unrepresented Parties

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Plaintiff, Pro Se
jtkirk1969@yahoo.com

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

LOUIS MATTHEW CLEMENTS, Petitioner, vs. STATE OF FLORIDA, FLORIDA ATTORNEY GENERAL, and SECRETARY, DOC, Respondents.	Case No.: 2:17-CV-396-JLB-NPM

APPLICATION FOR CERTIFICATE OF APPEALABILITY OR MOTION FOR RECONSIDERATION

Notice is hereby given that LOUIS MATTHEW CLEMENTS, in the above-named case, hereby RESPECTFULLY applies to the District Court or the United States Court of Appeals for the 11th Circuit for a Certificate of Appealability from DE 51, ORDER OF DISMISSAL entered in this action on 7/26/2021.

Plaintiff/Petitioner/Appellant asks that in the alternative, should the District Court find his below arguments compelling he reconsider his order and judgment.

1. Included documents to be reviewed:

    a. 51 ORDER OF DISMISSAL.

b. Motion for Permission to Appeal In Forma Pauperis and Affidavit

INTRO.

It is unclear to Plaintiff/Petitioner/Appellant whether he is allowed to appeal this matter "by right". The Court seems to offer some explanation in the footer at the bottom of DE 51. As Plaintiff is *pro se*, a more concrete, "yes or no" guidance is requested in future documents.

The procedure for application for Certificate of Appealability is also unclear to *pro se* Plaintiff/Petitioner/Appellant and whether argument for certificate in the District Court is required first. Petitioner will therefore provide a short brief in case it is required.

SUMMARY OF ISSUES TO PRESENT

1. A controversy exists between the circuits as to whether the Florida Sex Offender registry constitutes an "in-custody" status for purposes of Habeas Corpus upon expiration of a probation period or sentence.
2. A similar controversy exists in that the 11th USCA has not specifically addressed this matter.
3. Similar issues surround the controversy such as "collateral" and "remedial rather than punitive" questions.
4. Other issues include whether the Florida Sexual Registration poses "significant restraints on liberty that are not otherwise experienced by the general public".

SUMMARY OF ARGUMENT

In December 2019, the Florida legislative auditor's office released a report noting that the number of people on the state's sex offender registry had expanded 53 percent since 2005, to about 73,000.

To wit, this is a matter of great public importance and personal importance in the interest of freedom, rights and justice of not only Petitioner but those similarly situated. Petitioner deserves the chance to "sway" the District Court toward a stance more aligned with the ruling in the 3rd USCA (SEE, *Piasecki v. Court of Common Pleas, Bucks Cty., PA*, 917 F.3d 161 (3d Cir. 2019)) and/or convince the 11th USCA the importance of taking a stance on this matter especially in the context of the current state of the world.

ARGUMENT

Firstly, the 11th USCA must take a stance on this matter as Petitioner is one of 73,000 (and growing) similarly situated Floridian individuals being affected by its indecision and/or reluctance. The Circuit also covers 2 other similarly situated States in its jurisdiction (Georgia and Alabama). It is not enough to rely on the decisions of warring sister Circuit Courts of appeal where only one (3rd USCA) reflects the modern, realistic, self-evident view (See, *Piasecki).*

Secondly, The Florida Legislature has deemed the requirements of the Florida Sex Offender Registry (simply by adding one blurb of fine print lawyer speak to the statutes, clearly designed to quickly strike down any future litigation over the matter), "remedial rather than punitive". As the world still struggles in a COVID society, we easily see that fine print lawyer speak is far from reality.

We don't have to look far for guidance on what the modern world and State Legislatures in this and other countries truly deem as "punitive, significant restraints on liberty". We must only look to the COVID world that now exists.

In the pre-covid world, it was fine for the "general public" to go about, untethered to any threats to their most simple of freedoms. It was fine for State Legislatures all over the Country to apply strict SORNA and other guidelines to individuals for certain crimes when those individuals have not had their own freedoms tested in any way shape or form. It is easy for the Florida Legislature, sitting on high in its lofty, unrealistic cloud, to add some fine print to statute § 943.0435(12) (2020) implying that "the designation of a person as a sexual offender is not a sentence or a punishment". It is self-evident that these are just empty words.

The COVID world has forced the world to reveal the true bar when it comes to defining "punitive" or "significant restraints on liberty". As we have seen daily in the media, the bar is **exceptionally low.**

For example, one would think that to any sane person it is self-evident that the CDC guidelines are clearly designed to keep people alive. Yet, bafflingly, they have become a dueling point for major cities while threatening to tear a nation apart where some have even implied ulterior, political motives and conspiracy theories are circulated even by high-ranking officials. Florida's very own Governor refuses to follow them, finds them to be "punitive" and offers "full pardons" to anyone arrested for violating them. Fist fights have broken out when the "general public" have lost their minds after having been asked to comply with a seemingly insignificant request to wear a mask, grandmothers in grocery stores attacked, children and families removed from flights. US elections have been decided on mask mandates. Former US Presidents have refused to wear them while in office, current US Presidents have found it difficult to follow their own mask mandates and law makers all over the US have shown similar results. We see marching in the streets in protest and violent riots here and in other countries.

This is the reaction by the "general public" to even the most minor of threats to the smallest of freedoms. These are the same state law makers, Presidents and other country leaders that deem **much more exceptional limits to freedom** such as those on the Florida Sex Offender Registry, including a lifetime of scarlet lettering, constant threat of arrest and prison for non-compliance (up to 5 years in Florida), electronic monitoring (on probation), personal reporting twice or four times a year, reporting emails, address changes and only 3 days of travel without registering in a new city even while on a vacation; to be simply "not a sentence or a punishment but just a designation". We see now, this is only untested and unrealistic rhetoric. For the "general public", these CDC "minor, insignificant restrictions" go away with COVID. For those on the Florida Registry, the self-evident "punitive" and "significant restraints on liberty" remain for life. This lawyer-speak fine print lie must be challenged.

CONCLUSION

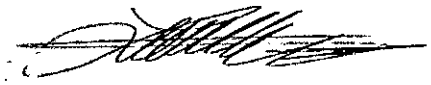
The Governor of Florida, Ron DeSantis has additionally called the self-evident CDC mandates (obviously designed to keep people alive) a "bureaucratic virus" said it "discriminates against children". He has made a

statement via the media just today in regard to the CDC saying that, "bureaucrats should not lie or mislead the public".

Plaintiff/Petitioner/Appellant wholeheartedly agrees with that sentiment. The Florida Sex Offender Registry, walks like a punishment, quacks like a punishment and therefore, is a punishment, no matter what the fine print says otherwise.

To wit, Plaintiff/Petitioner/Appellant asks that this Court grant a Certificate of Appealability or in the alternative, reconsider his order of dismissal in this case.

Respectfully submitted,



Plaintiff, *Pro Se,* Louis Matthew Clements

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on 7/27/2021, a copy of the foregoing **APPLICATION FOR CIRTIFICATE OF APPEALABILITY,** was provided via Email or Electronic Filing to all Defendants in the case at the following Email addresses: oag.civil.eserve@myfloridalegal.com, CrimAppTpa@myfloridalegal.com Tonja.Rook@myfloridalegal.com

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LOUIS MATTHEW CLEMENTS,

Petitioner,

vs.

STATE OF FLORIDA, FLORIDA ATTORNEY GENERAL, and SECRETARY, DOC,

Respondents.

Case No.: 2:17-CV-396-JLB-NPM

AMENDED NOTICE OF APPEAL

Notice is hereby given that LOUIS MATTHEW CLEMENTS, in the above-named case, hereby, for the sake of clarity, RESPECTFULLY amends the documents he wishes the United States Court of Appeals for the 11th Circuit to review in addition to DE 51, ORDER OF DISMISSAL entered in this action on 7/26/2021.

1. Documents to be reviewed:

    a. DE 51 ORDER OF DISMISSAL.
    b. DE 57 ORDER ON MOTION FOR RECONSIDERATION
    c. DE 61 ORDER ON MOTION FOR RECONSIDERATION

ARGUMENT

Plaintiff/Petitioner is pro se and untrained at law. All the intricacies of Court rules are still difficult for him to understand. To wit, it is unclear to Plaintiff whether he must mention each document he wishes to be reviewed even if he has argued what should be reviewed in his already filed and complete brief filed in the 11th Cir.

The STATE'S response in the 11th Cir. seems to think that Plaintiff/Petitioner has not preserved issues presented in DE 53, DE 58 and DE 59, all MOTIONS FOR RECONSIDERATION by this Court.

Plaintiff/Petitioner formally adds the previously unmentioned documents he wishes to be reviewed for the express purpose of clarity for the parties and Courts. Plaintiff/Petitioner hopes this is a suitable remedy.

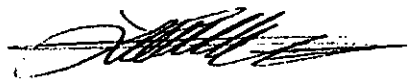
1. Plaintiff/Petitioner has fully briefed all the issues he wishes appealed in the 11th Cir. briefs so no amendment to his briefs in the 11th Cir. is necessary.
2. Similarly, even though the States brief finds the added documents "not appealed" and therefore "not preserved", they did argue against all the arguments in the included documents mentioned in this Amended NOA.
3. For the reasons stated above, Plaintiff/Petitioner finds there should be no prejudice to either party by filing of this Amended NOA.

4. Plaintiff/Petitioner stresses that he wishes the Courts to decide this case on the merits other than his ability to understand and comply with the rules of the Courts.

CONCLUSION

Plaintiff asks that this Court allow amendment of the original NOA in this case for the express purpose of clarity to the 11th Cir. and to properly clarify what documents he wished reviewed by that Court.

Respectfully submitted,



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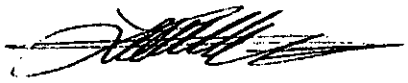

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