IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 21-12046-E

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ANGELO C. PEARSON, II,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

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

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ORDER:

Angelo Pearson's motion for a certificate of appealability ("COA") is DENIED because he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). His motion to hold the COA in abeyance pending the resolution of his petition for *en banc* initial hearing is also DENIED.

UNITED STATES CIRCUIT JUDGE

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Appeal from the United States District Court
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Before: NEWSOM and BRANCH, Circuit Judges.

BY THE COURT:

Angelo C. Pearson, II, has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2 and 22-1(c), of this Court's January 12, 2022 order, denying a certificate of appealability. Upon review, Pearson's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ANGELO C. PERSON, II,

Petitioner,

v. Case No: 6:20-cv-45-GAP-EJK

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

Respondents.
_____/

**ORDER**

This cause is before the Court on a Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed by Petitioner pursuant to 28 U.S.C. § 2254. The Petition contains a Memorandum in Support of Habeas Corpus Petition. Respondents filed a Response to Petition ("Response," Doc. 12), and Petitioner filed a Reply (Doc. 14). For the following reasons, the Court concludes that the Petition is untimely.

## I. PROCEDURAL BACKGROUND

A Grand Jury charged Petitioner by Indictment with one count of felony murder in the first degree (Count One) and two counts of armed robbery (Counts Two and Three). (Doc. 12-1 at 6-7). A jury found Petitioner guilty as charged as

to Counts One and Three, and guilty of the lesser included offense of attempted robbery with a firearm as to Count Two. (*Id.* at 704-05). The trial court adjudicated Petitioner guilty of the crimes and sentenced him to life imprisonment. (Doc. 12-2 at 43-48). Petitioner filed a direct appeal, and Florida's Fifth District Court of Appeal ("Fifth DCA") affirmed *per curiam* on December 12, 2000. (*Id.* at 74).

On February 19, 2002, Petitioner filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850,[1] which the trial court denied. (*Id.* at 79-82, 101-07). Petitioner appealed the denial, and the Fifth DCA affirmed the denial *per curiam*. (*Id.* at 145). The mandate issued on February 28, 2003. (*Id.* at 147).

During the pendency of the Rule 3.850 proceedings, Petitioner filed a petition alleging ineffective assistance of appellate counsel in the Fifth DCA. (*Id.* at 150-60). The Fifth DCA denied the petition on September 17, 2002, and denied the motion for rehearing on March 10, 2003. (*Id.* at 175, 184).

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[1] Unless otherwise noted, the pleadings filed by Petitioner after the conclusion of the direct appeal were *pro se*. References to the filing date of those pleadings shall be the filing date under the mailbox rule. *See Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999) (under the "mailbox rule," a pro se prisoner's motion to vacate, set aside, or correct sentence was filed on the date that he signed, executed, and delivered his petition to prison authorities for mailing).

On April 5, 2004, Petitioner filed a second Rule 3.850 motion, but it was dismissed on June 7, 2004, pursuant to Petitioner's request for a voluntary dismissal. (*Id.* at 186-90, 200).

On April 26, 2006, Petitioner filed a third Rule 3.850 motion, which the trial court denied on May 18, 2006. (*Id.* at 206-212; Doc. 12-3 at 2-4). The Fifth DCA affirmed *per curiam* on August 11, 2009. (Doc. 12-3 at 36). The mandate issued on October 1, 2009. (*Id.* at 44).

During the pendency of the third Rule 3.850 proceedings and after the conclusion of those proceedings, Petitioner filed several other postconviction motions and petitions with the trial court and the Fifth DCA, all of which were denied. The Petition was filed on December 30, 2019.

## II. LEGAL STANDARD

Pursuant to 28 U.S.C. § 2244,

> (d)(1) 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 –
>
> > (A) the date on which the judgment of conviction became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the

> Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The 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.

## III. ANALYSIS

In the present case, the Fifth DCA entered its *per curiam* affirmance of Petitioner's convictions and sentences on December 12, 2000. Petitioner then had ninety days, or through March 12, 2001, to petition the Supreme Court of the United States for a writ of certiorari (ninety days runs from when judgment was entered or when motion for rehearing was denied).[2] Thus, under § 2244(d)(1)(A),

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[2] Rule 13 provides as follows:

> The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the

the judgment of conviction became final on March 12, 2001, and Petitioner had through March 13, 2002, absent any tolling, to file a federal habeas petition.

Pursuant to section 2244(d)(2), the one-year period is "tolled" for the time during which a properly filed state postconviction or collateral proceeding is pending. When Petitioner filed his first motion for postconviction relief with the state trial court on February 19, 2002, 344 days of the one-year period had run. During the pendency of those proceedings, Petitioner filed a petition alleging ineffective assistance of appellate counsel in the Fifth DCA. The proceedings in the Fifth DCA concluded on March 10, 2003, which was after the Rule 3.850 proceedings concluded. Thus, the one-year period expired 21 days later on March 31, 2003, and the Petition was untimely.

All of Petitioner's other postconviction motions and petitions were filed after the one-year period had expired, and, therefore, did not toll the one-year period of limitation. *See Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) ("A

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> date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

Sup. Ct. R. 13(3).

state-court petition . . . that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled.").

Petitioner recognizes that the Petition is untimely but argues that he "recently discovered" that the trial court's denial of his motion for arrest of judgment was "based on a misconception of the law, which allowed a manifest injustice to go uncorrected." (Doc. 1 at 25). In particular, he argues that "the jury's findings of attempted armed robbery cannot support the felony murder conviction in this case." (*Id.* at 27).

The Supreme Court recognizes that the one-year period of limitation is subject to equitable tolling in appropriate cases. *Holland v. Florida*, 560, U.S. 631, 645 (2010). However, a petitioner is entitled to equitable tolling only when it is demonstrated that 1) the petitioner "has been pursuing his rights diligently," and 2) "some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 649 (internal quotations and citations omitted). As to the first prong, the movant need only demonstrate "reasonable diligence" rather than "maximum feasible diligence." *Id.* at 653 (quotations omitted). As to the second prong, an extraordinary circumstance is one that is both beyond the movant's control and unavoidable even with diligence. *Drew v. Dep't of Corrs.*, 297 F.3d 1278, 1286 (11th Cir.2002). Equitable tolling "is an extraordinary remedy which is typically applied

sparingly," and the movant bears the burden of showing that it is warranted. *Drew*, 297 F.3d at 1286 (quotation omitted).

Petitioner argues in his Reply that "the jury's Count 2 verdict is inconsistent with . . . an essential element of the Count 1 offense and states that his claim "centers around *In Re Winship*, 397 U.S. 358 (1970)." (Doc. 14 at 5-6). However, Petitioner fails to explain why he was unable to discover this issue at the time of his conviction or why it took him over sixteen years from the date of the expiration of the one-year period of limitation to file the instant Petition. As such, there has been no showing that Petitioner has been pursuing his rights diligently or that some extraordinary circumstance stood in his way and prevented timely filing. Petitioner has failed to satisfy either prong of the *Holland* standard or to otherwise demonstrate that he is entitled to equitable tolling. Consequently, Petitioner has not demonstrated that there is any basis upon which to extend the one-year deadline or that the Petition should otherwise be subject to equitable tolling. The Petition was untimely and will be denied.

Allegations not specifically addressed herein are without merit.

## IV. CERTIFICATE OF APPEALABILITY

This 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." 28 U.S.C. ' 2253(c)(2). To make such a showing "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner fails to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner fails to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

## V. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**.
2. This case is **DISMISSED with prejudice**.

3. Petitioner is **DENIED** a Certificate of Appealability in this case.

4. The Clerk of the Court is directed to enter judgment in favor of Respondents and to close this case.

**DONE** and **ORDERED** in Orlando, Florida on May 21, 2021.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party