APPENDIX A

January 20, 2023 Fifth District Court of Appeal denying Motion For Rehearing

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ROBERT W. GILLMAN,

Appellant,

v.

CASE NO. 5D22-1389
LT CASE NO. 1996-CF-3875-A-Z

STATE OF FLORIDA,

Appellee.
_____/

DATE: January 20, 2023

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Rehearing, filed December 21, 2022 (mailbox date), is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Sandra B. Williams

SANDRA B. WILLIAMS, CLERK

Panel: Judges Evander, Wallis and Harris

cc:

Allison L. Morris

Office of the Attorney General

Robert W. Gillman

APPENDIX B

December 6, 2022 Fifth District Court of Appeal ("DCA") order Per curium Affirming Trial Courts May 12, 2022 order denying Motion for post conviction relief

And

Mandate of February 13, 2023

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ROBERT W. GILLMAN,

Appellant,

v.

Case No. 5D22-1389
LT Case No. 1996-CF-3875-A-Z

STATE OF FLORIDA,

Appellee.

_____/

Decision filed December 6, 2022

3.850 Appeal from the Circuit Court for Marion County, Anthony M. Tatti, Judge.

Robert W. Gillman, Bushnell, pro se.

Ashley Moody, Attorney General, Tallahassee, and Allison L. Morris, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

EVANDER, WALLIS and HARRIS, JJ., concur.

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL OR BY PETITION, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION OR DECISION;

YOU ARE HEREBY COMMANDED THAT FURTHER PROCEEDINGS AS MAY BE REQUIRED BE HAD IN SAID CAUSE IN ACCORDANCE WITH THE RULING OF THIS COURT AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE BRIAN D. LAMBERT, CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT, AND THE SEAL OF THE SAID COURT AT DAYTONA BEACH, FLORIDA ON THIS DAY.

DATE: February 13, 2023
FIFTH DCA CASE NO.: 5D 22-1389
CASE STYLE: ROBERT W. GILLMAN v. STATE OF FLORIDA
COUNTY OF ORIGIN: Marion
TRIAL COURT CASE NO.: 1996-CF-3875-A-Z

I hereby certify that the foregoing is
(a true copy of) the original Court mandate.

Sandra B. Williams

SANDRA B. WILLIAMS, CLERK

Mandate and Opinion to: Clerk Marion
cc: (without attached opinion)

Allison L. Morris | Office of the Attorney General | Robert W. Gillman

APPENDIX C

FIFTH DISTRICT COURT OF APPEAL November 30, 2022 order granting Motion to Enlarge Page Limits and denying Motion to Correct and Supplement Record Filed August 26, 2022, Motion to Correct and Supplement Record filed October 27, 2022 and Motion to Correct and Supplement Record filed November 3, 2022

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ROBERT W. GILLMAN,

Appellant,

v.

CASE NO. 5D22-1389
LT CASE NO. 1996-CF-3875-A-Z

STATE OF FLORIDA,

Appellee.

_____/

DATE: November 30, 2022

BY ORDER OF THE COURT:

ORDERED that Appellant's "Motion to Enlarge Page Limits of Brief," filed July 14, 2022 (mailbox date), is granted and Appellant's Initial Brief is accepted. It is further

ORDERED that Appellant's "Motion to Correct and Supplement Record," filed August 26, 2022 (mailbox date), "Notice to the Court via Motion to Correct and Supplement Record," filed October 27, 2022 (mailbox date), and "Motion to Correct and Supplement Record," filed November 3, 2022 (mailbox date), are denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Sandra B. Williams

SANDRA B. WILLIAMS, CLERK

Panel: Judges Evander, Wallis and Harris

cc:
Allison L. Morris
Office of the Attorney General
Robert W. Gillman

APPENDIX D

September 27, 2022 Fifth District Court of Appeal order granting in part Motion To Correct and Supplement Record filed July 28, 2022

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ROBERT W. GILLMAN,
Appellant,

v.

CASE NO. 5D22-1389
LT CASE NO. 1996-CF-3875-A-Z

STATE OF FLORIDA,
Appellee.
_____/

DATE: September 27, 2022

BY ORDER OF THE COURT:

ORDERED that Appellant's "Motion to Correct and Supplement Record," filed July 28, 2022 (mailbox date), is granted in part. Pursuant to Florida Rule of Appellate Procedure 9.141(b)(2)(A), it is

ORDERED that the clerk of the lower court shall transmit a Supplemental Record on Appeal containing Appellant's underlying Motion for Postconviction Relief, filed on or about February 7, 2022 [Docket #1368], and any attachments thereto, to this Court on or before **October 13, 2022.**

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Sandra B. Williams

SANDRA B. WILLIAMS, CLERK

Panel: Judges Evander, Wallis and Harris

cc:
Allison L. Morris
Clerk Marion

Office of the Attorney General

Robert W. Gillman

APPENDIX E

May 31, 2022 Fifth Judicial Circuit Court
order denying Motion For Rehearing

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA

vs. CASE NO.: 42-1996-CF-3875-A-Z

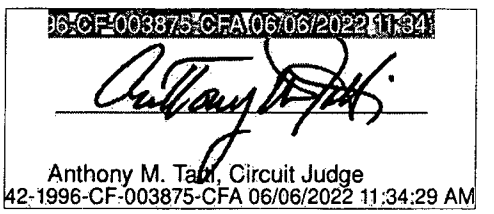
ROBERT W. GILLMAN,
Defendant.
_____/

ORDER DENYING DEFENDANT'S PRO SE MOTION FOR REHEARING

THIS CAUSE having come before the Court on the Defendant's Pro Se Motion for Rehearing filed on May 31, 2022 and the Court having reviewed the file and being otherwise fully advised in the premises, it is therefore

ORDERED and ADJUDGED that Defendant's Pro Se Motion for Rehearing is hereby Denied.

DONE AND ORDERED in Chambers this Monday, June 6, 2022, at Ocala, Marion County, Florida.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail and/or E-Mail delivery this Monday, June 6, 2022 to:

Office of the State of Florida
eservicemarion@sao5.org

Robert W. Gillman DC#U16057
Sumter Correctional Institution
9544 CR 476B
Bushnell, FL 33513

APPENDIX F

May 12, 2022 Fifth Judicial Circuit Court order denying Motion For Post-Conviction Conviction Relief

MAY 12, 2022

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA,

v. CASE NO.: 1996-CF-3875

ROBERT W. GILLMAN,
Defendant.
_____/

ORDER GRANTING STATE'S MOTION TO STRIKE OR DENY WITH PREJUDICE DEFENDANT'S SUCCESSIVE MOTIVE FOR POSTCONVICTION RELIEF
AND
ORDER DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE is before the Court on the Defendant's "Post-Conviction Conviction (sic) Motion for New Trial," provided for filing on February 2, 2022. On April 13, 2022, the State filed its Motion to Strike or Deny with Prejudice Defendant's Successive Motion for Postconviction Relief, requesting the Court find Defendant's Motion untimely and successive. On April 28, 2022, the Defendant provided for filing his reply to the State's motion. The Court, having considered said Motions and reply, the court file, and being fully advised in the premises, finds as follows:

1. The Defendant was charged, by indictment, with murder in the first degree (Count I), murder in the second degree (Count II), burglary while armed (Count III), and armed extortion (Count IV). The Defendant proceeded to trial and, on October 11, 2002, a jury found the Defendant guilty on all counts. Upon motion by the State, the Court acquitted the Defendant on Count IV. On April 11, 2003, the Court sentenced the Defendant to life in prison on Count I and 20 years in prison on the remaining counts, to be served consecutively to Count I. The Defendant appealed and the Fifth District Court of Appeal *per curiam* affirmed the Defendant's judgment and sentence. *Gillman v. State*, 875 So. 2d 1250 (Fla. 5th DCA 2004).

2. On July 1, 2005, the Defendant filed a motion to correct illegal sentence. On July 13, 2005, the Court denied the Defendant's motion. The Defendant appealed and the Fifth District

Court of Appeal *per curiam* affirmed the Court's denial. *Gillman v. State*, 918 So. 2d 981 (Fla. 5th DCA 2005).

3. The Defendant then filed a motion for post-conviction relief. The Defendant raised several claims of ineffective assistance of counsel and trial court error. On March 9, 2009, after an evidentiary hearing was held, the Court denied the Defendant's Motion. *See attached Order Denying Defendant's Motion for Post Conviction Relief.* The Defendant appealed and the Fifth District Court of Appeal *per curiam* affirmed the Court's denial. *Gillman v. State*, 38 So. 3d 153 (Fla. 5th DCA 2010).

4. In the instant Motion, the Defendant moves this Court to grant him a new trial pursuant to Fla. R. Crim. P. 3.600. However, a motion for new trial must be filed within ten days after rendition of the verdict. Fla. R. Crim. P. 3.590(1). As the verdict was rendered in 2002, the instant Motion is untimely.

5. This Motion is also untimely as a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850. Fla. R. Crim. P. 3.850(b) provides that a motion pursuant to this rule must be filed no more than two years after the judgment and sentence becomes final. The judgment and sentence becomes final and the clock starts running on the date of the mandate. *Beaty v. State*, 701 So. 2d 856 (Fla. 1997).

6. Here, the Defendant's judgment and sentence became final on June 28, 2004, the date the mandate was issued. *See Gillman v. State*, 875 So. 2d 1250 (Fla. 5th DCA 2004). The two-year time limitation period expired on June 28, 2006. The instant Motion was filed on February 2, 2022. Because more than two years has elapsed from the date the Defendant's judgment and sentence became final, the Defendant's Motion is untimely and procedurally barred.

7. Additionally, the Defendant's Motion is successive. A second or successive motion for post-conviction relief is an extraordinary pleading. Fla. R. Crim. P. 3.850(h)(2). Accordingly,

a court may dismiss a second or successive motion if the court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the defendant or attorney to assert those grounds in a prior motion constitutes an abuse of the procedure or there is no good cause for the failure of the defendant or defendant's counsel to have asserted those grounds in a prior motion. *Id.*

8. As discussed above, the Defendant previously filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, which was denied by the Court, on the merits, in 2009. *See attached Order Denying Defendant's Motion for Post Conviction Relief.* In the instant Motion, the Defendant raises two of the same issues the Defendant previously raised in his first motion. *Id.* The Court finds that the instant Motion is successive and an abuse of the procedure.

9. In his reply, the Defendant claims this Court should not deny the Defendant's Motion as untimely or successive because *State v. Burton*, 314 So. 2d 136 (Fla. 1975), which allows a court to set aside an order that is the product of fraud, deceit, or material mistake of fact, applies. However, "[m]otions to set aside orders denying prior motions to vacate a sentence under Rule 3.850 cannot be used to circumvent the limitations on successive motions set forth in the rule." *Garland v. State*, 141 So. 3d 255 (Fla. 4th DCA 2014) (quoting *Booker v. State*, 503 So. 2d 888, 889 (Fla. 1987)).

Based on the foregoing, it is,

ORDERED AND ADJUDGED:

1. The State's Motion to Strike or Deny with Prejudice Defendant's Successive Motion for Postconviction Relief is **GRANTED.**

2. The Defendant's *pro se* "Post-Conviction Conviction (sic) Motion for New Trial," is **DENIED.**

3. The Defendant may appeal this decision, in the manner permitted under Florida law, within thirty (30) days of rendition of this Order.

ORDERED this 12 day of May 2022, at Ocala, Florida.

ANTHONY M. TAETI
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been provided by US Mail/e-mail this 12 day of May 2022, to the following:

Office of the State Attorney
eservicemarion@sao5.org

Robert W. Gillman, DC# U16057
Sumter Correctional Institution
9544 County Road 476B
Bushnell, Florida 33513-0667

Judicial Assistant

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA
CASE NO.: 96-3875-CF-AZ

STATE OF FLORIDA

vs.

ROBERT WAYNE GILLMAN,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POST CONVICTION RELIEF

THIS COURT having considered Defendant's Motion for Post Conviction Relief, having reviewed the records of this case and all documents pertinent to Defendant's Motion, and having considered the arguments made by counsel at the evidentiary hearings held on September 17, 2008 and February 5, 2009, makes the following findings:

PROCEDURAL BACKGROUND

1. Defendant was charged by Indictment with first degree murder, second degree murder, armed burglary and armed extortion on January 14, 1997 for an incident that occurred on December 21, 1996. Following a jury trial on October 11, 2002, Defendant was convicted on all counts. Upon motion of the State, Defendant was acquitted of the armed extortion count. On April 11, 2003, Defendant was sentenced to life imprisonment followed by twenty year concurrent sentences on the remaining counts.

2. Defendant appealed his conviction and sentence which was per curiam affirmed by the Fifth DCA on April 20, 2004. A Mandate was issued on June 28, 2004.

3. Defendant filed a Motion to Correct Illegal Sentence on July 1, 2005, which was denied on July 13, 2005. Defendant appealed that decision which was denied.

4. Defendant, through counsel, filed this Motion for Post Conviction Relief asserting six claims of ineffective assistance of counsel (claims numbered 1, 2, 4, 5, 7, and 8), one claim of trial court error (claim numbered 3) and one claim of cumulative error (claim numbered 9). Claim 6 was withdrawn.

5. The Defendant and the State submitted their arguments regarding the above claims in evidentiary hearings held on September 17, 2008 and on February 5, 2009.

STANDARD OF REVIEW

The Supreme Court of Florida has reiterated the standard we apply to claims of ineffective assistance of counsel:

> A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986) (citing *Strickland v. Washington*, 466 U.S. 668 (1984); *Downs v. State*, 453 So.2d 1102, 1108-09 (Fla.1984)).

In reviewing counsel's conduct, "[a] fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." *Francis v. State*, 529 So.2d 670, 672 n. 4 (Fla. 1988) (quoting *Strickland*, 466 U.S. at 689). Strategic choices made after a thorough investigation of the law and facts relevant to plausible options are virtually

unchallengeable. *Strickland*, 466 U.S. at 690. Additionally, in *Downs v. State*, 453 So.2d 1102, 1108 (Fla. 1984), the Court explained "that counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment." Furthermore, "[a] defendant is not entitled to perfect error-free counsel, only to reasonably effective counsel." *Waterhouse v. State*, 522 So.2d 341, 343 (Fla. 1988). . The defendant alone carries the burden to overcome the presumption of effective assistance." *State v. Duncan*, 894 So.2d 817, 823 (Fla. 2004).

Additionally, claims which were or could have been raised on direct appeal are procedurally barred in a motion for postconviction relief. *Schwab v. State*, 814 So.2d 402 (Fla. 2002)

ANALYSIS OF DEFENDANT'S CLAIMS

1. In claim #1, Defendant claims counsel failed to raise Defendant's alleged incompetency in a timely manner to the trial court, failed to investigate the issue properly, and failed to secure a timely evaluation of Defendant prior to trial.

The Court notes and the Defendant mentions in his motion that counsel did file a Motion to Determine Competency on the eve of trial which was denied. In addition, Defendant was examined prior to sentencing in 2003 by two different doctors that found Defendant competent. The legal standard for competency for trial and competency for sentencing are the same. Fla. R. Crim. P. 3.210. Defendant's claim is purely speculative and fails to show that counsel was deficient. Accordingly, this claim is without merit as a matter of law.

2. In claim #2, Defendant claims his counsel labored under a conflict of interest at the time of the trial since Defendant's counsel's partner previously represented a State

witness in matters arising out of the same incident in which Defendant was tried. Defendant asserts that under Rule 4-1.9(a) and Rule 1-1.10(a) and (b), Rules Regulating the Florida Bar, Defendant's counsel's partner's representation of the State witness is imputed to Defendant's counsel. Defendant argues this conflict adversely affected Defendant's representation and reversal is required.

In this case, Ms. Jenkins, as a public defender, represented Ralph E. Troisi ('Troisi") in a case that arose out of the same incident of Defendant's case. Ms. Jenkins' representation of Troisi ended around 1998. Deposition of Patricia Jenkins, 25:19-26:11. Subsequently, Ms. Jenkins testified on Troisi's behalf at a bond hearing on unrelated cases in the year 2000. Deposition of Patricia Jenkins, 28:20-31:8. In March, 2001, Ms. Jenkins joined Huntley Johnson's firm, whom represented Defendant from the outset of this case in 1996. Ms. Jenkins was screened from any participation in this case. Deposition of Huntley Johnson, 25:13-20.

Imputation of Ms. Jenkins' representation of Troisi to Defendant's counsel is inappropriate in this case. Ms. Jenkins was a public defender at the time she represented Troisi, hence, she was a government lawyer under Rule 4-1.10(e). There is no precedent for imputation of a public defender's representation of a client to a law firm she later joins. Rule 4-1.9(a) and Rule 1-1.10(a) and (b), Rules Regulating the Florida Bar are inapplicable to this case. Accordingly, Defendant's claim that Ms. Jenkins' representation of Troisi is imputed to counsel's representation of Defendant is misplaced and without merit as a matter of law.

Defendant has failed to show that an actual conflict existed in this case. A conflict of interest occurs when counsel has a divided loyalty between two clients such

that a course of action beneficial to one would be damaging to the other. *Robinson v. State*, 750 So.2d 58 (Fla. 2nd DCA 1999) (citations omitted). In this case, Troisi was never a client of Defendant's counsel (Huntley Johnson), hence counsel had no loyalty to Troisi, nor did he possess any privileged communications that needed protection.

Additionally, in order to establish an ineffectiveness claim premised on an alleged conflict of interest, the defendant must establish that an actual conflict of interest existed that adversely affected his lawyer's performance. A lawyer suffers from an actual conflict of interest when he or she actively represents conflicting interests. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised. A possible, speculative or merely hypothetical conflict is insufficient to impugn a criminal conviction. Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. If a defendant successfully demonstrates the existence of an actual conflict, the defendant must also show that this conflict had an adverse effect upon his lawyer's representation. *Sliney v. State*, 944 So.2d 270 (Fla. 2006) (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)). In this claim, Defendant has failed to show or provide specific evidence that an actual conflict of interest existed or that counsel's performance was affected by such alleged conflict. Accordingly, this claim is without merit as a matter of law.

3. In claim #3, Defendant claims the trial court failed to inquire regarding the alleged conflict of interest.

The Court conducted a hearing on this issue a few days before trial, on October 4, 2002, and concluded that no actual conflict of interest existed unless Ms. Jenkins was to

be called as a State's witness. The Court found that if any conflict existed, it was with the State and not with the Defendant. See Hearing on Motion for Continuance, 3-27. Accordingly, this claim is without merit as a matter of law.

4. In claim #4, Defendant asserts Troisi would have been excluded as a witness for incompetency to testify and that counsel was ineffective for failing to properly and timely investigate and assert the incompetency of State witness Ralph Troisi. Defendant maintains that counsel failed to obtain medical records regarding Troisi's competency or to move to have Troisi examined for competency by a medical professional. Defendant also asserts that Ms. Jenkins was ineffective for not offering additional public information regarding Troisi's condition as required by Rule 4-1.9(b) and Rule 4-1.4(b).

At the evidentiary hearing on February 5, 2009, Defendant produced cumulative evidence of Troisi's drug use and 100% disability from PTSD. This information was already elicited by counsel through cross examination at the trial. Trial transcripts, jury trial, 841-847. Defendant did not proffer any evidence to indicate that Troisi was incompetent at the time of the trial. Trial transcripts indicate that Troisi was competent to be a witness. He testified clearly regarding his status as a State prisoner, prior drug user and his involvement in the events surrounding this case. Trial transcripts, jury trial, 803-888. Accordingly, this claim is conclusively refuted by the record. As to the allegations made against Ms. Jenkins, Ms. Jenkins was not Defendant's counsel, she was screened from Defendant's representation, and Rule 4-1.9(b) and Rule 4-1.4(b) are inapplicable to this case. Accordingly, this claim is without merit as a matter of law.

5. In claim #5, Defendant claims counsel was ineffective for failing to object to and affirmatively presenting inadmissible hearsay testimony regarding Defendant's unlawful entry into Tomms' residence that formed the basis for all counts of conviction.

This is a conclusory allegation that hearsay statements made at trial were inadmissible and that such statements were the basis for Defendant's conviction. According to the record, there was direct testimony of two different witnesses that Defendant's entrance into Tomms' residence was without invitation. Trial transcripts, Jury trial, 263-264; 821-822. Accordingly, this claim is conclusively refuted by the record and without merit.

6. In claim # 7, Defendant claims counsel was ineffective for failing to object to the jury instruction identifying Ballard as Defendant's accomplice which Defendant claims indicated to the jury that Defendant was an offender in commission of a crime. Defendant maintains the result of this instruction was the Court directing a verdict on the issue of Defendant and Ballard's guilt.

This jury instruction was a correct statement of the law that merely indicated the resulting crime of felony murder *if* the jury found that Defendant was an accomplice (emphasis added). Trial transcripts, jury trial, 1279-1310. Accordingly, this claim is conclusively refuted by the record.

7. In claim #8, Defendant claims counsel was ineffective for failing to object to supplemental jury instructions in response to a question by the jury. The jury instructions dealt with the right of Troisi as a guest in Tomms' residence to invite someone into the residence if that person properly knocks and identifies themselves. Defendant claims the

instruction misled the jury and was erroneous since it improperly shifted to the Defendant the burden of proof of an essential element of the charge of burglary.

At counsel's suggestion, the Court informed the jury that an invitee could give visitors permission to enter Tomms' residence. Trial transcripts, jury trial, 1314. This was a strategic decision by counsel as it expanded the group of people who could authorize entry. The Court did not shift the burden of proof regarding this element as the Court also gave this instruction to the jury without the comment regarding the knocking and identification of visitors. Trial transcripts, jury trial, 1320. Accordingly, this claim is without merit as Defendant has failed to overcome the presumption of effective counsel and such claim is conclusively refuted by the record.

8. In claim 9, Defendant claims cumulative error which is without merit as there was no error above. *Holland v. State*, 916 So.2d 750, 759 (Fla. 2005).

Based upon the foregoing, it is;

ORDERED AND ADJUDGED: Defendant's Motion for Post Conviction Relief is **denied**. The movant has the right to appeal within thirty days of the rendition of this order.

DONE AND ORDERED in Chambers, at Ocala, Marion County, Florida, on this 9th day of March 2009.

William T. Swigert

WILLIAM T. SWIGERT
Senior Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been provided by U.S. Mail this 9 day of March 2009 to the following:

Wm. J. Sheppard, Esquire
215 Washington Street
Jacksonville, Fla. 32202

Assistant State Attorney
19 NW Pine Avenue
Ocala, Fla. 34475

Judicial Assistant

APPENDIX G

February 7, 2022 Fifth Judicial Circuit Court Order to Respond

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA

vs. CASE NO.: 42-1996-CF-3875-A-Z

ROBERT W. GILLMAN,
Defendant.
_____/

ORDER TO RESPOND

This cause came before the court on Defendant's Pro Se "Post-Conviction Conviction Motion for New Trial" filed on February 7, 2022.

ORDERED that the State of Florida shall have sixty (60) days from the date of this order in which to file a response to the Defendant's Pro Se "Post-Conviction Conviction Motion for New Trial".

DONE AND ORDERED in Chambers this 10 day of February 2022, at Ocala, Marion County, Florida.

ANTHONY M. TATTI
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail and/or E-Mail delivery this 10 day of February 2022 to:

Office of the State Attorney
eservicemarion@sao5.org

Robert W. Gillman, DC#U16057
Sumter Correctional Institution
9544 CR 476-B
Bushnell, FL 33513

Judicial Assistant

APPENDIX H

November 4, 2019 U.S. Supreme Court order denying Petition For Writ of Certiorari

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

November 4, 2019

Mr. Robert Wayne Gillman
Prisoner ID #U16057
PO Box 158
Lowell, FL 32663-0158

Re: Robert Wayne Gillman
v. Mark S. Inch, Secretary, Florida Department of Corrections, et al.
No. 19-6081

Dear Mr. Gillman:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

APPENDIX I

June 25, 2019 Eleventh U.S. Circuit Court Order
Denying Petition for Panel Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15247-A

ROBERT WAYNE GILLMAN,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

Before: WILLIAM PRYOR and ROSENBAUM, Circuit Judges.

BY THE COURT:

Robert Wayne Gillman has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated April 24, 2019, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed *in forma pauperis*. Because Gillman 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.

APPENDIX J

April 24, 2019 Eleventh U.S. Circuit Court Order
Denying Motion for Certificate of Appealability ("COA") and
Motion to Proceed In Forma Pauperis ("IFP")

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-15247-A

ROBERT WAYNE GILLMAN,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

ORDER:

Robert Gillman is a Florida prisoner serving a life sentence of imprisonment after a jury convicted him of first-degree murder, second-degree murder, and armed burglary. He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") to appeal the denial of his construed Rule 60(b), Fed. R. Civ. P., motion, in which he argued that his first 28 U.S.C § 2254 habeas corpus petition, which was filed in 2010, was timely. Specifically, he argued that this Court overlooked the fact that he had signed his Fla. R. Crim. P. 3.850 motion a few days before the one-year limitation period expired, but his postconviction counsel failed to timely file his Rule 3.850 motion.

This Court has held that "a [COA] is required for the appeal of any denial of a Rule 60(b) motion for relief from a judgment in a § 2254 or § 2255 proceeding." *Gonzalez v. Sec'y for Dep't*

of Corrs., 366 F.3d 1253, 1263 (11th Cir. 2004) (*en banc*). To merit a COA, a movant 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 appeal of a Rule 60(b) motion is limited to a determination of whether the district court abused its discretion in denying the motion and shall 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). A Rule 60(b) motion permissibly may assert that a federal court's previous habeas ruling that precluded a merits determination (*i.e.*, a procedural ruling such as failure to exhaust, a procedural bar, or a statute-of-limitations bar) was in error. *Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005). To show that the district court abused its discretion in denying a Rule 60(b) motion, the petitioner "must demonstrate a justification so compelling that the district court was required to vacate its order." *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006)

Here, the district court did not abuse its discretion in denying Gillman's Rule 60(b) motion because he merely sought to relitigate the timeliness of his § 2254 petition based on equitable tolling, which had already been resolved against him by the district court and this Court. Moreover, Gillman did not assert any other basis for relief demonstrating that the denial of his motion was unwarranted. *See Cano*, 435 F.3d at 1342. Accordingly, Gillman's motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

APPENDIX K

February 5, 2019 U.S. District Court, Middle District, Ocala Division
Order Denying Motion for Certificate of Appealability ("COA") and
Motion to Proceed In Forma Pauperis ("IFP")

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ROBERT WAYNE GILLMAN,

Petitioner,

v. **Case No: 5:10-cv-380-Oc-10PRL**

SECRETARY, DEPARTMENT OF CORRECTIONS and FLORIDA ATTORNEY GENERAL

Respondents.

_____/

ORDER

By Order dated May 14, 2018, on remand from the Court of Appeals, the Court liberally construed a petition for habeas relief that Petitioner filed in another case to include a motion for relief from judgment in this matter – 5:10-cv-380. After allowing Petitioner the opportunity to file motions memoranda and exhibits, the Court denied the motion. Petitioner has since filed a Notice of Appeal (Doc. 77), Motion for Certificate of Appealability (Doc. 80) and Motion for Leave to Appeal *In Forma Pauperis*. (Doc. 78).

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] To make this showing, Petitioner "must demonstrate that the issues are debatable among jurists of reason" or "that a court could resolve the issues [differently]."[2] In addition, Petitioner could show "the questions

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[1] See Fed.R.Civ. P. 22; see also 28 U.S.C. § 2253.

[2] Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S.Ct. 3383 (1983) (citation omitted).

are adequate to deserve encouragement to proceed further."[3] Specifically, where a district court has rejected a prisoner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.[4]

Here, the Petitioner has not identified in his Motion for Certificate of Appealability the specific issue or issues he intends to argue in the Court of Appeals, nor has he presented any authority suggesting that reasonable jurists would find this Court's ruling to be debatable or wrong. As such, he is not entitled to relief.

Accordingly, the request for a Certificate of Appealability (Doc. 80) is **DENIED** and the Motion for Leave to Proceed on Appeal as a Pauper (Doc. 78) is **DENIED**.

IT IS SO ORDERED.

DONE and **ORDERED** in Ocala, Florida on February 5, 2019.

UNITED STATES DISTRICT JUDGE

[3] Id.

[4] See Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595 (2000); Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.), cert. denied, 531 U.S. 966 (2000).

APPENDIX L

December 6, 2018 U.S. District Court, Middle District, Ocala Division
Order Denying Petition for Panel Rehearing

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ROBERT WAYNE GILLMAN,

Petitioner,

v.

case no. 5:10-cv-380-Oc-10PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

By Order dated June 19, 2013, the Court denied the Petition filed pursuant to 28 U.S.C. § 2254 . (Doc. 33). An amended order was entered and judgment followed. (Doc. 37, 38). By Order dated May 14, 2018, because of a remand, the Court liberally construed a petition for habeas relief that Petitioner filed in 5:16-cv-479 (Doc. 4) to include a motion for relief from judgment. After allowing Petitioner the opportunity to file motions, memoranda and exhibits, the Court denied the motion. (Doc. 74). Pending before the Court is Petitioner's Motion for Reconsideration of the denial of the Motion for Relief from Judgment. (Doc. 75).

Upon due consideration, the motion (Doc. 75) is **DENIED**. The request for relief from judgment was properly denied for the reasons stated in the Court's November 14, 2018. Petitioner has not otherwise demonstrated that he is entitled to relief.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida, this 6th day of December, 2018.

UNITED STATES DISTRICT JUDGE

APPENDIX M

November 14, 2018 U.S. District Court, Middle District, Ocala Division
Order Denying Federal Motion for Relief from Judgment filed under
Fed.R.Civ.P. Rule 60(b)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ROBERT WAYNE GILLMAN,

Petitioner,

v.

case no. 5:10-cv-380-Oc-33PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

Petitioner, a state inmate proceeding *pro se*, filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. By Order dated June 19, 2013, after an evidentiary hearing, the Court denied the Petition as untimely. (Doc. 33). An Amended Order and Judgment were entered. (Doc. 37, 38). Pending before the Court is Petitioner's Motion for Relief from Judgment filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (Doc. 51).[1] The motion is based on Petitioner's argument that the Court should have considered his attorneys' misconduct in determining the issue of equitable tolling. Petitioner has filed a memorandum (Doc. 54) and a number of notices and exhibits in support of the request for relief. (Docs. 56, 57, 58, 62, 64, 65, 66, 69 and 70). For the reasons stated in this Order, Petitioner's Motion is due to be denied.

Procedural History

At the time this matter commenced, the issue before the Court was whether the federal

[1] Although the docket reflects that Petitioner initiated this case through counsel, the Court will consider the *pro se* post-conviction motion given the nature of the procedural history and the arguments relating to counsel's performance.

habeas Petition was timely filed. Petitioner provided the following argument regarding timeliness in his Petition:

> Charles Daniel Akes, Esquire, was hired immediately after the conclusion of my direct appeal to prosecute a motion for post-conviction relief in state court. I specifically and repeatedly directed that he do so within such time as to preserve my ability to comply with the time limitations of 28 U.S.C. 2244. Mr. Akes failed to do so and frustrated my ability to file within that period. When his failure to act timely became apparent, I obtained other counsel, who diligently investigated the grounds for post-conviction relief and filed a motion in state court on June 20, 2006. I also had filed a motion to correct sentencing error on July 8, 2005 (having earlier filed it by placement in institutional mail) and appealed from the denial thereof to the Fifth District Court of Appeal (No. 5D05-269), resulting in affirmance on January 18, 2006.
>
> Mr. Akes' license to practice law has been suspended by the Supreme Court of Florida because of his failure to provide services for other clients of his, including clients for whom he was hired to provide timely and competent services on motions for post-conviction relief.

Respondents filed a response moving to dismiss the Petition as untimely. (Doc. 4). Petitioner, through counsel, filed a reply to the response arguing that equitable tolling should apply because of Mr. Akes' performance. (Doc. 11).

On March 6, 2013, the Court conducted an evidentiary hearing to address whether Petitioner would have timely filed his habeas petition but for his counsel's alleged deficient performance, and whether Petitioner's claim was procedurally defaulted. (Doc. 20).

The parties agreed at the hearing that the Petition was untimely filed outside of the statute of limitations and it was due to be dismissed without the application of equitable tolling. The parties subsequently filed memoranda. By Amended Order dated July 5, 2013, the Court found that Petitioner's counsel, Mr. Akes, did not prevent him from timely filing his Petition. (Doc. 37). Accordingly, the Petition was denied with prejudice as untimely. (Doc. 37).

In 2014, the United States Court of Appeals for the Eleventh Circuit affirmed the decision

finding that this Court correctly concluded that Petitioner was not entitled to equitable tolling because he failed to show a causal connection between Mr. Akes' misconduct and his failure to timely file the federal petition. (Doc. 44). Mandate was issued. (Doc. 47). The United States Supreme Court denied a writ of certiorari. (Doc. 48).

In 2016, Petitioner, proceeding *pro se*, filed another petition pursuant to 28 U.S. C. § 2254 in case number 5:16-cv-479.[2] By Order dated December 16, 2016, the Court dismissed it as successive because Petitioner had not demonstrated that he had obtained permission from the Eleventh Circuit Court of Appeals to file a second or successive petition. The Court then denied Petitioner's Motion for Reconsideration.

The docket in 5:16-cv-479 reflects that the Court of Appeals affirmed in part, vacated in part and remanded that case to this Court. Specifically, the Court of Appeals agreed that "Gillman's § 2254 petition, if construed as such, was second or successive and that he was required to obtain authorization from [the Court of Appeals] before filing it in the district court, which he did not do." Id. However, the order also provided that Petitioner "contends that the district court failed to consider his request to construe his petition, insofar as it pertained to equitable tolling based on the conduct of his lawyers who replaced Akes, as a motion for relief under Federal Rule of Civil Procedure 60(b)(6) from the judgment dismissing his initial § 2254 petition." The Court of Appeals held a remand was warranted because it could not discern from the record whether this Court considered Petitioner's tolling argument under Fed.R.Civ.P. 60(b)(6) or, if so, on what grounds it may have rejected the argument. The order provided that "we remand for the district court to decide whether to entertain Gillman's pleading as a Rule 60(b)(6) motion and, if so, whether relief

[2] The petition was filed on the standard habeas form.

is warranted." Id.

By Order dated May 14, 2018, because of the remand, the Court liberally construed the petition filed in 5:16-cv-479 (Doc. 4) to include a motion filed pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. In light of the fact that Petitioner is seeking relief from judgment with respect to the initial ruling, the Court found that the motion was more properly docketed in the instant case - 5:10-cv-380.

Rule 60(b) Motion

In the Petition filed in 5:16-cv-479, Petitioner raised seven grounds for relief.[3] Again, these claims were deemed successive, but Petitioner provides an additional argument under the habeas form's section on timeliness, which is the basis for the request for relief from judgment under Rule 60(b). Now, Petitioner switches focus from Mr. Akes' performance to William Sheppard and Bryan DeMaggio's alleged misconduct. William Sheppard and Bryan DeMaggio represented Petitioner at the evidentiary hearing.[4]

The background and facts that were before the Court at that hearing are thoroughly discussed in the July 5, 2013 Order denying the Petition. Id. In relevant part, Petitioner hired Mr. Akes in 2004 to handle his 3.850 post-conviction motion. The evidence at the hearing showed that

[3] The seven grounds for relief were: (1) ineffective assistance of counsel due to the conflict of interest of trial counsel's partner, Tricia Jenkins, esquire; (2) the trial counsel failed to inquire regarding conflict of interest; (3) ineffective assistance of counsel for failing to properly and timely investigate and assert the incompetency of state witness Ralph Troisi; (4) ineffective assistance of counsel for failing to object to jury instructions identifying Gallard as Gillman's accomplice; (5) ineffective assistance of counsel for failing to object to supplemental jury instruction in response to question by the jury; (6) ineffective assistance of counsel for failing to object to and affirmatively present inadmissible hearsay testimony relating to the entry into Town's residence; and (7) ineffective assistance of counsel for failing to properly and timely assert Defendant's competency to stand trial. (Doc. 51).

[4] The record reflects that Mr. Sheppard filed the original petition in the instant case on Petitioner's behalf. (Doc. 1).

Petitioner and his family and friends made several attempts to communicate with the attorney and his staff regarding the status of his motion. Clearly dissatisfied with the response, or lack thereof, Petitioner eventually requested that Mr. Akes return his transcripts, and in August 2015, he filed a complaint with the Florida Bar. Petitioner testified at the evidentiary hearing that after the Florida Bar made its November 17, 2005 ruling that there was no cause regarding the complaint, he knew that his relationship with Mr. Akes' had ended and he decided to look for another attorney.

Because the only question before the Court was Mr. Akes' performance, the Court based its decision regarding the application of equitable tolling solely on Petitioner's interactions with that attorney. Notably, Petitioner argued that Mr. Akes' failure to return his transcripts prohibited him from filing his 3.850 motion. In order to make that determination, the Court considered testimony regarding Petitioner's subsequent relationships with other attorneys and their ability to file the motion with the transcripts.

After Petitioner deemed Mr. Akes' representation to be terminated, he hired another attorney, Stephanie Mack, through his sister to handle the matter. Time still remained under the statute of limitations to file his 3.850 motion. However, Petitioner testified that Ms. Mack disclosed that a conflict of interest existed. Petitioner stated that he refused to sign a waiver with respect to the conflict of interest and discharged Ms. Mack in March 2005. But, Petitioner's deadline to file the 3.850 motion was April 17, 2005, so that time still remained to do so.

Instead of filing the motion *pro se*, Petitioner hired William Sheppard and Bryan DeMaggio to pursue the matter. Petitioner signed the motion on April 12, 2006, which included citations to the trial transcripts. It was untimely filed on June 20, 2006.

In the July 5, 2013 Order, the Court found that even if Mr. Akes improperly failed to return

the transcripts, Petitioner still had months to pursue his claims, obtain transcripts, and Mr. Akes did not prevent Petitioner from complying with the statute of limitations.

Having failed at his equitable tolling argument based on Mr. Akes' performance, Petitioner contends in the instant motion, 3 years later, that he is entitled to relief from judgment because Mr. Sheppard and Mr. DeMaggio were the reason he did not comply with the statute of limitations. (Doc. 51). Petitioner states that he transmitted his 3.850 motion on April 12, 2006, 5 days before the deadline, but due to Mr. Sheppard and Mr. DeMaggio's ignorance, inadvertence and deliberate acts, it was untimely filed. Petitioner claims that the attorneys' failure to timely file the motion has deprived him of the opportunity to present his factual innocence claims.[5] Petitioner argues that this Court erred in only considering Mr. Akes' actions in conducting the equitable tolling analysis and he should be allowed to proceed. Specifically, Petitioner states that the Court failed to consider that Petitioner's 3.850 was signed, notarized and mailed to Mr. Sheppard and Mr. DeMaggio 5 days prior to the expiration of the statute of limitations.[6]

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[5] Petitioner refers to two grounds for relief he raised in his initial habeas petition: (1) ineffective assistance due to conflict of interest of trial counsel; and (2) ineffective assistance for failing to investigate the competency of the State's most critical witness, Ralph Troisi. A review of PACER reflects that Petitioner filed an application to submit a successive petition, which was denied. See In re Robert Gillman, docket number 15-14723. Petitioner argued that trial counsel's conflict of interest deprived him of the exculpatory evidence of Troisi's incompetency to testify and that Jenkins, trial counsel's law partner, the state and the trial court perpetrated a fraud on the jury by falsely representing Troisi as competent to testify and concealing evidence of incompetency. The Eleventh Circuit Court of Appeals found that the claims did not merit authorization to proceed. The order provides that the evidence that Petitioner relied upon could have been discovered following a reasonable investigation before is original 2254 proceedings ended, as he contended in his original 2254 petition that Troisi's incompetency had been concealed from him. Further, the order states that any evidence of Troisi's incompetency as a star witness or the concealment of such evidence relates to the sufficiency of trial evidence against Petitioner, but does not demonstrate, by clear and convincing evidence, that he is actually innocent of his offenses.

[6] The mailbox rule does not apply to prisoners with counsel. See United States v. Camilo, 2017 U.S. App. LEXIS 6747, *4 (11th Cir. 2017).

For the first time in his memorandum, Petitioner also claims that Ms. Mack caused the late filing because of her conflict of interest. (Doc. 54). Petitioner states that while this Court acknowledged Ms. Mack's conflict of interest, it did not discuss or factor it into its equitable tolling analysis. Petitioner claims that he "cannot be charged with the time spent while Mack was retained, but not representing his interests." Id. Petitioner states that the attorney failed to act as his representative and he is entitled to equitable tolling "during that time." Id.

Petitioner then argues that he was prejudiced by counsels' conflicts of interest dating back to 1997 making reference to an "agency breach" throughout the memorandum. Id. Petitioner complains about his counsels' performance at trial and counsels' alleged conflicts during his appeals and habeas proceedings. Petitioner claims that his trial counsel introduced inadmissible hearsay evidence later relied upon during the State's closing arguments to prove the burglary charge making the attorney an agent of the state; trial counsel continuously interfered with other attorneys for Petitioner throughout his state appeal and habeas proceedings; Mr. Troisi's mental health records were withheld through trial counsel's "agency breach;" and there is no reasonable explanation for the late filing of his 2254 petition other than Mr. Sheppard's self-interest, divided loyalties, dishonesty and bad faith.[7] Id.

Moreover, Petitioner contends that this Court erred in not construing his habeas petition as a motion under Rule 60(b) and the Court can reopen the case. Id. It appears that Petitioner adds that he is entitled to proceed with his claims through equitable tolling because he is factually innocent. In sum, Petitioner maintains that he is entitled to equitable tolling because his attorneys "abandoned him or labored under a conflict of interest and Gillman had his state post-conviction

[7] Petitioner states that "Johnson Vipperman and Jenkins are an associate/sister law firm of Sheppard, White, Thomas, Kachergus and DeMaggio." (Doc. 54).

motion signed, notarized, and turned over to prison officials prior to the expiration of AEDPA's limitations period." Id.

The Court is not persuaded that Petitioner is entitled to relief from the final judgment. Rule 60(b) of the Federal Rules of Civil Procedure permits a court to relieve a party from a judgment, order, or proceeding in a limited number of circumstances including: (1) mistake or neglect; (2) newly discovered evidence; (3) fraud; (4) when a judgment is void; or (5) when a judgment has been satisfied. The rule also provides a catchall provision authorizing relief based on "any other reason that justifies relief."

First, Petitioner's motion for relief from judgment is fatally flawed for the same reason his initial petition was denied. It is untimely. A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of judgment or order or the date of the proceeding. Fed.R.Civ.P. 60(c). Petitioner does not specify which reason he relies upon in filing his motion. If Petitioner relies on reasons (1), (2) or (3), then he is certainly out of time. The Court entered its judgment in this case on July 8, 2013. Petitioner did not file his successive petition, which apparently included the request for relief from judgment, until July 18, 2016.

Assuming arguendo that Petitioner brings his request pursuant to Rule 60(b)(4)(5) or (6), he still did not file the motion within a reasonable time. "A determination of what constitutes a reasonable time depends on the facts in an individual case, and in making the determination, courts should consider whether the movant had a good reason for the delay in filing and whether the non-movant would be prejudiced by the delay." Ramsey v. Walker, 2008 U.S. App. LEXIS 26286 (11th Cir. 2008) (citing Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930 (5th Cir. 1976)).

Petitioner filed his motion more than 3 years after judgment was entered. There is nothing in the record to reflect that Petitioner could not have raised his arguments to the Court at an earlier time. This is especially true since the crux of Petitioner's argument is that this Court erred when it did not consider at the March 2013 evidentiary hearing Mr. Sheppard, Mr. DeMaggio's and Ms. Mack's failure to file his 3.850 motion. In all of Petitioner's filings, the Court cannot identify a reason for the 3 year delay.

Second, even if the motion was timely filed, it is without merit. As stated, Petitioner does not specify which reason for relief upon which he relies under Rule 60(b). There is no allegation that opposing counsel engaged in misconduct, or that the judgment is void or satisfied. Accordingly, reasons (3)(4) or (5) are eliminated. To the extent that Petitioner relies on Rule 60(b)(1), the record refutes any claim of mistake or excusable neglect. The original petition filed in the instant case, along with the reply to the response, the arguments raised during the evidentiary hearing and the subsequent briefing all focused on Mr. Akes' performance and how it allegedly hindered him from pursuing his 3.850 motion.

The Court recognizes that Mr. Sheppard filed the initial 2254 petition in this case and represented him at the evidentiary hearing, but it was Petitioner's choice to hire this attorney. In other words, it was Petitioner's decision to proceed with his case through Mr. Sheppard and limit his equitable tolling argument to his previous attorney's conduct. It is clear from the record that Petitioner knew all of the facts, including Mr. Sheppard and Mr. DeMaggio's failure to timely file the 3.850 motion, but did not make this argument to the Court when it was time to do so. Accordingly, there is nothing to show mistake, inadvertence, surprise or excusable neglect.

For the same reason, Petitioner is not entitled to relief under Rule 60(b)(2). Petitioner could have and should have raised all of his arguments when the case was initially considered and there

is no adequate showing of newly discovered evidence to support relief.[8] The Court did not err in failing to consider claims that were known, but not presented.

It would appear that the crux of Petitioner's argument is that the Court should find another reason to justify relief pursuant to Rule 60(b)(6). The Court is not inclined to do so. While Petitioner may argue that all of these attorneys were working against him and had their own interests at heart throughout the trial and post-conviction proceedings, there was nothing to prohibit Petitioner from making these "conflict of interest" and "agency breach" claims in support of equitable tolling when the Court considered the timeliness of the petition.

Moreover, the Court is not persuaded that Petitioner's factual innocence or miscarriage of justice arguments entitle him to relief under Rule 60(b)(6) or any other subsection of that rule. Petitioner's claim of innocence is insufficient to reopen the judgment. Assuming that actual innocence is an extraordinary circumstance warranting relief from judgment, Petitioner has presented nothing that persuades the Court that he can proceed with his claims. The "supplemental authority" does not entitle him to relief.

Finally, the Court notes that Petitioner refers to Martinez v. Ryan, 132 S.Ct. 1309 (2012) in his memorandum and supplemental authority.[9] (Docs. 54, 56). To the extent that Petitioner relies on this case, the Eleventh Circuit has expressly held that Martinez did not recognize a new rule of constitutional law and thus has no effect on the triggering date for the one year AEDPA

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[8] The docket reflects that Petitioner filed motions to submit "new evidence" and exhibits for the Court's review. See Docs. 53, 62, 64, 65, 69 and 70.

[9] In Martinez, the Supreme Court held that procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of trial counsel if, in the initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

statute of limitations under § 2244(d)(1), nor does Martinez provide a basis for equitable tolling of the limitations period. Lambrix v. Sec'y, Fla. Dep't of Corr., 756 F.3d 1246, 1262-63 (11th Cir. 2014) (citing Chavez v. Sec'y, Fla. Dep't of Corr., 742 F.3d 940 (11th Cir. 2014) (finding that "the equitable rule in Martinez applies only to the issue of cause to excuse the procedural default of an ineffective assistance of trial counsel claim that occurred in a state collateral proceeding and has no application to the operation or tolling of the §2244(d) statute of limitations for filing a § 2254 petition."). Since the issue before the Court was not one of procedural default but timeliness, Martinez provides no basis for tolling the one year period.

Conclusion

Upon due consideration, the petition was properly dismissed as untimely for the reasons stated in the Court's July 5, 2013 Order, which the Court of Appeals affirmed. Petitioner's motion for relief filed pursuant to Fed.R.Civ.P. 60(b) (Doc. 51)is **DENIED.**

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida, this 14th day of November, 2018.

UNITED STATES DISTRICT JUDGE

APPENDIX N

May 14, 2018 U.S. District Court, Middle District, Ocala Division Order Recognizing Case as a filing under Fed.R.Civ.P. Rule 60(b) and Redocketing Case under New Case Number 5:10-cv-380

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ROBERT WAYNE GILLMAN,

Petitioner,

v.

case no. 5:16-cv-479-Oc-10PRL
5:10-cv-380-Oc-33PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents.
_____/

ORDER

Petitioner, a state inmate proceeding *pro se*, filed his initial petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in case number 5:10-cv-380. After conducting an evidentiary hearing regarding the issue of timeliness, the Court denied the petition on July 5, 2013 finding that it was untimely filed. Notably, the Court found that the application of equitable tolling was not appropriate in that case.

In 2016, Petitioner filed another petition pursuant to 28 U.S. C. § 2254 in case number 5:16-cv-479. By Order dated December 16, 2016, the Court dismissed it as successive because Petitioner had not demonstrated that he had obtained permission from the Eleventh Circuit Court of Appeals to file a second or successive petition. The Court subsequently denied Petitioner's Motion for Reconsideration.

The docket in 5:16-cv-479 reflects that the Court of Appeals recently affirmed in part, vacated in part and remanded that case to this Court. Specifically, the Court

of Appeals agreed that "Gillman's § 2254 petition, if construed as such, was second or successive and that he was required to obtain authorization from [the Court of Appeals] before filing it in the district court, which he did not do." Id. Accordingly, the Order affirmed that the petition was successive. Id.

However, the Order provides that Petitioner "contends that the district court failed to consider his request to construe his petition, insofar as it pertained to equitable tolling based on the conduct of his lawyers who replaced Akes, as a motion for relief under Federal Rule of Civil Procedure 60(b)(6) from the judgment dismissing his initial § 2254 petition." The Court of Appeals held a remand was warranted because it could not discern form the record whether this Court considered Petitioner's tolling argument under Fed.R.Civ.P. 60(b)(6) or, if so, on what grounds it may have rejected the argument. The Order provides that "we remand for the district court to decide whether to entertain Gillman's pleading as a Rule 60(b)(6) motion and, if so, whether relief is warranted." Id.

While Petitioner clearly initiated a new case in 5:16-cv-479 by filing a petition for writ of habeas corpus on the Court's standard form, a review of the pleading shows that Petitioner referenced the Court's previous ruling in 5:10-cv-380 in two sections on the form. (5:16-cv-479, Doc. 4, pgs. 15, 16). Petitioner continued to complain that the initial petition was untimely filed due to his attorneys' conduct.

Upon due consideration, and because of the remand, the Court liberally construes the petition filed in 5:16-cv-479 (Doc. 4) to include a motion filed pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. In light of the fact that

Petitioner is seeking relief from judgment with respect to the Court's initial ruling, the motion is more properly docketed in case number 5:10-cv-380. As such, the Clerk is directed to docket the petition as a motion for the Court's consideration in 5:10-cv-380.

While the Court will review Petitioner's argument under Fed.R.Civ.P. 60(b)(6) in a separate order, there has been no ruling on the merits of the motion or any finding as to whether the motion is subject to a procedural default or bar.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida, this 14th day of May, 2018.

UNITED STATES DISTRICT JUDGE

APPENDIX O

March 27, 2018 Eleventh U.S. Circuit Court Order Affirming in Part, Vacating in Part, and Remanding Case Number 5:16-cv-479-WTH-PRL

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-10295
Non-Argument Calendar

D.C. Docket No. 5:16-cv-00479-WTH-PRL

ROBERT WAYNE GILLMAN,

Petitioner - Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents - Appellees.

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

(March 27, 2018)

Before TJOFLAT, JILL PRYOR and NEWSOM, Circuit Judges.

PER CURIAM:

Robert Wayne Gillman, a Florida inmate proceeding *pro se*, appeals the district court's dismissal of his 28 U.S.C. § 2254 petition for a writ of habeas corpus as impermissibly second or successive. After careful review, we affirm in part, vacate in part, and remand for further proceedings.

I.

Gillman filed a § 2254 petition to challenge his 2002 state criminal convictions. He acknowledged that his petition was untimely but argued that his attorney Charles Daniel Akes's abandonment provided grounds for equitable tolling of § 2254's statute of limitations. The district court dismissed Gillman's petition, concluding that he was not entitled to equitable tolling based on Akes's conduct, and we affirmed on that ground alone. *See Gillman v. Sec'y, Fla. Dep't of Corr.*, 576 F. App'x 940 (11th Cir. 2014) (unpublished). Gillman filed an application in this Court for authorization to file a second or successive § 2254 petition to challenge his 2002 convictions, which we denied. *See In re Gillman*, No. 15-14723, Nov. 19, 2015 Order. Gillman then filed the instant § 2254 petition in district court alleging that in dismissing his initial petition as untimely the district court overlooked misconduct by lawyers appointed to represent him after Akes was replaced but before the statute of limitations expired—including lawyers who represented him during his initial § 2254 proceedings in district court and this Court—that would justify equitable tolling. He also advanced substantive claims

of error in his convictions. After the State pointed out that his petition was second or successive, Gillman asked the district court to avoid the bar to second or successive habeas petitions as to his equitable tolling claim by construing his filing as a motion for relief from a final judgment under Federal Rule of Civil Procedure 60(b)(6).

Without addressing Rule 60(b)(6), the district court determined that Gillman's petition was successive and, because it was not authorized by this Court pursuant to 28 U.S.C. § 2244(b)(1), was due to be dismissed. Gillman appealed.[1]

II.

We review *de novo* a district court's conclusion that a § 2254 petition is second or successive such that the petitioner must first seek authorization in this Court to file it. *Stewart v. United States*, 646 F.3d 856, 858 (11th Cir. 2011). Subject to two exceptions, "[a] claim presented in a second or successive habeas corpus application under section 2254 . . . shall be dismissed." 28 U.S.C. § 2244(b)(2). A claim need not be dismissed if:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

[1] Gillman is not required to have a certificate of appealability to pursue his appeal. *See Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004).

> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. Even if one of these exceptions applies, however, a petitioner must first "move in the appropriate court of appeals for an order authorizing the district court to consider the application" before the district court may consider it. *Id.* § 2244(b)(3)(A).

We review for an abuse of discretion the district court's denial of a Rule 60(b) motion. *Jackson v. Crosby*, 437 F.3d 1290, 1295 (11th Cir. 2006). "We will find an abuse of discretion only when a decision is in clear error, the district court applied an incorrect legal standard or followed improper procedures, or when neither the district court's decision nor the record provide[s] sufficient explanation to enable meaningful appellate review." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 678 F.3d 1199, 1201 (11th Cir. 2012).

We must liberally construe Gillman's filings because he is proceeding without counsel. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008).

III.

We agree with the district court that Gillman's § 2254 petition, if construed as such, was second or successive and that he was required to obtain authorization from this Court before filing it in the district court, which he did not do. As the

district court properly concluded, both Gillman's initial and instant § 2254 petitions challenged the same 2002 state court judgment of conviction. His instant petition is therefore successive. *See Magwood v. Patterson*, 561 U.S. 320, 338-39 (2010) (explaining that a § 2254 petition addressing a state court judgment that previously has been challenged via an initial § 2254 petition is successive). Even if Gillman's substantive claims were based on newly discovered evidence such that they would qualify under one of the exceptions to § 2244(b)'s dismissal requirement, the statute required him to seek authorization from this Court before filing the second petition in the district court, and Gillman has not obtained such authorization.

Gillman contends that the district court failed to consider his request to construe his petition, insofar as it pertained to equitable tolling based on the conduct of his lawyers who replaced Akes, as a motion for relief under Federal Rule of Civil Procedure 60(b)(6) from the judgment dismissing his initial § 2254 petition. Because we cannot discern from the record whether the district court considered Gillman's tolling argument under Rule 60(b)(6) or, if so, on what grounds it may have rejected his argument, we cannot meaningfully review its decision and therefore remand. *See Friends of the Everglades*, 678 F.3d at 1201.

Rule 60(b)(6), the catchall provision of Rule 60(b), authorizes relief for "any other reason that justifies relief" from a judgment. Fed. R. Civ. P. 60(b)(6).

"Where a Rule 60(b) motion challenges only a district court's prior ruling that a habeas petition was time-barred, it 'is not the equivalent of a successive habeas petition.'" *Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198, 1210 (11th Cir. 2014) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535-36 (2005)). But "a movant seeking relief under Rule 60(b)(6) [must] show extraordinary circumstances justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (internal quotation marks omitted).

We express no opinion on whether Gillman has shown extraordinary circumstances based on the conduct of his lawyers who replaced Akes that would justify revisiting the equitable tolling question. We note that "[e]ven where the Rule 60(b) motion demonstrates sufficiently extraordinary circumstances, whether to grant the requested relief is a matter for the district court's sound discretion." *Lugo*, 750 F.3d at 1210 (alteration and internal quotation marks omitted). But the district court's silence on the matter renders impossible our task of reviewing its decision. Thus, we remand for the district court to decide whether to entertain Gillman's pleading as a Rule 60(b)(6) motion and, if so, whether relief is warranted.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

APPENDIX P

April 21, 2016 Fifth District Court of Appeal ("DCA") Order Denying Petition for Rehearing, Clarification, and Certified Opinion

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ROBERT W. GILLMAN,

Petitioner,

v. CASE NO. 5D15-4425

STATE OF FLORIDA,

Respondent.
_____/

DATE: April 21, 2016

BY ORDER OF THE COURT:

ORDERED that Petitioner's "Motion for Rehearing, Clarification and Certified Opinion", filed April 4, 2016, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

Authorized By: Judges Orfinger, Torpy, and Cohen

cc:

Office of Attorney General Robert W. Gillman

APPENDIX Q

March 18, 2016 Fifth District Court of Appeal ("DCA")
Order Denying Petition for Writ of Mandamus

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ROBERT W. GILLMAN,

Petitioner,

v. CASE NO. 5D15-4425

STATE OF FLORIDA,

Respondent.
_____/

DATE: March 18, 2016

BY ORDER OF THE COURT:

ORDERED that the Petition for Writ of Mandamus, filed December 21, 2016, is dismissed as moot.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

Authorized by: Judges Orfinger, Torpy, and Cohen

cc:

Office of Attorney General Robert W. Gillman Hon. Anthony Michael Tatti

APPENDIX R

January 27, 2016 Fifth Judicial Circuit Court for Marion County, Florida Order Denying Amended Motion for Disposition and Motion to Produce Documents from Out-of-State Records

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR MARION COUNTY, FLORIDA

ROBERT WAYNE GILLMAN,
Petitioner,

vs. Case No: 2015-1396-CA-G

STATE OF FLORIDA,
Respondent.
_____/

ORDER ON AMENDED MOTION FOR DISPOSITION and MOTION TO PRODUCE DOCUMENTS FROM OUTSTATE RECORDS

THIS CAUSE came before the Court on Petitioner's (1) Amended Motion for Disposition[1], provided for mailing on July 15, 2015[2], and (2) Motion to Produce Documents from the Outstate records, provided for mailing on July 24, 2015. The Court, having considered said motions, reviewed the court file, and being otherwise duly advised in the premises finds the following:

Two outstanding motions have been brought to the attention of the Court in this matter. The first, Petitioner's Amended Motion for Disposition, ultimately seeks a ruling from the Court on the issues raised in Petitioner's Petition for Writ of Mandamus. An order denying Petitioner's Writ of Mandamus was entered on November 23, 2015. Therefore, there is no further action for this Court to take regarding the initial petition.

Petitioner also filed a Motion to Produce Documents from Outstate Records. Petitioner has requested that the Court instruct the Clerk to release documents from the Arizona State Prison system pertaining to another criminal defendant, Ralph E. Troisi. The documents requested in the motion overlap with the documents requested in

[1]Petitioner's Motion for Disposition, provided for mailing on July 1, 2015, will not be addressed by the Court as the argument is superseded by Petitioner's Amended Motion for Disposition.

[2]The caption for Petitioner's Amended Motion for Disposition identified its Case Number as 96-3875-CF-A despite addressing the relief sought by the Petition for Writ of Mandamus in this case. As a result, it was not brought to the attention of this Court until a review of the case file in the criminal matter.

Petitioner's petition for writ of mandamus. Therefore, the Court finds that the motion is duplicative and the merits of Petitioner's request were addressed in the Court's order denying Petitioner's Writ of Mandamus entered on November 23, 2015.

It is therefore **ORDERED and ADJUDGED**:

1) Petitioner's Amended Motion for Disposition is **hereby denied** as moot.

2) Petitioner's Motion to Produce Documents From Outstate Records is **hereby denied** as moot.

IT IS SO ORDERED in chambers, Marion County Judicial Center, Ocala, Florida, on this 21st day of January, 2016.

Edward L. Scott
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished to the following U.S. Mail this 21 day of January, 2016:

Robert Wayne Gillman, DC# U16057
Suwannee Correctional Institution Annex
5964 U.S. Hwy 90
Live Oak, FL 32060

Marion County Clerk of Court
P.O. Box 1030
Ocala, FL 34478

Becky Knipe
Judicial Assistant

APPENDIX S

January 26, 2016 Fifth Judicial Circuit Court for Marion County, Florida
Order Responding to Petition for Writ of Mandamus and Order
Denying Motion for Default

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT

ROBERT W. GILLMAN,

Petitioner,

vs.

DCA CASE NO.: 5D15-4425
CIRCUIT CASE NO.: 1996-CF-3875

STATE OF FLORIDA,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Petitioner filed a Motion to Compel in the Fifth District Court of Appeal on November 23, 2015. In his motion, the Petitioner requests the Fifth District Court of Appeal compel the undersigned to enter an order on the Defendant's Motion for Disposition, provided for filing on July 1, 2015, Amended Motion for Disposition, provided for filing on July 15, 2015, Motion to Produce Out-of-State Records, provided for filing on July 24, 2015, and Motion for Default, provided for filing on August 26, 2015. The Fifth District Court of Appeal ordered the undersigned to respond to the motion on January 25, 2016.

The undersigned has reviewed the Defendant's case file. It appears the Defendant has filed several documents[1] in the above-styled felony case which should have been filed in the Defendant's civil case, case number 2015-CA-1396, in which the Defendant was seeking mandamus relief to compel the Clerk of Court to release certain documents[2]. The undersigned has referred these documents to the Honorable Edward L. Scott, the judge presiding over the Defendant's petition for writ of mandamus, to address.

[1] Specifically, the Defendant incorrectly filed his Motion for Disposition, Amended Motion for Disposition, and Motion to Produce Documents.
[2] The Defendant's petition for writ of mandamus was denied on November 24, 2015 by the Honorable Edward L. Scott.

As to the Defendant's Motion for Default, this Court has reviewed the motion. After considering the motion, the undersigned has entered, contemporaneously with this Response, an order denying the Defendant's motion for default. *See attached Order Denying Defendant's Motion for Default.*

DONE this 26 day of January, 2016, at Ocala, Florida.

ANTHONY M. TATTI
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been provided by US Mail/inter-office mail this 26 day of January, 2016, to the following:

Clerk of the Court
Fifth District Court of Appeal
300 South Beach Street
Daytona Beach, FL 32114

Office of the Attorney General
444 Seabreeze Blvd., Ste. 500
Daytona Beach, FL 32118

Robert W. Gillman, DC# U16057
Suwannee Correctional Institution
5964 U.S. Highway 90
Live Oak, Florida 32060

Office of the State Attorney
(By Inter-office mail)

Judicial Assistant

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

CASE NO.: 1996-CF-3875-A

ROBERT W. GILLMAN,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR DEFAULT

THIS CAUSE is before the Court on the Defendant's *pro se* Motion for Default, filed on August 26, 2015. In his Motion, the Defendant requests the Honorable David B. Eddy, the Administrative Judge for the Fifth Judicial Circuit in and for Marion County, Florida, to instruct the Honorable Edward L. Scott, the judge presiding over the Defendant's petition for writ of mandamus, to grant his petition for writ of mandamus and order the release of certain documents. However, "[a] judge of a paramount court cannot direct a colleague of that court or of an inferior court how to rule upon a matter except through an established writ or appellate process." *Valdez v. Chief Judge of Eleventh Judicial Circuit of Florida*, 640 So. 2d 1164 (Fla. 3d DCA 1994). Therefore, it is,

ORDERED: The Defendant's Motion for Default is **DENIED**.

ORDERED this 26 day of January, 2016, at Ocala, Florida.

ANTHONY M. TATTI
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been provided by US Mail/Inter-Office Mail this 26 day of January, 2016, to the following:

Robert W. Gillman, DC# U16057
Suwannee Correctional Institution
5964 U.S. Highway 90
Live Oak, Florida 32060

Office of the State Attorney
(Inter-Office Mail)

B Vargas
Judicial Assistant

APPENDIX T

November 23, 2015 Fifth Judicial Circuit Court for Marion County, Florida Order Denying Petition for Writ of Mandamus

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN AND FOR MARION COUNTY, FLORIDA

ROBERT WAYNE GILLMAN,
Petitioner,

vs. Case No: 2015-1396-CA-G

STATE OF FLORIDA,
Respondent.
_____/

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

THIS CAUSE came before the Court on Petitioner's Petition for Writ of Mandamus, transferred by the Fifth District Court of Appeal on June 25, 2015. The Court, having considered said Petition, reviewed the court file, and being otherwise duly advised in the premises finds the following:

To state a cause of action for mandamus relief, a petition for writ of mandamus must allege that (1) Respondent had a clear legal duty to perform a ministerial act; (2) Petitioner has a clear legal right to have the duty performed; and (3) Petitioner does not have another legal remedy available. *RHS Corporation v. City of Boynton Beach,* 736 So.2d 1211 (Fla. 4th DCA 1999).

Petitioner alleges that the Marion County Clerk of Court has not released a number of documents he requested: (1) *Nolle Prosequi* in four separate criminal cases, (2) correspondence between a criminal defendant and their attorney, and (3) all court records regarding the competency of a criminal defendant. It appears that the *Nolle Prosequi* documents requested are attached as Exhibit A to the petition. Therefore, the request is moot. Petitioner also requests that correspondence between Ralph Troisi, another criminal defendant, and his attorney be produced. It is ambiguous who this attorney is, other than a vague descriptor as "counsel from Massachusetts", or who what connection "Patricia Jenkins", the individual identified as receiving the letter, has to the Respondent. Therefore, Petitioner has not established that Respondent has a clear legal duty to act.

Finally, Petitioner seeks unrestricted access to the court records of another individual. However, Petitioner has not alleged that it paid the fee required for providing copies of that document. *See Roesch v. State*, 633 So.2d 1 (Fla. 1993). According to the exhibits attached to the Petition, Petitioner has previously had his document requests denied for that very reason. As the Respondent has no clear legal duty to act without Petitioner providing payment for the requested copies, mandamus relief is not appropriate at this time.

It is therefore **ORDERED and ADJUDGED**: Petitioner's petition for writ of mandamus is **hereby denied.**

IT IS SO ORDERED in chambers, Marion County Judicial Center, Ocala, Florida, on this 23rd day of November, 2015.

Edward L. Scott
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished to the following U.S. Mail this 23 day of November, 2015:

Robert Wayne Gillman, DC# U16057
Suwannee Correctional Institution Annex
5964 U.S. Hwy 90
Live Oak, FL 32060

Marion County Clerk of Court
P.O. Box 1030
Ocala, FL 34478

Becky Knipe
Judicial Assistant

APPENDIX U

March 2, 2015 U.S. Supreme Court Order Denying
Petition for Writ of Certiorari

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

March 2, 2015

Ms. Cheryl J. Sturm
387 Ring Road
Chadds Ford, PA 19317

Re: Robert Wayne Gillman
v. Julie L. Jones, Secretary, Florida Department of Corrections, et al.
No. 14-8002

Dear Ms. Sturm:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

APPENDIX V

November 19, 2015 Eleventh U.S. Circuit Court Order Denying Application for Leave to File Second or Successive Habeas Corpus Petition Pursuant to 28 U.S.C. §2244(b)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-14723-C

In re: ROBERT GILLMAN,

Petitioner.

Application for Leave to File a Second or Successive Habeas Corpus Petition, 28 U.S.C. § 2244(b)

Before: TJOFLAT, MARCUS and MARTIN, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Robert Gillman has filed an application seeking an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus. Such authorization may be granted only if:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C). "A claim

presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." *Id.* § 2244(b)(1).

In 2010, Gillman filed his original § 2254 petition, in which he claimed, *inter alia*, that he received ineffective assistance of trial counsel due to a conflict of interest of his counsel's law partner, Tricia Jenkins, arguing that Jenkins—who had represented the State's star witness against Gillman, Ralph Troisi, before joining Gillman's trial counsel's firm—concealed evidence of Troisi's incompetency that she had learned while representing him. The district court denied the petition with prejudice in 2013.

In his current application, Gillman first claims that, due to his trial counsel's conflict of interest, he was deprived of exculpatory evidence of Troisi's incompetency to testify. Second, he claims that Jenkins, the State, and the trial court perpetrated a fraud on the jury by falsely representing Troisi as competent to testify and concealing evidence of his incompetency.

Gillman's claims do not merit authorization to file a second or successive § 2254 petition. First, he cannot obtain authorization to file his conflict of interest claim because he raised it in his first § 2254 petition. *See* 28 U.S.C. § 2244(b)(1); *In re Hill*, 715 F.3d 284, 291-93 (11th Cir. 2013) (concluding that § 2244(b)(1) precludes authorization to file a previously presented claim in a successive § 2254 petition even if the applicant presents new evidence or new legal arguments in support of the claim). Second, neither of Gillman's claims satisfies the requirements of § 2244(b)(2)(B). The evidence Gillman's claims rely upon could have been discovered following a reasonable investigation before his original § 2254 proceedings ended, as he contended in his original § 2254 petition that evidence of Troisi's incompetency had been concealed from him at trial. *See* 28 U.S.C. § 2244(b)(2)(B)(i); *In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997) (holding that the inquiry is "whether a reasonable investigation undertaken

before the initial habeas motion was litigated would have uncovered the facts the applicant alleges are 'newly discovered'"). Moreover, any evidence of Troisi's incompetency as a star witness or the concealment of such evidence relates to the sufficiency of the trial evidence against Gillman, but does not demonstrate, by clear and convincing evidence, that he is actually innocent of his offenses. *See* 28 U.S.C. § 2244(b)(2)(B)(ii); *In re Boshears*, 110 F.3d at 1541 (holding that the applicant must show that the newly discovered evidence established that he was actually innocent of the offense).

Accordingly, because Gillman has failed to make a *prima facie* showing of the existence of either of the grounds set forth in § 2244(b)(2), his application for leave to file a second or successive petition is hereby DENIED.

APPENDIX W

October 7, 2014 Eleventh U.S. Circuit Court Order
Denying Petition for Panel Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13616-FF

ROBERT WAYNE GILLMAN,

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: ED CARNES, Chief Judge, TJOFLAT and JORDAN, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

ORD-41

APPENDIX X

August 14, 2014 Eleventh U.S. Circuit Court Order Affirming
Order of U.S. District Court, Middle District, Ocala Division

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13616
Non-Argument Calendar

D.C. Docket No. 5:10-cv-00380-VMC-PRL

ROBERT WAYNE GILLMAN,

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

(August 14, 2014)

Before ED CARNES, Chief Judge, TJOFLAT and JORDAN, Circuit Judges.

PER CURIAM:

Robert Wayne Gillman, a Florida state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition as untimely. He contends that the district court erred in concluding that he was not entitled to equitable tolling of the one-year statute of limitations provided for under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

I.

Gillman is serving a sentence of life imprisonment after he was convicted in 2003 on charges of first-degree murder, second-degree murder, and armed burglary. On September 7, 2004, the one-year statute of limitations for Gillman to file his § 2254 petition began to run after his convictions became final. To assist him in pursuing post-conviction relief, Gillman hired Charles Daniel Akes to serve as his attorney. Gillman sent Akes materials relevant to his case, including his copy of the trial transcripts, by September 2004.

Akes served as Gillman's lawyer from September 2004 until November 2005. During that time, he failed to file any motions on Gillman's behalf. Gillman sent Akes several letters asking about the status of his case, and Akes responded only once to assure Gillman that he was working on his case. Gillman's friends and family also looked into Akes' diligence, calling his office several times for updates on the progress of Gillman's petition. On the occasions when they called Akes' office, they were either unable to speak with him about the case or received

assurances that he was still working on preparing a state motion for post-conviction relief.

In the spring of 2005, with no updates from Akes forthcoming, Gillman took other steps to ensure that his petition would be timely filed. In March 2005 he sent Akes several letters requesting that he return the copy of the trial transcripts that Gillman had sent to him so he could help prepare his state court motion. Despite those requests, Akes never returned the transcripts to Gillman. Gillman eventually filed a pro se motion for post-conviction relief under Florida Rule of Criminal Procedure 3.800 on July 1, 2005, which tolled the statute of limitations for his § 2254 petition. By that date, 297 days had passed since the federal statute of limitations began running, which meant that he would have 68 more days to file his § 2254 petition once his limitations period began to run again.

In August 2005 Gillman filed a complaint against Akes with the Florida Bar. His complaint was forwarded to the grievance committee, and it was resolved in November 2005 without any formal disciplinary action against Akes.[1] Gillman did not consider Akes to be his lawyer after the disciplinary proceedings had concluded.

[1] After other clients filed complaints with the Florida Bar, Akes was eventually suspended from the practice of law.

While Akes was still Gillman's lawyer, a Florida trial court denied the Rule 3.800 motion that Gillman had filed pro se. On December 13, 2005, Florida's Fifth District Court of Appeal affirmed the denial and its mandate issued on February 6, 2006. At that point, the statute of limitations on Gillman's § 2254 petition began to run again and was set to expire 68 days later on April 15, 2006.[2]

In December 2005 Gillman retained a new attorney, Stephanie Mack, to replace Akes. Mack worked on his case for several months, but in March 2006 she asked Gillman to sign a conflict waiver after informing him that she had previously worked as a staff attorney for Florida's Fifth Judicial Circuit, which was the same circuit in which Gillman was convicted. He refused to sign the waiver.

Shortly thereafter Gillman retained William Sheppard and Bryan DeMaggio to serve as his post-conviction counsel. Those attorneys helped Gillman prepare a state post-conviction motion under Florida Rule of Criminal Procedure 3.850.[3] Gillman signed the verification form on that motion on April 12, 2006 — a few days before the statute of limitations would expire for his § 2254 petition. Although properly filing the Rule 3.850 motion would have again tolled the § 2254 statute of limitations, for some unexplained reason Sheppard and DeMaggio did

---

[2] That date fell on a Saturday, which meant that (without any additional tolling) he would not have to file his petition until the following Monday, April 17, 2006. See Fed. R. Civ. P. 6(a).

[3] Although Gillman alleged that Akes had failed to return his copy of the trial transcripts, it is undisputed that the Rule 3.850 motion included citations to those transcripts. It is unclear whether Sheppard and DeMaggio received Gillman's copy of the trial transcripts from Akes, or whether they obtained new transcript copies on their own.

not file the motion until June 20, 2006.[4] By then the deadline for Gillman to file his § 2254 petition had expired. He eventually filed his federal petition on August 5, 2010. After holding an evidentiary hearing and determining that Gillman was not entitled to equitable tolling of the statute of limitations, the district court dismissed his petition as untimely.

II.

Gillman challenges the district court's determination that he was not entitled to equitable tolling of the § 2254 statute of limitations. He contends that he was entitled to equitable tolling because Akes abandoned him and did not immediately return his copy of the trial transcripts, which he claims he needed to prepare a meaningful § 2254 petition.[5] We review de novo whether Gillman's § 2254 petition was timely filed, as well as whether he was entitled to equitable tolling. Chavez v. Sec'y, Dep't of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011); Hepburn v. Moore, 215 F.3d 1208, 1209 (11th Cir. 2000). The only issue we address is whether Gillman was entitled to equitable tolling because neither side disputes that, without that tolling, his petition would be time-barred.

---

[4] That motion was also denied, and the denial was affirmed on appeal. The mandate was issued on July 21, 2010.

[5] Although Gillman makes several other arguments on appeal, he did not fairly raise them before the district court. Therefore, we will consider only the argument that Gillman raised below. See Nyland v. Moore, 216 F.3d 1264, 1265 (11th Cir. 2000); Smith v. Sec'y, Dep't of Corr., 572 F.3d 1327, 1352 (11th Cir. 2009) (refusing to consider an argument raised on appeal by a habeas petitioner because he had not fairly presented the argument to the district court).

AEDPA imposes a one-year statute of limitations on a state prisoner's § 2254 habeas petition. 28 U.S.C. § 2244(d)(1). The one-year limitations period is subject to equitable tolling, which applies when a petitioner "untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000) (quotation marks omitted). Equitable tolling is an "extraordinary remedy" reserved for "rare and exceptional circumstances." Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th Cir. 2009) (quotation marks omitted). To establish entitlement to equitable tolling, a petitioner must prove "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Holland v. Florida, 560 U.S. 631, 649, 130 S.Ct. 2549, 2562 (2010) (quotation marks omitted). A petitioner must "show a causal connection between the alleged extraordinary circumstances and the late filing of the petition." San Martin v. McNeil, 633 F.3d 1257, 1267 (11th Cir. 2011).

In this case, the district court correctly concluded that Gillman was not entitled to equitable tolling because he failed to show a causal connection between Akes' misconduct and his failure to timely file his § 2254 petition. At the evidentiary hearing that the district court held on Gillman's petition, he acknowledged that he no longer considered Akes to be his attorney as of November 2005. At that point in time, the statute of limitations was tolled because

his Rule 3.800 application for state post-conviction relief was still pending, 28 U.S.C. § 2244(d)(2), and once the limitations period began to run again he still had 68 days left to file his § 2254 petition. Because Gillman had a reasonable amount of time left after November 2005 to prepare and file his petition,[6] Akes' failure to file any post-conviction motions on Gillman's behalf did not cause him to miss his § 2254 filing deadline.[7]

Gillman's contention that he should receive equitable tolling because Akes did not return his copy of the trial transcripts is similarly unavailing. First, Gillman did not need to include citations to those transcripts in order to properly file his § 2254 motion. See Rules Governing § 2254 Cases, Rule 2(c) (requiring only that a petition "state the facts supporting each ground" for relief). Second, even if his petition did need to include specific record citations, Gillman's current post-conviction attorneys (Sheppard and DeMaggio) included citations to the trial transcripts in the Rule 3.850 motion that they prepared on his behalf before the

[6] The statute of limitations was not set to expire until April 17, 2006, about four to five months after Akes was no longer his lawyer.

[7] In Cadet v. Florida Department of Corrections, 742 F.3d 473, 481 (11th Cir. 2014), we held that the correct standard for determining whether attorney misconduct qualifies as an extraordinary circumstance for equitable tolling purposes is whether the conduct amounts to abandonment of the attorney–client relationship. Because Gillman has failed to establish a causal connection between his failure to timely file his § 2254 petition and Akes' actions, we need not address the application of Cadet's abandonment standard to this case.

statute of limitations on Gillman's § 2254 petition had expired.[8] That means that Gillman or his attorneys had access to the trial transcripts before the federal statute of limitations expired, and therefore Akes' alleged failure to return Gillman's copy of the trial transcripts did not prevent him from timely filing a § 2254 petition that included citations to the trial record.

Because Gillman has failed to show a causal connection between the alleged extraordinary circumstances and his failure to timely file his § 2254 petition, the district court did not err in denying him equitable tolling and dismissing his petition as time-barred.

AFFIRMED.

[8] As mentioned earlier, Gillman signed the verification form on his Rule 3.850 motion a few days before the statute of limitations expired, but for some unexplained reason Sheppard and DeMaggio did not file the motion until several months later.

APPENDIX Y

July 5, 2013 U.S. District Court, Middle District, Ocala Division
Amended Order Denying Application for Habeas Corpus
as Time-Barred

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ROBERT WAYNE GILMAN,

Petitioner,

-vs- Case No. 5:10-cv-380-Oc-33PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et. al.,

Respondents.

ORDER

Petitioner, through counsel, initiated this case by filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1). By Order dated June 19, 2013, the Court denied the Petition with prejudice. (Doc. 33). Judgment was entered the following day. (Doc. 34). Pending before the Court is Petitioner's Motion to Alter Judgment and Order to conform with the requirements of Rule 11(a) of the Rules governing § 2254 cases. (Doc. 35). Specifically, Petitioner requests that the Court issue or deny a certificate of appealability. Id.

Upon due consideration, Petitioner's Motion (Doc. 35) is **GRANTED**. The Order denying the Petition (Doc. 33) and the Judgment (Doc. 34) are hereby **WITHDRAWN**. An Amended Order and Judgment will be entered separately in accordance with this Order.

DONE and ORDERED at Tampa, Florida this 5th day of July, 2013.

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Copies to: Robert Wayne Gillman
Counsel of Record

APPENDIX Z

June 19, 2013 U.S. District Court, Middle District, Ocala Division
Order Denying Application for Habeas Corpus as Time-Barred

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ROBERT WAYNE GILMAN,

Petitioner,

-vs- Case No. 5:10-cv-380-Oc-33PRL

SECRETARY, DEPARTMENT OF CORRECTIONS, et. al.,

Respondents.

ORDER

Petitioner, through counsel, initiated this case by filing a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1). Respondents filed a Response to the Petition asserting that the case is due to be dismissed because the Petition was untimely filed. (Doc. 4). Petitioner filed a Reply to the Response. (Doc. 11). At the direction of the Court, Respondents submitted a Supplemental Brief. (Docs. 12, 13). This case is ripe for review. (Doc. 16).

Procedural History

In October 11, 2002, a jury in the Circuit Court of the Fifth Judicial Circuit in and for Marion County, Florida found Petitioner guilty of Felony Murder in the First Degree, Murder in the Second Degree, Burglary While Armed and Armed Extortion. (Doc. 6, Ex. B). On

April 11, 2003, the trial court granted a judgment of acquittal as to the Armed Extortion count. (Doc. 6, Ex. C). The court sentenced Petitioner to life imprisonment on the First Degree Murder offense and 20 years imprisonment on the Murder in the Second Degree and Burglary offenses to run concurrent with each other, but consecutive to the life sentence. Id.

Petitioner appealed the judgment and sentence. On April 20, 2004, the Fifth District Court of Appeal (Fifth DCA) affirmed the judgment and sentence. (Doc. 6, Ex. H). Petitioner then filed a motion for rehearing and motion for rehearing *en banc*. (Doc. 6, Exs. I, J). The Fifth DCA denied the motion and mandate issued on June 28, 2004. (Doc. O).

On July 1, 2005, Petitioner filed a *pro se* motion pursuant to Rule 3.800 of the Florida Rules of Criminal Procedure. (Doc. 6, Ex. P). The trial court denied the 3.800 motion and the Fifth DCA affirmed the denial. (Doc. 6, Exs. Q, V).

On February 2, 2006, Petitioner filed a *pro se* petition with the Florida Supreme Court seeking review of the Fifth DCA's opinion affirming the denial of the motion to correct sentence. (Doc. 6, Ex. Z). On February 3, 2006, the Florida Supreme Court dismissed the petition for lack of jurisdiction. (Doc. 6, Ex. AA). Mandate issued on February 6, 2006. (Doc. 6, Ex. Y).

On June 20, 2006, Petitioner, through counsel, filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (Doc. 6, Ex. Doc. BB). The motion was denied and the Fifth DCA affirmed the denial. (Doc. 26). Mandate

issued on July 21, 2010. Id. Petitioner, through counsel, filed his federal habeas Petition on August 10, 2010, which is pending before the Court. (Doc. 1).

By Order dated January 18, 2013, the Court scheduled an evidentiary hearing to address the issue of whether Petitioner would have timely filed his federal habeas Petition but for his counsel's alleged deficient performance, and whether Petitioner's claim is procedurally defaulted. (Doc. 16). On March 6, 2013, the Court conducted the hearing and received subsequent briefs from the Parties on the issue. (Docs. 20, 26, 27, 30).

Background and Relevant Facts

Petitioner contends that on July 2004, he wrote to an attorney, C. Daniel Akes, regarding his case. (Doc. 26). In a letter dated July 16, 2004, Mr. Akes responded to Petitioner acknowledging receipt of the letter and states that he "would be happy to try and help out." (Evid. Hearing, Ex. 2).[1] Mr. Akes also explains that he charges $800.00 to review a post-conviction matter and to advise Petitioner on whether it will give him a chance for relief. Id. The letter states that if Petitioner decides that he wants Mr. Akes to pursue the post-conviction motion, it will cost an additional $2,500.00. Id.

Mr. Akes also explains that there are additional costs if there is an evidentiary hearing and directs him to forward pertinent documents if Petitioner wishes to proceed. Id. Petitioner claims that he sent the transcripts to Mr. Akes. (Doc. 26; Doc. 31, pgs. 39-40). On November 4, 2004, Petitioner's direct appeal attorney sent Mr. Akes the record

[1]At the evidentiary hearing, Petitioner submitted Exhibit 2, which includes attachments Petitioner sent to the Florida Bar to support a Bar complaint against Mr. Akes.

on appeal. Id. At the evidentiary hearing, Richard Barner, Petitioner's friend, testified that he gave an $800.00 check to Mr. Akes' paralegal dated August 25, 2004. (Ex. 31, pg. 34, Evid. Hearing, Ex. 1).

The record reflects that even though Mr. Barner paid the $800.00, Petitioner had difficulty communicating with Mr. Akes and began to correspond with him to voice his frustration and concern. Specifically, in a letter dated February 21, 2005, Petitioner states that "after many wholehearted attempts writing letters to your office, I have failed to get any form of response." (Evid. Hearing, Ex. 2). Petitioner's letter also provides the following:

> I am at a total loss for understanding why no response has been illicited [sic] by your office. I've requested one many times. I possess much useful information to share, but we must have established communication in order to do so. There are filing deadlines to meet, and I'd most certainly like to do so. Without being reasonably informed immediately, I will not know what to do other then to file a complaint to the Florida Bar Ass[ociation.]...
>
> Id.

In another letter dated March 2, 2005, Petitioner advises Mr. Akes and his paralegal that "it is [his] understanding as told to [him by the attorney representing him during the direct appeal] that we only have 1 year to keep open federal appeals. Let's file something as to stop the time clock from running. The mandate came out in June 2004." Id. Mr. Akes responded with a letter dated March 7, 2005, acknowledging receipt of Petitioner's letters. Id. The letter states that Mr. Akes would like to assure Petitioner that he is working on the case and has asked his paralegal to make it a priority. Id.

Despite Mr. Akes' March 7, 2005 letter, Petitioner continued to correspond with his office to express frustration with the progress of his case. In two letters dated March 24, 2005, Petitioner complained of the "seriously slow responses from the office," and that requested the return of the trial transcripts and other documents that he sent to the office. Id. Petitioner states that "this brief is going to be filed by June or sooner, so I need to be working in the event that your office fails to be ready." Id.

The testimony at the evidentiary hearing also reflects that Petitioner attempted to communicate with Mr. Akes and his office via telephone. Petitioner testified that after he did not receive a response from Mr. Akes with respect to his letters, he had his friend, mother and sister try to call his office to no avail. (Doc. 31, pg. 42). Petitioner states that at the times that they did make contact with his office, Mr. Akes "would assure them that he was going to do his job and that he was working on it..." (Doc. 31, pg. 41).

Further, Petitioner testified that he eventually spoke with the paralegal and Mr. Akes and was assured that Mr. Akes' office was going to "get the case done and file it." (Doc. 31, pg. 43). Moreover, Petitioner's sister, Laura Gillman, testified that she called Mr. Akes' office in January and March and the paralegal informed her that they were working on Petitioner's case. (Doc. 31, pg. 14).

On July 1, 2005, Petitioner, proceeding *pro se*, filed a motion pursuant to Florida Rule of Criminal Procedure 3.800. (Doc. 6, Ex. P). Petitioner asserts that he filed the motion in an effort to toll the time limit to file his federal petition. (Doc. 26). During the pendency of the 3.800 motion, Petitioner wrote Mr. Akes again asking for his set of

transcripts. (Evid. Hearing, Ex. 2). The August 1, 2005 letter reflects that Petitioner had made many requests for the return of his personal transcripts and requested that Mr. Akes send the documents "at once." Id. Petitioner states that he "wish[ed] to avoid being time-barred from federal appeals under rule 28 U.S.C.A. 2244 as [his] mandate was June 28, 2004." Id. Petitioner requested the documents "so [he] may work to insure a timely filing should [Mr. Akes] fail to do so." Id.

On August 15, 2005, Petitioner filed a complaint against Mr. Akes with the Florida Bar Association. Id. On August 29, 2005, the Florida Bar sent a copy of the complaint to Mr. Akes and directed him to respond. (Evid. Hearing, Ex. 3). On September 30, 2005, the Florida Bar sent another letter to Mr. Akes, which requested a response. (Evid. Hearing, Ex. 4). On October 14, 2005, the complaint was forwarded to the grievance committee for further investigation and disposition. (Evid. Hearing, Ex. 5). On November 17, 2005, the Florida Bar issued a "Notice of No Probable Cause and Letter of Advice to Accused." (Evid. Hearing, Ex. 8).[2]

In Mid-December Petitioner retained another attorney through his sister. (Doc. 31, pg. 19). However, Petitioner testified that the attorney disclosed to Petitioner that a conflict of interest existed. (Doc. 31, pg. 48). Petitioner stated that he refused to sign a waiver with respect to the conflict of interest. Id. Petitioner testified that he then retained his current counsel and filed his motion for post-conviction relief on June 20, 2006. (Doc. 31, pg. 48;

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[2]The Florida Bar subsequently suspended Mr. Akes from the practice of law after other individuals complained about his failure to work on their cases. (Evid. Hearing, Exs. 9-11).

See Doc. 26). On August 5, 2010, he executed his federal habeas Petition and filed it through counsel on August 10, 2010. (Doc. 1).

Discussion

The issue before the Court is whether this Petition is due to be dismissed because it was untimely filed. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a petitioner has one-year from the date the conviction and sentence became final to file a federal habeas petition. The AEDPA also provides that the one-year time limit is statutorily tolled during the pendency of any properly filed state collateral petitions or motions.

The one-year limitations period may also be equitably tolled if a petitioner can show: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. San Martin v. Secretary, Florida Dept. of Corrections, 633 F.3d 1257 (11th Cir. 2011) (citing Holland v. Florida, 130 S.Ct. 2549, 2562 (2010)). The tolling remedy must be used sparingly. Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000).

With respect to the first prong, the petitioner must show reasonable diligence, rather than demonstrate maximum feasible diligence. Id. (citing Holland, 130 S.Ct. at 2565). As for extraordinary circumstances, the petitioner must show a causal connection between the alleged extraordinary circumstances and the late filing of the petition. San Martin, 633 F.3d at 1267. At least sometimes, an attorney's unprofessional conduct can be so egregious as to create an extraordinary circumstance warranting equitable tolling even if

a petitioner is not entitled to equitable tolling for "a garden variety claim of excusable neglect." Holland, 130 S.Ct. at 2553. In these circumstances, equitable tolling can be applied in the "absence of an allegation of proof of bad faith, dishonesty, divided loyalty, [or] mental impairment." Id. at 2573.

Here, Petitioner does not contest that his federal petition was untimely filed. (Doc. 31, pg. 4). The Parties, and the Court, are in agreement that without the application of equitable tolling, the Petition is due to be dismissed. Specifically, the record reflects that Fifth DCA issued its mandate on June 28, 2004 with respect to the denial of Petitioner's motion for rehearing, motion for rehearing *en banc*, and motion to strike. (Doc. 6, Ex. N). Petitioners' one-year limitation period did not begin to run until September 7, 2004, which was 90 days after the motion for rehearing was denied.[3] On July 1, 2005, Petitioner filed his *pro se* 3.800 motion. (Doc. 6, Ex. P). At this time, 297 days had passed on the one-year limitations period. On July 13, 2005, the trial court denied the motion and on December 13, 2005, the Fifth DCA affirmed the denial. (Doc. 6, Exs. Q, V). Mandate issued on February 6, 2006. (Doc. 6, Ex. Y).

The limitations period began to run again with 68 days remaining, putting the deadline at April 17, 2006.[4] On June 20, 2006, Petitioner filed a motion pursuant to 3.850 of the Florida Rules of Criminal Procedure, which was denied. (Doc. 6, Ex. BB, Ex. 31, pg.

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[3]Supreme Court rule 13.3 provides that the 90 day period for filing a petition for writ of certiorari runs from the date of the denial of a motion for rehearing.

[4]The Parties contend that the period expired on April 15, 2006. However, April 15, 2006 was a Saturday. Accordingly, the deadline was April 17, 2006, Monday. See Fed.R.Civ.P. 6(a).

50). Mandate issued on July 21, 2010. (Doc. 31, pg. 50). On August 5, 2010, Petitioner executed his federal habeas Petition. (Doc. 1). As such, Petitioner untimely filed the Petition. Petitioner argues that despite his due diligence, his attorneys misconduct caused him to filed outside of the statute of limitations. (Doc. 26). Accordingly, he claims he is entitled to equitable tolling. Id.

As an initial matter, at the evidentiary hearing and in the filings with the Court, Respondents argue that Petitioner cannot demonstrate that attorney misconduct amounted to an extraordinary circumstance because Mr. Akes was not counsel of record "properly hired to represent [Petitioner]." (Doc. 18; Doc. 31, pg. 10-11). Respondents rely on Mr. Akes' July 16, 2004 letter to Petitioner, which explains that he charges $800.00 to review the post-conviction matter and that if Petitioner decided to pursue the state motion it would cost an additional $2,500.00. (Evid. Hearing, Ex. 2). Respondents contend that the record reflects that only $800.00 was paid, and, therefore, Petitioner never paid to file the 3.850 motion at the time when he was prepared to file it. (Doc. 31, pg. 10).

Respondents also cite to a facsimile Mr. Akes purportedly sent to Laura Gillman, which states that he finished the 3.850 motion, it was ready to be filed on or before Monday August 22, 2005, and that it was his understanding that Ms. Gillman would be forwarding payment upon receipt of the correspondence. (Doc. 31, 16-17; Doc. 13, Ex. OO). Respondents claim that the letter reflects that Mr. Akes sent the letter and he never received a response or payment. (Doc. 27).

Accordingly, Respondents argue that Petitioner "did nothing more than pay for services by Mr. Akes to review his record for purposes of determining whether or not there were any issues raised in the 3.850 post-conviction motion." (Doc. 31, pg. 10). Respondents claim that Petitioner never hired Mr. Akes to file the motion on his behalf and did not appear as counsel. Id. As such, attorney misconduct does not entitled Petitioner to equitable tolling because there was no attorney responsible for pursuing the state matter.

The Court is not persuaded by this argument. The Court recognizes that Florida Rules of Professional Responsibility permit agreements which limit the scope of representation. Rule 4-1.2. However, Petitioner, his sister and friend all testified that Mr. Akes and his paralegal informed them that they were "working on the case." (Doc. 31). Indeed, Mr. Akes advised Petitioner in the March 7, 2005 letter that he "would like to assure [Petitioner] that we are working on [Petitioner's] case..." (Evid. Hearing, Ex. 2).

While Mr. Akes may have been referring to the initial review of the case file in the letter, the testimony shows that Mr. Akes' office gave some indication that they were working on Petitioner's 3.850 motion. Specifically, as discussed in this Order, Ms. Gillman testified that she called the office in January and March and the paralegal told her that "they were working on the case and would be ready to file." (Doc. 31, pg. 14). Mr. Barner, Petitioner's friend, also testified that Mr. Akes would work on the motion. The transcript reflects the following:

State Attorney: You told them that you were ready to pay the $2500?

Mr. Barner: Yes.

State Attorney: But were you aware that there would be no $2500 to pay unless Mr. Akes determined that there were some valid issues to raise in a post-conviction motion?

Mr. Barner: We finally got past that point. He was doing whatever the motion was and it was going to be $2500 after that. He would call me when the paperwork was ready and I would give him the money. That was Akes.

(Doc. 31, pg. 36).

Further, Petitioner testified that he spoke with Mr. Akes on the telephone was advised that Mr. Akes was his attorney and that he was "going to get the case done and file it, and it looked like it was a good thing." (Doc. 31, pg. 48-49). Petitioner claims that he sent his transcript and records to Mr. Akes for his review and it was not until after the Florida Bar concluded with Petitioner's complaint that he realized the attorney had "abandoned him and was no longer functioning as his attorney." (Doc. 26, Doc. 31, pg. 46).

Even if there was only payment for the initial review of the files, the Court finds that there is no merit to the claim that equitable tolling should not be applied because Mr. Akes was not "counsel of record." Petitioner could have reasonably thought that Mr. Akes and his paralegal's reassurances meant that there was a possibility that his office might pursue the post-conviction motion matter. Indeed, Petitioner's testimony and his letters to Mr. Akes reflect that he repeatedly requested the return of the transcripts and files in case Mr.

Akes decided not to the file the motion. (Evid. Hearing, Ex. 2; Doc. 31, pg. 43). Mr. Akes did not return the files. (Doc. 31, pg. 46).

Moreover, assuming Mr. Akes sent the facsimile to Ms. Gillman, she testified that she did not receive it. (Doc. 31, pgs. 16-19). She stated that the facsimile did not make sense because she was not responsible for payment. (Doc. 31, pg. 17). Mr. Barner testified that he made it clear to Mr. Akes and his paralegal that he was responsible for payment. (Doc. 31, pg. 32).

Despite the Court's rejection of Respondents' "no counsel of record argument," the Court finds that Petitioner is not entitled to equitable tolling. The seminal case on attorney misconduct and how it applies to equitable tolling is Holland. Indeed, Petitioner relies heavily on this case in his attempt to demonstrate that his case should go forward. (See Docs. 11, 26, 31). In Holland, the Supreme Court held that an attorney's serious misconduct may warrant equitable toling. 130 S.Ct. at 2564-65. The defendant in the case filed a *pro se* federal habeas petition after the deadline had already passed. Id. at 2554-55. The defendant claimed that he was entitled to tolling because of his attorney's conduct. Id. at 2555. The defendant alleged that during the two years that his state habeas petition was pending, his attorney communicated with him only three times by letter and never met him or updated him on his case. Id.

After the attorney argued the appeal before the Florida Supreme Court, the defendant wrote multiple letters to counsel regarding the importance of filing his federal habeas petition on time. Id. at 2556. The attorney still missed the filing deadline for his

federal habeas petition. Id. at 2556-57. Once the defendant learned that the Florida Supreme Court had decided his case and the federal filing deadline had passed, he immediately filed his own *pro se* federal habeas petition. Id. at 2557.

The Supreme Court found that the attorney's failure to timely file despite the many letters emphasizing the importance of doing so, the apparent lack of research regarding the correct filing date, the failure to inform the defendant that the Florida Supreme Court had decided his case, and the cumulative failure to communicate with the defendant over a period of years amounted to more than simple negligence. Id. at 2564. The Court held that under this circumstance the attorney's misconduct may have constituted extraordinary circumstances warranting tolling and remanded the case for such a determination. Id. at 2565.

Like the defendant in Holland, Petitioner made many unanswered attempts to contact his attorney and expressed the importance of meeting the federal deadline. However, an important distinction exists between the facts in Holland and the circumstances in the instant case. Once Petitioner's relationship with Mr. Akes was admittedly terminated, a significant amount of time remained on Petitioner's federal one-year limitation period.

Petitioner testified that after the Florida Bar made its November 17, 2005 ruling that there was no cause regarding Petitioner's complaint against Mr. Akes, he knew that their relationship had ended and he decided to look for another attorney. (Doc. 31, pg. 46). Not only was there time remaining when Petitioner realized that Mr. Akes was no longer

representing his interests, but the limitations period was actually statutorily tolled at that time. Specifically, in July 2005, Petitioner filed a *pro se* motion pursuant rule 3.800 of the Florida Rules of Criminal Procedure for the purpose of tolling the deadline. (Doc. 6, Ex. P; Doc. 31, pg. 44). On July 13, 2005, the trial court denied the motion and on December 13, 2005, the Fifth DCA affirmed the denial. (Doc. 6, Exs. Q, V). Mandate issued on February 6, 2006. (Doc. 6, Ex. Y). The limitations period began to run again putting the deadline at April 17, 2006. Petitioner did not file his 3.850 motion until June 20, 2006. (Doc. 6, Ex. BB).

Accordingly, several months passed before he filed his 3.850 motion and federal habeas petition. (Doc. 31, pg. 63). The Florida Bar may have suspended Mr. Akes in the following years after allegations of similar misconduct which might help show that he led people to believe he was assisting them when he was not, but Petitioner admits that he was aware that his case was abandoned in November 2005. Even if Petitioner was not inclined to work on his 3.850 motion and federal petition during the pendency of his 3.800 motion, he still had 68 days remaining after the motion was denied and mandate issued.

Petitioner had adequate time to timely file his own post-conviction motion and his federal petition even if Mr. Akes failed to "do what [Petitioner] paid him to do" as Petitioner asserts. (Doc. 31, pg. 55). Petitioner, through his sister, retained another attorney in mid-December 2005. Id. After the attorney revealed that a conflict of interest existed, Petitioner discharged her in March 2005. (Doc. 31, pgs. 55, 63). Petitioner acknowledges

that he could have filed his motion *pro se* at this time, but instead hired another attorney to pursue the matter. (Doc. 31, pg. 63).

Based on these circumstances, the Court finds that Mr. Akes' actions did not prevent Petitioner from timely filing. Even if attorney misconduct may in some instances amount to egregious behavior, the extraordinary circumstance must actually stand in the way of a timely filing. See Holland, 130 S.Ct. at 2562. Indeed, the Eleventh Circuit requires that a defendant show a causal connection between the alleged extraordinary circumstances and the late filing of the petition. San Martin, 633 F.3d at 1267, (citing Lawrence v. Florida, 421 F.3d 1221, 1226-27 (11th Cir. 2005). Petitioner has simply not demonstrated such a connection.

Petitioner makes much of the fact that he requested his transcripts from Mr. Akes, but did not receive them. Petitioner argues that without the returned copies of the file, "it is unrealistic to expect [Petitioner] to prepare and file a meaningful petition on his own within the limitations period." (Doc. 26, pg. 18). The Court is again not satisfied by this argument. The Court appreciates the fact that Petitioner attempted to retrieve his files from Mr. Akes. Indeed, Petitioner's Florida Bar Complaint reflects that Petitioner complained that the attorney failed to return his "personal transcript sets." (Evid. Hearing, Ex. 2).

However, as late as November 2005, Petitioner knew for sure that Mr. Akes had abandoned the case. With time remaining on the federal limitations clock, Petitioner retained another attorney, and that attorney was able to obtain the transcripts. (Doc. 31, pg. 46). On April 12, 2005, after retaining yet another attorney and with time still remaining,

Petitioner signed his 3.850 motion, which cites to the trial transcript. (Doc. 6, Ex. BB). Even if Mr. Akes improperly failed to return the transcripts, Petitioner still had months to pursue his claims. Again, Mr. Akes' conduct did not prevent Petitioner from timely filing his Petition.

Accordingly, the Court finds that the application of equitable tolling is not appropriate in this case and the Petition is due to be dismissed as untimely.

Conclusion

Upon due consideration, the Petition (Doc. 1) is hereby **DENIED with prejudice**. The Clerk is directed to enter judgment accordingly, terminate any pending motions and close the file.

DONE and ORDERED at Tampa, Florida this 19th day of June, 2013.

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Copies to: Robert Wayne Gillman
Counsel of Record

APPENDIX AA

June 29, 2010 Fifth District Court of Appeal ("DCA") Order Per Curiam Affirming (without Written Opinion) the Lower Court Order Denying Defendant's Motion for Postconviction Relief

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT
JANUARY TERM 2010

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

ROBERT WAYNE GILLMAN,

Appellant,

v.

Case No. 5D09-1175

STATE OF FLORIDA,

Appellee.

_____/

Decision filed June 29, 2010

3.850 Appeal from the Circuit Court
for Marion County,
William T. Swigert, Judge.

D. Gray Thomas, Wm. J. Sheppard and Bryan E. DeMaggio of Sheppard, White, Et Al., Jacksonville, for Appellant.

Bill McCollum, Attorney General, Tallahassee, and Rebecca Roark Wall, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

MONACO, C.J., COHEN, J. and PLEUS, JR., R.J., Senior Judge, concur.

APPENDIX BB

March 9, 2009 Fifth Judicial Circuit Court for Marion County, Florida
Order Denying Defendant's Motion for Postconviction Relief

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT IN AND
FOR MARION COUNTY, FLORIDA
CASE NO.: 96-3875-CF-AZ

STATE OF FLORIDA

vs.

ROBERT WAYNE GILLMAN,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR POST CONVICTION RELIEF

THIS COURT having considered Defendant's Motion for Post Conviction Relief, having reviewed the records of this case and all documents pertinent to Defendant's Motion, and having considered the arguments made by counsel at the evidentiary hearings held on September 17, 2008 and February 5, 2009, makes the following findings:

PROCEDURAL BACKGROUND

1. Defendant was charged by Indictment with first degree murder, second degree murder, armed burglary and armed extortion on January 14, 1997 for an incident that occurred on December 21, 1996. Following a jury trial on October 11, 2002, Defendant was convicted on all counts. Upon motion of the State, Defendant was acquitted of the armed extortion count. On April 11, 2003, Defendant was sentenced to life imprisonment followed by twenty year concurrent sentences on the remaining counts.

2. Defendant appealed his conviction and sentence which was per curiam affirmed by the Fifth DCA on April 20, 2004. A Mandate was issued on June 28, 2004.

3. Defendant filed a Motion to Correct Illegal Sentence on July 1, 2005, which was denied on July 13, 2005. Defendant appealed that decision which was denied.

4. Defendant, through counsel, filed this Motion for Post Conviction Relief asserting six claims of ineffective assistance of counsel (claims numbered 1, 2, 4, 5, 7, and 8), one claim of trial court error (claim numbered 3) and one claim of cumulative error (claim numbered 9). Claim 6 was withdrawn.

5. The Defendant and the State submitted their arguments regarding the above claims in evidentiary hearings held on September 17, 2008 and on February 5, 2009.

STANDARD OF REVIEW

The Supreme Court of Florida has reiterated the standard we apply to claims of ineffective assistance of counsel:

> A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986) (citing *Strickland v. Washington*, 466 U.S. 668 (1984); *Downs v. State*, 453 So.2d 1102, 1108-09 (Fla.1984)).

In reviewing counsel's conduct, "[a] fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." *Francis v. State*, 529 So.2d 670, 672 n. 4 (Fla. 1988) (quoting *Strickland*, 466 U.S. at 689). Strategic choices made after a thorough investigation of the law and facts relevant to plausible options are virtually

unchallengeable. *Strickland*, 466 U.S. at 690. Additionally, in *Downs v. State*, 453 So.2d 1102, 1108 (Fla. 1984), the Court explained "that counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment." Furthermore, "[a] defendant is not entitled to perfect error-free counsel, only to reasonably effective counsel." *Waterhouse v. State*, 522 So.2d 341, 343 (Fla. 1988). . The defendant alone carries the burden to overcome the presumption of effective assistance." *State v. Duncan*, 894 So.2d 817, 823 (Fla. 2004).

Additionally, claims which were or could have been raised on direct appeal are procedurally barred in a motion for postconviction relief. *Schwab v. State*, 814 So.2d 402 (Fla. 2002)

ANALYSIS OF DEFENDANT'S CLAIMS

1. In claim #1, Defendant claims counsel failed to raise Defendant's alleged incompetency in a timely manner to the trial court, failed to investigate the issue properly, and failed to secure a timely evaluation of Defendant prior to trial.

The Court notes and the Defendant mentions in his motion that counsel did file a Motion to Determine Competency on the eve of trial which was denied. In addition, Defendant was examined prior to sentencing in 2003 by two different doctors that found Defendant competent. The legal standard for competency for trial and competency for sentencing are the same. Fla. R. Crim. P. 3.210. Defendant's claim is purely speculative and fails to show that counsel was deficient. Accordingly, this claim is without merit as a matter of law.

2. In claim #2, Defendant claims his counsel labored under a conflict of interest at the time of the trial since Defendant's counsel's partner previously represented a State

witness in matters arising out of the same incident in which Defendant was tried. Defendant asserts that under Rule 4-1.9(a) and Rule 1-1.10(a) and (b), Rules Regulating the Florida Bar, Defendant's counsel's partner's representation of the State witness is imputed to Defendant's counsel. Defendant argues this conflict adversely affected Defendant's representation and reversal is required.

In this case, Ms. Jenkins, as a public defender, represented Ralph E. Troisi ('Troisi") in a case that arose out of the same incident of Defendant's case. Ms. Jenkins' representation of Troisi ended around 1998. Deposition of Patricia Jenkins, 25:19-26:11. Subsequently, Ms. Jenkins testified on Troisi's behalf at a bond hearing on unrelated cases in the year 2000. Deposition of Patricia Jenkins, 28:20-31:8. In March, 2001, Ms. Jenkins joined Huntley Johnson's firm, whom represented Defendant from the outset of this case in 1996. Ms. Jenkins was screened from any participation in this case. Deposition of Huntley Johnson, 25:13-20.

Imputation of Ms. Jenkins' representation of Troisi to Defendant's counsel is inappropriate in this case. Ms. Jenkins was a public defender at the time she represented Troisi, hence, she was a government lawyer under Rule 4-1.10(e). There is no precedent for imputation of a public defender's representation of a client to a law firm she later joins. Rule 4-1.9(a) and Rule 1-1.10(a) and (b), Rules Regulating the Florida Bar are inapplicable to this case. Accordingly, Defendant's claim that Ms. Jenkins' representation of Troisi is imputed to counsel's representation of Defendant is misplaced and without merit as a matter of law.

Defendant has failed to show that an actual conflict existed in this case. A conflict of interest occurs when counsel has a divided loyalty between two clients such

that a course of action beneficial to one would be damaging to the other. *Robinson v. State*, 750 So.2d 58 (Fla. 2nd DCA 1999) (citations omitted). In this case, Troisi was never a client of Defendant's counsel (Huntley Johnson), hence counsel had no loyalty to Troisi, nor did he possess any privileged communications that needed protection.

Additionally, in order to establish an ineffectiveness claim premised on an alleged conflict of interest, the defendant must establish that an actual conflict of interest existed that adversely affected his lawyer's performance. A lawyer suffers from an actual conflict of interest when he or she actively represents conflicting interests. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised. A possible, speculative or merely hypothetical conflict is insufficient to impugn a criminal conviction. Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. If a defendant successfully demonstrates the existence of an actual conflict, the defendant must also show that this conflict had an adverse effect upon his lawyer's representation. *Sliney v. State*, 944 So.2d 270 (Fla. 2006) (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)). In this claim, Defendant has failed to show or provide specific evidence that an actual conflict of interest existed or that counsel's performance was affected by such alleged conflict. Accordingly, this claim is without merit as a matter of law.

3. In claim #3, Defendant claims the trial court failed to inquire regarding the alleged conflict of interest.

The Court conducted a hearing on this issue a few days before trial, on October 4, 2002, and concluded that no actual conflict of interest existed unless Ms. Jenkins was to

be called as a State's witness. The Court found that if any conflict existed, it was with the State and not with the Defendant. See Hearing on Motion for Continuance, 3-27. Accordingly, this claim is without merit as a matter of law.

4. In claim #4, Defendant asserts Troisi would have been excluded as a witness for incompetency to testify and that counsel was ineffective for failing to properly and timely investigate and assert the incompetency of State witness Ralph Troisi. Defendant maintains that counsel failed to obtain medical records regarding Troisi's competency or to move to have Troisi examined for competency by a medical professional. Defendant also asserts that Ms. Jenkins was ineffective for not offering additional public information regarding Troisi's condition as required by Rule 4-1.9(b) and Rule 4-1.4(b).

At the evidentiary hearing on February 5, 2009, Defendant produced cumulative evidence of Troisi's drug use and 100% disability from PTSD. This information was already elicited by counsel through cross examination at the trial. Trial transcripts, jury trial, 841-847. Defendant did not proffer any evidence to indicate that Troisi was incompetent at the time of the trial. Trial transcripts indicate that Troisi was competent to be a witness. He testified clearly regarding his status as a State prisoner, prior drug user and his involvement in the events surrounding this case. Trial transcripts, jury trial, 803-888. Accordingly, this claim is conclusively refuted by the record. As to the allegations made against Ms. Jenkins, Ms. Jenkins was not Defendant's counsel, she was screened from Defendant's representation, and Rule 4-1.9(b) and Rule 4-1.4(b) are inapplicable to this case. Accordingly, this claim is without merit as a matter of law.

5. In claim #5, Defendant claims counsel was ineffective for failing to object to and affirmatively presenting inadmissible hearsay testimony regarding Defendant's unlawful entry into Tomms' residence that formed the basis for all counts of conviction.

This is a conclusory allegation that hearsay statements made at trial were inadmissible and that such statements were the basis for Defendant's conviction. According to the record, there was direct testimony of two different witnesses that Defendant's entrance into Tomms' residence was without invitation. Trial transcripts, Jury trial, 263-264; 821-822. Accordingly, this claim is conclusively refuted by the record and without merit.

6. In claim # 7, Defendant claims counsel was ineffective for failing to object to the jury instruction identifying Ballard as Defendant's accomplice which Defendant claims indicated to the jury that Defendant was an offender in commission of a crime. Defendant maintains the result of this instruction was the Court directing a verdict on the issue of Defendant and Ballard's guilt.

This jury instruction was a correct statement of the law that merely indicated the resulting crime of felony murder *if* the jury found that Defendant was an accomplice (emphasis added). Trial transcripts, jury trial, 1279-1310. Accordingly, this claim is conclusively refuted by the record.

7. In claim #8, Defendant claims counsel was ineffective for failing to object to supplemental jury instructions in response to a question by the jury. The jury instructions dealt with the right of Troisi as a guest in Tomms' residence to invite someone into the residence if that person properly knocks and identifies themselves. Defendant claims the

instruction misled the jury and was erroneous since it improperly shifted to the Defendant the burden of proof of an essential element of the charge of burglary.

At counsel's suggestion, the Court informed the jury that an invitee could give visitors permission to enter Tomms' residence. Trial transcripts, jury trial, 1314. This was a strategic decision by counsel as it expanded the group of people who could authorize entry. The Court did not shift the burden of proof regarding this element as the Court also gave this instruction to the jury without the comment regarding the knocking and identification of visitors. Trial transcripts, jury trial, 1320. Accordingly, this claim is without merit as Defendant has failed to overcome the presumption of effective counsel and such claim is conclusively refuted by the record.

8. In claim 9, Defendant claims cumulative error which is without merit as there was no error above. *Holland v. State*, 916 So.2d 750, 759 (Fla. 2005).

Based upon the foregoing, it is;

ORDERED AND ADJUDGED: Defendant's Motion for Post Conviction Relief is **denied**. The movant has the right to appeal within thirty days of the rendition of this order.

DONE AND ORDERED in Chambers, at Ocala, Marion County, Florida, on this 9th day of March 2009.

WILLIAM T. SWIGERT
Senior Circuit Judge

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