DOCKET No._____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID MILLER, JR.,

Petitioner,

VS.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTION, ET AL.,

Respondent.

APPLICATION FOR SIXTY (60) DAY EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ADDRESSED TO JUSTICE CLARENCE THOMAS

ATTACHMENT A

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-10657

Non-Argument Calendar

DAVID MILLER, JR.,

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
D.C. Docket No. 3:17-cv-00932-BJD-JBT

ORDER:

David Miller, Jr., a Florida inmate sentenced to death, applies for a certificate of appealability to appeal the denial of his petition for a writ of habeas corpus as untimely. *See* 28 U.S.C. § 2244. Because no jurist of reason could debate whether he has shown that he is entitled to equitable tolling, Miller's application for a certificate of appealability is **DENIED**.

The district court denied Miller's petition because it was untimely and not entitled to equitable tolling. "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). Miller acknowledges that his petition was filed after the one-year limitation period, but he argues that he is entitled to equitable tolling. *See* 28 U.S.C. § 2244(d)(1).

Miller has failed to carry his burden to show that jurists of reason could find it debatable whether he is entitled to equitable tolling for the entire period between the expiration of the limitation period on August 3, 2006, and January 30, 2019, when Miller filed his petition. *See, e.g., Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1237 (11th Cir. 2017) (explaining that "[b]ecause [a

petitioner]" did not show that he was entitled to equitable tolling "the district court properly dismissed the habeas petition as untimely"). "[E]quitable tolling is an extraordinary remedy limited to rare and exceptional circumstances." *Id.* at 1221 (internal quotation marks omitted). Miller's application for a certificate of appealability does not offer any argument that could give a jurist of reason any reason to doubt that the district court correctly resolved the procedural issue when it denied the petition as untimely. To be sure, Miller offers arguments that attempt to cast doubt upon the reasoning of the district court, which relied only on the relationship between Miller and his attorney that led up to the August 3, 2006, deadline. But Miller does not offer any reason why he is entitled to equitable tolling for the period after the withdrawal of his original attorney in 2013. During that period, Miller was represented by the multiple attorneys, including the Capital Habeas Unit of the Federal Public Defender's Office for the Northern District of Florida, which was appointed on August 24, 2017.

The standard for granting a certificate of appealability is whether the district court's "*resolution*" of the issue "was debatable amongst jurists of reason," *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (emphasis added), not whether the specific reasoning of the district court was infallible. *See, e.g.*, *Szuchon v. Lehman*, 273 F.3d 299, 318 n.8 (3d Cir. 2001) ("[W]e can deny a certificate of appealability on any ground with support in the record."). So, even if we assumed that jurists of reason could debate whether Miller is entitled to equitable tolling up to the withdrawal of his attorney in

2013, Miller has still not shown that a jurist of reason could debate the resolution of the timeliness issue. Because Miller does not offer any argument that could convince a jurist of reason that it is debatable whether he is entitled to the extraordinary remedy of equitable tolling for the period between 2013 and January 30, 2019, his application for a certificate of appealability is **DENIED**. And Miller's motion to proceed in forma pauperis is **DENIED** as moot.

CHIEF JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 10, 2022

Gregory W. Brown
Federal Public Defender's Office
400 N TAMPA ST STE 2700
TAMPA, FL 32801

Appeal Number: 22-10657-P
Case Style: David Miller, Jr. v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 3:17-cv-00932-BJD-JBT

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

DOCKET No._____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID MILLER, JR.,

Petitioner,

VS.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTION, ET AL.,

Respondent.

APPLICATION FOR SIXTY (60) DAY EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ADDRESSED TO JUSTICE CLARENCE THOMAS

ATTACHMENT B

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-10657

Non-Argument Calendar

DAVID MILLER, JR.,

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
D.C. Docket No. 3:17-cv-00932-BJD-JBT

Before WILLIAM PRYOR, Chief Judge, JORDAN and LAGOA, Circuit Judges.

PER CURIAM:

Appellant's motion for reconsideration of this Court's Order denying a Certificate of Appealability is **DENIED**.

JORDAN, Circuit Judge, concurring.

Mr. Miller seeks reconsideration of the order denying him a certificate of appealability. I agree with the court that we should deny that motion but believe that some explanation for the denial is warranted. As this is my first foray in this case, I set out my reasoning.

The one-year AEDPA limitations period began to run for Mr. Miller on January 22, 2001, which was 90 days after the Florida Supreme Court issued its opinion on direct appeal. *See Miller v. State*, 770 So. 2d 1144 (Fla. 2000); 28 U.S.C. § 2244(d)(1)(A). On October 2, 2001—253 days into the limitation period—Robert Norgard filed a motion for state post-conviction relief on Mr. Miller's behalf. In 2005, Mr. Norgard also filed a state habeas corpus petition. The AEDPA clock stopped until the post-conviction proceedings concluded. *See* § 2244(d)(2). That occurred on April 13, 2006, when the Florida Supreme Court issued the mandate on its denial of Mr. Miller's post-conviction motion and state habeas petition. *See Miller v. State*, 926 So. 2d 1243 (Fla. 2006). At that point, Mr. Miller had 112 days left (i.e., until August 3, 2006) before the AEDPA deadline expired. The AEDPA deadline passed with no petition filed in federal court. It was not until January 30, 2019—more than 12 years after the deadline expired—that the Capital Habeas Unit of the Federal Defender's Office for the Northern District

of Florida (CHU-N) filed Mr. Miller's federal habeas corpus petition. *See* D.E. 15.[1]

The procedural question presented by Mr. Miller's application for a COA, and by Mr. Miller's motion for reconsideration, is whether reasonable jurists could (a) debate whether Mr. Miller is entitled to equitable tolling for those 12 plus years or (b) conclude that the issue is adequate to deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327, 336–37 (2003); *Lambrix v. Secretary*, 872 F.3d 1170, 1179 (11th Cir. 2017); 28 U.S.C. § 2253(c). Equitable tolling is "an extraordinary remedy limited to rare and exceptional circumstances." *Cadet v. Fla. Dep't of Corr.*, 853 F. 3 1216, 1221 (11th Cir. 2017) (internal quotations and citation omitted).

The district court held a limited evidentiary hearing on the issue of equitable tolling as it related to Mr. Norgard's

[1] CHU-N filed a motion for appointment of counsel in district court in August of 2017 but notably did not file a federal habeas petition. *See* D.E. 1. CHU-N instead asked the district court to hold the case in abeyance pending resolution of Mr. Miller's then-pending state habeas corpus petition in light of the Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). *See* D.E. 7. The district court ordered CHU-N to file a status report informing it of the progress of Mr. Miller's state court proceedings by August 14, 2018, and administratively closed the case. *See* D.E. 10. CHU-N timely filed a status report informing the court of Mr. Miller's ongoing state habeas corpus action. *See* D.E. 11. But it was the state, not CHU-N (on Mr. Miller's behalf), which filed a motion to reopen the case months after Mr. Miller's state habeas proceedings had concluded. *See* D.E. 14.

representation. Although Mr. Norgard was the only witness at the hearing, Mr. Miller also introduced a number of exhibits.

Following the hearing, the district court credited Mr. Norgard's testimony and found that it was Mr. Miller "who decided to forego his federal remedies and reported his decision to Mr. Norgard at the state court evidentiary hearing and during a post-mandate phone conversation before the [AEDPA] limitation period expired[.]" D.E. 72 at 27. *See also id.* at 30 (noting that at the state court evidentiary hearing held on November 4-5, 2003, Mr. Miller stated on the record that he "want[ed] to cancel these proceedings and go back to prison" and "want[ed] to drop all [his] appeals"). Because Mr. Norgard "abided by his client's directive to not file a federal habeas petition," there was "no abandonment" or "constructive abandonment." *Id.* at 27–28. Nor were there extraordinary circumstances warranting equitable tolling, even taking into account Mr. Miler's mental problems, because there was no persuasive evidence that Mr. Miller was not competent at the time he conveyed his wishes to Mr. Norgard. *See id.* at 31–40.[2]

---

[2] Mr. Miller contends that the district court failed to recognize the interrelatedness of his mental illness and attorney misconduct. *See* D.E. 24 at 17–18 ("In rejecting tolling due to attorney misconduct, the district court focused on the instructions not to file [a federal habeas petition] allegedly given by a severely mentally ill man."). But "mental impairment is not per se a reason to toll a statue of limitations." *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009). Mr. Miller must demonstrate "a causal connection between his mental incapacity and his ability to file a timely" petition at all relevant times. *Id.* As far as I can tell, we have failed to grant equitable tolling for a mentally ill

I assume, without deciding, that reasonable jurists could debate the district court's factual findings on these issues and whether Mr. Miller is entitled to equitable tolling through August/September of 2013, when Mr. Norgard withdrew as counsel. *See Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018). Among other things, Mr. Miller introduced evidence at the evidentiary hearing that some of the phone calls that Mr. Norgard said he had placed to Mr. Miller (including the April 26, 2006, call where Mr. Miller supposedly confirmed his position) were not listed on Department of Corrections records; that Mr. Norgard did not see Mr. Miller at the Jacksonville jail during the state evidentiary hearing; that after the state evidentiary hearing Mr. Norgard next visited Mr. Miller in prison on August 9, 2013, well after the AEDPA limitations period had expired; and that Mr. Norgard's billing records did not reflect his purported phone calls with Mr. Miller to discuss whether or not to file a federal habeas petition.

I also assume, again without deciding, that reasonable jurists could debate whether Mr. Miller is entitled to equitable tolling from August of 2017—when CHU-N was appointed as counsel—through January of 2019, when CHU-N filed Mr. Miller's federal habeas petition. The Capital Habeas Unit of the Federal Defender's Office for the Middle District of Florida (CHU-M) replaced CHU-N because the court recognized that CHU-N had a possible conflict

---

petitioner—who is represented by counsel—without some kind of showing of attorney misconduct (e.g., abandonment, bad faith, dishonesty, divided loyalty, mental impairment). *See Cadet*, 853 F.3d at 1236–37.

with respect to equitable tolling given its delay in filing Mr. Miller's federal habeas corpus petition. *See* D.E. 35. CHU-M therefore asked the district court to give it additional time to make equitable tolling arguments for the period of time spanning from CHU-N's appointment to the filing of the habeas corpus petition. *See* D.E. 40. In June of 2021 the district court granted the motion and gave CHU-M until December 8, 2021, to file its additional memorandum on equitable tolling related to CHU-N. *See* D.E. 43. But CHU-M never got the chance to file its memorandum because the district court dismissed Mr. Miller's habeas corpus petition as untimely on November 18, 2021, nearly a month before CHU-M's deadline to address equitable tolling with respect to CHU-N. *See* D.E. 72. Reasonable jurists could debate whether the district court erred in not giving CHU-M the time it had previously granted to file its memorandum, as the denial of an opportunity to litigate on a material issue is a violation of due process which can never be harmless error. *See United States v. Smith*, 30 F.4th 1334, 1338 (11th Cir. 2022).

But even making these two assumptions, there is still a big time period—from September of 2013 to August of 2017—that needs to be excused through equitable tolling. On September 24, 2013, the state court appointed Frank Tassone as Mr. Miller's new attorney in place of Mr. Norgard. After a little more than a year, and without having filed (as far as I can tell) anything on Mr. Miller's behalf, Mr. Tassone moved to withdraw as counsel. On December 9, 2014, the state court appointed Christopher Anderson as Mr. Miller's new attorney. More than two and half years later, on

June 28, 2017, Mr. Anderson filed a second state petition seeking relief in light of the Supreme Court's decision in *Hurst*. As noted earlier, CHU-N was appointed as Mr. Miller's federal habeas corpus counsel in August of 2017 while Mr. Anderson litigated the availability of *Hurst* relief in state court.

The problem for Mr. Miller, as I see it, is that he did not signal or explain to the district court in his filings that the period of time covered by the representations of Mr. Tassone and Mr. Anderson was also subject to equitable tolling. CHU-N did not make any such assertion before it withdrew, and CHU-M did not say that it would seek equitable tolling for that four-year period (it only asserted that it was going to make an equitable tolling argument for the time covered by CHU-N's representation). *See* D.E. 40 at 1 (CHU-M requesting an extension to file a memorandum "concerning equitable tolling of the limitation during the period of *CHU-N's* representation") (emphasis added). So the district court was not put on notice that equitable tolling was an issue for the time that Mr. Miller was represented by Mr. Tassone and Mr. Anderson. And when Mr. Miller moved for a COA in this court, he did not make any equitable tolling arguments about his representation by those two attorneys. In fact, Mr. Miller did not make any arguments about Mr. Tassone or Mr. Anderson until his motion for reconsideration. Because a motion for reconsideration generally cannot be used to assert arguments or introduce evidence that could have been presented prior to the entry of the order in question, *see Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir.

2009), I do not think Mr. Miller has met the COA standard with respect to equitable tolling for the time covered by the representations of Mr. Tassone and Mr. Anderson.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

August 09, 2022

Gregory W. Brown
Federal Public Defender's Office
400 N TAMPA ST STE 2700
TAMPA, FL 32801

Appeal Number: 22-10657-P
Case Style: David Miller, Jr. v. Secretary, Florida Department of Corrections, et al
District Court Docket No: 3:17-cv-00932-BJD-JBT

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

MOT-2 Notice of Court Action