In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-10427

LUNICK JANVIER,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:22-cv-60787-RLR

Before JORDAN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Lunick Janvier has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's August 28, 2023, order denying his motion for a certificate of appealability, on appeal from the district court's dismissal of his *pro se* 28 U.S.C. § 2254 petition. Upon review, Janvier's motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

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ORDER:

Lunick Janvier is a Florida prisoner serving life imprisonment for first-degree murder with a firearm and other offenses. He moves for a certificate of appealability ("COA"), in order to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition, filed in April 2022, as untimely. To obtain a COA, Janvier must show that reasonable jurists would debate both (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year statute of limitations for filing a § 2254 petition that begins to run from, *inter alia*, the date on which the judgment became final by the conclusion of direct review, or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). A state prisoner's conviction generally becomes final when the Supreme Court denies *certiorari* or issues a decision on the merits, or when the 90-day period to file a *certiorari* petition expires. *Nix v. Sec'y for Dep't of Corr.*, 393 F.3d 1235, 1236-37 (11th Cir. 2004).

Additionally, the limitations period is statutorily tolled while a properly filed application for state post-conviction relief is pending. 28 U.S.C. § 2244(d)(2). However, once the limitations period has expired, a subsequent state court filing cannot revive it. *Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004). The AEDPA's limitations period also may be equitably tolled, but only if a petitioner

shows "(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 (2010) (quotation marks omitted).

Here, reasonable jurists would not debate the district court's dismissal of Janvier's § 2254 petition as untimely. First, although his convictions became final upon expiration of the period for him to seek *certiorari* in the U.S. Supreme Court, from the Fourth District Court of Appeal's affirmance of his direct appeal, the time for him to file his § 2254 petition did not actually start running until the affirmance of the denial of his Fla. R. Cim. P. 3.800 motion, because that motion had statutorily tolled the federal limitations period while it remained pending. *See Nix*, 393 F.3d at 1236-37; 28 U.S.C. § 2244(d)(2). Thus, absent further tolling, he had until November 2014, or one year following the affirmance of the denial of his Rule 3.800 motion, to file his § 2254 petition. *See* 28 U.S.C. § 2244(d)(1)(A).

Second, the district court properly determined that he could not demonstrate an entitlement to equitable tolling, for the 386-day period following the state appellate court's denial of rehearing on his state habeas petition. *See Holland*, 560 U.S. at 649. Even accepting as true his claim that he was separated from his legal papers and denied access to prison law clerks during that period, those are not "extraordinary circumstances" warranting equitable tolling. *See Akins v. United States*, 204 F.3d 1086, 1089-90 (11th Cir. 2000).

Third, because Janvier could not demonstrate an entitlement to equitable tolling for that period, the time for him to file his § 2254 petition already had expired when he filed his Fla. R. Crim P. 3.850 motion. More than a year had elapsed between the state appellate court's denial of rehearing on his state habeas petition, and the filing of his Rule 3.850 motion, which meant that his Rule 3.850 motion could not statutorily toll the federal limitations period. *See Sibley*, 377 F.3d at 1204. Because his Rule 3.850 motion did not have any tolling effect, he effectively filed his § 2254 petition approximately seven years after the federal limitations period already had expired.

Considering that the district court properly determined both that Janvier could not demonstrate an entitlement to equitable tolling, and that he had filed his § 2254 petition approximately seven years after the deadline for doing so had expired, reasonable jurists would not debate the district court's dismissal of the petition as untimely. *See Slack*, 529 U.S. at 484. Accordingly, Janvier's motion for a COA is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

APPENDIX-C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-60787-CIV-ROSENBERG

LUNICK JANVIER,

Petitioner,

v.

FLORIDA DEPARTMENT
OF CORRECTIONS,

Respondent.
_____/

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254

Lunick Janvier ("Petitioner"), appearing *pro se*, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("Petition") [DE 1]. Petitioner challenges his state court judgment and conviction in Case No. 2002-CF-020320-10B in the Seventeenth Judicial Circuit Court in and for Broward County, Florida [*id.* at 1]. The Court has reviewed the Petition [*id.*], Respondent's Response and supporting attachments [DE 7, DE 8, DE 9], Petitioner's Reply [DE 21], and the whole record. For the reasons discussed below, the Petition is **DISMISSED AS UNTIMELY** under 28 U.S.C. § 2244.

* * *

Rule 4 of the Rules Governing Section 2254 Cases authorizes courts to dismiss a habeas petition arising under section 2254 "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court[.]" Rule 4, Rules Governing § 2254 Cases. This includes the authority to dismiss a federal habeas petition if it is not timely per the statute of limitations set for in the Antiterrorism and Effective Death Penalty Act ("AEDPA"),

which governs this proceeding. *See Day v. McDonough*, 547 U.S. 198, 205, 210–11 (2006). Stated broadly, AEDPA imposes a one-year statute of limitations on petitions for writ of habeas corpus filed by state prisoners. *See* 28 U.S.C. § 2244(d)(1).

> The one-year limitation period "runs from the latest of" the following dates:
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)–(D). "The time during which a properly filed application for State post[]conviction or other collateral review with respect to the pertinent judgment or claim is pending" is not "counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

In 2009, following a jury trial, Petitioner was convicted of first-degree murder with a firearm (Count 1), attempted felony murder with a firearm (Count 2), and attempted robbery with a firearm (Count 3) [DE 8 at 8–9]. The trial court sentenced Petitioner to life in prison for Count 1 and concurrent twenty-year prison terms for Counts 2 and 3 [*id.* at 74–83]. Petitioner then filed a timely direct appeal of his judgment and sentence in the Fourth District Court of Appeal [*id.* at 85]. On June 12, 2012, the Fourth District per curiam affirmed Petitioner's conviction and sentence [*id.* at 169]. However, while Petitioner's appeal in the Fourth District was pending, he filed a Rule 3.800(a) motion [*id.* at 194], which the trial court ultimately denied on April 8, 2013 [*id.* at 215–16]. Petitioner appealed the trial court's denial of his Rule 3.800(a) Motion to the Fourth District,

which affirmed per curiam the trial Court's decision on October 2, 2013 [*id.* at 239]. The Fourth District issued its mandate on November 1, 2013 [*id.* at 242].

Following the mandate issued on November 1, 2013, the federal limitations period ran untolled for 103 days until Petitioner filed his state habeas petition on February 13, 2014 [*id.* at 244]. *See San Martin v. McNeil*, 633 F.3d 1257, 1266 (11th Cir. 2011) (citing *Lawrence v. Florida*, 549 U.S. 327, 331–32 (2007)) ("The AEDPA clock resumes running when the state's highest court issues its mandate disposing of the motion for post-conviction relief.")[1]; Fed. R. Civ. P 6(a)(1) ("When the period is stated in days or a longer unit of time . . . exclude the day of the event that triggers the period . . . ."). The Fourth District entered an order denying the petition on March 20, 2014 [*id.* at 261]. Petitioner then filed a motion for rehearing, [DE 8 at 263], which the Fourth District denied on May 14, 2014[2] [*id.* at 266].

On June 5, 2015—386 untolled days later—Petitioner filed his Rule 3.850 Motion. By the time Petitioner filed his Rule 3.850 Motion, the federal limitations had expired[3]; and, therefore, the Rule 3.850 Motion did not toll the federal limitations period because there was nothing left to

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[1] In this instance, the Fourth District is, in effect, the highest state court because Petitioner did not appeal its October 2, 2013, affirmance to the Florida Supreme Court before the Fourth District issued its mandate on November 1, 2013.

[2] Petitioner sought review of this order in the Florida Supreme Court, but this was not proper because the Florida Supreme Court lacks jurisdiction to review unelaborated opinions and orders [DE 8 at 268]. Therefore, Petitioner's notice to invoke discretionary jurisdiction did not toll the AEDPA limitations period. *See Reighn v. McNeil*, 2009 WL 3644805 at *4, n. 2 (N.D. Fla., Oct. 30, 2009).

[3] Specifically, Petitioner's federal limitations period expired on January 31, 2015. When the Fourth District denied Petitioner's motion for rehearing in the Rule 3.800(a) matter, 104 untolled days had already elapsed. This meant that Petitioner only had 261 days remaining in his federal limitations period. The Fourth District denied the Motion for rehearing on May 14, 2014 [DE 8 at 266]. Therefore, the federal limitations period started to run on May 15, 2014, and expired 261 days later on January 31, 2015. *See San Martin*, 633 F.3d at 1266.

toll. *See Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (holding that a properly filed application for state postconviction relief does not provide statutory tolling of the AEDPA limitations period where the motion for state postconviction relief was not filed until after section 2244(d)'s one-year limitation period had expired); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) ("A state-court petition . . . that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled."). Nearly seven years after filing his Rule 3.850 Motion,[4] Petitioner filed the instant Petition in this Court on April 18, 2022 [DE 1 at 1]. In total, Petitioner allowed **2998 untolled days** to pass before he filed the Petition.

Petitioner acknowledges that his Petition is untimely but argues that he is entitled to equitable tolling [DE 21 at 2]. Specifically, Petitioner argues that separation from his legal documents and obstructed access to prison law clerks when drafting his state postconviction motion amounted to extraordinary circumstances warranting equitable tolling. Before the Court will equitably toll time, a petitioner must show (1) that he has been pursuing his rights diligently and (2) that some extraordinary circumstance stood in his way and prevented timely filing. *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) (cleaned up); *see also Holland v. Florida*, 560 U.S. 631, 649 (2010) (same). The petitioner bears the burden of establishing the applicability of equitable tolling by making specific allegations. *See Cole v. Warden, Ga. State Prison*, 768 F.3d 1150, 1158 (11th Cir. 2014) (citing *Hutchinson v. Fla.*, 677 F. 3d 1097, 1099 (11th Cir. 2012)).

Petitioner has not met his burden in showing that he is entitled to equitable tolling because his separation from personal legal documents and limited access to law clerks when drafting his

[4] During these intervening years, Petitioner waited approximately six years for the trial court to summarily deny his Rule 3.850 Motion [DE 8 at 315]. Petitioner then appealed the trial court's denial to the Fourth District, which affirmed the trial court's denial on March 17, 2022 [*id.* at 361].

state court postconviction motion for relief are not extraordinary circumstances warranting equitable tolling. The Eleventh Circuit has stated that "periods of time in which a prisoner is separated from his legal documents do not constitute extraordinary circumstances." *Dukes v. Sec'y, Fla. Dep't of Corr.*, No. 21-13203-C, 2022 WL 832280 at *3 (11th Cir. 2022) (citing *Dodd v. United States*, 365 F.3d 1273, 1282–84 (11th Cir. 2004) and *Atkins v. United States*, 204 F.3d 1086, 1089–90 (11th Cir. 2000)). Likewise, "limited access to . . . prison law clerks does not establish extraordinary circumstances for equitable tolling." *See Bland v. State*, 2017 WL 5668005, at *3 (11th Cir. 2017) (citing *Atkins*, 204 F.3d at 1089–90). And because Plaintiff fails to establish that an extraordinary circumstance prevented the timely filing of the instant Petition, the Court need not determine whether he was diligently pursuing his rights. *See Diaz v. Sec'y for Dep't of Corr.*, 362 F.3d 698 (11th Cir. 2004) ("[T]he petitioner must show both extraordinary circumstances and due diligence in order to be entitled to equitable tolling.") (citation omitted). In sum, Petitioner fails to establish the applicability of equitable tolling.

The only other way Petitioner could overcome his procedural bar is to qualify for the other equitable exception under 28 U.S.C. § 2254—actual innocence. However, Petitioner has not alleged that he is actually innocent of his conviction; therefore, his case does not fall within this exception.

CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying or dismissing his petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1); *Harbison v. Bell*, 556 U.S. 180 (2009). This Court should issue a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

If "the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," a COA should not issue unless the prisoner shows 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." *Id.* Reasonable jurists would not find the procedural ruling in this Order debatable, requiring no discussion of the petition's merits. No COA is warranted.

CONCLUSION

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

1. The Petition for writ of habeas corpus [DE 1] is **DISMISSED AS UNTIMELY**.
2. No Certificate of Appealability shall issue.
3. The Clerk of Court shall **CLOSE THIS CASE**.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 18th day of January 2023.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record

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