

In the  
United States Court of Appeals  
For the Eleventh Circuit

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No. 23-10086

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FRANKIE WAYNE POPE,

Petitioner-Appellant,

*versus*

WARDEN,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Middle District of Georgia  
D.C. Docket No. 4:22-cv-00035-CDL-MSH

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## ORDER:

Frankie Pope is a Florida prisoner serving a 25-year sentence for rape, aggravated sodomy, false imprisonment, terroristic threats, and possession of marijuana. He moves this Court for a certificate of appealability (“COA”) in order to appeal the district court’s dismissal of his 28 U.S.C. § 2254 petition as untimely. He also moves for leave to proceed *in forma pauperis* (“IFP”), and appointment of counsel.

In order to obtain a COA, a movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Where the district court denied a habeas petition on procedural grounds, the petitioner must show that reasonable jurists would debate (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).

Under the Antiterrorism and Effective Death Penalty Act of 1996, a habeas petition is governed by a one-year statute of limitations that begins to run, as relevant, on “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). Here, reasonable jurists would not debate the district court’s conclusion that Pope’s § 2254 petition was untimely. *See Slack*, 529 U.S. at 484.

Pope pled guilty and was sentenced on March 31, 2014. Since he did not directly appeal within the 30-day deadline, the

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Order of the Court

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judgment became final for federal habeas purposes on April 30, 2014. *See* O.C.G.A. § 5-6-38(a).

The district court correctly concluded that Pope's two out-of-time motions to withdraw his guilty plea did not statutorily toll the one-year deadline under Georgia law. *See Humphrey v. State*, 787 S.E.2d 169, 170 (Ga. 2016). The district court also correctly concluded that the dismissal of Pope's 2015 federal habeas petition did not toll the limitations period. *See Rhines v. Weber*, 544 U.S. 269, 274-75 (2005).

Pope also failed to show that he was entitled to equitable tolling, or that the miscarriage-of-justice exception should have applied to excuse the untimeliness of his petition. *See Holland v. Florida*, 560 U.S. 631, 649 (2010); *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). Nothing in the record establishes that an extraordinary circumstance prevented Pope from timely filing a § 2254 petition, and he did not contend that he was actually innocent. *See id.*

Accordingly, Pope's motion for a COA is DENIED, and his motions for appointment of counsel and for IFP status as to the COA are DENIED AS MOOT.

Finally, because Pope moves for IFP status, his appeal with regard to other matters is subject to a frivolity determination. *See* 28 U.S.C. § 1915(e)(2)(B). "[A]n action is frivolous if it is without arguable merit either in law or fact." *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (quotation marks omitted), *overruled on other grounds by Hoever v. Marks*, 993 F.3d 1352 (11th Cir. 2021) (en banc).

Any appeal of the district court's dismissals of Pope's miscellaneous motions would also be frivolous. *See id.* Pope's motion requesting a transfer for mental health reasons would have been more appropriately raised under 42 U.S.C. § 1983. *See Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006). His motion to investigate social security numbers and driver's license fraud was unrelated to the convictions for which he sought relief. *See Estelle v. McGuire*, 502 U.S. 62, 68-69 (1991).

Given that the district court properly dismissed the § 2254 petition as untimely, it also did not err in denying Pope's motion for discovery and an evidentiary hearing, his motion to strike the state's filings, or his motion to toll the statute of limitations. Finally, given the district court's prior statement that it would appoint counsel, if necessary, combined with the fact that Pope's petition was clearly untimely, the district court did not err in denying Pope's motion for appointment of counsel.

Accordingly, Pope's motion for IFP status is DENIED as to the appeal from the denial of the miscellaneous motions.

/s/ Adalberto Jordan

UNITED STATES CIRCUIT JUDGE

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No. 23-10086

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FRANKIE WAYNE POPE,

Petitioner Appellant,

*versus*

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Appeal from the United States District Court  
for the Middle District of Georgia  
D.C. Docket No. 4:22-cv 00035 CDL MSH

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Before JORDAN and NEWSOM, Circuit Judges.

BY THE COURT:

Frankie Pope has filed a motion for reconsideration of this Court's November 7, 2023, order denying a certificate of appealability, leave to proceed *in forma pauperis*, and appointment of counsel on appeal from the district court's order dismissing his 28 U.S.C. § 2254 petition as untimely. Upon review, Pope's motion is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION**

FRANKIE WAYNE POPE,

Petitioner,

vs.

Warden KEVIN SPRAYBERRY,

Respondent.

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NO. 4:22-CV-35-CDL-MSH

**ORDER AND RECOMMENDATION**

Petitioner Frankie Wayne Pope, an inmate currently incarcerated at Hays State Prison in Trion, Georgia, filed a *pro se* petition and recast petition for a writ of habeas corpus seeking relief under 28 U.S.C. § 2254 (ECF Nos. 1, 19). Pending before the Court is Respondent's motion to dismiss Pope's habeas petition as untimely (ECF No. 30) and various motions made by Petitioner.<sup>1</sup> For the reasons stated below, the Court recommends that Respondent's motion to dismiss be granted and Pope's habeas petitions be dismissed as untimely.

**BACKGROUND**

On October 8, 2012, a Taylor County grand jury returned a six-count indictment

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<sup>1</sup> After Respondent filed his motion to dismiss Pope's petition as untimely, Pope filed a motion to investigate social security and driver's license (ECF No. 33), a motion for discovery and an evidentiary hearing (ECF No. 38), a motion to strike Respondent's motion to dismiss (ECF No. 42), a motion to strike Respondent's response to Petitioner's motion (ECF No. 44), a motion to appoint counsel and for a protective order (ECF No. 46), and a motion for the clerk to toll the statute of limitations (ECF No. 47). For the reasons discussed below, these motions are **DENIED**. Further, the Court **RECOMMENDS** that Petitioner's motion for transfer (ECF No. 32) be **DENIED**.

charging Pope with rape, two counts of aggravated sodomy, false imprisonment, terroristic threats, and possession of marijuana, less than an ounce. Resp't's Ex. 1, at 3-4, ECF No. 34-1. Pope entered a negotiated guilty plea on March 31, 2014, to rape, two counts of sodomy, false imprisonment, terroristic threats, and possession of marijuana. Resp't's Ex. 2, at 1-2, ECF No. 34-2. Pope did not directly appeal his judgment of conviction, but, on October 2, 2014, he filed an out-of-time motion to withdraw his guilty plea. Resp't's Ex. 3, ECF No. 34-3. Pope then filed a second out-of-time motion on February 9, 2015. Resp't's Ex. 4, ECF No. 34-4. The trial court denied both motions on January 13, 2020, for lack of jurisdiction because the motions were not filed in the same term of court in which Pope entered his guilty plea. Resp't's Ex. 5, at 2, ECF No. 34-5.

On October 5, 2015, while Pope's motions were pending in Taylor County, he filed a state habeas corpus petition and two amended petitions in Chattooga County challenging his Taylor County convictions. Resp't's Exs. 6-8, ECF Nos. 34-6, 34-7, 34-8. After the case was transferred to Lowndes County, evidentiary hearings were held on November 16, 2017, and January 17, 2019, and the court ultimately denied his petition on the merits on February 26, 2021. Resp't's Ex. 9, ECF No. 34-9. Pope then applied for a certificate of probable cause to appeal to the Supreme Court of Georgia on March 26, 2021 (ECF No. 34-10), which was denied on December 14, 2021 (ECF No. 34-11). The court issued its remittitur on February 15, 2022. Resp't's Ex. 12, ECF No. 34-12.

Pope filed the present federal habeas corpus petition on December 31, 2021. Pet. for Writ of Habeas Corpus, ECF No. 1. After Petitioner filed six sets of motions and numerous pages of supporting documents, the Court ordered Pope to consolidate all his



claims into one petition. Order 1-3, ECF No. 14. Pope then recast his petition (ECF No. 19) and filed four other motions (ECF Nos. 16, 17, 18, 20) that the Court denied on May 11, 2022. Order 1-4, ECF No. 21. Thereafter, Pope filed a second motion for discovery and request for counsel (ECF No. 27), which the Court denied on June 27, 2022 (ECF No. 28).

Respondent Sprayberry filed a motion to dismiss Pope's federal habeas petition as untimely on July 11, 2022. Resp't's Mot. to Dismiss, ECF No. 30. Thereafter, Pope filed a motion to be transferred for mental health reasons (ECF No. 32), a motion to investigate social security and driver's license (ECF No. 33), a motion for discovery and an evidentiary hearing (ECF No. 38), a motion to strike Respondent's motion to dismiss (ECF No. 42), a motion to strike Respondent's response to Petitioner's motion (ECF No. 44), a motion to appoint counsel and for a protective order (ECF No. 46), and a motion for the clerk to toll the statute of limitations (ECF No. 47). Respondent's motion to dismiss and Petitioner's motions are ripe for review.

### **DISCUSSION**

Respondent moves to dismiss Petitioner's application for federal habeas relief because it was untimely filed outside the applicable limitations period. Br. in Supp. of Mot. to Dismiss 2, ECF No. 30-1. Petitioner argues his petition is not untimely because his case was held "pending" in the United States District Court since he first filed a federal habeas petition in 2015. Pet'r's Mot. to Strike 1, ECF No. 42. Alternatively, Petitioner argues the statute of limitations should be tolled. Mot. for Clerk to Toll S.O.L. 1, ECF No. 47. The Court agrees with Respondent that Petitioner's application for habeas relief is

untimely, and therefore, recommends that Respondent's motion to dismiss be granted. It is also recommended that Petitioner's motion to be transferred (ECF No. 32) be denied. Further, Petitioner's motions (ECF. Nos. 33, 38, 42, 44, 47) are denied.

### **I. The Applicable Limitations Period**

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") was enacted primarily to put an end to the unacceptable delay in the review of prisoners' habeas petitions. *See Hohn v. United States*, 524 U.S. 236, 264-65 (1998) (Scalia, J., dissenting) ("The purpose of the AEDPA is not obscure. It was to eliminate the interminable delays in the execution of state and federal criminal sentences, and the . . . overloading of our federal criminal justice system, produced by various aspects of this Court's habeas corpus jurisprudence."). The AEDPA, effective April 24, 1996, therefore instituted a time bar as follows:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.
- . . .
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). The limitations period begins to run on "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). To determine whether a petition was timely filed, the Court "must determine (1) when the collateral motion was filed and (2) when the judgment of conviction became final." *McCloud v. Hooks*, 560 F.3d 1223, 1227

(internal quotation marks omitted).

## **II. Petitioner's Habeas Petition**

Petitioner's limitations period has expired, and his petition is untimely. Pope entered his guilty plea on March 31, 2014, from which point he had thirty days to file a direct appeal. *See* O.C.G.A. § 5-6-38(a). Pope did not do so; therefore, his convictions became final for purposes of AEDPA on April 30, 2014, the date on which his time to seek review expired.

Petitioner's two out-of-time motions to withdraw his guilty plea did not toll the AEDPA limitations period because they were filed after the term of court in which his plea was accepted, thus the court lacked jurisdiction to consider his motions. Under applicable law, a motion to withdraw a plea must be filed during the term of court in which the guilty plea was entered. *Humphrey v. State*, 787 S.E.2d 169, 170 (Ga. 2016) (holding that a motion to withdraw "must be filed within the term of court in which the defendant was sentenced under the plea, as the trial court lacks jurisdiction to entertain a motion to withdraw filed beyond the term of sentencing"). Pope entered his plea in the February 2014 court term but did not file a motion to withdraw his plea until October 2014, after the term of court ended. As a result, the motions were not properly filed and do not serve to toll the AEDPA limitations period. *See Colbert v. Head*, 146 F. App'x 340, 344-45 (11th Cir. 2005) (finding that a petitioner's out-of-time motion to withdraw plea did not toll AEDPA because it was not a "properly filed" application for state post-conviction relief).

Petitioner's previous federal habeas filing also had no tolling effect for purposes of AEDPA. Petitioner argues that he "filed into" the United States District Court in February

2015 and “notified” the district court that he must exhaust his state remedies prior to filing a federal habeas petition. Pet’r’s Mot. to Strike 1. Petitioner incorrectly asserts this kept his case “pending” in federal court until his state remedies were exhausted and finalized on February 26, 2021. *Id.* Petitioner wrote a letter to the Court on March 6, 2015, that was construed as a federal habeas petition. *See Pope v. Crickmar* (“*Pope I*”), No. 4:15-cv-35 (M.D. Ga., filed Mar. 6, 2015). However, when asked to recast his petition, Pope wrote three letters to the Court, in which he stated he did not intend to file a petition under § 2254 and emphasized his efforts to challenge his conviction in the state court system. R. & R. 1-2, *Pope I*, Apr. 27, 2015. Notably, Pope stated he was “concerned [his petition] may be rejected once it’s found out that [his] state habeas has not been filed.” *Id.* at 2.

The Court construed Pope’s letters as seeking dismissal of his habeas petition and dismissed the petition without prejudice. *Id.* at 2-3; Order 1, *Pope I*, May 19, 2015 (adopting recommendation of dismissal). Contrary to Pope’s argument, this dismissal did *not* keep his petition pending in the district court. Rather, the dismissal provided Pope the opportunity to refile his petition in a timely manner once his state remedies were exhausted. Further, filing a federal habeas petition does not toll AEDPA’s one-year statute of limitations. *See Rhines v. Weber*, 544 U.S. 269, 274-75 (2005) (“Although the limitations period is tolled during the pendency of a properly filed application for State post-conviction or other collateral review, the filing of a petition for habeas corpus in federal court does not toll the statute of limitations”) (internal citations and quotation marks omitted) (citing *Duncan v. Walker*, 533 U.S. 167, 181-182 (2001)). Pope failed to timely refile a petition; thus, his argument that his first petition remained “pending” has no merit.

Petitioner's federal habeas petition is untimely. He had one year from April 30, 2014—until April 30, 2015—to file his federal habeas petition unless the limitations period was tolled. 28 U.S.C. § 2244(d). He did not file a state collateral attack within this one-year period, and his attempt to file a federal habeas petition before exhausting his state remedies was futile. Instead, Pope waited until October 5, 2015, to file his state habeas petition, which was beyond his April 30, 2015, deadline. Resp't's Ex. 6, ECF No. 34-6. "A state court petition . . . that is filed following the expiration of the limitations period cannot toll [the AEDPA] period because there is no period remaining to be tolled." *Webster v. Moore*, 199 F.3d 1256, 1299 (11th Cir. 2000). As such, Petitioner's state habeas petition does not affect the timeliness of his federal habeas application. Thus, his federal habeas petition is untimely and should be dismissed.

### **III. Equitable Tolling**

In his motion to toll the statute of limitations (ECF No. 47), Petitioner appears to ask the Court to apply equitable tolling because of his previous federal habeas petition. *See Pope I*. Petitioner is not entitled to equitable tolling. The one-year AEDPA limitations period is subject to equitable tolling only in certain situations. *Holland v. Florida*, 560 U.S. 631, 645 (2010). 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." *Id.* at 649. Tolling is "an extraordinary remedy limited to rare and exceptional circumstances and typically applied sparingly." *Thomas v. Att'y Gen., Fla.*, 795 F.3d 1286, 1291 (11th Cir. 2015).

Pope merely asks for tolling and does not show that he has pursued his rights

diligently or that extraordinary circumstances stood in the way of him filing a petition for relief in a timely fashion. After his conviction became final in April 2014, Pope did not directly appeal his conviction, and instead, waited until after the term of court ended to file two out-of-time motions to withdraw his plea. Petitioner asserts, without explanation, that his 2015 filings in this Court warrant tolling of the statute of limitations, but as discussed above, that petition was dismissed because Pope had not exhausted his state remedies. Further, Plaintiff has not provided any explanation for his inability to timely file a state habeas petition before the AEDPA limitations period expired. Consequently, Petitioner is not entitled to equitable tolling and his petition is untimely under 28 U.S.C. § 2244(d). Thus, his motion to toll the statute of limitations should be denied.

#### **IV. Petitioner's Other Motions**

Pope filed several other motions, all of which lack merit, particularly in light of the untimeliness of his petition.

##### **A. Transfer for Mental Health**

Pope, who is presently incarcerated at Hays State Prison, requests to be transferred to Lakebridge Behavioral Health System, a private mental health hospital. Pet'r's Mot. for Transfer 1, ECF No. 32. Pope requests the transfer because his "support system" has passed away, he is "destitute," and he has been threatened and harmed in prison. *Id.* Pope's motion should be denied. He is not challenging the validity of his conviction and sentence, but rather the conditions of his confinement. Such a claim is not cognizable in federal habeas corpus. *See McKinnis v. Mosley*, 693 F.2d 1054, 1056-57 (11th Cir. 1982); *see also* *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006). Accordingly, the Court

**RECOMMENDS** Petitioner's motion be **DENIED**.

**B. Motion to Investigate Social Security and Driver's License**

Pope's motion appears to request that the Court investigate a debt owed to Portfolio Recovery Associates, LLC. Pet'r's Mot. to Investigate 1, ECF No. 33. Pope's motion is not related to the convictions for which he seeks habeas relief. The purpose of federal habeas review is to determine whether a conviction violated the laws of the United States. *See Estelle v. McGuire*, 502, U.S. 62, 68-69 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). The Court is not authorized to order an investigation on a matter wholly unrelated to the convictions for which Petitioner seeks relief. Therefore, Petitioner's motion is **DENIED**.

**C. Motion for Discovery and Evidentiary Hearing**

Pope asks the Court for discovery and for an evidentiary hearing. Pet'r's Mot. for Discovery, ECF No. 38. Pope has filed three previous motions for discovery (ECF Nos. 3, 20, 27), all of which have been denied by this Court (ECF Nos. 14, 21, 28). For the reasons stated in those previous orders, and because the issue of discovery is moot if Pope's petition is dismissed as untimely, his motion is **DENIED**.

**D. Motions to Strike**

Pope filed two documents styled as "motions to strike" Respondent's pleadings (ECF Nos. 42, 44). Because the Court recommends dismissal of Pope's petition as untimely, these motions are **DENIED**.

**E. Motion to Appoint Counsel and Protective Order**

Pope moves the Court to appoint him counsel and a social worker. Pet'r's Mot. to Appoint Counsel, ECF No. 46. The Court has previously denied Pope's request for counsel and stated, "[s]hould it later become apparent that legal assistance is required in order to avoid prejudice to Plaintiff's rights, the Court, on its own motion, will consider assisting him in securing legal counsel at that time. Consequently, there is no need for Plaintiff to file additional requests for counsel." For the reasons stated in our previous order, Pope's motion is **DENIED**.

F. Motion for Clerk to Toll the Statute of Limitations

Pope moves the clerk of the Court to toll the statute of limitations. Pet'r's Mot. to Toll, ECF No. 47. As discussed above, Pope is not entitled to equitable tolling. Therefore, Pope's motion is **DENIED**.

**CERTIFICATE OF APPEALABILITY**

Rule 11(a) of Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability may issue only if the applicant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court denies a habeas petition on procedural grounds without reaching the merits of the petitioner's application for habeas relief, this standard requires a petitioner to demonstrate 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.” *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Pope cannot meet this standard and, therefore, a certificate of appealability in this case should be denied.

### CONCLUSION

For the reasons stated above, it is **RECOMMENDED** that Respondent’s motion to dismiss (ECF No. 30) be **GRANTED** and Pope’s petition and recast petition for habeas relief (ECF Nos. 1, 19) be **DISMISSED** as untimely. Petitioner’s motion to investigate social security and driver’s license (ECF No. 33), motion for discovery and an evidentiary hearing (ECF No. 38), motion to strike Respondent’s motion to dismiss (ECF No. 42), motion to strike Respondent’s response to Petitioner’s motion (ECF No. 44), motion to appoint counsel and for a protective order (ECF No. 46), and motion for the clerk to toll the statute of limitations (ECF No. 47) are **DENIED**. The Court **RECOMMENDS** that Pope’s motion for transfer (ECF No. 32) be **DENIED**. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, within FOURTEEN (14) DAYS after being served with a copy hereof. Any objection should be no longer than TWENTY (20) PAGES in length. *See* M.D. Ga. L.R. 7.4. The district judge shall make a *de novo* determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, “[a] party failing to object to a magistrate judge’s findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court’s order based on unobjected-to factual

and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice.”

SO ORDERED and RECOMMENDED, this 2nd day of September, 2022.

/s/ Stephen Hyles

UNITED STATES MAGISTRATE JUDGE