

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17748
Non-Argument Calendar

D.C. Docket No. 0:16-cv-62321-RNS

FRANCIS W. SUGHRUE,

Petitioner - Appellant,

versus

STATE OF FLORIDA,
STATE OF FLORIDA, ATTORNEY GENERAL,

Respondents - Appellees.

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

(January 12, 2018)

Before JULIE CARNES, JILL PRYOR and HULL, Circuit Judges.

PER CURIAM:

Sughrue's objections, adopted the magistrate judge's report and recommendation, and dismissed the petition. Sughrue appealed.²

II.

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)(1). This dismissal requirement is inapplicable if the petitioner either “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 demonstrates that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence” and that those facts, “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 [petitioner] guilty of the underlying offense. *Id.* § 2244(b)(2). 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).

² Sughrue is not required to have a certificate of appealability to litigate his appeal. *See Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004).

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).

III.

We agree with the district court that Sughrue's § 2254 petition was second or successive such that he was required to seek authorization from this Court before filing it in the district court, which he did not do. As the district court concluded, both Sughrue's initial and instant § 2254 petitions challenged the same 1990 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 already has been challenged via an initial § 2254 petition is successive). Sughrue contends that several of his claims are based on newly discovered evidence and thus qualify under one of the two exceptions to § 2244(b)'s dismissal requirement, but even if this is true, the statute requires him to seek authorization from this Court before filing such a petition in the district court, and Sughrue failed to do so.

Sughrue maintains in the alternative that his petition could properly be considered a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). Even assuming for purposes of this opinion that the claims in his petition theoretically could be brought via a Rule 60(b) motion, the district court's

dismissal was correct. A Rule 60(b) motion based on fraud “must be made . . . no more than a year after the entry of the judgment or order or the date of the proceeding.” Fed. R. Civ. P. 60(c)(1). Because the Federal Rules of Civil Procedure apply only to federal district court proceedings, *see* Fed. R. Civ. P. 1, the only judgment or order Sughrue could attack under Rule 60(b) is the district court’s denial of his initial § 2254 proceeding, which was entered nearly ten years ago. Thus, Sughrue’s instant petition, even if properly construed as a Rule 60(b) motion, was untimely under Rule 60(c)(1).

For these reasons, the district court correctly dismissed Sughrue’s petition.³

AFFIRMED.

³ We therefore need not address any of the merits arguments Sughrue advances in his brief.

**UNITED STATES COURT OF APPEALS
For the Eleventh Circuit**

No. 16-17748

District Court Docket No.
0:16-cv-62321-RNS

FRANCIS W. SUGHRUE,

Petitioner - Appellant,

versus

STATE OF FLORIDA,
STATE OF FLORIDA, ATTORNEY GENERAL,

Respondents - Appellees.

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

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: January 12, 2018
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna Clark

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-62321-CIV-SCOLA
MAGISTRATE JUDGE P.A. WHITE

FRANCIS W. SUGHRUE,

Petitioner,

v.

JULIE J. JONES,

Respondent.

REPORT RE DISMISSAL
FOR FAILURE TO OBTAIN
AUTHORIZATION PURSUANT TO
28 U.S.C. §2244(b)(3)

I. Introduction

Francis Sughrue filed this second federal habeas corpus petition, pursuant to 28 U.S.C. §2254, challenging the constitutionality of his convictions and sentences entered following a jury verdict in the Seventeenth Judicial Circuit Court in and for Broward County, Florida, in case number 88-20264CF10A.

This Cause was referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts. No order to show cause was issued because the petition as filed is subject to dismissal. In issuing this report, the undersigned has carefully reviewed and considered the instant petition (DE#1) and attached exhibits, Petitioner's memorandum of law in support of his habeas corpus petition (DE#5), Petitioner's prior habeas corpus petition filed in case number 97-6463-Civ-Ungaro, which attacked the same convictions and sentences under attack here, the court record in that case, the appellate decision affirming the district court's denial of Petitioner's first habeas corpus petition (97cv6463:DE#31), and the subsequent procedural history in the state courts.

II. Background and Procedural History

On November 8, 1988, Petitioner was charged by Information with one count of trafficking in cocaine over 400 grams (count 1), one count of conspiracy to traffic in cocaine over 400 grams (count 2), and one count of felony battery on a law enforcement officer (count 3). (97cv06463:DE#15¹). On October 11, 1990, the jury found Petitioner guilty on all counts as charged. (97cv06463:DE#15). On December 12, 1990, Petitioner was sentenced to two concurrent life sentences, with a minimum mandatory sentence of fifteen (15) years as to counts one and two, and five (5) years concurrent as to count three, as an habitual violent offender. (97cv06463:DE#15).

Petitioner prosecuted a direct appeal in the Fourth District Court of Appeal. On April 29, 1992, the state appellate court affirmed per curiam the convictions, but reversed the determination that Petitioner had violated his probation. Sughrue v. State, 597 So.2d 935 (Fla. 4th DCA 1992).

On February 22, 1994, the Petitioner filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (97cv06463:DE#15). The trial court denied relief, and Petitioner appealed to the Fourth District Court of Appeal. (97cv06463:DE#15). On October 17, 1995, the Fourth District affirmed per curiam, without written opinion, the trial court's denial of postconviction relief. Sughrue v. State, 661 So.2d 839 (Fla. 4th DCA 1995)(table). On November 14, 1995, the Florida Supreme Court dismissed for lack of jurisdiction Petitioner's

¹ The undersigned takes judicial notice of the Report of Magistrate Judge issued in the prior §2254 petition (97cv06463:DE#15), which relied on the state record that was only contained in the court file and was not scanned and docketed electronically. (97cv06463:DE#10). The Report was adopted by the District Judge. (97cv06463:DE#18).

appeal of the Fourth District's decision. Sughrue v. State, 664 So.2d 249 (Fla. 1995) (table).

Petitioner filed his first habeas corpus petition in this court on April 23, 1997. The petition was deemed timely, because it was filed within one year of the enactment of the Antiterrorism and Effective Death Penalty Act (the "AEDPA"). (97cv06463:DE#15). A Report (97cv06463:DE#15) recommending that the petition be denied on the merits was adopted by the district court on May 14, 1998. (97cv06463:DE#18). Petitioner appealed to the Eleventh Circuit and the court affirmed the district court's denial on the merits of Petitioner's habeas corpus petition. Sughrue v. Butler, 190 F.3d 542 (11th Cir. 1999) (table). The mandate issued on October 21, 1999. (97cv06463:DE#31). The United States Supreme Court denied certiorari. Sughrue v. Butler, 529 U.S. 1039, 120 S.Ct. 1536, 146 L.Ed.2d 350 (2000).

Undeterred, Petitioner has now returned to this court, filing this second, federal habeas petition, pursuant to 28 U.S.C. §2254, on September 23, 2016.² Although the petition was signed under penalty of perjury, the lengthy accompanying memorandum was not signed and dated under penalty of perjury.

² The instant petition was delivered to prison officials for mailing to this court on September 23, 2016. "Under the prison mailbox rule, a pro se prisoner's court filing is deemed filed on the date it is delivered to prison authorities for mailing." Williams v. McNeil, 557 F.3d 1287, 1290 n.2 (11th Cir. 2009); see Fed.R.App. 4(c)(1) ("If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing."). Unless there is evidence to the contrary, like prison logs or other records, a prisoner's motion is deemed delivered to prison authorities on the day he signed it. See Washington v. United States, 243 F.3d 1299, 1301 (11th Cir. 2001); Adams v. United States, 173 F.3d 1339 (11th Cir. 1999) (prisoner's pleading is deemed filed when executed and delivered to prison authorities for mailing).

III. Discussion

As previously discussed, careful review of Petitioner's latest filings confirms that he filed a prior habeas petition pursuant to 28 U.S.C. §2254 in which he challenged the constitutionality of his state court conviction in case number 88-20264CF10A. The first petition was denied on the merits.

Petitioner seeks to raise claims herein that he appears to have pursued in the state forum after he filed his initial federal petition. He claims to have filed state habeas corpus petitions and/or motions to correct illegal sentence in the Seventeenth Judicial Circuit Court after he filed his first habeas corpus petition in this court. The Broward County Clerk of Court's on line docket reflects that Petitioner has filed numerous motions for resentencing, petitions for writ of habeas corpus and/or motions to correct illegal sentence. The lengthy procedural history in the state courts does not affect the successiveness of the instant federal habeas corpus petition, because none of Petitioner's motions were successful, and he is still attacking the same convictions and sentences he attacked in his first federal habeas corpus petition on new or previously raised grounds. See, e.g., Magwood v. Patterson, 561 U.S. 320, 323-24, 130 S.Ct. 2788, 2792, 177 L.Ed.2d 592 (2010) (holding that a habeas application that challenges for the first time a new judgment entered pursuant to a resentencing hearing is not successive under §2244(b)). Thus, the denial on the merits of his initial §2254 petition constitutes a jurisdictional bar on this second unauthorized §2254 petition.

Section 2244(b) provides in pertinent part:

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --

(A) the application 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.

(3) (A) *Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.*

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals....

28 U.S.C. §2244(b) (emphasis added).

Thus, in accordance with 28 U.S.C. §2244(b)(3)(A), "[B]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." See 28 U.S.C. §2244(b)(3)(A); Felker v. Turpin, 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996); In re Medina, 109 F.3d 1560 (11th Cir. 1997). "A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by

a three-judge panel of the court of appeals" and may be granted "only if [the assigned panel of judges] determines that the application makes a *prima facie* showing that the application satisfies the requirements of [28 U.S.C. §2244(b)(2)]." See 28 U.S.C. §2244(b)(3)(B) and (C).

Here, the instant federal petition challenges the legality of the same state court judgment that was the subject of Petitioner's first §2254 action filed by him in 1997. Furthermore, the 1997 habeas petition qualified as a first §2254 habeas corpus petition for purposes of determining successor status because it was denied on the merits.

Consequently, absent authorization from the Eleventh Circuit to file a successive habeas petition, the district court lacks jurisdiction over this federal petition. See Burton v. Stewart, 549 U.S. 147, 153, 127 S.Ct. 793, 796, 166 L.Ed.2d 628 (2007) (finding that petitioner was required to receive authorization from the appellate court before filing his second habeas corpus petition and failure to do so divested the district court of jurisdiction to entertain it).

Petitioner does not allege that he obtained the requisite permission from the Eleventh Circuit Court of Appeals prior to filing the instant federal habeas petition. This failing operates as a jurisdictional bar that precludes this district court's consideration of the merits of the instant petition. See 28 U.S.C. §2244(b)(3)(A); Fugate v. Dep't of Corrections, 301 F.3d 1287, 1288 (11th Cir. 2002). Therefore, the petition should be dismissed for lack of jurisdiction.

If the Petitioner intends to pursue this case, he should forthwith apply to the United States Eleventh Circuit Court of Appeals for the authorization required by 28 U.S.C. §2244(b)(3)(A).

Since the first petition was denied on the merits, rendering this second petition successive, any attempt by Petitioner to obtain review on the merits of his attack on his conviction is for the Eleventh Circuit Court of Appeals to decide. The Petitioner will be provided with a form to apply for such authorization with this report. Since this successive petition appears to be barred by the one year statute of limitations set forth in 28 U.S.C. §2244, it does not appear that either a direct transfer of the case to the Court of Appeals pursuant to 28 U.S.C. §1631, or a stay of the present case would be appropriate. See generally Guenther v. Holt, 173 F.3d 1328 (11th Cir. 1999).

IV. Certificate of Appealability

As amended effective December 1, 2009, §2254 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rules Governing §2254 Proceedings, Rule 11(b), 28 U.S.C. foll. §2254.

After review of the record, Petitioner is not entitled to a certificate of appealability. "A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). To merit a certificate of appealability, Petitioner must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir.

2001). Here, Petitioner cannot satisfy the Slack test. Slack, 529 U.S. at 484.

As now provided by Rules Governing §2254 Proceedings, Rule 11(a), 28 U.S.C. foll. §2254: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

V. Recommendation

It is recommended that this petition for habeas corpus relief be dismissed for lack of jurisdiction for failure of the Petitioner to obtain from the Eleventh Circuit Court of Appeals the authorization required by 28 U.S.C. §2244(b)(3) with regard to the challenges to his convictions and sentences; that no certificate of appealability issue; and that this case be closed.

Objections to this report may be filed with the District Judge within fourteen (14) days of receipt of a copy of the report.

SIGNED this 11th day of October, 2016.


UNITED STATES MAGISTRATE JUDGE

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