UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 06-20182-CIV-SEITZ

ALBERT HOLLAND, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_________________________________/

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AS UNTIMELY FILED

THIS MATTER is before the Court on Respondent State of Florida's (the "State") Response to Order to Show Cause [DE-14], in which it argues that Petitioner's application for a writ of habeas corpus [DE-1] is untimely and should be dismissed. Petitioner filed a reply [DE-35], arguing that his petition is timely under a theory the United States Supreme Court recently rejected and asking the Court to apply equitable tolling, in any event. The Court allowed the State to file a sur-reply responding to Petitioner's equitable tolling argument. Upon review of the record, the applicable law, and the pertinent facts of this case, the Court finds that Petitioner's application for habeas relief is untimely and should not be equitably tolled.

I. FACTUAL AND PROCEDURAL BACKGROUND

On or about August 16, 1990, Petitioner Albert Holland was indicted in Broward County, Florida, on four counts – including first-degree premeditated murder. A jury convicted him on all four counts, and he was sentenced to death on the first-degree murder count, life imprisonment for sexual battery, 40 years for attempted first-degree murder, and 17 years for armed robbery. On appeal, the Florida Supreme Court reversed the convictions and remanded the case for a new trial. *See generally Holland v. State*, 636 So. 2d 1289 (Fla. 1994).

On retrial, another jury found Petitioner guilty.[1] Once again, the trial court sentenced Petitioner to death on the first-degree murder count. This time, on appeal, the Florida Supreme Court affirmed Petitioner's conviction and death sentence, and the United States Supreme Court denied *certiorari* on October 1, 2001. *See generally Holland v. State*, 773 So. 2d 1065 (Fla. 2000), *cert. denied*, 534 U.S. 831 (2001).

On or about September 19, 2002,[2] 353 days later, Petitioner filed his application for state post-conviction relief, which tolled the one-year time limit for filing his federal habeas petition under 28 U.S.C. § 2254. The court denied relief, and on appeal, the Florida Supreme Court affirmed this decision. *See generally Holland v. State*, 916 So. 2d 750 (Fla. 2005). The mandate issued on December 1, 2005. Petitioner then sought review of the denial of state post-conviction relief in the United States Supreme Court. The United States Supreme Court denied *certiorari* on April 17, 2006. *See generally Holland v. Florida*, 126 S. Ct. 1790 (2006). In the meantime, on January 19, 2006, Petitioner, acting *pro se*, filed the present federal habeas petition.

II. DISCUSSION

A. The Pendency of a *Cert* Petition in the United States Supreme Court Does Not Toll the One-Year Time Limit for Filing a Federal Habeas Petition Under § 2244.

A prisoner in state custody has one year to seek federal habeas corpus relief once his state court judgment of conviction becomes final. *See* 28 U.S.C. § 2244(d). The judgment becomes final when "the Supreme Court has had an opportunity to review the case or the time for seeking review has expired." *Coates v. Byrd*, 211 F.3d 1225, 1226 (11th Cir. 2000) (citing *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir.1999)). Under 28 U.S.C. § 2244(d)(2), the limitations period is tolled for the time during which "a

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[1] On the sexual battery count, a jury found Petitioner guilty of the lesser offense of attempted sexual battery.

[2] The State has identified this date as the date on which Petitioner filed his state-court motion. Petitioner has identified September 17, 2002 as the date on which he filed his state-court motion.

properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."

Petitioner's judgment and conviction became final on October 1, 2001. Petitioner filed his application for state post-conviction relief 353 days later, on September 19, 2002. The filing of his state habeas petition stopped the clock temporarily. Once the Florida Supreme Court issued its mandate on December 1, 2005, affirming the denial of state habeas relief, Petitioner had just 12 more days – until December 13, 2005 – to file his federal habeas petition. Petitioner did not file his federal petition until more than a month later, on January 19, 2006.

Petitioner had argued to this Court that the filing and pendency of his *cert* petition in the United States Supreme Court tolled his one-year time limit for filing his federal habeas petition. The parties had been awaiting a decision from the United States Supreme Court on this very question. On February 20, 2007, the United States Supreme Court squarely held that the time during which a *cert* petition is pending does not toll the one-year statute of limitations pursuant to 28 U.S.C. § 2244(d). *Lawrence v. Florida*, 127 S. Ct. 1079, 1081 (2007). Thus, Petitioner's first argument fails.

B. Equitable Tolling Is Not Warranted in This Case.

Although the United States Supreme Court has yet to decide whether the doctrine of equitable tolling applies to extend the one-year limitations period set forth in 28 U.S.C. § 2244, the Eleventh Circuit has held that it does. *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000). "Equitable tolling is an extraordinary remedy which is typically applied sparingly." *Id.* A district court can allow equitable tolling where a movant files a habeas petition untimely "because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Id.* (quoting *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)) (emphasis added). However, this should be done only in "rare and exceptional circumstances," such as when the State's conduct prevents timely filing. *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005) *aff'd*, 127 S. Ct. 1079 (2007); *see also Arce v. Garcia*, 400

F.3d 1340, 1349 (11th Cir. 2005) (noting that, in order to invoke equitable tolling, "courts usually require some affirmative misconduct").

Petitioner bears the burden of establishing his entitlement to this extraordinary remedy. *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1286 (11th Cir. 2002), *overruled in part on other grounds by Sykosky v. Crosby*, 187 Fed. Appx. 953 (11th Cir. 2006). Here, Petitioner posits five arguments for equitable tolling: (1) the Florida Supreme Court's failure to oversee his former State-appointed attorney, Bradley M. Collins, Esq.;[3] (2) the Florida Supreme Court's Clerk's Office's failure to inform him that mandate had issued in his post-conviction appeal; (3) the Department of Corrections' ("DOC") "refusal" to allow him access to the "Writs" room; (4) Collins' failure to keep him informed of the status of his case and to timely file the federal habeas petition; and (5) his long history of mental illness, which prevented him from timely filing his petition. As shown below, all of these arguments lack merit.

1. The Florida Supreme Court's failure to oversee Collins

Petitioner claims that the Florida Supreme Court's failure to oversee Collins' efforts should allow for equitable tolling. Petitioner is incorrect. This does not constitute an extraordinary circumstance warranting equitable tolling. *See Lawrence*, 421 F.3d at 1226 (State's provision of an inadequate or incompetent attorney is not a basis for equitable tolling).

2. The Florida Supreme Court's failure to inform him that mandate had issued

Petitioner next argues that the Florida Supreme Court's failure to advise him that mandate had issued in his post-conviction appeal likewise should allow for equitable tolling. This argument also misses its mark. Petitioner's situation is distinguishable from the scenario in *Knight v. Schofield*, 292 F.3d 709, 710-11 (11th Cir. 2002), in which the Clerk of the Georgia Supreme Court specifically assured inmate Knight that he would be notified as soon as a decision in his case issued, but inadvertently sent

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[3] Collins was appointed for post-conviction purposes when the Office of Capital Collateral Regional Counsel – South withdrew from Petitioner's case because of caseload conflict.

notice of the decision to the wrong person. Knight showed diligence by trying to contact the Clerk when he never received a response. *Id.* at 711. Accordingly, the Eleventh Circuit reversed the district court's denial of equitable tolling, finding that "[u]ntil the clerk responded, Knight had no way of knowing that his state remedies had been exhausted." *Id.* at 711.

Here, Petitioner never argues that someone in the Clerk's Office promised to inform him of the outcome of his case. Further, there is no evidence that Petitioner ever contacted the Florida Supreme Court to request a copy of its decision and/or mandate denying post-conviction relief. Petitioner did contact the Florida Supreme Court for other reasons, though – for example, (1) to seek Collins' removal as his attorney (*i.e.*, Feb. 23 and June 17, 2004); and (2) to request copies of various pleadings, other court filings, and dates of Orders (*i.e.*, Nov. 17 and Nov. 24, 2003; Jan. 23, Apr. 29, and Aug. 26, 2004). (Pet'r's App. [DE-38] I and J.) Just as Petitioner directly sought to have the Florida Supreme Court send him certain information, he could have asked it to send him notice of the mandate denying state post-conviction relief.[4]

3. The DOC's alleged refusal to allow Petitioner access to the "Writs" room

Petitioner alleges that the DOC denied him access to the "Writs" room, and that this should serve

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[4] In his reply, Petitioner notes, without any evidentiary support, that he contacted the Florida Supreme Court in October 2005 to determine how to find his case on its website so that he could "secure the assistance of outside supporters to keep him updated about the appeal." (Pet'r's Reply [DE-35] at 18). He has only filed in the record copies of certain pages of the website apparently sent to him, without offering any evidence to show that he needed the website to secure "outside supporters." (Pet'r's App. N.) He also does not discuss what efforts he made to find such "outside supporters" once he received information about the website or how these outside supporters were going to keep him apprised of the status of his case.

Petitioner also conflates a communication regarding the direct appeal of his conviction and sentence on re-trial with his case for post-conviction relief. He emphasizes a letter he sent to the Florida Supreme Court on December 21, 2005, which he does not include in his Appendix. The Florida Supreme Court (Office of the Clerk) sent Petitioner a response to this letter, which Petitioner includes as Appendix P. The response noted that Petitioner had inquired as to the date "Mandate issued in [Case No.] SC89922 [the direct appeal of his conviction and sentence on re-trial]." (Pet'r's App. P.) In the response, the Clerk of the Court advised Petitioner that he needed to contact the Florida State Archives, as the case file had been sent there. (*Id.*) Contrary to Petitioner's characterization of the response as "acknowledging that Petitioner's request was also for a status of Case No. SC03-1033 [regarding his motion for state post-conviction relief]," the text of the Clerk's response does not so indicate.

as a basis for equitable tolling. Counsel for the State asserts that a notation of "refused" on the "Northeast Unit Writ Room Callout" sheet means that the inmate refused, not that prison officials denied him access to the room. (State's Sur-Reply ¶ 9.) The Court has no way of verifying this information; however, the mere assertion that the DOC denied Petitioner access to the "Writs" room does not constitute an extraordinary circumstance such that equitable tolling is justified. This allegation is similar to an allegation of deficiencies in or lack of access to a prison law library[5] – which the Eleventh Circuit has held does not provide a basis for equitable tolling, without more. *Helton v. Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1313-14 (11th Cir. 2001) (inmate's bare allegation of prison library's deficiency insufficient; no evidence as to when inmate learned of alleged deficiency or any efforts taken to remedy such deficiency); *Akins v. United States*, 204 F.3d 1086, 1090 (11th Cir. 2000) (prisoner's mere inability to access law library is not, in itself, an unconstitutional impediment; inmate must show such inability caused actual harm); *see also Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (inmate offered no specificity as to allegation of lack of access to legal materials; "[i]t is not enough to say that the Minnesota facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate").

Here, Petitioner offers no specific information about the connection between his denial of access to the "Writs" room and the delay in filing his federal habeas petition. He also does not discuss his efforts to gain access to the "Writs" room once he was denied: did he seek out a reason for the denial? what was the response? how many times did he try to gain access to the room after the denial? was he denied each time? what was the reason given for the subsequent denials? Petitioner provides nothing but the bald assertion of his lack of access to the room. This is insufficient to establish an entitlement to equitable tolling.

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[5] The Court assumes that the "Writs" room is a type of prison law library.

4. Collins' failures as Petitioner's appointed counsel

Petitioner asserts that Collins failed to timely file the instant habeas petition and failed to keep him informed of the status of his case, and that such failures should allow for equitable tolling. It is well-settled that attorney negligence in calculating deadlines and understanding the law on habeas relief is not a basis for equitable tolling. *Helton*, 259 F.3d at 1313 (agreeing that attorney mistake does not warrant equitable tolling); *Steed*, 219 F.3d at 1300 ("[a]ny miscalculation or misinterpretation . . . in interpreting the plain language of the statute does not constitute an extraordinary circumstance sufficient to warrant equitable tolling"). As for Collins' alleged failure to keep Petitioner informed of the status of his case, the record shows that Collins met with Petitioner on death row and communicated with him in writing on several occasions,[6] provided to Petitioner a detailed, written explanation of the strategy for the case, pursued state collateral relief for Petitioner, and filed a petition for a writ of *certiorari* from the United States Supreme Court. Collins had also prepared a proposed federal habeas petition on Petitioner's behalf and sent it to Petitioner for his review, "suggesting that Holland either sign the Petition for filing or indicate that he would prefer [Collins] comply with Holland's repeated requests that [Collins] move the trial court for leave to withdraw as counsel of record."[7] (State's App. [DE-41] Ex. 1.) Petitioner never responded to Collins' correspondence. (*Id.*)

Rather than cooperate with Collins, Petitioner filed numerous *pro se* motions during the time Collins represented him.[8] He repeatedly expressed his desire for Collins to withdraw from the case and

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[6] The record evidence shows that Collins wrote at least eight letters to Petitioner – one undated letter (but sometime after May 30, 2002); one letter on December 23, 2002; one letter on January 22, 2003; letters on January 14, June 15, and July 19, 2004; and letters on January 18 and January 31, 2006.

[7] This is taken from paragraph (d) of Collins' March 24, 2006 motion to withdraw as Petitioner's counsel. It appears that, had Petitioner signed the document Collins drafted, his federal petition would still have been late. Even so, as discussed earlier, attorney negligence in filing a habeas petition does not constitute an extraordinary circumstance.

[8] A defendant does not have a right to "hybrid" representation – that is, to proceed *pro se* while simultaneously being represented by an attorney. *Cross v. United States*, 893 F.2d 1287, 11291-92 (11th Cir. 1990).

actively sought Collins' removal by filing motions to this effect on February 23 and June 17, 2004. Indeed, according to Collins, Petitioner "has complained of conflicts with every counsel he has had since the beginning of his case, including trial counsel in his first trial and again different counsel in his retrial."[9] (*Id.*)

Even if Collins was so careless in keeping Petitioner apprised of his case that his behavior could be characterized as an "extraordinary circumstance," Petitioner must still show that he acted with due diligence in order to be afforded equitable tolling. The record shows that he wrote a few letters to his attorney, but he did not seek any help from the court system to find out the date mandate issued denying his state habeas petition, nor did he seek aid from "outside supporters" he claimed he wanted to enlist to help him. This does not demonstrate due diligence. *See Powe v. Culliver*, Case No. 05-17150, 2006 WL 3253960, at *4 (11th Cir. Sep. 19, 2006) (finding "arguably extraordinary" circumstances because of attorneys' failures to respond to petitioner's letters, but holding that petitioner did not show due diligence – where he wrote just three letters to his attorneys, did not seek further help from the trial court, and failed to file his state habeas petition on his own, even without a copy of his trial transcript).

5. Petitioner's long history of mental illness

In his brief, Petitioner alludes to his long history of mental illness as a basis for equitable tolling. Petitioner must be able to establish a causal connection between his mental incapacity and his ability to file a petition timely; the mere contention of mental incapacity, without more, is insufficient. *Lawrence*, 421 F.3d at 1226-27. Petitioner has offered no such connection. Indeed, as the State points out, Petitioner's conduct belies any claim that his mental illness prevented him from discovering through appropriate diligence the date his post-conviction appeal was decided and mandate issued. Petitioner has

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[9] This statement is taken from a letter written by Collins' attorney, Kevin J. Kulik, in response to Petitioner's complaint to The Florida Bar regarding Collins. The Court notes that The Florida Bar did not initiate an investigation of Collins' conduct, finding that the issues Petitioner raised "did not rise to the standard of a violation of The Rules Regulating The Florida Bar." (Pet'r's App. H.)

repeatedly sought to represent himself, filing several *pro se* motions and other documents with the Court even while represented by counsel. He has written numerous, cogent letters to counsel, the DOC, the courts, and The Florida Bar (complaining about his attorney's alleged incompetence). He has sought from the Florida Supreme Court copies of various pleadings and other filings in his state habeas case. What this shows is that Petitioner was certainly capable of using due diligence to ascertain his filing deadline for the instant habeas petition, but did not. Accordingly, it is hereby

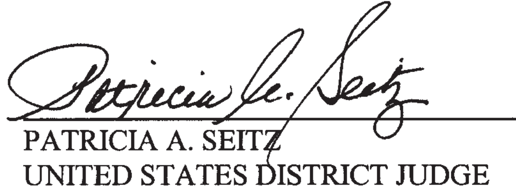
ORDERED that:

(1) Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [DE-1] is DENIED AS UNTIMELY FILED;

(2) All pending motions not otherwise ruled upon in this Order are DENIED AS MOOT; and

(3) This case is CLOSED.

DONE and ORDERED in Miami, Florida, this 27th day of April, 2007.



PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record