

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11335
Non-Argument Calendar

D.C. Docket No. 6:11-cv-01850-JA-GJK

FRANK L. AMODEO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

(March 12, 2020)

Before WILLIAM PRYOR, GRANT and LUCK, Circuit Judges.

PER CURIAM:

Frank Louis Amodeo, a federal prisoner, appeals the denial of his motions to reopen his second motion to vacate his sentence, 28 U.S.C. § 2255, and his related motion for appointed counsel. Fed. R. Civ. P. 60(b). The government moves to dismiss Amodeo's appeal for lack of jurisdiction for failure to obtain a certificate of appealability, *see* 28 U.S.C. § 2253(c), and Amodeo responds that a certificate is unnecessary to appeal the order denying his motion for appointed counsel. Amodeo does not dispute that he must have a certificate of appealability to appeal the order denying his Rule 60(b) motions, *see Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1263 (11th Cir. 2004) (en banc), and because he cannot satisfy the requirements to obtain one, we deny him a certificate, grant in part the motion of the government, and dismiss the issues related to his motions to reopen. But because Amodeo needs no certificate of appealability to appeal the order denying his motion for appointed counsel, *see Crain v. Sec'y, Fla. Dep't of Corr.*, 918 F.3d 1294, 1295 & n.1 (11th Cir. 2019), we affirm that order.

I. BACKGROUND

For the better part of a decade, Amodeo has argued, without success, that he is mentally ill in an effort to overturn his convictions for one count of conspiring to defraud the United States, 18 U.S.C. § 371, one count of obstructing an agency investigation, *id.* § 1505, and three counts of failing to remit payroll taxes, 26 U.S.C. § 7202. On direct appeal, we rejected as meritless Amodeo's argument that

the district court failed to ensure that he was competent to plead guilty. *United States v. Amodeo*, 387 F. App'x 953, 954 (11th Cir. 2010). Later, the district court dismissed Amodeo's first motion to vacate, 28 U.S.C. § 2255, in which he argued that he was incompetent to plead guilty, and we denied Amodeo's application for a certificate of appealability. *Amodeo v. United States*, No. 11-16083 (11th Cir. June 14, 2012). After the district court dismissed Amodeo's second motion to vacate without prejudice for exceeding page limitations, we denied Amodeo's application for a certificate of appealability for "fail[ure] to make a substantial showing of the denial of a constitutional right" because he "was given numerous opportunities . . . to amend his motion with clear instructions from the district court" and because "his filings ma[de] clear that he . . . intended to continue requesting that the court allow him to file a longer pleading." *Amodeo v. United States*, No. 12-11930 (11th Cir. Dec. 10, 2012). Recently, we rejected Amodeo's argument that his mental illness constituted an extraordinary circumstance that tolled the time to file his third motion to vacate. *Amodeo v. United States*, No. 15-15280, slip op. at 4–5 (11th Cir. Jan. 22, 2020).

In 2016, Amodeo moved, without success, to reopen his second motion to vacate. Fed. R. Civ. P. 60(b). Amodeo argued that the district court should have assessed his competence before dismissing his second motion to vacate, and he submitted two expert reports from 2008 that stated his bipolar disorder rendered

him incapable of proceeding *pro se*. The district court denied Amodeo's motion to reopen as untimely, Fed. R. Civ. P. 60(c)(1), and we denied his application for a certificate of appealability, *Amodeo v. United States*, No. 16-11728 (11th Cir. Jan. 6, 2017). We concluded that reasonable jurists would not find debatable the decision to deny Amodeo's motion to reopen as untimely when "it was filed over three years after the district court's judgment and this Court's denial of a COA." *Id.*, slip op. at 4. And we concluded that Amodeo "failed to show extraordinary circumstances" because, "[c]ontrary to his assertion[], the district court . . . was not required to conduct an evidentiary hearing as to his mental capacity at the time of the filing" *Id.*

Amodeo lately has filed a salvo of motions to reopen his second motion to vacate based on his mental incompetency and a motion for appointed counsel. Fed. R. Civ. P. 60(b). Amodeo's legal guardian, Charles Rahn, moved to reopen on the ground that the district court should have known that Amodeo was incapable of litigating his second motion to vacate and appointed him a guardian or attorney. Rahn submitted a report from a psychologist who opined that, as of April 2017, Amodeo lacked the capacity to proceed *pro se* and that, between 2009 and 2012, his medications caused him to suffer from cognitive deficits. The district court denied the motion to reopen as untimely and for "failure to demonstrate any of the factors set forth in Rule 60(b) or to provide any other basis for reconsideration of

[its] Order of February 7, 2012,” and denied Amodeo a certificate of appealability. Rahn next filed two amended motions to reopen that included a request for appointed counsel, but the district court denied the amended motions for “failure to present any basis for relief” and denied certificates of appealability. Rahn then filed a motion to appoint counsel, which the district court denied summarily.

Rahn filed a notice of appeal on Amodeo’s behalf without requesting a certificate of appealability from this Court. *See* 28 U.S.C. § 2253(c)(1). Because Rahn could not serve as legal counsel for Amodeo, *see Martin-Trigona v. Shaw*, 986 F.2d 1384, 1388 n.1 (11th Cir. 1993), we granted Amodeo’s motion for appointed counsel.

After Amodeo filed his initial brief, the government moved to dismiss the appeal for lack of jurisdiction. *See* 28 U.S.C. § 2253(c). Amodeo responds that he is not required to obtain a certificate of appealability to appeal the denial of his request for appointed counsel and that he is entitled to assistance to litigate his motion to reopen. In the alternative, Amodeo argues that he is entitled to a certificate of appealability to appeal the denial of his motions to reopen.

II. STANDARD OF REVIEW

We review *de novo* issues regarding our jurisdiction. *Williams v. Chatman*, 510 F.3d 1290, 1293 (11th Cir. 2007).

III. DISCUSSION

We divide our discussion in two parts. First, we explain why Amodeo is not entitled to a certificate of appealability. Second, we explain why the district court did not abuse its discretion when it denied Amodeo's motion for appointed counsel.

A. Amodeo is Not Entitled to a Certificate of Appealability.

This court has “limited jurisdiction, possessing only that power authorized by Constitution and statute.” *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (internal quotation marks omitted). We have authority to review “final decisions of the district courts.” 28 U.S.C. § 1291. But “an appeal may not be taken to the court of appeals from . . . the final order in a proceeding under 2255” unless the federal prisoner obtains a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B).

Amodeo is required to obtain a certificate of appealability to appeal the orders denying his motions to reopen. Those decisions were final orders that prevented Amodeo from revisiting his proceeding under section 2255. *Hamilton v. Sec'y, Fla. Dep't of Corrs.*, 793 F.3d 1261, 1265 (11th Cir. 2015); *Gonzalez*, 366 F.3d at 1263. It matters not whether Amodeo's motion was denied as untimely instead of on the merits because “*Slack v. McDaniel*[, 529 U.S. 473, 484-85 (2000), held] that a COA is required to appeal the denial of a claim solely on *procedural* grounds.” *Hamilton*, 793 F.3d at 1265.

To obtain a certificate of appealability, Amodeo has to make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Because the district court based its decision on Federal Rule of Civil Procedure 60(b), Amodeo must prove “that jurists of reason would find it debatable whether the [motions] state[] 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*, 529 U.S. at 484. Under Rule 60(b), the district court had wide discretion to determine whether Amodeo moved within a reasonable time to reopen his earlier proceeding. *Cano v. Baker*, 435 F.3d 1337, 1341 (11th Cir. 2006).

Reasonable jurists would not debate the decision to deny Amodeo’s motions to reopen as untimely. Amodeo sought to reopen a judgment that was more than five years old. Amodeo long had known of his mental impairments and had, in that interim, proved capable of pursuing postconviction relief diligently. The district court did not abuse its discretion by rejecting an argument that it considered one year earlier and that we determined did not merit a certificate of appealability.

B. The District Court Did Not Abuse Its Discretion by Denying Amodeo’s Motion for Appointed Counsel.

Amodeo did not need a certificate of appealability to appeal the order denying his motion to appoint counsel. *See Harbison v. Bell*, 129 S. Ct. 1481, 1485 (2009) (“An order . . . that denies a motion for appointment of counsel . . . is not . . . subject to the COA requirement.”). And the order was final and appealable, 28

U.S.C. § 1291, because Amodeo’s postconviction proceeding was no longer pending and “nothing remained for the court to do.” *See Crain*, 918 F.3d at 1295 & n.1. So we may review that order.

The district court did not abuse its discretion by denying Amodeo’s motion for appointed counsel. *See United States v. Webb*, 565 F.3d 789, 793 (11th Cir. 2009). Amodeo had “no federal constitutional right to counsel in [his] postconviction proceedings,” *Barbour v. Haley*, 471 F.3d 1222, 1227 (11th Cir. 2006); *see Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), nor did “the interests of justice or due process so require” that he receive legal assistance, *Schultz v. Wainwright*, 701 F.2d 900, 901 (11th Cir. 1983); 18 U.S.C. § 3006A(a)(2)(B). It would have been futile to appoint counsel for Amodeo to pursue a claim that was untimely. And Amodeo did not need the aid of an attorney because he had a legal guardian acting on his behalf. *See Fed. R. Civ. P. 17(c)*.

IV. CONCLUSION

We **GRANT** in part the motion of the government and **DISMISS** for lack of jurisdiction Amodeo’s challenge to the denial of his motions to reopen. We **AFFIRM** the denial of Amodeo’s motion for appointed counsel.