IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10043-H

JOHNNY ALLEN MARTIN,

Petitioner-Appellant,

versus

GREGORY MCLAUGHLIN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Johnny Allen Martin has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 13, 2018, order denying a certificate of appealability. Upon review, Martin's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX
A.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10043-H

JOHNNY ALLEN MARTIN,

Petitioner-Appellant,

versus

GREGORY MCLAUGHLIN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ORDER:

Johnny Allen Martin is a Georgia prisoner serving a life sentence, after a jury convicted him in 2001 of armed robbery and sexual battery. He filed a direct appeal, and the Georgia Court of Appeals affirmed his convictions and sentences on April 15, 2003. Martin then sought *certiorari* review in the Supreme Court of Georgia, which was denied on September 22, 2003. Martin did not file a petition for *certiorari* in the Supreme Court of the United States.

Martin subsequently filed a state habeas petition in 2005, which was denied. He then filed a second state habeas petition in 2015, raising, for the first time, a single claim that the trial court erred in denying him appointment of new counsel for the purposes of appeal, resulting in a conflict of interest in violation of his Sixth Amendment rights. The state habeas court denied

APPENDIX
B.

the petition as time-barred and successive. The Supreme Court of Georgia denied Martin a certificate of probable cause to appeal the denial of his second habeas petition.

In 2017, Martin filed the instant *pro se* petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, raising the same claim: he was denied his right to conflict-free appellate counsel because his trial counsel represented him on appeal.

The magistrate judge prepared a report and recommendation ("R&R") recommending dismissal of the petition as time-barred. The district court adopted the R&R and dismissed the petition. Martin appealed and now seeks a certificate of appealability ("COA") from this Court. In his motion for a COA, he contends that the district court erred in failing to consider the merits of his claim, which concerns a constitutional right that cannot be waived due to an untimely petition.

In order to obtain a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that reasonable jurists would find debatable whether the district court was correct in its procedural ruling and whether the petition states a valid claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This Court "review[s] *de novo* a district court's denial of a habeas petition as untimely." *Chavers v. Sec'y, Fla. Dep't of Corr.*, 468 F.3d 1273, 1274 (11th Cir. 2006).

Here, the Supreme Court of Georgia denied *certiorari* in Martin's direct appeal on September 22, 2003. Martin then had 90 days in which to seek further review from the Supreme Court of the United States. *See* Sup. Ct. R. 13.1 (allowing 90 days to file a certiorari petition seeking review of a state court judgment). Martin did not do so. Thus, Martin's judgment became final on December 22, 2003, and the one-year federal limitations period expired on

December 22, 2004. *See* 28 U.S.C. § 2244(d)(1)(A). The instant § 2254 petition, filed in 2017, is untimely.

Nor does Martin show that he is entitled to tolling of the limitations period. Martin's state habeas petitions, filed in 2005 and 2015, were filed after the expiration of the federal limitations period, so they do not entitle him to statutory tolling. *See Tinker v. Moore*, 255 F. 3d at 1333-34. Martin has also not alleged that he is entitled to equitable tolling, and, even if he had, he cannot show that he has pursued his rights diligently, as the instant claim was known to him at the time of his 2001 convictions and subsequent direct appeal but was not raised until his second habeas petition filed in 2015. *See Holland v. Florida*, 560 U.S. 631, 648 (2010).

Finally, although there is an actual innocence exception to § 2244's statute of limitations, Martin has not alleged that he is actually innocent. *See McQuiggin v. Perkins*, 569 U.S. 383, 394-95 (2013) (stating that, in order to qualify to the actual-innocence exception to § 2244's statute of limitations, a petitioner must show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.").

Accordingly, Martin's instant § 2254 petition, filed in 2017, was brought well after the one-year limitations period expired in 2004. Because he has failed to establish that reasonable jurists would find the district court's procedural ruling debatable, his motion for a COA is DENIED. *See Slack*, 529 U.S. at 484.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY ALLEN MARTIN, GDC ID # 155366, Case # 217139, Petitioner,	:	CIVIL ACTION NO. 1:17-CV-04317-AT
v.	:	
GREGORY MCLAUGHLIN, Macon State Prison, Respondent.	:	HABEAS CORPUS 28 U.S.C. § 2254

ORDER

This action is before the Court on the Final Report and Recommendation of Magistrate Judge Justin S. Anand [Doc. 9 ("R&R")], recommending that Petitioner's habeas corpus petition be dismissed as time-barred. Petitioner objects. [Doc. 13 ("Objs.")].

In reviewing a Magistrate Judge's R&R, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." United States v. Schultz, 565 F.3d 1353, 1361 (11th Cir. 2009) (quoting Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988)) (internal quotation marks omitted). Absent objection, the district court judge "may accept, reject, or modify, in whole or in part, the findings and

APPENDIX
C.

recommendations made by the magistrate [judge]," 28 U.S.C. § 636(b)(1), and "need only satisfy itself that there is no clear error on the face of the record" in order to accept the recommendation. Fed. R. Civ. P. 72, advisory committee note, 1983 Addition, Subdivision (b). In accordance with 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the Court has conducted a *de novo* review of those portions of the R&R to which Petitioner objects and has reviewed the remainder of the R&R for plain error. See United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983).

The Magistrate Judge concludes that Petitioner's federal habeas petition is untimely because Petitioner's judgment of conviction became final on direct appeal on December 22, 2003, and the federal limitations period expired untolled one year later, on December 22, 2004, before Petitioner filed his first state habeas petition in 2005. [R&R at 5-6]. In 2015, nine years after his first state petition was denied, Petitioner filed a second petition, which was dismissed as both time-barred and second or successive. [*Id.* at 2-4]. The Magistrate Judge notes that Petitioner has presented no basis for the application here of equitable tolling, nor has he presented any evidence of his actual innocence. [*Id.* at 7-9].

Petitioner objects that the Magistrate Judge neither considered his federal habeas brief [Doc. 8] nor addressed the issues of whether he was denied his nonwaivable Sixth Amendment right to conflict-free counsel on direct appeal and

whether his second state habeas petition was improperly dismissed as second or successive without a hearing. [Objs.]. But Petitioner offers no objection to the R&R's only relevant conclusions — that his federal habeas petition is untimely and that neither equitable tolling nor his actual innocence overcomes the time bar. Nor does Petitioner's federal habeas brief address the timeliness issue.

CONCLUSION

Finding no basis for granting Petitioner's specific objections to the R&R and no plain error in the remainder of the R&R, the Court **OVERRULES** Petitioner's Objections [Doc. 13] and **ADOPTS** the R&R [Doc. 9] as the Opinion and Order of the Court. Petitioner's habeas corpus petition [Doc. 1] is **DISMISSED as time-barred**; and Petitioner is **DENIED** a certificate of appealability.

IT IS SO ORDERED this 19th day of December, 2017.

AMY TOTENBERG
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY ALLEN MARTIN,

Petitioner,

vs.

GREGORY MCLAUGHLIN, Macon State Prison,

Respondent.

CIVIL ACTION FILE

1:17-cv-4317-AT

JUDGMENT

This action having come before the Court, the Honorable Amy Totenberg, United States District Judge, for consideration of the Magistrate's Report and Recommendation, and the Court having **ADOPTED** the Report and Recommendation, it is

Ordered and Adjudged that the Petition for Writ of Habeas Corpus is DISMISSED as time-barred under Rule 4 of the Rules Governing Section 2254 Cases.

Dated at Atlanta, Georgia this 19th day of December, 2017.

JAMES N. HATTEN
CLERK OF COURT

By: s/ James Jarvis
Deputy Clerk

Prepared and Entered
In the Clerk's Office
December 19, 2017
James N. Hatten
Clerk of Court

By: s/ James Jarvis
Deputy Clerk

APPENDIX
C.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY ALLEN MARTIN, GDC ID # 155366, Case # 217139, Petitioner,	:	CIVIL ACTION NO. 1:17-CV-04317-AT-JSA
v.	:	
GREGORY MCLAUGHLIN, Macon State Prison, Respondent.	:	HABEAS CORPUS 28 U.S.C. § 2254

MAGISTRATE JUDGE'S ORDER AND
FINAL REPORT AND RECOMMENDATION

Petitioner, a Georgia prisoner, seeks via a 28 U.S.C. § 2254 habeas corpus petition to challenge his March 2001 convictions in the Superior Court of Douglas County for armed robbery and sexual battery, and his resulting sentence of life without parole. (Doc. 1). His application for leave to proceed *in forma pauperis* (Doc. 2) is **GRANTED**.

Rule 4 of the Rules Governing Section 2254 Cases allows for summary dismissal of a habeas petition that plainly reveals that relief is not warranted. *See McFarland v. Scott*, 512 U.S. 849, 856 (1994) (stating that Rule 4 dismissal is appropriate when the petition "appears legally insufficient on its face"); *see also Day v. McDonough*, 547 U.S. 198, 209-10 (2006) ("hold[ing] that district courts are

APPENDIX
D.

permitted . . . to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition," but noting that, "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions").

I. Procedural History

After the Court of Appeals of Georgia affirmed Petitioner's convictions on direct appeal on April 15, 2003, the Supreme Court of Georgia denied his petition for certiorari review on September 22, 2003. (Doc. 1 at 2; *see* Doc. 1-2). Petitioner filed a state habeas petition in 2005, Case No. 05-CV-321, which was denied on July 26, 2006. (Doc. 1 at 3). Petitioner apparently did not seek a certificate of probable cause ("CPC") from the Supreme Court of Georgia to appeal that denial. Nine years later, on July 15, 2015, he filed a second state habeas petition, which was denied on April 7, 2016. (*Id.* at 4). On August 28, 2017, the Supreme Court of Georgia denied Petitioner a CPC to appeal that denial. (*Id.* at 5).

Petitioner signed and submitted his federal habeas petition on September 19, 2017. (*Id.* at 15). Petitioner raises one claim: that he was denied his right to conflict-free appellate counsel because his trial counsel represented him on appeal. (*Id.* at 5). Petitioner first raised this claim in his second state habeas petition. (*Id.* at 6).

In denying Petitioner's second state habeas petition as both time-barred and

second or successive, the state habeas court noted that "Petitioner filed this petition challenging his March 2001 Douglas County jury trial convictions for two counts of armed robbery, sexual battery, and Violation of the Georgia Controlled Substances Act, which were affirmed on appeal in Martin v. State, No. A03A0593 (Ga. App. April 15, 2003) (unpublished), cert. denied, No. S03C1323 (Ga. Sep. 22, 2003)." (Doc. 1-2 at 1; *see id.* at 1-2 ("This is the second habeas corpus petition filed by petitioner challenging the same convictions. [He] previously challenged the same convictions in Martin v. Thompson, Civil Action No. 05-CV-321 (Telfair Super. Ct. July 25, 2006), in which the court denied relief.")).

As to the time bar, the state habeas court stated:

> Petitioner's convictions were affirmed on direct appeal on April 15, 2003. Petitioner then sought certiorari review in the Supreme Court of Georgia, which was denied on September 22, 2003. Petitioner then had 90 days from the Georgia Supreme Court's decision in which to file a certiorari petition in the United States Supreme Court pursuant to Rule 13 of the Rules of the United States Supreme Court. Petitioner did not file a certiorari petition, so his convictions were "final" on December 22, 2003, when the 90-day period in which to file a certiorari petition expired.

(*Id.* at 2-3 (concluding that Petitioner had missed the 5-year deadline for filing a timely state habeas petition)). The court stated further: "This petition should also be dismissed as successive under O.C.G.A. § 9-14-51, as this is petitioner's second

[petition] challenging the same Douglas County convictions. The sole ground raised in this petition certainly could have been raised in the prior case." (*Id.* at 3; *see id.* at 3-4 ("Petitioner did not raise in his prior case the claim raised herein - i.e., that the trial court erred in denying him appointment of new counsel for purposes of appeal, and manifesting a conflict of interest, in violation of his Sixth Amendment rights. This ground should be dismissed as successive, as it could have reasonably been raised in the prior case, along with the other claims of ineffective assistance of counsel raised in the prior case, since the claim here is not based on new facts or new law.")).

II. Petitioner's Habeas Petition Is Time-Barred.

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires that an application for federal habeas review of a state court judgment of conviction be filed within one year of 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).

If the record does not suggest otherwise, and here it does not, the limitations period for a federal habeas petition is triggered by the finality of the judgment of conviction at issue, i.e., "by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Because Petitioner sought appellate review in the Supreme Court of Georgia, but did not seek further review in the Supreme Court of the United States within the 90-day time limit for doing so, his convictions became final under § 2244(d)(1)(A) at the close of that 90-day window. *See* SUP. CT. R. 13.1 (allowing 90 days to file certiorari petition in Supreme Court of the United States seeking review of "a judgment . . . entered by a state court of last resort"); *Bond v. Moore*, 309 F.3d 770, 774 (11th Cir. 2002) (holding that "statute of limitations under 28 U.S.C. § 2244(d) should not . . . beg[i]n to run until this 90-day window ha[s] expired").

The Supreme Court of Georgia denied Petitioner's application for certiorari review on direct appeal on September 22, 2003. The 90-day window for Petitioner to

seek review in the Supreme Court of the United States closed on December 22, 2003, and his judgment of conviction became final on that date. Unless statutory or equitable tolling applies here or Petitioner has presented a colorable claim of actual innocence, the one-year federal limitations period ran untolled until it expired on December 22, 2004.

A. Statutory Tolling

Statutory tolling applies when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). It appears that Petitioner filed his first state habeas petition in 2005. (*See* Doc. 1 at 3 (giving the number for his state habeas case as 05-CV-321, indicating that it was filed in 2005)). Because he did not file an application for state post-conviction or other collateral review with respect to his judgment of conviction during the one-year federal limitations period, which expired on December 22, 2004, statutory tolling does not apply here. *See George v. Sec'y Dep't of Corr.*, 438 Fed. Appx. 751, 753 n.5 (11th Cir. 2011) (noting "that § 2244(d)(2) does not provide for statutory tolling [when] the one-year limitations period provided by AEDPA ha[s] already expired [before a petitioner files] his state post-conviction motion"; and citing *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir.

2001), for its "holding that a properly filed application for state post-conviction relief does not provide statutory tolling of [the] AEDPA limitations period where the motion for state post-conviction relief was not filed until after § 2244(d)'s one-year limitation period had expired"). Thus, to obtain merits review of his otherwise untimely federal habeas petition, Petitioner must establish either that equitable tolling is warranted or that he is actually innocent of his crimes of conviction. He has done neither.[1]

B. Equitable Tolling

The Supreme Court of the United States has held that the AEDPA limitations period "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). The Court noted, however, "that a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing," although "[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Id.* at 649, 653 (citation and internal quotations omitted); *see Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009)

[1]Even if the Court were to allow tolling during the pendency of Petitioner's first state habeas petition, the outcome here would be the same, because that first petition was pending only until August 25, 2006, when the time expired for him to file a CPC application with the Supreme Court of Georgia, and the limitations period ran untolled thereafter at least until July 15, 2015, almost nine years later.

("[E]quitable tolling is an extraordinary remedy, [and] it is limited to rare and exceptional circumstances and typically applied sparingly. Thus, . . . [it] is available only when a [petitioner] untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." (citation and internal quotations omitted)). "The petitioner bears the burden of showing that equitable tolling is warranted." *Id.* "To establish diligence, . . . [he] must present evidence showing reasonable efforts to timely file his action." *Dodd v. United States*, 365 F.3d 1273, 1282 (11th Cir. 2004). A petitioner "must plead or proffer enough facts that, if true, would justify an evidentiary hearing on the issue." *Hutchinson v. Florida*, 677 F.3d 1097, 1099 (11th Cir. 2012). "And the allegations supporting equitable tolling must be specific and not conclusory." *Id.*; *see Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011) ("Conclusory allegations are simply not enough to warrant a hearing."). Petitioner does not attempt to establish any grounds to warrant equitable tolling.

C. Actual Innocence

Finally, even if the limitations period has expired, "actual innocence, if proved, serves as a gateway through which a petitioner may pass," although "[t]he gateway should open only when a petition presents 'evidence of innocence so strong that a court

cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.' " *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928, 1936 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)). "To be credible," a "claim that constitutional error has caused the conviction of an innocent person" must be supported "with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. To prevail on such a claim, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327; *see Kuenzel v. Comm'r, Ala. Dep't of Corr.*, 690 F.3d 1311, 1314-15, 1318 (11th Cir. 2012) (discussing "*Schlup* gateway" to consideration of procedurally barred claims, which gateway the Supreme Court created to prevent the conviction of a defendant who is actually innocent). Petitioner does not offer any new reliable evidence to establish his actual innocence.

III. Certificate of Appealability

A state prisoner must obtain a certificate of appealability (COA) before appealing the denial of his federal habeas petition. 28 U.S.C. § 2253(c)(1)(A). A COA may issue only when the petitioner makes a "substantial showing of the denial

of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is met when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). A petitioner need not "show he will ultimately succeed on appeal" because "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 337, 342 (2003)).

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, . . . a certificate of appealability should issue only when the prisoner shows both 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.

Jimenez v. Quarterman, 555 U.S. 113, 118 n.3 (2009) (quotations omitted). Because jurists of reason would not find it debatable, and would agree, that Petitioner's federal habeas petition is untimely and that neither statutory nor equitable tolling nor Petitioner's actual innocence allows review of the merits of his habeas claim, a certificate of appealability is not warranted here.

IV. Conclusion

For the foregoing reasons, **IT IS RECOMMENDED** that Petitioner's habeas corpus petition (Doc. 1) be **DISMISSED as time-barred** under Rule 4 of the Rules Governing Section 2254 Cases and that Petitioner be **DENIED** a certificate of appealability.

The Clerk is **DIRECTED** to terminate the referral to the Magistrate Judge.

SO ORDERED and RECOMMENDED this 3rd day of November, 2017.

JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE

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